

# COLD WINDS FROM THE NORTH: AN ANALYSIS OF RECENT SHIFTS IN NORTH AMERICAN REFUGEE POLICY†

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## INTRODUCTION

Over the past decade, the people of Central and South America and the Caribbean have endured increasing political unrest and social upheaval. Several countries in these regions, long subjected to military or autocratic rule, have become embroiled in civil war or revolution. As a result, many citizens of these nations fear for their own safety because of their political views, their nationality, or their membership in particular organizations or groups. In or-

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† This Article was originally drafted for the Colloquium held in March 1987. Since then, several major changes in North American refugee law have occurred, including events as this Article went to press. Consequently, this Article, in large measure, reflects the uncertain state of current North American refugee policies.

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der to survive, many of these individuals must leave their homes and migrate north to seek protection pursuant to United States or Canadian refugee laws.<sup>1</sup>

In 1976, Canada revised the Immigration Act to create a comprehensive system for addressing the claims of individuals facing persecution in their countries of origin.<sup>2</sup> Four years later, the United States implemented a statutory scheme specifically designed to guarantee the protection of refugees.<sup>3</sup> By virtue of having developed these measures to assist refugees, both countries formally put into effect the provisions of the United Nations Convention Relating to the Status of Refugees<sup>4</sup> and the accompanying Protocol.<sup>5</sup> Moreover, both Canada and the United States adopted the United Nations Protocol's definition of "refugee"<sup>6</sup> to determine who qualifies for protection under the statutory framework of each respective country.

For the thousands of individuals fleeing domestic turmoil or persecution, however, recent and proposed changes in Canadian and United States refugee policies add to the already mounting concerns about the availability of refuge in North America.<sup>7</sup> One manifestation of the changes in North American

1. Events in three countries have been instrumental in generating the mass migration from Central America to North America. The 1979 overthrow of the Somoza regime in Nicaragua and continuing efforts by United States-sponsored counter-revolutionary forces ("contras") to oust the current government have created economic and political instability in that country. In El Salvador, an eight-year-old civil war and continuing repression have left over 70,000 people dead, most at the hands of government troops and right-wing death squads. *N.Y. Times*, June 7, 1988, at A1, col. 5. A brutal counterinsurgency campaign in Guatemala in the early 1980's led to tens of thousands of deaths and disappearances, especially among the Indian population.

The violence has led to large numbers of displaced people. The United Nations High Commissioner on Refugees (UNHCR) estimates that in 1986 as many as two million Central Americans have been displaced. UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, REFUGEES 21 (Dec. 1986) [hereinafter UNHCR, REFUGEES]. Of these, it has been estimated that as many as half a million Salvadorans and thousands of Guatemalans have entered the United States. H.R. Rep. No. 1142, 98th Cong., 2d Sess., pt. I, at 3 (1984). Another 40,800 Guatemalans are in Mexico, and 43,000 Salvadorans and 44,000 Nicaraguans are refugees in other Central American countries, according to UNHCR figures. UNHCR, REFUGEES, 20-22, 27 (July 1986).

2. Immigration Act, 1976, ch. 52 1976-1977 Can. Stat. 1193.

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

4. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 136 [hereinafter U.N. Convention].

5. United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 16 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The United States ratified the U.N. Protocol on October 4, 1968. 114 CONG. REC. 29,607 (1968); 19 U.S.T. 6223, T.I.A.S. No. 6577. Canada ratified the U.N. Convention and Protocol on June 4, 1969. 1969 Can. T.S. Nos. 6, 29.

6. The Protocol defines a refugee as 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 the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or owing to such fear, is unwilling to return to it.

U.N. Protocol, *supra* note 5, art. 1.

7. See, e.g., Comment, *Ecumenical, Municipal and Legal Challenges to U.S. Refugee Pol-*

commitment to refugee protection was the Canadian government's abrupt announcement on February 20, 1987, that refugees from countries experiencing civil strife and turmoil would have to apply for refugee status in Canada under the regular, rather than the expedited, refugee determination procedures.<sup>8</sup> Previously, refugees from such countries were accorded expeditious processing for permanent residency under the Canadian Special Programs procedures. In addition, refugees attempting to enter Canada from the United States would have to remain in the United States until an adjudicative proceeding could be scheduled for them.<sup>9</sup>

Immigration experts criticized the elimination of the expedited processing aspect of the Canadian refugee protection programs,<sup>10</sup> although the basic protections of Canada's refugee law did remain intact. Nonetheless, the February 1987 developments presaged more significant restrictions in North American refugee policies.

Uncertainty about the future protection of refugees increased when both Canada and the United States announced proposed revisions to their respective refugee determination procedures. The Canadian government introduced legislation in May and August 1987 that would completely restructure the administration of its programs for refugees applying at the border as well as from within Canada. Perhaps more importantly, the legislation would restrict overall access to refugee protection. After heated debate, the legislation finally was enacted in the summer of 1988.<sup>11</sup>

Revision of the Canadian scheme had long been expected. During the previous seven years, the Canadian government had commissioned a series of studies to recommend changes in the refugee determination procedures.<sup>12</sup> The

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icy, 21 HARV. C.R.-C.L. L. REV. 493 (1986); Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295 (1985).

8. Minister of Employment and Immigration, Ministers Act to Curb Refugee Claims Abuse, Press Release 87-6 (Feb. 20, 1987) (on file with the New York University Review of Law & Social Change) [hereinafter MEI, February Press Release]. Prior to this date, the Canadian Special Programs procedures automatically issued permits to remain in Canada to individuals from eighteen countries experiencing domestic turmoil. See *infra* notes 167-69 and accompanying text.

9. *Id.*

10. See, e.g., Blum, *Canada: Closing the Door to Central American Refugees*, Christian Sci. Monitor, Apr. 16, 1987, at 20, col. 1; Plaut, *Ottawa Morally Wrong to Shut Door*, The Globe and Mail (Toronto), Mar. 13, 1987, at A7 col. A.

11. Two bills passed in the Canadian Parliament and were approved by the Canadian Governor General on July 22, 1988. The first, C. 55, 33d Parl., 2d Sess., introduced in May 1987, replaces the existing procedures for reviewing asylum applications with a more streamlined administrative process and significantly increases the bases for denying access to the procedures. The second, C. 84, 33d Parl., 2d Sess., introduced in August 1987, limits access to Canadian asylum protection by broadening the "security risk" exemption from asylum protection and imposing severe penalties on individuals who assist refugees in entering the country. See *infra* text accompanying notes 192-205.

12. W.G. PLAUT, REFUGEE DETERMINATION IN CANADA: A REPORT TO THE HONOURABLE FLORA MACDONALD, MEI (1985) [hereinafter PLAUT REPORT]; E. RATHUSHNY, A NEW REFUGEE STATUS DETERMINATION PROCESS FOR CANADA, A REPORT TO THE HONOURABLE JOHN ROBERTS, MEI (1984) [hereinafter RATHUSHNY REPORT]; PRO-

impetus for change also derived from an important decision of the Canadian Supreme Court invalidating key elements of the Canadian asylum procedures.<sup>13</sup> More importantly, however, the Canadian government took the position that existing procedures were insufficient to accommodate the increasing numbers of asylum applications.<sup>14</sup> Despite government assurances that the new procedures will protect refugees, the scope of the revisions and the severe limitations that they impose regarding which persons may apply for protection have prompted sharp criticism.<sup>15</sup>

In the United States, the Immigration and Naturalization Service (INS) proposed comprehensive changes to the regulations governing the United States asylum adjudication process on August 24, 1987.<sup>16</sup> These proposed regulations — later withdrawn — eliminated the role of immigration judges and the formal adversarial hearing currently used to adjudicate refugee applications.<sup>17</sup> Instead, the proposal provided that INS asylum officers determine the legitimacy of asylum claims in an informal, non-adversarial interview setting.<sup>18</sup> The INS, confronted with strong objections,<sup>19</sup> withdrew this particular aspect of its proposal.<sup>20</sup> In a subsequent proposal, several months later, the INS shifted focus by limiting the scope of the hearing conducted by the immigration judge.<sup>21</sup> The suggested changes, and those in subsequently proposed regulations, illustrate the blend of competing interests influencing the direction and implementation of United States refugee policy.

The proposed revisions to the United States asylum policies and the newly-enacted Canadian refugee law reflect the current apprehension in the United States and Canada with respect to expansive refugee and asylum programs. Indeed, these recent events heighten concerns regarding North Ameri-

GRAM POLICY DEVELOPMENT DIVISION, ENFORCEMENT BRANCH, REPORT ON DELAYS IN REFUGEE STATUS DETERMINATION PROCESS (1983) [hereinafter POLICY DIVISION REPORT]; TASK FORCE ON IMMIGRATION PRACTICES AND PROCEDURES, ESTABLISHED BY THE HONOURABLE LLOYD AXWORTHY, MEI, THE REFUGEE STATUS DETERMINATION PROCESS (1981) [hereinafter TASK FORCE REPORT].

13. *Singh v. Minister of Employment & Immigration*, [1985] 1 S.C.R. 177. See *infra* text accompanying notes 153-58.

14. See *infra* text accompanying notes 170-72.

15. See, e.g., Toronto Refugee Affairs Council, *An Analysis of Some of the Major Provisions of Bill C-84* (Sept. 30, 1987) (on file with the New York University Review of Law & Social Change); *Right of Refugees to Seek Asylum is Being Eroded, Conference Told*, The Globe and Mail (Toronto), Oct. 26, 1987, at A14, col. 1; *Refugee Policy Called Death Sentence for Many*, Sunday Star (Toronto), Oct. 25, 1987, at A8; *Immigration Staff Oppose Turning Back Ships at Sea*, The Globe and Mail (Toronto), Sept. 3, 1987, at A1.

16. 52 Fed. Reg. 32,552 (1987) (to have been codified at 8 C.F.R. § 208); see *infra* text accompanying notes 181-91.

17. 52 Fed. Reg. 32,554 (1987) (to have been codified at 8 C.F.R. § 208.3(b)).

18. 52 Fed. Reg. 32,556 (1987) (to have been codified at 8 C.F.R. § 208.8(a)).

19. See, e.g., American Immigration Lawyers Association, *Comments on Proposed Asylum and Withholding of Deportation Regulations* (Oct. 27, 1987) [hereinafter AILA Comments I] (on file with the New York University Review of Law & Social Change).

20. *U.S. Drops Closed-Door Plan in Asylum Cases*, L.A. Times, Oct. 28, 1987, at 3, col. 1.

21. 53 Fed. Reg. 11,300 (1988) (proposed to be codified at 8 C.F.R. §§ 208.14, 236.3(c), 242.17(c)(4)).

can commitment to aiding persons fleeing persecution, particularly in this hemisphere.

This Article analyzes the current situation of refugees seeking asylum in North America. It begins in Part I with a brief historical overview of North American refugee policy. Part II summarizes the refugee policies and practices employed by the United States and Canada. Part III examines the enacted and proposed revisions to United States and Canadian refugee processing systems and explains the reasons for the current policy shifts. Part IV examines the implications of the enacted and proposed revisions. This section suggests an analytical paradigm for evaluating North American policy and explores the consequences of the recent policy shifts on those seeking refuge in North America.

Canada and the United States are at a turning point in their refugee and asylum policies. A number of the changes in the structure and administration of these countries' respective asylum programs have significant detrimental consequences for refugees. In the past, international commitments, political and public pressure, as well as judicial intervention, have prevented both countries from any wholesale rollback of the protections offered to refugees. It seems clear, however, that fears about the detrimental impact of the admission of refugees are beginning to overshadow humanitarian concerns and have led to dramatic restrictions on the opportunity for those facing persecution to find "safe haven" in North America.

## I.

### HISTORICAL DEVELOPMENT OF NORTH AMERICAN REFUGEE POLICIES

A cohesive refugee policy is a recent phenomenon in both the United States and Canada. Prior to the twentieth century, both countries maintained a policy of unrestricted immigration.<sup>22</sup> Even when restrictive immigration programs were instituted, refugee policy per se was ignored or was implemented only on an ad hoc basis.<sup>23</sup> Not until the 1970s and 1980s did both countries enact comprehensive refugee legislation.<sup>24</sup>

Despite the virtually unrestricted immigration policies of both the United States and Canada until the early part of this century, each nation occasionally

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22. The United States began limited regulation of immigration during the nineteenth century by denying admission to prostitutes, criminals, "mental defectives," and persons likely to become public charges. Immigration Act of March 3, 1875, ch. 141, 18 Stat. 477; Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214. The use of specific grounds for exclusion was the primary means of immigration regulation. Canada's first immigration law, given royal assent in 1869, created an Immigration Branch within the Department of Agriculture, initiating Canada's long-standing connection between its immigration policy and its concerns with regard to economic development. G. DIRKS, CANADA'S REFUGEE POLICY: INDIFFERENCE OR OPPORTUNISM? 25 (1977) (citing DEP'T OF MANPOWER AND IMMIGRATION, EVOLUTION OF THE IMMIGRATION ACT (1967)).

23. See *infra* text accompanying notes 35-63.

24. See *supra* notes 2-3 and *infra* text accompanying notes 62-63.

endeavored to render special treatment to persons fleeing from religious or political persecution. For example, in 1834, the United States Congress granted thirty-six sections of land in Illinois and Michigan to a number of Polish exiles who had taken part in the First Polish Revolt against Czarist Russia.<sup>25</sup> Pre-confederated Canada provided refuge to United Empire Loyalists who fled the American colonies after the American Revolution in 1783.<sup>26</sup> In addition, in 1833, Upper Canada granted refuge to thousands of Black slaves fleeing from the United States.<sup>27</sup> In the second half of the nineteenth century, Canada admitted approximately 9000 Mennonites and 8000 Doukhobors who were fleeing religious persecution in Czarist Russia.<sup>28</sup>

For both Canada and the United States, however, the motivation for welcoming these refugees derived not from humanitarian concern but from each nation's need for labor to develop its frontier.<sup>29</sup> The immigration policies of both nations changed in the early twentieth century as restrictionist legislation was favored by many as the appropriate method for controlling swelling immigrant populations.<sup>30</sup> The United States enacted the Immigration Act of 1917,

25. Act of June 30, 1834, ch. 247, 4 Stat. 743; see also E. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965* 24 (1981).

26. THE LAW UNION OF ONTARIO, *IMMIGRANT'S HANDBOOK: A CRITICAL GUIDE* 143 (1981).

27. G. DIRKS, *supra* note 22, at 23; see also M. HANSEN AND J. BREBNER, *THE MINGLING OF THE CANADIAN AND AMERICAN PEOPLES* 113-14 (1940).

28. G. DIRKS, *supra* note 22, at 28-29, 32-33.

29. *Id.* at 33-34 ("Canada accepted these thousands primarily because the land had to be settled and made productive. Humanitarianism must be thought of as playing a secondary role."); O. HANDLIN, *IMMIGRATION AS A FACTOR IN AMERICAN HISTORY* 1 (1959) ("[I]n the nineteenth century, a continued flow of new Americans had helped open the West and, at the same time, had contributed to the development of urban life and the growth of an industrial economy."). Nevertheless, a humanitarian impulse toward refugees seems to have been a strong part of United States self-conception at its inception. See, e.g., G. WASHINGTON, *To the Members of the Volunteer Association and Other Inhabitants of The Kingdom of Ireland Who Have Lately Arrived in the City of New York*, 27 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES* 253, 254 (J. Fitzpatrick ed. 1938) (in which Washington described the United States as a land whose "bosom . . . is open to receive . . . the persecuted and oppressed of all nations . . .").

30. See Immigration Act of 1917, ch. 29, 39 Stat. 874; Immigration Act of 1921, ch. 8, 42 Stat. 5; Immigration Act of 1924, ch. 190, 43 Stat. 153, as amended by 44 Stat. 1455 (1927) and 45 Stat. 400 (1928), repealed by Immigration and Nationality Act, June 27, 1952, ch. 477, 66 Stat. 163; see *infra* notes 35-36 and accompanying text. The Canadian statute for the same period is Immigration Act of 1910, ch. 27, 1910 Can. Stat., as amended by ch. 12, 1911 Can. Stat., ch. 25, 1919 Can. Stat., ch. 32, 1921 Can. Stat., and ch. 45, 1924 Can. Stat.

Immigration to the United States rose to a high of 8.8 million people in the decade from 1901-1910, dropping to 4.1 million for the years 1921-1930. While 1.6 million people came from Russia in 1901-1910, the number had dropped to 62,000 two decades later. Irish immigration brought 656,000 immigrants between 1881-1890, another 725,000 during the twenty-year period from 1891-1910, and dropped to 146,000 between 1911-1920. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, *STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE*, Chart Imm. 1.2 (1984).

Canadian immigration rose to 1.6 million during the period of 1901-1910, 1.7 million in the decade 1911-1920 and fell to 1.2 million during 1921-1930. In the next decade it dropped to 158,000. G. DIRKS, *supra* note 22, at Appendix A (*citing* ANNUAL REPORT OF THE DEPART-

which severely limited immigration through the use of a literacy test<sup>31</sup> and an immigrant "head tax."<sup>32</sup> However, the 1917 Act permitted aliens who could prove that they were "seeking admission to the United States to avoid religious persecution" to circumvent the literacy test requirement.<sup>33</sup> For the first time, United States law explicitly distinguished between refugees and immigrants.

For the next twenty years, political and economic considerations dictated the course of United States immigration policy. Canadian restrictionist policy vacillated widely, depending upon the administration in power. For example, when the Liberal government took power in 1922, it made possible the admission of some 20,000 Mennonites into Canada.<sup>34</sup> However, restrictive North American immigration policies dominated in the 1920s with the implementation of the National Origins Quota system in the United States<sup>35</sup> and similar nationality-based immigration legislation in Canada.<sup>36</sup>

Prior to and during World War II, neither the United States nor Canada satisfactorily responded to the need to protect the victims of Nazi persecution.<sup>37</sup> Indeed, a 1939 bill to allow 20,000 German refugee children to immigrate to the United States was defeated.<sup>38</sup> After the war, however, both countries approached the enormous refugee crisis with a renewed spirit of humanitarianism with Canada becoming one of the first non-European nations to

MENT OF MANPOWER AND IMMIGRATION 7 (Ottawa 1970); 1968 IMMIGRATION STATISTICS 4 (Ottawa 1968); CANADA YEAR BOOK 185 (1975)).

31. Immigration Act of 1917, Pub.L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 877, *repealed by* Act of June 27, 1952, ch. 477, 66 Stat. 279.

32. *Id.* at § 2, 39 Stat. at 875.

33. *Id.* at § 3, 39 Stat. at 877.

34. G. DIRKS, *supra* note 22, at 37; F. EPP, MENNONITE EXODUS 103-05 (1962).

35. The Act of May 19, 1921, restricted immigration by members of any given nationality group to three percent of the number of members of that group living in the United States at the time of the 1910 census. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5. A second quota act, the Immigration Act of 1924, set the annual quota for immigrants of a specific nationality at two percent of the group's population in the United States as estimated by the census of 1890. Beginning July 1, 1927, the act restricted immigration to 150,000 people per year, distributed proportionately across nationality groups, according to the estimated national origins of the population of the United States at the time of the 1920 census. Immigration Act of 1924, ch. 190, §§ 11(a), (b), 43 Stat. 153, 159, *as amended by* 44 Stat. 1455 (1927) and 45 Stat. 400 (1928), *repealed by* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 279.

36. Canada's restrictions on immigration began in 1923 with the enactment of the Chinese Immigration Act of 1923, ch. 38, 1923 Can. Stat. 301, *repealed by* Act of May 14, 1947, ch. 19, § 4, 1947 Can. Stat. 109, which specifically set out a narrow class of individuals who were eligible for admission into Canada.

37. The lack of response on the part of both the United States and Canada to the victims of Nazi persecution is well-documented. *See* I. ABELLA & H. TROPER, NONE IS TOO MANY (1982); L. DINNERSTEIN, AMERICA AND THE SURVIVORS OF THE HOLOCAUST (1982); H. FEINGOLD, THE POLITICS OF RESCUE (1970); D. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945 (1984); *see also* G. DIRKS, *supra* note 22, at 72-98; Abella, *North America and the Jewish Refugee Crisis*, 5 REFUGEE, Dec. 1985, at 10, 10-14.

38. S.J. Res. 64, 76th Cong., 1st Sess., 84 CONG. REC. 1278 (1939). Opponents of the bill successfully raised arguments based on the high level of unemployment in the country as well as on xenophobia and anti-Semitism. *See* 76 CONG. REC. 3630-32, 4546, App. 1011 (1939).

accept European refugees.<sup>39</sup> Ultimately, Canada admitted 40,000 refugees during the post-war years, all by special Orders-in-Council, including 2,000 Catholic and Jewish children and 300 Europeans with tuberculosis.<sup>40</sup>

Despite the new-found "humanitarian" spirit in the two countries, the development of United States and Canadian refugee policy over the next thirty years continued to be governed by political concerns. The Displaced Persons Acts of 1948, enacted by the United States Congress, allowed the entry of persons displaced by the war who reached the Allied Zones as of December 22, 1945.<sup>41</sup> This legislation effectively excluded the majority of Jewish refugees, most of whom did not reach the Allied zones by that date.<sup>42</sup> In 1950, the qualifying date was changed to January 1, 1949, thereby partially ameliorating the anti-Semitic effect of the prior legislation.<sup>43</sup> But the 1950 amendments also introduced an explicit political bias into the process by prohibiting any refugee who was or had been a member of the Communist party from entering the United States.<sup>44</sup> The Refugee Relief Act of 1953 followed soon after and was specifically designed to protect only refugees fleeing communist-controlled countries.<sup>45</sup>

Consistent with their primary concern for refugees fleeing communism, Canada and the United States quickly expanded their refugee policies in reaction to the Soviet invasion of Hungary in 1956. In Canada, the ruling Liberal Party permitted an unlimited number of Hungarian refugees into Canada and paid for their transportation.<sup>46</sup> Eventually, a total of 37,565 Hungarians made

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39. In 1945, Canadian immigration officers were authorized to "grant a landing to any refugee who entered Canada as such under non-immigrant status subsequent to September 1st, 1939." Order in Council *re* Status of Refugees, P.C. 6687, 4 Can. Stat. Ord. & Regs. 123. An Order-in-Council is a type of subordinate legislation carried out by a government body pursuant to its enabling statute. The Governor-in-Council, that is, the governor of the Privy Council, has the power to issue an order "requiring" that certain regulations in the order be established. *See* E. DRIEDGER, *THE COMPOSITION OF LEGISLATION* (1976).

40. The special Orders-in-Council were enacted largely pursuant to the government's "sponsored labor movement," which carried out the official policy of filling labor shortages by hand-selecting refugees capable of performing specialized skills. *See* G. DIRKS, *supra* note 22, at 151-57; B. LAPPIN, *THE REDEEMED CHILDREN* (1963); Department of External Affairs, file 5475-EA-140, internal memorandum, Sept. 17, 1959, *cited in* G. DIRKS, *supra* note 22, at 305 n.26.

41. Displaced Persons Acts of 1948, Pub. L. No. 80-774, § (c)(1), 62 Stat. 1009 (1948).

42. *See* 94 CONG. REC. 7729-30 (1948); L. DINNERSTEIN, *supra* note 37, at 170-75.

43. Act of June 16, 1950, ch. 262, § 1, 64 Stat. 219. The amendments were intended to admit Jewish refugees excluded by the 1948 Act, as well as Catholics and other religious and political refugees who fled from the Soviet Union after 1947. H.R. Rep. No. 581, 81st Cong., 1st Sess. 15 (1949).

44. Act of June 16, 1950, ch. 262, § 13, 64 Stat. 219, 227.

45. Refugee Relief Act of 1953, ch. 336, 67 Stat. 400; *see also* H.R. 608, 96th Cong., 1st Sess. 2 (1979) (noting that over 200,000 visas were made available, outside of those available under immigration quotas, for refugees escaping from behind the "Iron Curtain").

46. CANADA, HOUSE OF COMMONS DEBATES, 22d Parl., 4th (Special) Sess. 115 (1956). *See generally* G. DIRKS, *supra* note 22, at 193-202 (discussing the Canadian response to the Hungarian refugee crisis which emerged after the 1956 Soviet occupation of Budapest).



their way to Canada.<sup>47</sup> In the United States, President Eisenhower, although willing to admit a large number of Hungarian refugees, found himself limited by the restrictive terms of the Refugee Relief Act of 1953 which imposed a cap on the number of refugees admissible from the Communist countries of Eastern Europe.<sup>48</sup> As a result, he used his broad admission authority under the so-called "parole" section of the Immigration and Nationality Act<sup>49</sup> (INA) to permit the entry of 32,000 Hungarians.<sup>50</sup>

The availability of the parole authority in the United States facilitated the ad hoc approach to refugee policy that dominated the 1960s and 1970s. Under the parole authority, the United States provided refuge to, among others, Cubans,<sup>51</sup> Soviet Jews,<sup>52</sup> and Indochinese.<sup>53</sup> In later years, Congress passed legislation which adjusted the status of some of those groups initially admitted under the "parole" authority and provided for their regular admission as permanent United States residents.<sup>54</sup>

The 1965 amendments to the INA allowed for the admission to the United States of a limited number of persons who feared persecution from communist or communist-dominated countries or who were from regions in the Middle East.<sup>55</sup> Although the amendments constituted the first permanent statutory provision for the admission of refugees to the United States, they

47. G. DIRKS, *supra* note 22, at 202 n.71 (citing ANNUAL REPORT OF THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION, YEAR ENDING MARCH 31, 1959 at 26 (Ottawa)).

48. Refugee Relief Act of 1953, ch. 336, § 4, 67 Stat. 400, 401.

49. Immigration and Nationality Act of 1952, ch. 477, § 212(d)(5), 66 Stat. 163, 188 (codified at 8 U.S.C. § 1182(d)(5)) (amended 1980) [hereinafter INA]. The "parole" section of the INA originally provided that:

[t]he Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

This section was used extensively before 1980 to admit refugees who were otherwise inadmissible. When Congress enacted the Refugee Act of 1980, the parole section of the INA was amended to provide that refugees could only be paroled into the United States if the Attorney General determined that "compelling reasons in the public interest" required that they be "paroled" into the United States rather than admitted under the newly enacted asylum procedures. 8 U.S.C. § 1182(d)(5)(B).

50. SEN. COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 30 (Comm. Print 1979) [hereinafter REVIEW OF REFUGEE RESETTLEMENT]; see also Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 14-15 (1981).

51. REVIEW OF REFUGEE RESETTLEMENT, *supra* note 50, at 32.

52. IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORT 5 (1973).

53. REVIEW OF REFUGEE RESETTLEMENT, *supra* note 50, at 33-34.

54. See Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (adjusting the status of Cubans); Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223, as amended by Pub. L. No. 96-212, 94 Stat. 102 (1980) (adjusting the status of Indochinese immigrants).

55. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 912-13 (codified as amended at 8 U.S.C. § 1153 (a)(7) (1982)).

reinforced the ideologically and geographically restricted refugee policy that dominated the 1960s and 1970s. The 1965 amendments also revised a provision of the INA to accord the Attorney General the discretion to withhold deportation of an individual to a country where the alien "would be persecuted on account of his race, religion or political opinion."<sup>56</sup>

During the 1960s and 1970s, Canada formulated its refugee policies largely in reaction to international political crises, with an eye toward its labor needs and overall economic well-being.<sup>57</sup> Following the Soviet invasion of Czechoslovakia in 1968, for example, Canada acted swiftly to attract Czechoslovakian refugees with the highest levels of education and occupational skills. Of the approximately 11,000 Czechs admitted to Canada, one-third were highly skilled workers or professionals.<sup>58</sup> Similarly, Canada quickly responded in 1972 by accepting some 6,000 refugees when President Idi Amin expelled the 80,000 Ugandan Asians holding British passports.<sup>59</sup> As a result, Canada received another group of highly educated, easily employable immigrants.<sup>60</sup> However, when confronted in 1973 with a large number of "leftist" refugees seeking protection following the overthrow of Salvador Allende in Chile, Canada was restrained in its response, accepting far fewer numbers of these Chilean refugees than it had in response to the Ugandan and Czechoslovakian crises.<sup>61</sup>

Not until the mid-to-late-1970s did Canada and the United States abandon their ad hoc, response-oriented refugee policies and begin to revise their refugee laws to create all-inclusive, non-discriminatory legislative schemes. In 1976, Canada enacted a new Immigration Act, which included substantial revisions of its refugee law.<sup>62</sup> Four years later, the United States Congress passed the Refugee Act of 1980.<sup>63</sup> These laws represented efforts to correct the inadequacies of past policies that had failed to provide a comprehensive approach to the admission and treatment of refugees in North America.

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56. *Id.* § 243(h), 8 U.S.C. § 1253(h); *see infra* note 81.

57. G. DIRKS, *supra* note 22, at 228. Indicative of the Canadian approach was the merging of its immigration and labor departments in 1966 to form the Department of Manpower and Immigration. The government explained that its policy towards refugees would be guided by a sense of humanitarian obligations but that the extent of future admissions would be "contingent upon the Canadian economic, social and political structure remaining strong and healthy." MINISTER OF MANPOWER AND IMMIGRATION, WHITE PAPER ON IMMIGRATION 16 (1966).

58. G. DIRKS, *supra* note 22, at 234-35.

59. *Id.* at 239.

60. Approximately fifty percent of the Ugandan refugees had in excess of over twelve years of schooling. Some forty-five percent of those seeking employment sought work in either sales or some area of commerce. An additional fifteen percent described themselves as professionals. G. DIRKS, *supra* note 22, at 243, *citing* DEPT. OF MANPOWER AND IMMIGRATION, BASIC CHARACTERISTICS OF A SELECTED REFUGEE SAMPLE (Ottawa, 1975).

61. *Id.* at 250.

62. Immigration Act, 1976, ch. 52, 1976-1977 Can. Stat. 1193.

63. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The Refugee Act provisions have been incorporated into various sections of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

## II

## NORTH AMERICAN REFUGEE POLICIES IN TRANSITION

In implementing their respective refugee laws, both the United States and Canada formally implemented the provisions of the United Nations Convention Relating to the Status of Refugees and the accompanying protocol. Both countries adopted the United Nation's protocol definition of "refugee" to determine who would qualify for protection from expulsion.<sup>64</sup> Nevertheless, the two countries have differed both in their interpretations of who constitutes a "refugee" and in their creation of procedures for addressing the claims of those seeking refugee status.

This section surveys United States and Canadian refugee policies and practices. It gives an overview of the applicable procedures for adjudicating refugee claims, administrative and judicial review procedures, the criteria employed for assessing claims for refugee status, and alternative sources of protection for those fleeing persecution.

#### A. *The United States Framework for Addressing Refugee Claims*

Congress, in enacting the Refugee Act of 1980, intended to conform United States law to the treaty obligations embodied in the United Nations Protocol Relating to the Status of Refugees.<sup>65</sup> The Act establishes a comprehensive framework for making refugee determinations.

The United States framework provides three procedural avenues to persons in the United States applying for protection from persecution. The primary avenue is through a grant of asylum, a status created by the Refugee Act of 1980.<sup>66</sup> Some applicants may also request withholding of deportation, a procedure first introduced by the Immigration and Nationality Act of 1952 and strengthened in the Refugee Act of 1980.<sup>67</sup> Finally, the Attorney General has the power to grant extended voluntary departure (EVD). EVD, on occasion, has been used to provide temporary refuge to persons from countries experiencing civil strife or hostilities who would not otherwise meet the statutory requirements for asylum.<sup>68</sup>

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64. See *supra* notes 4-5 and accompanying text.

65. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, . . . to which the United States acceded in 1968."); S. REP. NO. 256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 141.

66. Refugee Act of 1980, § 201(b) (codified as amended at INA § 208, 8 U.S.C. § 1158 (1982)).

67. INA § 243(h), 66 Stat. 163, 214 (1952), *amended by* the Refugee Act of 1980, § 203(e) (codified as amended at 8 U.S.C. § 1253(h) (1982)). See *infra*, note 81.

68. Extended voluntary departure ("EVD") is an administratively created discretionary arrangement akin to a form of parole. T. ALENIKOFF & D. MARTIN, *IMMIGRATION LAW AND POLICY* 726-727 (1985). See *infra* notes 123-28 and accompanying text. EVD may be granted

## 1. *Asylum and Withholding of Deportation*

### a. *Administrative Provisions — The Application Process*

The Refugee Act of 1980 includes provisions for refugee claims by those applying for asylum at the border or from within the United States.<sup>69</sup> Under the Act, an alien may apply for asylum regardless of her immigration status.<sup>70</sup> To be eligible for asylum, the applicant must qualify as a "refugee" within the definition adopted in the Refugee Act of 1980, which states that a refugee is:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>71</sup>

The Attorney General may grant or deny the asylum request as a matter of discretion even though the applicant meets the eligibility criteria in the refugee definition.<sup>72</sup>

Under current procedures, an asylum application may be filed with the INS at any time or with the Executive Office of Immigration Review (EOIR)

by the INS to persons who are temporarily unable "to return to their home country because of civil war or catastrophic circumstances there." I.N.S. O.I. § 242.10(e)(3) (April 4, 1979).

69. The Refugee Act of 1980 also provides for claims by overseas applicants. The Act delineates an elaborate system of consultation between the President and Congress to determine the number of refugees who will be admitted to the United States each year. INA § 207, 8 U.S.C. § 1157. The Act requires that the President submit a detailed report to Congress on the world refugee situation and a report containing proposed United States resettlement obligations for the coming year. INA § 207(d)(1), 8 U.S.C. § 1157(d)(1). This report recommends the number of visas to be made available for refugees from particular geographical regions. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON THE WORLD REFUGEE SITUATION, REPORT TO THE CONGRESS (Reports for fiscal years 1981-1986); U.S. COORDINATION FOR REFUGEE AFFAIRS, PROPOSED REFUGEE ADMISSIONS AND ALLOCATIONS (Reports for fiscal years 1981-1986). An individual applicant seeking admission must be able to demonstrate that she is a refugee within the statutory definition, that she comes from the geographical area for which visa numbers for refugees have been designated as available (and is therefore, by definition, a refugee "of special humanitarian concern" to the United States) and that she is admissible to the United States as an immigrant. INA § 207(a)(2), (3), 8 U.S.C. § 1157(a)(2), (3). An overseas refugee applicant applies to the locally stationed United States INS officer responsible for her area or to a United States consular officer when no INS personnel are available. 8 C.F.R. § 207.1(a) (1987).

For an excellent analysis and critique of the refugee admissions system *see* REFUGEE POLICY GROUP, OF SPECIAL HUMANITARIAN CONCERN: U.S. REFUGEE ADMISSIONS SINCE PASSAGE OF THE REFUGEE ACT (1985).

70. INA § 208, 8 U.S.C. § 1158. Prior to the Refugee Act of 1980, asylum was provided only by regulation. 8 C.F.R. § 108 (1975), *revoked by* 46 Fed. Reg. 45,117 (1981).

71. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

72. INA § 208(a), 8 U.S.C. § 1158(a). *See* Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985); Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1 (1987).

during the course of exclusion or deportation proceedings before an immigration judge.<sup>73</sup> If an alien files with the INS, an INS officer will examine her under oath regarding her asylum application.<sup>74</sup> Once a determination has been made, the INS District Director must provide the applicant with a written copy of the decision.<sup>75</sup> An applicant may not directly appeal the District Director's decision<sup>76</sup> but may again raise the asylum claim in any subsequent exclusion or deportation proceeding.<sup>77</sup> If application for asylum is made during an exclusion or deportation proceeding, the immigration judge will conduct an evidentiary hearing to determine eligibility for protection.<sup>78</sup>

An application for asylum made in the course of exclusion or deportation proceedings is also considered an application for "withholding of deportation."<sup>79</sup> The Refugee Act revised the INA's withholding of deportation provisions to require that:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title)<sup>80</sup> to a country if the Attorney General determines that such alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>81</sup>

If an applicant fulfills these conditions, the Attorney General *must* withhold deportation unless the applicant is a threat to national security, has committed

73. 8 C.F.R. §§ 208.1, 208.3(a), 208.9 (1987).

74. *Id.* at § 208.6. The burden of proof is on the applicant to show that she comes within the definition of refugee. *Id.* § 208.5. The applicant may be represented by counsel who may cross-examine witnesses and introduce evidence. *Id.* at § 292.5(b).

75. *Id.* at § 208.8(b).

76. *Id.* at § 208.8(c).

77. *Id.* at § 208.9.

78. *Id.* at § 208.10. Both the applicant and the INS may present evidence for the record. INS also may present non-record, classified evidence to the immigration judge. *Id.* at § 208.10(c).

79. *Id.* at § 208.3(b).

80. This exception refers to aliens deportable because of their involvement in Nazi activities during the period of 1933-1945. INA § 241(a)(19), 8 U.S.C. § 1251(a)(19) (1982).

81. INA § 243(h), 8 U.S.C. § 1253(h) (1982). From 1952 to 1965, the INA provided for discretionary withholding for deportation of an alien who would be subject to persecution if returned to her homeland. INA § 243(h), 66 Stat. 163, 214 (1952) (requiring the alien be subject to "physical persecution"). In 1965, the statutory language was amended to protect those fleeing "persecution on account of race, religion or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11, 79 Stat. 911, 918 (1965). The 1980 revision was intended to bring the United States statutory language into conformity with Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees. See H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 161. Article 33 prohibits the expulsion or return of "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of [sic] a particular social group or political opinion." U.N. Convention, *supra* note 4, art. 33, 19 U.S.T. at 6276, T.I.A.S. No. 6577 at 54, 189 U.N.T.S. at 176. Note that Article 33 refers to a prohibition against the return of a refugee to the country where her life or freedom would be threatened whereas § 243(h) refers to an alien needing the same protection.

a serious crime, or has persecuted others.<sup>82</sup>

Current regulations also require that each asylum application be forwarded to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department for, in some cases, the issuance of an "advisory opinion" regarding the individual's eligibility for asylum.<sup>83</sup> Although several commentators<sup>84</sup> and courts<sup>85</sup> have questioned the reliability of the State Department opinions, a recent study by the United States General Accounting Office has shown a high degree of correlation between the State Department's opinions and decisions by INS.<sup>86</sup>

### b. *Criteria for Determining Asylum Eligibility*

In order for an alien who is physically present in the United States or at a land border or port of entry to qualify for asylum, the Attorney General must

82. 8 U.S.C. § 1253(h)(2)(A)-(D). Asylum and withholding of deportation provide different benefits. There is no entitlement to asylum; it is granted only to refugees who demonstrate persecution or a well-founded fear of persecution, subject to the Attorney General's discretion. Those aliens granted asylum are eligible for permanent residence after residing in the United States for one year. INA § 209, 8 U.S.C. § 1159. In contrast, withholding of deportation is mandatory where an alien's life or freedom would be threatened. However, the alien may be deported to another country which will accept her. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 n.6 (1987).

83. 8 C.F.R. § 208.7 (1987). If the applicant files with the District Director, the District Director must request an advisory opinion from the BHRHA pursuant to 8 C.F.R. § 208.7. The applicant has a right to inspect, explain and rebut an unfavorable opinion. *Id.* at § 208.8(d). If the application is filed before an immigration judge, the judge must request an opinion before the hearing can proceed. *Id.* at § 208.10(b). If an opinion has previously been rendered to the District Director, a new one is only required if circumstances have changed so substantially that a second referral would materially aid adjudication. *Id.*

Recent budgetary cuts have forced BHRHA to reduce the number of cases in which it gives individual advisory opinions. BHRHA will instead categorize cases as: 1) those for which BHRHA really has nothing substantive to add; 2) those for which BHRHA can provide a "generic" letter, designed to assist the INS in understanding the human rights situation in the applicant's home country, rather than tailored to the individual application; and 3) those for which an individual opinion is appropriate. 53 Fed. Reg. 2893 (1988).

84. Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT'L L. 235, 333 (1983); Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 43 MD. L. REV. 91 (1986); Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 628-29 (1981); Note, *The State Department Advisory Opinion: A Due Process Critique*, 1 GEO. IMM. L. REP. 4 (Spring 1984) ("The opinion, never mandated by Congress, is the result of an ill-defined, haphazard, politicalized process devoid of standards for assessing the validity of asylum claims.").

85. The circuit courts of appeal have expressed widely divergent views on the reliability of the BHRHA opinion letter. *Compare, e.g., Asghari v. INS*, 396 F.2d 391, 392 (9th Cir. 1968) (terming the State Department a "knowledgeable and competent source") with *Kasravi v. INS*, 400 F.2d 675, 676-77, n.1 (9th Cir. 1968) (noting that the State Department opinions do not carry the "guarantees of reliability" which the law demands of admissible evidence and that candid discussion of a particular nation's political shortcomings may "not be compatible with the high duty to maintain advantageous diplomatic relations . . .").

86. G.A.O., ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN — FEW DENIED APPLICANTS DEPORTED (1987).

determine that the alien is a refugee as defined by statute.<sup>87</sup> Thus, the alien must demonstrate that she has a "well-founded fear of persecution."<sup>88</sup> Further, to prevail in an application for the withholding of deportation, she must demonstrate that her "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>89</sup> Because there is as yet no one definitive construction of these terms and of the precise evidentiary requirements to prove an asylum claim, aliens hoping to find safe haven in the United States often experience difficulty in establishing eligibility.

Although the United States has adopted the U.N. Convention's definition of refugee, even a cursory review of administrative interpretations of that definition reveals that they generally have been narrow and the quantum of evidence required by immigration authorities to meet the applicant's burden of proof has been high. One critical factor in determining whether a refugee will obtain protection, which illustrates the problem of restrictive administrative interpretations, is the question of what constitutes "persecution" (for an asylum claim) and "threat to life or freedom" (for withholding of deportation) "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>90</sup> Although the Board of Immigration Appeals (BIA) generally has interpreted these elements of eligibility for asylum and withholding of deportation restrictively,<sup>91</sup> some United States courts have begun to require the BIA to adopt a more expansive view of this aspect of the refugee definition.

For example, in *Hernandez-Ortiz v. INS*,<sup>92</sup> the United States Court of Appeals for the Ninth Circuit demonstrates the comparatively expansive interpretive approach taken by the courts. This decision provides perhaps the best example of United States discourse on what constitutes persecution on the grounds of political opinion, a commonly cited basis for asylum. In *Hernandez-Ortiz*, the court held that the persecuting government's belief regarding the applicant's political opinion, rather than her actual conduct, was

87. INA § 208(a), 8 U.S.C. § 1158(a) (1982).

88. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 208.5 (1987). *See also* *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

89. INA § 243(h), 8 U.S.C. § 1253(h) (1982).

90. Because the term "threat to life and freedom" has been construed to have no other meaning than "persecution," the two terms arguably encompass the same conduct. But whether these two terms are synonymous has not been fully resolved by the courts. *See* *Blum, The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 *SAN DIEGO L. REV.* 327, 343-44 (1986). Courts have consistently held that those fleeing widespread violence, anarchy or unrest that equally affects all citizens of the applicant's homeland, are not eligible for recognition as refugees since they do not fear "persecution" on account of any of the five statutory factors. *See, e.g.,* *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984); *Martinez-Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir. 1982).

91. *See, e.g., In re* *Maldonado-Cruz*, Interim Dec. No. 3041 (BIA 1987); *In re* *Acosta*, Interim Dec. No. 2986 (BIA 1985).

92. 777 F.2d 509 (9th Cir. 1985). Another excellent example of judicial consideration of these issues is *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988).

controlling. The court ruled that when a government uses threats of force or violence against an individual or political group where there is no apparent legitimate basis for governmental action, "the most reasonable presumption is that the government's actions are politically motivated."<sup>93</sup>

The Ninth Circuit employed similar reasoning in its decision in *Lazo-Majano v. INS*.<sup>94</sup> There the applicant, a domestic servant and washerwoman, expressed a fear of continued persecution by a Salvadoran military officer who was systematically terrorizing and raping her. The court determined that the officer's threat to denounce her as a subversive, despite her lack of political involvement, was a sufficient basis for prohibiting her return to El Salvador, given the officer's "cynical imputation of political opinion to her."<sup>95</sup>

The evidentiary burden on applicants is also a telling example of the significant hurdles for those seeking sanctuary in the United States. Until recently, the BIA interpreted the Refugee Act of 1980 to require that an applicant demonstrate a "clear probability of persecution" to be eligible for asylum.<sup>96</sup> The United States Supreme Court, however, rejected this restrictive interpretation. Instead, it concluded that the two statutory remedies — asylum and withholding of deportation — are distinct and governed by differing standards of proof.<sup>97</sup>

In *INS v. Stevic*,<sup>98</sup> the Supreme Court agreed with the BIA that the standard for determining eligibility for withholding of deportation requires an applicant to demonstrate that there is a "clear probability," or that it is "more likely than not," that she will suffer persecution if returned to her home country.<sup>99</sup> However, in *INS v. Cardoza-Fonseca*,<sup>100</sup> the Court ruled that this more burdensome standard of proof did not apply to asylum applications. Those applications are governed by the terms of the refugee definition, which requires applicants to demonstrate only that they have a "well-founded fear of

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93. 777 F.2d at 516.

94. 813 F.2d 1432 (9th Cir. 1987).

95. *Id.* at 1435. The Ninth Circuit decisions in *Lazo-Majano* and *Hernandez-Ortiz* contrast sharply with the view of the Fifth Circuit. In *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *reh'g denied* 814 F.2d 658 (1987), *cert. denied* 108 S.Ct. 92 (1987), the United States Court of Appeals for the Fifth Circuit rejected the asylum claim of a Salvadoran woman who had been brutally raped and who had witnessed the torture murder of her uncle and cousins, all of whom had been active in the agrarian reform movement. Later, she was personally threatened by her attacker. The court ruled that she had not shown a nexus between the acts of persecution and any individual political opinion she personally held. In upholding the BIA's decision, the court impliedly rejected the notion of "imputed political opinion" as a sufficient basis for asylum. *Id.* at 289.

96. *In re Portales*, 18 I. & N. Dec. 239, 241 (B.I.A. 1982); *In re Martinez-Romero*, 18 I. & N. Dec. 75, 78 (B.I.A. 1982), *aff'd*, 692 F.2d 595 (9th Cir. 1984). The BIA held to this position even after the United States Supreme Court decision in *Stevic*. See *INS v. Stevic*, 467 U.S. 407 (1984). *In re Acosta*, Interim Dec. No. 2986 (B.I.A. 1985).

97. *Stevic*, 467 U.S. at 430.

98. 467 U.S. 407 (1984).

99. *Id.* at 424, 430.

100. 480 U.S. 421 (1987).



persecution."<sup>101</sup>

The BIA has recently interpreted *Cardoza-Fonseca* in its decision in *In re Mogharrabi*.<sup>102</sup> In *Mogharrabi*, the BIA endorsed the view of several circuit court cases that "an applicant for asylum has established a well-founded fear if she shows that a reasonable person in her circumstances would fear persecution."<sup>103</sup>

For the most part, despite these court-imposed liberalizations in the standards governing asylum cases, the immigration authorities continue to place high evidentiary burdens on asylum-seekers. For example, the BIA until recently maintained that an applicant's statements, by themselves, are insufficient to support a claim for asylum.<sup>104</sup> But in the past few years United States courts have acknowledged and given full weight to the asylum applicant's own credible statement. The Court of Appeals for the Ninth Circuit, in particular, has begun to rethink the requirement that applicants for asylum have the burden to corroborate their own statement. In *Bolanos-Hernandez v. INS*,<sup>105</sup> the Ninth Circuit expressly ruled that an applicant for asylum does not have to corroborate a direct threat by a persecuting agent. Several recent cases have extended that principle to situations in which the threat to the applicant was made indirectly.<sup>106</sup>

In *Mogharrabi*, the BIA appears to have begrudgingly accepted the

101. *Id.* at 1209, 1222.

102. *In re Mogharrabi*, Interim Dec. No. 3028 (B.I.A. 1987).

103. *Id.* at 7. *See, e.g.*, *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565; *Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986). The BIA held that the factors set forth in *In re Acosta* should guide its decisions in determining whether a reasonable person would fear persecution. These factors, as revised slightly by the Board, are: (1) that the applicant "possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort"; (2) "the persecutor is already aware, or could . . . become aware," that the applicant "possesses this belief or characteristic"; (3) "the persecutor has the capability of punishing the alien"; and (4) "the persecutor has the inclination to punish" the applicant. *In re Mogharrabi*, Interim Dec. No. 3028, at 8-9, *quoting In re Acosta*, Interim Dec. No. 2986, at 22 (B.I.A. 1985).

104. *See, e.g.*, *In re Escobar*, Interim Dec. No. 2944 (B.I.A. 1983); *In re Castellon*, 17 I. & N. Dec. 616, 621 (B.I.A. 1981); *In re McMullen*, 17 I. & N. Dec. 542, 547 (B.I.A. 1980), *rev'd*, 658 F.2d 1313 (9th Cir. 1981).

105. 749 F.2d 1316 (9th Cir. 1984), *as amended*, 767 F.2d 1277 (9th Cir. 1985). In *Bolanos-Hernandez*, the court recognized that "omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger" but that imposing such a requirement "would result in the deportations of many people whose lives genuinely are in jeopardy." 749 F.2d at 1323-24. The court noted that "[a]uthentic refugees rarely are able to offer direct corroboration of specific threats." *Id.* The Seventh Circuit Court of Appeals has taken the position that the applicant's uncorroborated testimony may be sufficient to meet her evidentiary burden, but only if it is "credible, persuasive, and points to *specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution." *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984)(emphasis in original).

106. *Artiga-Turcios v. INS*, 813 F.2d 262 (9th Cir. 1987) (former Salvadoran soldier told by neighbor that guerrillas were seeking him); *Canjura-Flores v. INS*, 784 F.2d 885 (9th Cir. 1985) (Salvadoran activist provided uncorroborated testimony that National Guard sought him after his departure from El Salvador).

courts' insistence that its previous wholesale rejection of the applicant's statement was contrary to established principles of law. The Board stated:

we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for [her] fear.<sup>107</sup>

The guarantee of protection for refugees set forth in the Refugee Act of 1980 has been thwarted by the BIA's high evidentiary standards and narrow application of the eligibility criterion for asylum and withholding of deportation. Fortunately, judicial oversight has tempered the BIA's frustration of Congress' intent in enacting the Refugee Act.<sup>108</sup>

### *c. Review Procedures*

As noted above, no direct appeal lies from an INS decision to deny an application for asylum.<sup>109</sup> However, if an immigration judge denies an asylum application, a request for withholding of deportation, or both, the applicant may seek an administrative review of the decision by the BIA.<sup>110</sup> The BIA has *de novo* jurisdiction to review the transcript of the proceedings below and the record of evidence submitted at the hearing.<sup>111</sup> Although it may permit oral argument pertaining to the merits of the application as well as to the correctness of the immigration judge's decision, the BIA's review is limited to the record of the proceedings.<sup>112</sup>

Should the BIA uphold either an administrative finding of deportability or a denial of an application for relief from deportation made during the course of deportation proceedings, the applicant may appeal to the circuit court of appeals.<sup>113</sup> At the circuit court level, the scope of review varies depending upon whether the issue involves the denial of asylum or the denial of withholding of deportation. In reviewing the BIA's decision to deny asylum,

107. *In re Mogharrabi*, Interim Dec. No. 3028, at 7-8.

108. The Board, however, continues to issue opinions reflecting the disparate views on the interpretation of the criteria for refugee eligibility. See, e.g., *In re Maldonado-Cruz*, Interim Dec. No. 3041 (B.I.A. 1987) (denying asylum and withholding of deportation to a Salvadoran who was forcibly recruited by the guerrillas, who deserted and was sought by them; the BIA stated that a guerrilla army, like a conventional governmental military force, has the right to enforce discipline, even against forcible recruits).

109. 8 C.F.R. § 208.8(c) (1987).

110. *Id.* at § 3.1(b); NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE, § 9.2(d) (1986).

111. NATIONAL LAWYERS GUILD, *supra* note 110, § 9.2(d), at 9-9, 9-10.

112. See 8 C.F.R. § 3.1(e) (1987); NATIONAL LAWYERS GUILD, *supra* note 110, § 9.2(d), at 9-9.

113. INA § 106(a), 8 U.S.C. § 1105a(a).

the court employs a two-tiered standard. First it determines whether substantial evidence supported the determination by the BIA that the applicant failed to demonstrate a well-founded fear of persecution and therefore failed to establish eligibility for asylum as a refugee.<sup>114</sup> Under the substantial evidence standard, a court may reverse an agency decision which cannot be sustained by "reasonable, substantial, and probative evidence in the record considered as a whole."<sup>115</sup>

Where the applicant successfully established her eligibility as a "refugee" but the application nevertheless was denied on a discretionary basis, the court then reviews the BIA's decision under an abuse of discretion standard.<sup>116</sup> An abuse of discretion occurs when the BIA's decision is arbitrary, capricious and not in accordance with law,<sup>117</sup> when the BIA does not accord the applicant a full and fair hearing,<sup>118</sup> when it fails to consider all relevant factors in making its determination,<sup>119</sup> or when the BIA acts contrary to its own regulations or the governing statute.<sup>120</sup>

When reviewing the denial of withholding of deportation, the circuit court uses the substantial evidence standard, the same standard applied in reviewing denials of asylum.<sup>121</sup> Following a final decision by the circuit court of appeals, either party may file a petition for certiorari to the United States Supreme Court.<sup>122</sup>

## 2. *Extended Voluntary Departure*

The Refugee Act of 1980 provides no express mechanism for granting temporary protection to individuals or groups who are in "refugee-like" situa-

114. *See, e.g.,* Diaz-Escobar v. INS, 782 F.2d 1488, 1493 (9th Cir. 1986); Vides-Vides v. INS, 783 F.2d 1463, 1466 (9th Cir. 1986); Garcia-Ramos v. INS, 775 F.2d 1370, 1373-74 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984).

115. Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986). Mortazavi v. INS, 719 F.2d 86 (4th Cir. 1984); *see also* McMullen v. INS, 658 F.2d 1312, 1317 (9th Cir. 1981) ("Application of the substantial evidence test does not mean, of course, that the reviewing court must review the facts *de novo* . . . . Our inquiry is limited to a review of the record to determine whether the agency's determination is substantially supported."); Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984) ("Although the substantial evidence standard of review requires slightly stricter scrutiny than the ordinary clear error standard . . . courts must be careful to keep it sufficiently more deferential than *de novo* review.");

116. *See, e.g.,* Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987); Del Valle v. INS, 776 F.2d 1407, 1412 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 n.9 (9th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984).

117. *See, e.g.,* Carrasco-Favela v. INS, 563 F.2d 1220, 1222 n.5 (5th Cir. 1977).

118. *See, e.g.,* Castro-O'Ryan v. INS, 821 F.2d 1415 (9th Cir. 1987); Vissian v. INS, 548 F.2d 325, 329 (10th Cir. 1977).

119. *See, e.g.,* Ramos v. INS, 695 F.2d 181, 186 (5th Cir. 1983); Luciano-Vincente v. INS, 786 F.2d 706 (5th Cir. 1986). *See generally* Bowman Transportation v. Arkansas Best Freight System, 419 U.S. 281, 285-86 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

120. *See, e.g.,* Israel v. INS, 785 F.2d 738 (9th Cir. 1986).

121. *See, e.g.,* McMullen v. INS, 658 F.2d 1312, 1316-17 (9th Cir. 1981); *see also* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984).

122. 28 U.S.C. § 2101 (1986).

tions — fleeing from civil strife, conflict, war or anarchy in their homeland — but who cannot meet the statutory standard of eligibility for refugee status. On occasion, however, groups or individuals in such circumstances may be permitted to remain in the United States pursuant to a policy known as “extended voluntary departure” (EVD).<sup>123</sup> EVD does not protect an alien from being deported in the future but merely confers a temporary status to remain in the United States for a six month or one year period, during which time she may be granted authorization to work.<sup>124</sup> As long as the protective status is in effect, the INS will not enforce the departure of the protected individuals from the United States.<sup>125</sup>

EVD status has been granted to citizens of countries experiencing dangerous conditions, martial law, or turmoil.<sup>126</sup> However, the United States government has consistently maintained that its motivation for granting EVD does not derive solely from humanitarian considerations, but encompasses foreign and domestic political objectives as well.<sup>127</sup> Because of the discretionary and political nature of this form of temporary safe haven, EVD is an extremely limited and elusive form of relief from deportation for a person who

123. See T. ALEINIKOFF & D. MARTIN, *supra* note 68, at 726-27 (1985). There is no explicit statutory or regulatory authority for EVD, a status which apparently evolved as an ad hoc administrative practice of the INS. See Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 157 (1986). EVD may be an outgrowth of the different, but related, authority under which the Attorney General has the discretion to grant voluntary departure status to deportable aliens under 8 U.S.C. § 1252(b) and 8 U.S.C. § 1254(e). *Id.* One court has ruled that the origin of the authority to grant EVD is the broad mandate of the Attorney General under 8 U.S.C. § 1103(a) to establish such regulations as are necessary to enforce the immigration laws. *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 804 F.2d 1256 (D.C. Cir. 1986), *on reh'g*, 846 F.2d 1499 (D.C. Cir. 1988), *vacated and reh'g en banc granted*, 808 F.2d 847 (D.C. Cir. 1987), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988). See *supra* note 68 and accompanying text.

124. 8 C.F.R. § 274 a.12. See also Note, *supra* note 123, at 175. Recent legislation adjusts the status of persons who entered the United States prior to July 21, 1984, and who were on EVD during the five-year period ending November 1, 1987, to that of permanent residents. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204 § 902, 101 Stat. 1331 (1987).

125. See *supra* note 123; see also T. ALEINIKOFF & D. MARTIN, *supra* note 68, at 727.

126. See, e.g., 62 INTERP. REL. 106 (1985) (reproducing an INS wire (File: CO 243.56-P) continuing the grant of extended voluntary departure to Afghan nations “because of the turmoil prevailing in that country.”); 61 INTERP. REL. 1070 (1984) (reproducing a July 21, 1984, Department of Justice press release extending the grant of EVD to citizens of Poland, effective since martial law was imposed in that country). Since 1960, a form of EVD status has been granted to: Cubans (1960-66); Dominicans (1966-78); Western Hemisphere individuals with applicable visa preference dates pursuant to the court order in *Silva v. Levi*, No. 76-C4268 (N.D. Ill. Mar. 10, 1977) *modified* 605 F.2d 978 (1979) (1968-83); Czechs (1968-77); Chileans (1971-77); Cambodians, Vietnamese, and Laotians (1975-77); Ethiopians (1975—still in effect for pre-June 30, 1980 arrivals); Ugandans (1978—still in effect); Iranians (Apr.-Dec. 1979); Nicaraguans (1979—1980); Afghans (1981—still in effect); and Poles (1982—still in effect). AMERICAN IMMIGRATION LAWYERS ASS'N, MONTHLY MAILING 325-27, exh. 20 (July 1984) (reprinting government response to plaintiff interrogatories in *Local 25*).

127. See, e.g., Letter from Attorney General William French Smith to Congressmen (July 19, 1983) (discussing the government's refusal to grant EVD status to citizens of El Salvador), *reprinted in* T. ALEINIKOFF & D. MARTIN, *supra* note 68, at 731-33.

needs protection but who cannot meet the rigorous statutory requirements for recognition as a "refugee."<sup>128</sup>

### B. *The Canadian Framework for Addressing Refugee Claims*

The procedures enunciated in the 1976 Immigration Act<sup>129</sup> pertaining to the adjudication of refugee claims have been the primary subject of the debate over asylum policy in Canada in recent years. The result is legislation that significantly changes the Canadian scheme under which refugees receive asylum.<sup>130</sup>

Analyzing the effect of recently enacted law in Canada requires an understanding of the structure of the prior scheme under which refugees applied for asylum. Previously, Canadian law recognized three categories of individuals eligible for protection: (1) those who conform to the United Nations Convention's definition of "refugee"; (2) those who were members of a Designated Class; and (3) those who were eligible under the Special Programs.<sup>131</sup>

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128. The need for a status akin to, but not the same as, refugee status has been most starkly posed by the recent influx of Salvadorans into the United States from that war-torn nation. *See, e.g.,* Comment, *supra* note 7, at 545; Note, *supra* note 7, at 309. Because members of Congress, church organizations, and others failed to influence the State Department and the Attorney General to grant EVD status to Salvadorans, a number of legislative initiatives to confer such status on Salvadorans has been presented in Congress over the past several years. *See* T. ALENIKOFF & D. MARTIN, *supra* note 68, at 729-35. Recent immigration legislation, H.R. 3810 100 Cong., 1st Sess., 133 CONG. REC. H11864-04 (1982), incorporated a provision suspending the deportation of Salvadorans during an eighteen month study period, but the provision was deleted during the House-Senate Conference negotiations on the bill. AMERICAN IMMIGRATION LAWYERS ASS'N, MONTHLY MAILING 516 (Nov. 1986). Legislation was also introduced in the 100th Congress to create a generic "safe haven" category for those in refugee-like situations. H.R. 2922, 100th Cong., 1st Sess., 133 CONG. REC. H6240-01 (1987). The Temporary Safe Haven Act of 1988 passed the House on October 5, 1988, H.R. 4379, 100th Cong., 2d Sess. Some scholars argue that customary international law norms require a grant of "temporary refuge" to those fleeing civil war and gross violations of human rights and that, specifically, Salvadorans should receive such protection. *See* Hartman & Perluss, *Temporary Refugee: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986).

129. Immigration Act, 1976, ch. 52 1976-1977 Can. Stat. 1193.

130. *See infra* notes 192-207 and accompanying text.

131. For a discussion of each of these programs, *see infra* text accompanying notes 142-51, 159-69. The Immigration Act provides that persons seeking asylum in Canada may apply at any Canadian embassy or consulate. The number of applications granted through this process are limited to an annually-established ceiling. Under the statute, admission under immigrant status is granted to persons who are "Convention refugees seeking resettlement" in Canada. Immigration Regulations § 3, SOR 78-172, 112 Can. Gaz. 761 (1978) (Convention refugees seeking resettlement are in the first priority category for immigrant visas). As one step in the admission process, the Canadian consulate must determine that the applicant is likely to "successfully establish" herself in Canada before entry as an immigrant on the basis of refugee status may be granted. *Id.* at § 7(1), SOR 78-172, 112 Can. Gaz. 763 (1978) (factors for consideration in determining the selection of Convention refugees). This aspect of Canadian refugee policy is unchanged under revisions of refugee policy recently enacted by the Canadian government.

The Canadian admissions system also explicitly includes provisions for the acceptance of persons other than those designated as "Convention refugees." *See id.* at § 7 SOR 78-172, 112 Can. Gaz. 763 (1978); *see also, infra* notes 159-69 and accompanying text.

### 1. *Convention Refugee*

The Canadian "Convention refugee" program resembles the asylum program of the United States. Persons who conform to the U.N. Convention's definition of a refugee are provided permanent asylum.<sup>132</sup> The new legislation does not technically change the definitions applied under the Convention refugee program. As a practical matter, however, the recent amendments to the eligibility procedures will significantly affect the ability of refugees to gain protected status in Canada.<sup>133</sup>

#### a. *Administrative Provisions—The Application Process*

Under Canadian law, effective until January 1, 1989, an individual subject to an inquiry proceeding to determine whether she may be admitted into or be permitted to remain in Canada may submit a refugee application at the border or from within Canada.<sup>134</sup> If the applicant is in Canada in violation of Canadian immigration law, the inquiry is adjourned to allow for a considera-

132. Immigration Act, 1976, ch. 52, §§ 2(1), 4(2)(b), 1976-1977 Can. Stat. 1193, 1198.

133. See *infra* text accompanying notes 223-32.

134. Immigration Act, 1976, ch. 52, § 45, 1976-1977 Can. Stat. 1193, 1224-25. Under an agreement between the Canadian federal government and Quebec, Quebec has broad powers independent of the federal system to admit immigrants to the province. See Agreement Between the Government of Canada and the Gouvernement du Québec with Regard to Cooperation on Immigration Matters and on the Selection of Foreign Nationals Wishing to Settle Either Permanently or Temporarily in Québec, signed by J. S. G. Cullen, Minister of Employment and Immigration and Jacques Couture, Ministre de l'Immigration du Québec [hereinafter Agreement], cited in Stroll, *Quebec Refugee and Asylum Policy*, at 3 n.14 (unpublished paper) (on file with the New York University Review of Law & Social Change). Although the Agreement specifically prohibits Quebec from determining who is a bona fide Convention refugee, it does not prevent Quebec from applying a broader criteria for admission of persons in refugee-like situations.

Under Quebec immigration law, the Minister of Immigration possesses broad authority to admit foreign nationals to Quebec whom the government views as "dans une situation de détresse" [in a situation of distress]. An Act to Amend the Immigration Department Act, ch. 82, § 3(c), 1978 Qué. Stat. 957. The provincial regulations define those in a "distressful situation" as Convention refugees and persons outside their country of residence "for reasons of war, civil disorders, or change in the political regime [who are] unable to return . . . because of a well-founded reason that [their] personal safety would be in danger," or because of natural catastrophe. Qué. Rev. Regs., ch. M-23.1, r.2, §§ 18(a)-(b) (1981). The Quebec authorities have liberally construed these provisions which are already broader than statutory refugee definitions under either Canadian or United States federal law. Interview with Louise Gagné, Secrétaire déléguée auprès des réfugiés, Ministère des Communautés culturelles et de l'Immigration (Jan. 3, 1986).

A person determined to fall within the provisions of Quebec's regulations will be issued a Certificate de sélection du Québec (CSQ) which, under the agreement between Quebec and Canada, entitles the bearer to temporary residence in Canada as a refugee. Qué. Rev. Regs., ch. M-23.1, r.2, § 17(a) (1981). Although a CSQ does not guarantee that Canada will confer permanent resident status, in practice ninety-nine percent of CSQ recipients are awarded permanent residency six to eight months after receiving their CSQ. Interview with Louise Gagné *supra*. An applicant may be deemed eligible to receive a CSQ while in Quebec but must travel outside Canada in order to process her application for entry as an immigrant through a visa office overseas.

tion of the application for refugee status.<sup>135</sup> The claimant is then examined under oath by a Senior Immigration Officer (SIO), an employee of the Canadian Employment and Immigration Commission (CEIC).<sup>136</sup> Under the current system, the SIO has no decisionmaking authority; rather, her role is to elicit and record the testimony of the applicant. The transcript of the proceedings before the SIO is then forwarded to the Refugee Status Advisory Committee (RSAC).

The RSAC is a statutorily created body that acts in an advisory capacity to the Minister of Employment and Immigration (MEI).<sup>137</sup> The RSAC reviews the interview transcript to determine the merits of the refugee status request.<sup>138</sup> The statutory scheme in place until January 1, 1989, does not guarantee a right of personal appearance or of oral hearing before the RSAC.<sup>139</sup> RSAC determinations, made by three-member panels,<sup>140</sup> are forwarded to the MEI as recommendations. Although the MEI, under the statute effective until January, 1988, retains the ultimate decisionmaking authority, she follows the RSAC's recommendations in the vast majority of cases.<sup>141</sup>

#### *b. Criteria for Determining Refugee Status*

The 1976 Immigration Act defines a "Convention refugee" as:

any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, (a) is outside the country of his nationality and is unable to avail himself of the protection of that country, or (b) not having a country of nationality, is outside the

135. Immigration Act, 1976, ch. 52, § 45(1), 1976-1977 Can. Stat. 1193, 1224. The Immigration Commission also permits persons to claim refugee status while "in status," while legally in Canada, but this privilege is not delineated in statute or regulation. B. Jackman, *Refugees, Designated Classes and Special Programmes 15* (May 1985) (unpublished manuscript) (on file with the New York University Review of Law & Social Change).

136. Immigration Act, 1976, ch. 52, § 45(1), 1976-1977 Can. Stat. at 1224. The SIO is not an asylum or refugee law specialist. Avery, *supra* note 84, at 259 (citing criticism that the SIOs lack expertise in refugee matters); Howard, *Contemporary Canadian Refugee Policy: A Critical Assessment*, 6 CAN. PUB. POL'Y 366 (1980).

137. Immigration Act, 1976, ch. 52, §§ 45(3), 45(4), 48, 1976-1977 Can. Stat. at 1224, 1226. The RSAC is composed of individuals from the CEIC, the Canadian Department of External Affairs (DEA) and of citizen members drawn from outside the government, all of whom are appointed by the MEI. Avery, *supra* note 84, at 260. The RSAC functions independently from the CEIC, and CEIC and DEA appointees are relieved of their other duties during the term of their appointments. *Id.* See also 1 REFUGEES, Mar.-Apr. 1982, at 3-4 (summarizing announcement of MEI Lloyd Axworthy regarding structure of RSAC).

138. Avery, *supra* note 84, at 260-68 (describing the role of RSAC in the adjudication process).

139. Wydrzynski, *Refugees and the Immigration Act*, 25 MCGILL L.J. 185 (1979). An experimental program to allow some refugee claimants oral hearings before a member of RSAC began in May 1983. 61 INTERP. REL. (Sept. 14, 1984).

140. Avery, *supra* note 84, at 263.

141. TASK FORCE REPORT, *supra* note 12, at 51.

country of his former habitual residence and is unable, or, by reason of such fear, is unwilling to return to that country.<sup>142</sup>

In Canada, as in the United States, the central issue involved in adjudicating refugee claims is whether the applicant has sufficiently demonstrated a "well-founded fear of persecution." In contrast to the general tenor of adjudications in the United States, however, Canadian interpretations of this criterion have created a standard generally favorable to those seeking refugee status.

Canadian cases, for example, have more broadly interpreted the definition of "refugee" than have the United States decisions. In *In re Mingot*,<sup>143</sup> the Immigration Appeals Board (IAB) elaborated on the meaning of the term "well-founded fear of persecution," an essential element of the definition of a refugee:

Fear, even if well-founded or reasonable fear, is a subjective feeling within the person who experiences it. Its compelling and constraining power can vary in intensity from one person to another and should be evaluated in light of the particular circumstances of the case. However, this evaluation must be made objectively by the court . . . [T]he burden of reasonable fear lies with the person who claims refugee status. This can be a very difficult task and clearly the court in authority must not rely upon the strict rules of production of evidence used in ordinary cases. In other words, where there is doubt, the person claiming refugee status must be given the benefit of the same. . . .<sup>144</sup>

Canadian law, then, provides the asylum applicant the benefit of any factual doubt that might arise in evaluating her claim for asylum. Additionally, in *Mingot*, the IAB signalled its implicit recognition that the subjective fact of "fear of persecution" can be well-founded, or objectively based, without proof beyond the applicant's own credible statement.<sup>145</sup> Thus, the evidentiary burden on the refugee-applicant is less stringent than that faced by applicants in adjudications by United States immigration authorities.

The RSAC adopted the reasoning of *Mingot* in its *Guidelines for Assessing*

142. Immigration Act, 1976, ch. 52, § 2(1), 1976-1977 Can. Stat. 1193, 1193.

143. 8 I.A.C. 351 (I.A.B. 1973).

144. *Id.* at 356. *Mingot* reviewed an application for refugee protection under prior legislation that referred to the refugee definition. See Immigration Appeal Board Act, ch. 27, 1973-1974 Can. Stat. 423.

145. Although the IAB upheld the order for *Mingot's* deportation, it did so based upon the conclusion that *Mingot's* vague fear of possible future hardship or maltreatment was insufficient to establish a "well-founded fear of persecution." 8 I.A.C. at 367. The IAB however, gave full weight to *Mingot's* claims despite the fact that he offered no corroborative evidence beyond his personal testimony. See also *Rujadeen v. M.E.I.*, [1985] 55 N.R. 129 (F.C.A. 1984) (reversing the IAB and granting asylum to Tamil refugee based solely on the personal testimony of his persecution on the basis of race and religion); *In re Sanchez*, Nos. 79-1110, 79-1111 (I.A.B. Apr. 23, 1980) (ruling that the claimant was a refugee, the IAB based its decision on claimant's plausible, credible and truthful testimony that he was being persecuted by the Chilean authorities); *In re Iyar*, No. 79-1237 (IAB Jan. 15, 1980).



*Refugee Claims:* “[w]hen an application of the refugee definition to a claimant is in doubt, the claimant will receive the benefit of the doubt.”<sup>146</sup> RSAC members are careful to apply this standard in reviewing applications for refugee status. Although RSAC members first review an application without giving the applicant the benefit of the doubt, they will re-examine the application giving the applicant the benefit of the doubt if any uncertainty arises. In so doing, they evaluate the case from the applicant’s point of view and accord full weight to the applicant’s statement, even though the statement may not be objectively corroborated or seems questionable. This “benefit of the doubt” review can lead to the reversal of recommendations for an adverse decision.<sup>147</sup>

In addition to a more favorable standard of proof, Canada employs an expansive notion of what constitutes persecution on account of the five statutory factors. Notably, refugee determinations in Canada are not limited to those instances where the applicant actually engaged in political activity in her home country. Instead, the standard includes consideration of whether the ruling government of the country from which the refugee fled *perceives* her to be a political subversive or opponent.<sup>148</sup> The RSAC has endorsed this view in its *Guidelines* and concludes that “[p]olitical opinion means what is political in the opinion of the government from which the refugee flees, not what is political in the opinion of the refugee, or in the opinion of Canadian officials.”<sup>149</sup>

In addition, Canadian courts, in reviewing cases premised on “membership in a particular social group” have adopted similar reasoning. The determinative factor, according to one appellate case, is whether the group is perceived as an opposition group, not whether in fact they are an opposition group.<sup>150</sup> These interpretations are ones which only recently have been acknowledged by United States courts.<sup>151</sup>

### c. Review Procedures

Under the statute in effect until January 1, 1989, if the MEI does not

146. REFUGEE STATUS ADVISORY COMMITTEE, NEW REFUGEE STATUS ADVISORY COMMITTEE GUIDELINES ON REFUGEE DEFINITION AND ASSESSMENT OF CREDIBILITY ¶ 3 (1982) [hereinafter RSAC GUIDELINES].

147. Personal observation of RSAC deliberations by the author, in Ottawa, Canada (June 5, 1985); interviews with Joseph Stern, Chair of RSAC (June & November, 1985; May, 1987).

148. See *Inzunza Orellana v. M.E.I.*, [1979] 103 D.L.R.3d 105 (F.C.A.); see also *Adjei v. M.E.I.*, No. A-498-81 (F.C.A. 1982) (holding that IAB had erred in looking at its own opinion of the applicant’s politics rather than asking itself how the Ghanaian governing authorities viewed the applicant’s political involvement and actions); *Astudillo v. M.E.I.*, [1979] 31 N.R. 121, 122 (F.C.A.) (reversing the IAB, holding that, while the applicant himself had said that he was not involved in political activities, the actions of the Chilean government indicated that his activities were viewed as such).

149. RSAC GUIDELINES, *supra* note 146, ¶ 11; see also MINISTER OF EMPLOYMENT AND IMMIGRATION, IMMIGRATION MANUAL ¶ 8.07 (1)(A)(IV) [HEREINAFTER IMMIGRATION MANUAL] (“[P]olitical ‘opinion,’ in its widest context, embraces anyone who is persecuted on grounds that they are *alleged* or known to hold opinions contrary to, or critical of, the government. . . .”).

150. *Astudillo v. M.E.I.*, [1979] 31 N.R. 121 (F.C.A.).

151. See *supra* notes 92-95 and accompanying text.

determine that the claimant applying within Canada or at the border satisfies the definition of a refugee, the applicant has the right to a redetermination of the claim by the IAB.<sup>152</sup>

The Canadian Supreme Court in 1984 reviewed the statutory redetermination procedures in *Singh v. Minister of Employment and Immigration*.<sup>153</sup> In *Singh*, the Court held that a refugee status redetermination could not be based solely on the written record of an earlier proceeding. Instead, the applicant must receive an oral hearing.<sup>154</sup> Accordingly, the Court remanded the applicant's case to the IAB for an oral hearing on the merits.<sup>155</sup> As a result of the decision in *Singh*, the IAB has granted an oral hearing in every subsequent refugee redetermination case.<sup>156</sup>

Under the Canadian scheme effective until January 1, 1989, IAB decisions denying eligibility for "Convention Refugee" status are reviewable on the basis of a number of specified categories of error in the Federal Court of Appeal.<sup>157</sup> Final judgments or determinations by the Federal Court of Appeal may be reviewed by the Supreme Court of Canada when the appeal raises

152. Immigration Act, 1976, ch. 52, § 70(1), 1976-1977 Can. Stat. 1193, 1233.

153. 1 S.C.R. 177, 17 D.L.R. (4th) 422 (1985).

154. *Id.* The Court's decision was premised on two different bases. Justices Dickson, Lamer, and Wilson ruled that the lack of an oral hearing violated § 7 of the Canadian Charter of Rights and Freedoms guaranteeing the "rights to life, liberty and security" to all persons and "the right not to be deprived thereof except in accordance with principles of fundamental justice." *Singh*, 1 S.C.R. at 220; see CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 7 (1986). The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act of 1982, an act that modernized Canada's original "Constitution," the British North American Act of 1867. The Charter enumerates guaranteed, fundamental freedoms but is not interpreted as denying any other rights that exist in Canadian law. See E. Mendes, *Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights*, 20 ALTA L. REV. 383 (1982); R. Hahn, *Canada's Charter of Rights and Freedoms*, PUB. L. 530-538 (1984).

Justices Beetz, Estey, and McIntyre premised their opinion invalidating the redetermination procedure on § 2(e) of the Canadian Bill of Rights which guarantees that "no law of Canada shall be construed or applied so as to . . . (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations." The Justices reasoned that the lack of an oral hearing at any point in the refugee determination process before any body or official empowered to adjudicate their claim on the merits offends principles of "fundamental justice." See generally, *Singh*, 1 S.C.R. at 177. The Canadian Bill of Rights also enumerates fundamental freedoms, but it is an independent bill and is not incorporated into the new Constitution. Canadian Bill of Rights, ch. 44, 24th Parl., 3d Sess., 1960 Can. Stat. 519.

155. *Singh*, 1 S.C.R. at 239.

156. B. Jackman, *supra* note 135, at 19. Currently, the IAB is not hearing any refugee cases, pending implementation of the new legislation. Telephone interview with Barbara Jackman (October 1988).

157. Federal Court Act, ch. 1, § 28(1) 1970-71-72 Can. Stat. 1, 17. The court will review decisions when the deciding board, commission, or tribunal: "(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." *Id.*

questions of "public importance."<sup>158</sup>

## 2. Designated Classes

Canadian law incorporates a classification scheme that permits entry of individuals who are fleeing from particular regions of the world, who are "political prisoners," or who are "oppressed persons" still within their home countries.<sup>159</sup> The admission of these "Designated Classes" recognizes that individuals escaping persecution in certain countries will almost always have a valid claim of refugee status and thus deserve special legal treatment and protection.

The current policy recognizes three groups under the rubric of "Designated Classes:" Indochinese refugees,<sup>160</sup> the self-exiled class<sup>161</sup> (which refers to citizens of the Eastern Bloc and the Soviet Union), and the political prisoner and oppressed person class<sup>162</sup> (which includes prisoners and their families living within the countries of Chile, El Salvador, Guatemala, Poland, and Uruguay). After an individual has demonstrated that she falls within one of these groups, Canadian law provides her with a permit to remain in Canada and, ultimately, to establish permanent residence.<sup>163</sup>

When the RSAC determines that an applicant does not meet the criteria of the U.N. Convention definition of a refugee, it will refer the rejected application to a Special Review Committee (SRC) for review. The SRC also has jurisdiction over applicants for permanent residence who fall within the Designated Classes or who come from either a country with severe exit controls, a country to which Canada will not return persons, or a country for which a special program is in effect.<sup>164</sup>

158. *Id.* at § 31, as amended by ch. 18, § 9(2), 1974-76 Can. Stat. 278.

159. Immigration Act, ch. 52, § 6(2), 1976-1977 Can. Stat. 1193, 1199 (allowing for the admission to Canada of "any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted . . .").

160. IMMIGRATION MANUAL, *supra* note 149, IS 3.31 (1984); Indochinese Designated Class regulations, SOR/78-931, 112 Can. Gaz. 4464, as amended. This class generally refers to former citizens of Cambodia, Laos, or Vietnam who were uprooted as a result of the Vietnam War, cannot return to their countries and are unable to settle elsewhere. The existence of a fear of persecution is presumed. *See generally* Wydrzynski, *supra* note 139, at 188.

161. *See* Self-Exiled Class, SOR/78-993, 112 Can. Gaz. 4470, as amended. Haitians have been added to the group of "self-exiled" class members. *Id.* at § 2, Schedule I.

162. Political Prisoner and Oppressed Class, SOR/82-997, 116 Can. Gaz. 3725. This grouping includes persons who "as a direct result of acts that in Canada would be considered a legitimate expression of free thought or a legitimate exercise of civil rights pertaining to dissent or to trade union activity have been (i) detained or imprisoned for a period exceeding 72 hours with or without charge, or (ii) subjected to some other recurring form of penal control." *See also Extracts from the Annual Report 1982-83, Employment and Immigration Canada*, 3 REFUGEE at 2, 20 (Dec. 1983).

163. B. Jackman, *supra* note 135, at 2.

164. IMMIGRATION MANUAL, *supra* note 149, IS ¶ 26.11 (2)(b) (1984) (delineating the mandate of the Special Review Committee).

### 3. *Special Programs*

Previously, many of the individuals who were ineligible under either the Refugee Convention or the Designated Classes scheme might have found safety in Canada under a third provision. Until February 20, 1987, Canadian law included "Special Programs" designed to assist persons from countries "experiencing adverse domestic events."<sup>165</sup> The Immigration Manual, which defined the scope of the Special Programs, stated that "[w]hile not always 'convention refugees' in the accepted sense of the term, such people are deserving of lenient or relaxed criteria."<sup>166</sup>

As of February 1987, eighteen countries — including Chile, El Salvador, Ethiopia, Guatemala, Iran, Iraq, Lebanon, Poland and Sri Lanka — were deemed to be experiencing adverse domestic events.<sup>167</sup> The Special Programs had provided that individuals from those eighteen countries were to be issued minister's permits allowing them to stay in Canada.<sup>168</sup> In addition, individuals fleeing the designated areas had received work authorization, public benefits, protection from expulsion, and ultimately would become permanent residents of Canada.<sup>169</sup>

## III.

### RECENT AND PROPOSED REVISIONS IN CANADIAN AND UNITED STATES POLICY

In both the United States and Canada, recently enacted and proposed revisions of refugee determination procedures threaten to limit the availability of protection for refugees fleeing to North America. Fear of increased numbers of refugee applications as well as concern about possible abuses of each country's asylum programs appear to play an important role in the more restrictive postures recently taken in Canada and the United States. Arguably the two nations have lost sight of the humanitarian ideals that initially motivated their commitment to the protection of those persecuted in their homelands.

#### A. *The Context for Change*

Identifying the motivations of North American policymakers provides an important insight into the future direction of refugee policy. In particular, two concerns have been decisive in the perceived need to revise current asylum procedures.

First, North American policymakers believe that revisions are necessary because of the increase during the 1980s in the number of individuals seeking refuge. In announcing the proposed restructuring of the application review

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165. *Id.* at IS ¶ 26.01.

166. *Id.*

167. *Id.* at IS ¶ 26.

168. *Id.* at IS ¶ 26.20(1)(b)(iii)(C).

169. *Id.* at IS ¶ 26 (ELS).

process in May of 1987, Canadian Minister of Employment and Immigration, Benoit Bouchard, described the application "crisis":

With the passing of the *Immigration Act, 1976*, Canada formally legislated its obligations to refugee claimants. It was expected that this law would respond to the anticipated small number of refugee claims from inside our borders. By the early 1980s, the system began to break down under the weight of an unprecedented number of claims to refugee status, many of which were abusive. This phenomenon — the direct result of international pressures — was compounded by an inefficient determination system that, in turn, stimulated more false claims.<sup>170</sup>

The situation in Canada has worsened in recent years. While there were 8,400 applications for refugee status in 1985, by 1986 the number of applications reached 18,000.<sup>171</sup> In January and February 1987, over 3,000 Salvadorans applied for refugee status.<sup>172</sup>

Policymakers in the United States voice similar concerns about the adequacy of current procedures to process increased numbers of asylum applications effectively.<sup>173</sup> Immediately after the enactment of the Refugee Act of 1980, the number of aliens requesting protection skyrocketed.<sup>174</sup> While the absolute number of applicants has declined, immigration authorities continue to express concern about the efficient operation of the adjudication system.<sup>175</sup>

The second motivation for the recent policy developments is the persistent fear that many of those seeking protection are individuals seeking to enter

170. See Minister of Employment and Immigration, New Refugee Determination Legislation, Press Release No. 87-15, A-1 (May 5, 1987) (on file with the New York University Review of Law & Social Change) [hereinafter MEI, May Press Release].

171. *Id.* at A-6. At least one reason for the increase in applications is the steady stream of people leaving the United States for Canada since the passage of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986). Foreign-born workers are now being fired from their jobs by United States' employers who are worried about the new law's penalties for knowingly hiring workers without legal status. See generally *id.* at § 274A, 8 U.S.C. § 1324a.

Salvadoran and Guatemalan refugees comprise the majority of those leaving the United States and seeking safe haven in Canada. Many of them reacted with confusion to the new law's amnesty provisions to legalize persons who entered the United States before January 1, 1982, and fear they face immediate deportation if they do not qualify. *Id.* at § 245A, 8 U.S.C. § 1255a. Still others were aware of Canada's policy of receptivity towards Central Americans (as expressed in Salvadoran and Guatemalan inclusion in the former Special Program provisions) and finally decided that it was time to take advantage of that North American "safety net." See *supra* text accompanying notes 165-69.

172. *Tighter Canada Policy Stems Flow of Refugees*, USA Today, July 15, 1987, at 1.

173. See 52 Fed. Reg. 32,552 (1987) (noting that the purpose of the withdrawn proposed changes to refugee determination procedures was "to enhance uniformity and efficiency in the process for determining eligibility for asylum or withholding of deportation").

174. See IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE (1982) (describing massive increase in applications with the passage of the Refugee Act of 1980).

175. 52 Fed. Reg. 32,552 (1987).

for economic reasons rather than true refugees. The United States government consistently has expressed apprehension about the vulnerability of its borders and the inherent problems associated with permitting aliens, including refugees, into the country.<sup>176</sup> Consequently, the United States has opted for a predominantly restrictive approach to domestic asylum-seekers and to the admission of refugees from countries within this hemisphere.<sup>177</sup>

In Canada, as in the United States, one of the primary justifications offered for the February 1987 elimination of the Special Programs stemmed from the belief that the program provided asylum to individuals who were economic, rather than political, refugees.<sup>178</sup> Given that the blanket protections offered by the Special Programs did not depend upon any individualized showing of persecution, anyone entering Canada from one of the enumerated countries could remain. In announcing the elimination of the Special Programs, the MEI cited exploitation of this loophole as the primary rationale for the government position:

[A] blanket admission/non-removal approach makes no distinction between economic migrants and refugees who need our protection. This approach has become a magnet for those economic migrants who know they will immediately get a Minister's Permit with permission to work and who also know they will not be removed. It has also resulted in the creation of an organized business with unscrupulous travel agents and consultants preying upon the ill-informed and counselling them on ways to circumvent Canadian immigration policy.<sup>179</sup>

These same policy concerns were instrumental in effecting the recent passage of dramatic, new legislation in Canada.<sup>180</sup> While the policy concerns of the two governments unquestionably have an element of legitimacy, the new legis-

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176. A July 20, 1984, Comptroller General's report expresses the official fear that refugees and undocumented immigrants "compete for jobs, use existing health care and public education facilities; and, in some cases create social tensions." COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS OF THE UNITED STATES, CENTRAL AMERICAN REFUGEES: REGIONAL CONDITIONS AND PROSPECTS AND POTENTIAL IMPACT ON THE UNITED STATES, at iv (1984). These fears influenced the 1986 passage of the Immigration Reform and Control Act, Pub.L. 99-603, 100 Stat. 3359, 8 U.S.C. §§ 1101-1557 (1986), which provides for employer sanctions for those who hire undocumented workers, *id.* at § 101(e)(4),(f), 8 U.S.C. § 1324a(e)(4),(f), increased border patrol funding, *id.* at § 111(a)(1), 8 U.S.C. § 1103(a) and amnesty for certain individuals, *id.* at § 201, 8 U.S.C. § 1255a.

177. United States officials have consistently raised the concern that many, if not most, of the individuals seeking refuge actually are motivated by economic concerns rather than political ones. See Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 MICH. J. L. REFORM 243 (1984); Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMM. L. J. 495, 546-50 (1986).

178. MEI, February Press Release, *supra* note 8, at A-2.

179. *Id.*

180. Minister of Employment and Immigration, Minister Calls for Quick Passage of Bill C-55. Press Release 88-14 (June 3, 1988) (on file with the New York University Review of Law & Social Change).

lation in Canada and the proposed regulations in the United States permanently and negatively affect refugee protection in a manner far beyond these concerns.

## B. *Recent and Proposed Changes in Refugee Policy*

### 1. *United States*

The INS recently proposed extensive changes in the refugee determination procedures, including the elimination of the immigration judge as adjudicator of the asylum or withholding of deportation application.<sup>181</sup> However, after substantial public response and criticism of the proposals, the INS announced that it would withdraw its proposal to eliminate immigration judges as adjudicators.<sup>182</sup> Nonetheless new proposals also recommend important and disturbing changes in the asylum process.<sup>183</sup>

The most recent proposals include a provision for the automatic denial of asylum where certain mandatory grounds for denial apply. Among these are the applicant's commission of a particularly serious crime in the United States, firm resettlement in a third country or being a security risk.<sup>184</sup> The proposed rules not only create these new mandatory grounds for denial of asylum, they also limit the scope of inquiry into asylum and withholding of deportation proceedings by denying an evidentiary hearing on the merits of the persecution claim.<sup>185</sup>

Critics have argued that the proposals are inconsistent with the clear congressional mandate that both rejected mandatory bases for denying asylum and deliberately created a discretionary remedy requiring a balancing of the hardship of denying asylum against the seriousness of any offending act. Further, critics argued that the notion that an applicant can be denied either asylum or withholding of deportation without a hearing on the merits of her case contradicts fundamental principles of due process and the right to be heard in any case where a liberty interest is at stake.<sup>186</sup>

The latest proposals include the creation of an asylum officer corps within

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181. 52 Fed. Reg. 32,554 (1987) (to have been codified at 8 C.F.R. § 208.1(b)) (replacing immigration judges with asylum officers who would adjudicate asylum and withholding of deportation after an informal, non-adversarial interview with the applicant).

182. See *supra* note 20. For a point-by-point analysis and critique of the withdrawn proposed regulations, see AILA Comments I, *supra* note 19.

183. 53 Fed. Reg. 11,300 (proposed to be codified at 8 C.F.R. §§ 208, 236.3, 242.17(c), 253.1(f)). See Comments on Proposed Asylum and Withholding of Deportation Regulations, American Immigration Lawyers Association, submitted to Department of Justice, May 6, 1988. [hereinafter AILA Comments II] (on file with the New York University Review of Law & Social Change).

184. 53 Fed. Reg. 11,300, 11,306 (1988) (proposed to be codified at 8 C.F.R. § 208.14(c)).

185. 53 Fed. Reg. 11,300, 11,309-11,310 (1988) (proposed to be codified at 8 C.F.R. 236.3(c) and 242.17(c)); 53 Fed. Reg. 28231 (1988) (proposed to be codified at 8 C.F.R. 208.10).

186. See *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (Refugee Act creates a constitutionally protected right to apply for asylum); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988).

the INS, under the direct supervision of the Assistant Commissioner for Refugee, Asylum and Parole. The asylum officers would serve the function currently fulfilled by immigration officers in the District Offices, who adjudicate requests for asylum under the supervision of the District Directors. The current proposals, like their highly-criticized, withdrawn predecessor, call for a non-adversarial interview, that gives broad discretion to the asylum officer to determine whether witnesses would be presented and whether counsel could make an oral presentation.<sup>187</sup>

Critical questions, however, remain regarding the capacity of the asylum officer to function in an impartial and neutral manner, given her position as an employee of INS and as an officer of an independent adjudicatory body. Concerns remain that the asylum officers will inevitably be influenced by their positions as employees of the enforcement agency.<sup>188</sup> Critics also are disturbed by the limitations on the ability of counsel to facilitate the asylum interview process and by the overly broad discretion of the asylum officer to limit the testimony of the applicant and her witnesses.<sup>189</sup>

The proposed changes also continue the practice of soliciting the comments of the BHRHA, which has the option to respond.<sup>190</sup> The proposals outline, in greater detail than the current asylum regulations, the type of information appropriate for BHRHA comment. This explicitly includes the highly criticized practice of appraising the bona fides of individual asylum applicants.<sup>191</sup>

## 2. Canada

The recently enacted changes affect the Canadian asylum scheme in several regards. The revisions implemented in February 1987 eliminated the Special Programs for individuals in Canada and imposed severe hardships on those people fleeing their strife-ridden countries. These people must now apply for refugee status under the Convention refugee processing criteria or fall within one of the Designated Classes. Thus, they risk being denied recognition as a Convention refugee and the possibility of deportation to a country where they might face persecution. Until the recent changes, one of the most significant differences between the Canadian treatment of refugees and that of the United States was Canada's provision of several protective mechanisms, including a program addressing the plight of persons in refugee-like situations.

However, the most crucial changes to the Canadian refugee determination process are contained in the recently enacted legislation. The legislation

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187. 53 Fed. Reg. 11,305 (1988) (proposed to be codified at 8 C.F.R. § 208.9); *see also* 52 Fed. Reg. at 32,556 (to have been codified at § 208.8(a), (c)).

188. *See* AILA Comments II, *supra* note 183, at 2, 8.

189. 53 Fed. Reg. 11,305 (1988). *See* AILA II, *supra* note 183, at 8-9.

190. 53 Fed. Reg. 11,305 (1988) (to be codified at 8 C.F.R. § 208.11); *see also* 52 Fed. Reg. 32,556 (to have been codified at 8 C.F.R. § 208.10).

191. 53 Fed. Reg. 11,305 (1983); (proposed to be codified at 8 C.F.R. § 208.11); *see also* 52 Fed. Reg. 32,556 (1982) (to have been codified at 8 C.F.R. § 208.10).



focuses on: restricting eligibility for applying for refugee status;<sup>192</sup> streamlining the administrative determination process;<sup>193</sup> and limiting appellate review of the administrative decisions.<sup>194</sup> In addition, the legislation creates the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD), which would combine in one body the refugee determination duties currently conducted by the RSAC and the IAB.<sup>195</sup>

Under the new scheme, an initial assessment of eligibility to apply for refugee status is made by a panel composed of a member of the newly created CRDD and an immigration adjudicator, specially trained to hear asylum claims.<sup>196</sup> By unanimous agreement, the panel is authorized to reject the applications of people who fall into one of five proposed categories: (1) those who have refugee status in another country; (2) those who have made clearly unfounded claims; (3) those who have abandoned their claims or whose applications have been previously rejected in Canada; (4) those who are subject to a removal order; and (5) those who arrive from a "safe" third country to which they would be allowed to return or in which they have a right to claim protection.<sup>197</sup> This formula for distinguishing between potentially meritorious applications and those undeserving of any consideration for protection differs most significantly from the current format with respect to the "safe country" concept. Those applications containing "an arguable claim" for protection, or those cases where there is a reasonable doubt about the claim, are forwarded to the Immigration and Refugee Board.<sup>198</sup>

If access to the process is granted, a hearing takes place before the CRDD of the Immigration and Refugee Board. A panel, composed of at least two members of the CRDD, conducts a non-adversarial oral hearing at which the applicant would have the opportunity to present evidence and cross-examine

192. C. 55, cl. 15 (to be codified at Immigration Act, § 48.1(1)(a)-(e)).

193. *Id.* at cl. 19 (to be codified at Immigration Act, §§ 59-71.3).

194. *Id.* at cl. 20 (to be codified at Immigration Act § 83.1).

195. *Id.* at cl. 19 (to be codified at Immigration Act §§ 61, 71.1).

196. *Id.* at cl. 15 (to be codified at Immigration Act § 48).

197. *Id.* at cl. 15 (to be codified at Immigration Act § 48.1(1)(a)-(f)). The MEI explains the process of deciding which countries provide a safe environment for applicants:

A list of safe countries will be established by Cabinet, with the advice of a consultative committee, appointed for this purpose, and with the input of the relevant organizations including the Refugee Board, the United Nations High Commissioner for Refugees (UNHCR), and non-governmental organizations (NGO's). The criteria for designating a country as "safe" include its human rights record, its record on nonrefoulement, (returning people to a country where they face persecution) and other information on the country from reputable sources. A country can be selectively excluded if it has a poor record vis-a-vis a particular group. The first list of these safe countries will be established by Cabinet to coincide with implementation of the new legislation and could include countries such as those in the European Economic Community and other states with an exemplary record of protecting refugees.

MEI, May Press Release, *supra* note 170, app. C, at 2.

198. C. 55, cl. 15 (to be codified at § 48.2(2)); *see also*, MEI, May Press Release, *supra* note 170, app. A, at 1.

witnesses.<sup>199</sup> The MEI has the right to send a representative, who would be allowed to present evidence at the hearing.<sup>200</sup> Any decision to reject the claim must be unanimous, and must be presented to the applicant in writing. Only one member of the two-member decisionmaking panel need support the claim in order for the panel to render a positive decision.<sup>201</sup>

Although the new refugee determination process remains premised on the basic definition of "refugee" contained in the current law, it excludes several categories of individuals. The legislation bars individuals who are deemed to have ceased to be refugees.<sup>202</sup> In addition, it precludes refugee status if there are "serious reasons" for believing that the applicant "has committed a crime against peace, a war crime, or a crime against humanity"; the applicant "has committed a serious non-political crime"; or the applicant "has been guilty of acts contrary to the purposes and principles of the United Nations."<sup>203</sup> New legislation also greatly expands the scope of the "security risk" exclusion.<sup>204</sup>

Canada's asylum determination process in effect until January 1, 1989, provided several layers of administrative and judicial review. However, the new legislation eliminates most of these procedures, leaving an applicant with little opportunity for review. For example, under the new law, the IAB is eliminated as a reviewing authority in those instances where a redetermination of the initial decision is sought. The only administrative hearing will be conducted before the newly-constituted Refugee Determination Division.<sup>205</sup>

The revisions also severely limit both the jurisdiction of the federal appeals courts and the courts' scope of review. Under the new law, refugee claimants are given the right to appeal from the decision of the Refugee Determination Division only by leave of the federal Courts of Appeal. This discre-

199. *Id.* at cl. 19 (to be codified at Immigration Act § 71.1).

200. *Id.* at cl. 19 (to be codified at Immigration Act § 71.1(5)(b)).

201. *Id.* at cl. 19 (to be codified §§ 71.1(10), (11)).

202. The new legislation (C. 55) amends subsection 2(2) of the Immigration Act to provide that:

A person ceases to be a Convention Refugee when (a) the person voluntarily reavails himself of the protection of the country of his nationality; (b) the person voluntarily reacquires his nationality; (c) the person acquires a new nationality and enjoys the protection of the country of that new nationality; (d) the person voluntarily re-establishes himself in the country that he left, or outside of which he remained, by reason of a fear of persecution; or (e) the reasons for the person's fear of persecution in the country that he left, or outside of which he remained, cease to exist.

*Id.* at cl. 1(4) (to be codified at Immigration Act § 2(2)).

203. These provisions are contained in section F of Article 1 of the U.N. Convention and are included in an appendix to the legislation. U.N. Convention, *supra* note 4, art. 1, § F.

204. C. 84 establishes new procedures for determining who constitutes a security risk for the purposes of exclusion. Where the party is a non-permanent resident, the Minister and Solicitor General determines whether to file a security certificate in the Federal Court of Canada. C. 84, cl. 4(1) (to be codified at Immigration Act § 41). The Court must uphold the certificate if the Minister's and Solicitor General's decision to issue the certificate was reasonable based on the information available to them. *Id.* at cl. 4 (to be codified at Immigration Act § 41(4)(d)). In addition, individuals subject to a security certificate can be detained until a final determination has been made. *Id.* at cl. 4 (to be codified at Immigration Act § 41(2)).

205. C. 55, at cl. 19 (to be codified at Immigration Act § 71.1).

tionary basis of review is further limited to questions of law, jurisdiction, and perverse or capricious interpretations of fact.<sup>206</sup> As a result, an applicant denied refugee status in Canada has a far more limited right to appeal, both administrative and judicial, than currently exists in the United States.<sup>207</sup>

#### IV.

#### ASSESSING REFUGEE PROTECTION IN NORTH AMERICA: WHITHER THE SAFE HAVEN?

In order to ascertain whether the United States and Canadian refugee determination procedures adequately protect individuals fleeing persecution, one must first construct a framework for discussion by determining the critical elements of any refugee protection program. This Article considers the adequacy of the United States and Canadian models under a paradigm that includes four key elements: (1) the extent to which the procedures permit sufficient *access* to the refugee determination process; (2) the adequacy of the *criteria used* to evaluate the validity of refugee claims for asylum or withholding of deportation; (3) procedural provisions for an *impartial and fair evaluation* of refugee claims; and (4) the sufficiency of *procedures for review* of administrative decisions. These evaluation criteria are not meant to serve as an all-inclusive list. Rather, they suggest only the minimum requirements for an equitable refugee determination process.

Sufficient access to the process ensures that individuals in need of protection have the initial opportunity for an adjudication of their claims without having to surmount procedural barriers or restrictive initial screening criteria. Once an applicant is afforded access to the process, the evaluation criteria used must guarantee that those deserving protection pursuant to the United Nations refugee definition receive asylum. Narrow interpretations of the elements of the United Nations refugee definition or an overly burdensome standard of proof on the applicant may result in the exclusion of worthy claims. To secure impartiality and accurate determinations, the procedural framework must ensure that administrative decisionmakers apply eligibility criteria fairly and permit meaningful review of administrative decisions.

#### A. *United States*

##### 1. *Access*

The asylum application process implemented in the United States theoretically presents little or no impediment to those seeking protection. As explained in Part II, an applicant can make a refugee claim prior to or during any deportation or exclusion proceeding.<sup>208</sup> Moreover, an application may be made even after proceedings have been concluded by filing a motion to reopen

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206. *Id.* at cl. 20 (to be codified at Immigration Act §§ 83.1-85).

207. *See supra* notes 109-22 and accompanying text.

208. *See supra* notes 69-86 and accompanying text.

the deportation hearings.<sup>209</sup> Thus far, no nationality group or particular category of refugees explicitly has been prevented, by either statute or regulation, from gaining access to the asylum process. The proposed amendments to the regulations do not affect access to refugee protection procedures.

Despite the lack of an explicit denial of access to the asylum procedures, however, questions have been raised about the INS' practice of urging potential asylum applicants to depart the country voluntarily.<sup>210</sup> This practice, known as "voluntary departure," occurs prior to the submission of an individual's request for asylum or an application for withholding of deportation.<sup>211</sup> The vast majority of aliens who are required to depart the United States have done so pursuant to this procedure<sup>212</sup> but with neither the awareness of their ability to submit a request for protection nor the opportunity to exercise that option.<sup>213</sup>

## 2. Refugee Application Criteria

While initial access to the asylum process is technically unencumbered, the INS and the BIA have imposed severe restrictions on the actual extension of refugee protection. They have attempted to erect significant barriers to eligibility by imposing a high burden of proof on the applicant as well as by narrowly interpreting definitional criteria.<sup>214</sup> However, courts in the United States have begun to show a greater willingness to review administrative interpretations of refugee status, and recent decisions may have a liberalizing influence on the course of further doctrinal developments.<sup>215</sup> If judicial oversight

209. 8 C.F.R. §§ 103.5, 208.11, 242.22 (1987).

210. See *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), *permanent injunction granted sub nom.* *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (permanent injunction requiring INS to inform Salvadorans of their right to apply for asylum); see also *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982), *dismissed without opin.*, 692 F.2d 755 (5th Cir. 1982); *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981).

211. There are informal procedures for making an application to depart the United States voluntarily before the initiation or commencement of deportation proceedings. See INA § 242(b), 8 U.S.C. § 1254(e) (1982); 8 C.F.R. § 242.5 (1987). See also GORDON AND ROSENFELD, *IMMIGRATION LAW AND PROCEDURE*, §§ 7.2(b)(1), 7.2(d)(1) (1986). Note that "voluntary departure" differs from "extended voluntary departure." The latter is a temporary protection status granted on a discretionary basis while the former expedites departure from the country. See *supra* notes 123-28 and accompanying text.

212. From 1971 to 1980, 96,374 aliens were deported from the United States while 7.2 million departed pursuant to voluntary departure procedures without an order of deportation. IMMIGRATION AND NATURALIZATION SERVICE, *INS STATISTICAL YEARBOOK*, 219, Chart ENF. 1.1 (1983).

213. See T. ALEINIKOFF & D. MARTIN, *supra* note 68, at 464.

214. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Blackmun, J., concurring) (criticizing INS "purposeful blindness" in misinterpreting the standard of proof for asylum); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (immigration judge cannot erect an "insuperable barrier" to obtaining refugee status through unreasonable evidentiary requirements).

215. See, e.g., *Arteaga v. I.N.S.*, 386 F.2d 1227 (9th Cir. 1987); *Turcios v. I.N.S.*, 821 F.2d 1396 (9th Cir. 1987). See also Blum, *supra* note 90, at 348-49; Blum, *Salvadoran Refugee Cases on Appeal: Somebody Up There Is Listening* 15 IMMIGRATION NEWSLETTER 1 (1986).

continues to expand, the INS and the BIA may be obligated to abandon their unduly narrow interpretation of the Refugee Act of 1980.

The proposed regulatory changes do not significantly change the criteria for determining eligibility. Rather, the proposals incorporate, to some extent, court rulings regarding the standard of proof and evidentiary requirements for establishing eligibility for asylum or for withholding of deportation.<sup>216</sup>

### 3. *Impartial and Fair Evaluation*

Since the enactment of the Refugee Act of 1980, the INS and the BIA have been severely criticized for failing to administer the asylum process in accord with the humanitarian ideals that prompted the passage of the law.<sup>217</sup> Indeed, a review of the pattern of asylum decisions reveals rather startling support for the claim that the INS and the BIA have failed to make the transition from a refugee policy based largely on political concerns to a policy based on humanitarian concerns. The INS has consistently granted asylum to individuals fleeing communist-controlled countries, while denying the applications of those who have escaped from countries that are United States allies or anti-communist.<sup>218</sup>

The first set of proposed amendments to the regulations, later withdrawn, would have worsened this situation by removing the immigration judge — an independent, specially-trained decisionmaker — from the refugee determination process. The current set of proposals retains the immigration judges for claims raised at exclusion or deportation hearings, but creates a corps of officers within the INS to determine the eligibility of the asylum applicant prior to enforcement proceedings. The proposed determination process gives unfettered discretion to the asylum officer to conduct the asylum interview — in particular, to limit the role of counsel and the presentation of evidence. Further, the retention of the asylum officer within INS means that an independent decisionmaker does not adjudicate initial requests for asylum at the administrative level. The new proposals also maintain the much-criticized participation of the Department of State, at least to some extent.

Finally, the new proposals radically limit the scope of the hearing, in some circumstances, even before the now-retained immigration judges. The

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216. 53 Fed. Reg. 11,300, 11,306 (1988) (proposed to be codified at 8 C.F.R. § 208.13); see also 52 Fed. Reg. 32,552, 32,553, 32,556 (1987) (to have been codified at 8 C.F.R. § 208.12). The holdings in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987), were explicitly incorporated into the definition of "well-founded fear of persecution." The holding in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), was also incorporated into provisions regarding applications based on the persecution of groups or categories of persons similarly situated.

217. See AILA Comments I, *supra* note 19, at 1.

218. For example, over ninety-six percent of all Salvadoran applications for asylum and more than ninety-nine percent of the Guatemalan claims were denied in the three year period between 1983-1986, while over sixty percent of Iranian and thirty-four percent of Polish claims were granted. Statistics of the Central Office of the INS, Office of Asylum, Refugee and Parole, 1983-1986.

proposed regulations require mandatory denials of asylum for persons with serious non-political criminal convictions, who are firmly resettled in a third country, or who pose a security risk. Despite contrary congressional intent, such persons may be denied asylum without consideration of the merits of their asylum claim or other relevant discretionary factors. Applicants for withholding of deportation may also be denied a hearing on the merits of their persecution claims if the immigration judge determines that mandatory denial is required.<sup>219</sup> Consequently, a bona fide refugee may be denied an opportunity to present her case.

#### 4. *Review Procedures*

The United States refugee determination process currently includes administrative as well as judicial review of refugee decisions.<sup>220</sup> An applicant who receives an unfavorable decision from an immigration judge may appeal the decision to the BIA and may then appeal a denial by the BIA to a federal court of appeals.<sup>221</sup>

The most important aspect of this review process is the significant role played by the federal courts in monitoring administrative compliance with the congressional intent of the Refugee Act of 1980. Given that courts often have reversed the BIA's unduly restrictive interpretation of refugee eligibility criteria,<sup>222</sup> judicial review appears to be a significant agent in protecting refugees.

Admittedly, appeals are costly and time-consuming. However, if the United States is effectively to provide a safe haven to the steady stream of refugees seeking protection, administrative review must reflect the protective purposes of the Refugee Act of 1980 and provide a meaningful, thorough and careful review of asylum and withholding of deportation decisions.

### B. *Canada*

#### 1. *Access*

Of the four evaluation criteria introduced in this discussion, the recent legislative and policy changes in Canada most profoundly affect an applicant's access to the refugee determination process. Prior to the elimination of the Special Programs, an individual from one of the protected countries needed only to apply in order to receive some type of protection from the Canadian government. The Special Programs accorded persons from eighteen countries special treatment, including exemption from individual refugee determinations, the granting of the right to enter Canada and to receive a Minister's Permit to remain, protection against being returned to the country from which the refugee fled, and the hope of eventual permanent resettlement in

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219. 53 Fed. Reg. 11,300, 11,309 (1988) (proposed to be codified at 8 C.F.R. §§ 236(c), 242.17(c)).

220. See *supra* notes 109-22 and accompanying text.

221. See *supra* notes 109-15 and accompanying text.

222. See *supra* text accompanying notes 87-108.

Canada.<sup>223</sup>

The most serious restrictions on access, however, are contained in the new legislation, effective January 1, 1989. The new procedures place an additional hurdle before the asylum applicant by providing for an initial screening at which the government determines whether the applicant is eligible to apply for asylum. Moreover, the new law allows the government to designate certain countries, such as the United States, as safe havens, thereby barring refugees temporarily situated in those countries from even applying for asylum in Canada.<sup>224</sup>

The changes enacted by the Canadian government would particularly affect Central Americans seeking sanctuary in Canada.<sup>225</sup> The Canadian government could designate the United States as a "safe country" for refugees travelling to Canada by way of the United States.<sup>226</sup> The irony of that designation, given the pattern and practice of United States discrimination against Central Americans, is self-evident.<sup>227</sup>

## 2. *Refugee Application Criteria*

As under the current provisions, the new criteria for receiving refugee protection remains substantially intact. Indeed, under the process in effect until January 1, 1989, in the absence of Special Programs to protect the individual refugee from return to her home country, the RSAC appeared to make a more concerted attempt to fairly, and without prejudice, adjudicate Central American refugee claims. Thus, Central Americans and other refugees fared better under the Canadian system, even with recent interim changes, than in the United States, where policy has consistently denied those refugees asylum.<sup>228</sup> However, under the changes that pertain to access, to be implemented in January 1989, the fact that the criteria for receiving asylum remain the same would have little meaning for many refugees. For those who are denied access to the process because they arrived from a "safe country," there is little consolation in the knowledge that, had their application been considered, they would have been adjudged under a system giving them the "benefit of the doubt."

## 3. *Impartial and Fair Evaluation*

Under the system in effect until January 1, 1989, a Senior Immigration Officer initially heard an applicant's claim for refugee status in a non-adver-

223. See *supra* text accompanying notes 165-70.

224. See *supra* notes 192-95 and accompanying text.

225. See *supra* note 172 and accompanying text (noting the large number of Central Americans currently seeking safe haven in Canada).

226. An agreement between Canada and the United States allows the United States to accept refugee claimants denied entry to Canada under the "safe country" screening provisions. MINISTER OF EMPLOYMENT AND IMMIGRATION, IMMIGRATION MANUAL, IE 14, app. B.

227. See *supra* note 218 and accompanying text.

228. *Id.*

sarial setting. But the MEI ultimately passed on the claim with the recommendations of the RSAC. The review process implemented as a result of the *Singh* decision provided the refugee with several protections in the appellate process.<sup>229</sup> These included the right to an oral hearing before the IAB. However, the evaluation procedure was still based solely on RSAC's review of a written record of the applicant's initial interview. The applicant had no initial opportunity to directly present her case to either the RSAC or the MEI, the ultimate decisionmakers.

The legislative changes alter the decisionmaking procedures in several important respects. First, the refugee determination process is entirely independent of the immigration enforcement agency. The Convention Refugee Determination Division of the Immigration and Refugee Board, separate from the CEIC or other currently existing enforcement entity, is established. In addition, the refugee is not subject to any enforcement-type procedure until after her refugee claim has been adjudicated. Both of these factors appear to favor the applicant.

Second, the hearing procedure contained in the new legislation employs elements of both adversarial and non-adversarial systems.<sup>230</sup> The hearing will be conducted in an informal setting with the claimant accorded the opportunity to present witnesses and evidence. However, the MEI will also be permitted to have a representative at the hearing who could present evidence on the government's behalf. Thus, the process is neither wholly adversarial nor non-adversarial. It does, however, offer the claimant a greater opportunity to present her case than is provided under the current regime.

Third, two adjudicators are involved in decisionmaking in each individual case.<sup>231</sup> Only one adjudicator need favor the claim for the applicant to receive refugee status. This system ensures that each adjudicator functions as a check against irrational, arbitrary, or biased decisionmaking by the other. This system also is intended to guarantee that the "benefit of the doubt" is more consistently resolved in favor of the applicant.<sup>232</sup>

This combination of proposals could produce an equitable new system. However, without access to the process itself or reasonable review procedures, the value of the proposed model is severely undermined.

#### 4. *Review Procedures*

In addition to denying access to the refugee determination process, another significant change under the new law is the severe curtailment of administrative and judicial oversight of the asylum process. The old system allowed for administrative review of the MEI's initial decision by the IAB. The system implemented in January 1989 eliminates this tier of administrative review and

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229. *See supra* text accompanying notes 152-58.

230. *See supra* notes 196-201 and accompanying text.

231. *See supra* text accompanying note 196.

232. *See supra* text accompanying note 146.



leaves only review by the judiciary. Furthermore, the previous system provided for an appeal by right to the federal court of appeal. Under the new scheme, the appeal to the federal court will be only by leave of the court.

As we have seen in the United States, judicial review can play an important role in preserving the rights of refugees. The removal of one layer and the limitation on the second layer of review dramatically increases the possibility of erroneous decisionmaking and the return of a bona fide refugee to a situation of potential persecution in her homeland.

#### CONCLUSION

The United States and Canada stand at a critical juncture in the evolution of their refugee protection procedures. Policymakers in both countries feel compelled to institute changes in their current schemes for adjudicating asylum claims, primarily because of fear that the current procedures are ill equipped to process the numbers of requests for protection and concern that many of the individual applicants are not truly in need of protection.

Unfortunately, the revisions that have been put forth as "cures" to these problems will only undermine the capacity of the United States and Canada to respond effectively, fairly and conscientiously to the continuing hemispheric and world-wide refugee crisis. The proposed revisions and newly-enacted procedures move both countries a long step backwards, away from the humanitarian ideals that inspired previous refugee laws in both Canada and the United States.

This Article has examined the current schemes in Canada and the United States, the recently enacted legislation in Canada, and the proposed revisions for refugee determinations in the United States in an effort to ascertain whether the two countries adequately protect individuals facing persecution in their home countries. The conclusion seems inescapable: unless greater attention is paid to the revisions being made in these countries' procedures, to ensure that they adequately protect refugees, there is a real danger that there will be no safe haven in North America.

