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A COMPARATIVE ANALYSIS OF THE CHANGING DEFINITION OF A REFUGEE

Todd Howland*

INTRODUCTION

It is difficult to pinpoint exactly who is a refugee. Oddly enough, in this instance international law constrains the analysis instead of clarifying it.

Scholarly discussions of refugee law are limited mostly to the "Convention" refugee,¹ although scholars are beginning to discuss other possible international bases for the protection of refugees.² To a large extent this discussion is academic, and fails

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1. E.g., Sexton, *Political Refugees, Nonrefoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSNAT'L L. 731 (1985).

These discussions are based on the law which grew out of the 1951 Convention, signed by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. The Convention defined a refugee as a person who:

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

Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 21, 1954), *reprinted in* 19 U.S.T. 6223, 6261 (1968) [hereinafter Convention].

This definition of a refugee arose from the dominance of the Western powers at a time when political rights were given complete prominence over economic rights, and when the Cold War and the real or imagined communist threat were powerful considerations. Fong, *Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats*, 52 BRIT. Y.B. INT'L L. 53, 94 (1981).

2. These discussions have attempted to fashion two separate legal bases for the protection of refugees: 1) the 1951 Geneva Convention and its 1967 Protocol on Refugees, and 2) the 1949 Geneva Convention and its 1977 Protocol, which deal with the plight of

to address the reality in which we live. The "Convention" refugee definition grew out of a past era. Its strict application today can be used by states as a legal crutch to legitimize policies that do not provide refuge to those in need. Currently, the body of international law used to protect refugees is inadequate on two accounts: first, the law does not adequately reflect the fact that refugees are persons who have been deprived of their fundamental human rights; second, the applied law fails to address adequately the problem of refugee flow.

Most people think of a refugee as someone who flees for safety, because of natural disasters, civil war, gross human rights abuses, or political persecution (individual or group).³ Some states are beginning to recognize that many of today's refugees do not fit perfectly into the legal category created by the 1951 Geneva Convention. These states are beginning to see how human rights are related not only to accepting refugees, but to refugee flow.⁴ This interconnectedness can be seen in these states' gradual movement toward internationalization of their refugee policies.

The problem is vast.⁵ Most contemporary work in the area

civilians during wartime. See, e.g., Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117 (1986) (discussion of the 1949 Geneva Convention and its Protocol). For discussions of refugee protection from two separate legal bases, see Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?* 26 VA. J. INT'L L. 857 (1986).

3. WEBSTER'S NEW COLLEGIATE DICTIONARY 964 (1979). The common definition is congruent with reality. According to an official of the United Nations High Commission for Refugees (UNHCR), those fleeing war and starvation make up the bulk of the world's refugees. See 39 U.N. GAOR Supp. (No. 12).

4. This movement is also gaining some momentum at the international level. After years of unwillingness by the United Nations High Commissioner for Refugees (UNHCR) to get involved in the difficult area of refugee creation, the UN is finally beginning to act. See Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 1 (1986); Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L. J. 483 (1985); but see *Report of Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, U.N. Doc. A/41/324 (1986).

5. Currently, it is estimated that there are in excess of 10 million refugees worldwide. REFUGEES, Oct. 1985, at 5. The U.S. Committee for Refugees estimates the figure is 10,261,000. *Refugee Commission Struggles to Keep up With the Flow*, N.Y. Times, Feb. 16, 1986, § 4 (Week in Review), at 3, col. 1 (chart at col. 5). Another estimate assumes that there are seven million refugees within the jurisdiction of UNHCR, and another three and a half million persons displaced within their own countries. Grahl-Madsen, *Refugees and Refugee Law in a World in Transition*, 1982 MICH. Y.B. INT'L LEGAL STUD.

is plagued by a misplaced emphasis. The crux of the problem is not how to help the "poor" refugees,⁶ or how to urge countries to open their doors wider when pressed with compassion fatigue,⁷ or how to eradicate the racism and xenophobia refugees face in the host countries.⁸ Those issues are symptoms of a greater problem, the lack of a global consciousness.⁹ Refugees are a global problem, and the problem requires a new framework and a new political language to eradicate it.¹⁰

65, 66 [hereinafter Grahl-Madsen, *World in Transition*].

6. Often people react to refugees as if they were somehow unfortunate victims of chance. This is only applicable in natural disaster situations. Most often people become refugees as a result of a political situation that was created by actions of governments. A majority of people become refugees as a result of individual and governmental action or inaction.

The refugee is someone entitled to respect. The first UN High Commissioner for Refugees stated:

The refugee problem has nothing to do with charity. It is not the problem of people to be pitied: far more of people to be admired. It is a problem of people who, somewhere, somehow, sometime, had the courage to give up the feeling of belonging which they possessed, rather than abandon the human freedom which they wanted more highly.

Quoted in Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449, 474 (1981).

7. Some scholars see global resource limitations and the international economic downturn as the cause of "compassion fatigue." Grahl-Madsen, *World in Transition*, *supra* note 5, at 65.

8. Refugee xenophobia is exemplified in the writings of Richard Lamm. *E.g.*, Lamm, *Refugees: Close the Door*, in REFUGEES (V. Nanda & G. Sheperd eds. forthcoming); R. LAMM & G. IMHOFF, *IMMIGRATION TIME BOMB: THE FRAGMENTING OF AMERICA* (1985); R. LAMM, *MEGATRAUMAS: AMERICA AT THE YEAR 2000* (1985).

9. Often nations seek a domestic solution to the international problem; they do not connect the fact that when a State breaks international law as a matter of convenience (e.g., by intervention, aggression, or warfare against another state), basic human rights are violated. This motivates people to flee. "It is utopian, though, to believe that the hardships suffered by more than twelve million refugees and displaced persons would appeal so strongly to the consciences of those who decide the destiny of the world that they would abandon those practices which generate the masses of refugees." Grahl-Madsen, *World in Transition*, *supra* note 5, at 68.

10. The importance of establishing a just world order to rectify many of contemporary society's most difficult issues has been stressed by Richard Falk. *See* Falk, *Solving the Puzzles of Global Reform*, 11 ALTERNATIVES 45 (1986). One critic of the call for global consciousness argues that such a call is unrealistic given the nation state system, and that the end product of such a call will only serve to benefit the Soviet Union. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law From Some of Its Best Friends*, 27 HARV. INT'L L.J. 599, 605 (1986). Coll's argument fails to address the fact that those calling for global consciousness have rejected the East-West paradigm and have sought a more reflective model to use when confronted with global problems such as underdevelopment. *See, e.g.*, Myrdal, *The "Soft State" in Un-*

Who is a refugee, and how to deal with refugees must be rethought to begin a reversal of the ever-increasing refugee flow.¹¹ The international community has balked; the harsh criticism and action needed in the area has been derailed by political gamesmanship.¹² Some states recognize the current deficiency in the international legal regime and are acting to adjust their laws and practices by simply interpreting the relevant international instruments in a contemporary context.¹³

This comparison of the changing definition of a refugee will focus on two aspects of current refugee law and practice: 1) the reflection in each country's laws of a more appropriate definition of a refugee and the application of this definition in the contemporary environment; and 2) the internationalization of each country's policies, in order to adjust to the interconnectedness of refugee creation and refugee flow (e.g., the relationship between foreign policy and refugee flow).

derdeveloped Countries, 15 UCLA L. REV. 1118 (1968).

11. Refugee flows have increased rapidly in recent years, a pattern expected to continue in the future. Suhrke, *Global Refugee Movements and Strategies of Response*, U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 157 (M. Kritz ed. 1983).

12. Previous efforts by the international community to redefine refugee law, and a State's obligation under it, have met with limited success, in the 1967 Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16), at 81, U.N. Doc. A/6716, 62 AM. J. INT'L L. 822 (1967); and the ill-fated United Nations Convention on Territorial Asylum, U.N. Doc. A/10177 (1975). See Nayar, *The Right of Asylum in International Law: Its Status and Prospects*, 17 ST. LOUIS U.L.J. 17 (1972) (extensive discussion of the Declaration); Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45 (1977) (extensive discussion of the Draft Convention); see also Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L L. 151 (1979).

In 1977 the Council of Europe adopted a Declaration on Territorial Asylum, which stated: "In fulfilling their humanitarian duties, the Member States of the Council of Europe reaffirm their intention to maintain their liberal attitude with regards to persons seeking asylum on their territory . . ." Declaration on Territorial Asylum, by the Committee of Ministers of the Council of Europe, reprinted in UNHCR, *Collection of International Instruments Concerning Refugees* 306 (2d ed. 1979).

13. The 1951 Geneva Convention, in combination with the 1949 Geneva Convention, can be interpreted to cover many current refugees, including those fleeing gross human rights abuses, wars of liberation, and racist attacks. Many well-documented articles show how a non-typical case can fit within either Geneva Convention and thus necessitate refuge for the fleeing individual. See, e.g., Hyndman, *The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants*, 9 HUM. RTS. Q. 49 (1987).

I. INTERNATIONAL LAW AND STANDARDS

Most discussions of the international law of refugees are limited to the 1951 Convention of the Status of Refugees and the 1967 Protocol. These instruments define who is a refugee,¹⁴ and when nonrefoulement is required.¹⁵ These discussions largely overlook the fact that other bodies of international law protect those who are commonly thought of as refugees, including: the 1949 Geneva Convention, disaster relief law, and human rights law.¹⁶ Some thoroughly documented and well argued attempts have been made in both the judicial and academic arenas to obtain acceptance of the application of these bodies of law to

14. The 1967 Protocol removes the temporal limits from the 1951 definition. Protocol relating to the Status of Refugees, Jan. 1, 1967, 19 U.S.T. 6223, 6225 art. I, § 2 (entered into force Oct. 4, 1967) [hereinafter Protocol]. It now applies to any person who

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

Protocol at 6261, 606 U.N.T.S. 267 art. 1(A)(2).

15. Nonrefoulement: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Protocol at 6276, 606 U.N.T.S. 267 art. 33.

16. There are three other legal bases for refugee protection: humanitarian law (protects those fleeing war), disaster victims, and the entire body of human rights law. Of the three, humanitarian law has received the most attention. Results of this attention include the Geneva Conventions I-IV of 1949 (specifically, provisions for the protection of civilians in a time of armed conflict), 6 U.S.T. 3516, 75 U.N.T.S. 5; the 1977 Protocols I and II Additional to the 1949 Geneva Convention, U.N. Doc. A/32/144 (1977), 72 AM. J. INT'L L. 457 (1978); *Resolution on Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, G.A. Res. 2675, 25 U.N. GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970); *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict 1974-1977*, 9 CASE W. RES. J. INT'L L. 9 (1977); *1954 Convention Relating to the Status of Stateless Persons*, 360 U.N.T.S. 117 (1960); *1961 Convention of the Reduction of Statelessness*, U.N. Doc. A/Conf. 9/S.R.15 (1961); *1957 Hague Agreement Relating to Refugee Seamen*, 506 U.N.T.S. 125 (1964); *Report of the U.N. High Commissioner for Refugees*, U.N. Doc. A/32/12 (1977).

For an extensive discussion of the international law (or lack thereof) that protects refugees created by a natural disaster, see Parker, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 1982 MICH. Y.B. INT'L LEGAL STUD. 137. The protection of refugees under human rights instruments is not explicit; this area will be discussed throughout the paper.

refugees.¹⁷

Refugee analysis relying on the 1951 or 1949 Geneva Convention falls into the so-called "old school" of thought in international law in which sovereign states are the only entities which have international personality.¹⁸ Under this approach a contradiction arises. Although international law defines who is a refugee, the sovereign state defines who may be granted asylum. Using this construction, no "right" to asylum exists, because the decision whether a refugee meets the international standard is left to the individual state.¹⁹ Effective arguments, however, have been made that an individual has the right to nonrefoulement (either under article 33 of the 1967 Protocol or the 1949 Geneva Conventions). Such arguments have succeeded by showing that because the international instruments are self-executing, the state parties are bound to the instruments' terms upon signature.²⁰ While these are positive steps, these arguments are limited by their underpinnings. The sovereign may agree that a right to nonrefoulement exists, but it is still the sovereign that

17. Especially noteworthy are the attempts to apply the 1949 Geneva Convention, which gives an individual the right to flee armed conflict when caught in the cross-fire. See Parker, *Human Rights and Humanitarian Law*, 7 WHITT. L. REV. 675 (1985); Parker, *Geneva Convention Protections for Salvadoran Refugees—An International Law Defense against Deportation and a Justification for Sanctuary*, 13 NAT'L LAW. GUILD IMMIGR. NEWSL. (May-June 1984); see also Perluss & Hartman, *supra* note 2; and see Fleiner-Gerster & Meyer, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, 34 INT'L & COMP. L.Q. 267 (1985) (discussion of the application of humanitarian law to the traditional notion of sovereignty).

As to the application of the 1949 Geneva Convention to internal strife, see Silverburg, *Sanctuary and Irregular Warfare: Contortive International Law*, 28 CHITTY'S L.J. 195 (1980). The principles apply in both international and internal warfare, even to guerrilla warfare and struggles for independence. See Aldrich, *Progressive Developments of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693, 700 (1986).

18. See T.O. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* (1979) (extensive discussion of the development of international law).

19. No right to asylum can be found in international law. The 1948 Universal Declaration of Human Rights states: "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights 3 U.N. GAOR I, U.N. Doc. A/810 (1948). This "right" is meaningless, unless the sovereign grants the person asylum. Gilbert, *Right of Asylum: A Change of Direction*, 32 INT'L & COMP. L.Q. 633 (1983).

20. This is the approach that defense counsel in the Tucson sanctuary trials attempted to use. See Helton, Cohan, Kronowitz, Pope & Valenica-Weber, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 503-517 (1986).

decides if the particular case is within the area that triggers the obligation.²¹

An alternative approach must be used to guarantee fair treatment of all refugees. The so-called "new school" of thought in international law recognizes that the true subjects of international law are not the metaphysical entities of the state, but individual human beings.²² The entire area of human rights law is an outgrowth of this trend. Human rights protect individuals no matter where they may be, inside their country of origin or inside a foreign country.²³ A prominent international legal scholar points out that upon examination of human rights documents it becomes apparent that the legal personality of human beings is a significant feature of contemporary international law.²⁴ Thus, international human rights law can theoretically provide meaningful protection to a refugee without the usual difficulties encountered with sovereignty.²⁵ For in human rights we are all members of the world community, and it is the community that must ensure that we all live with dignity and safety.²⁶

Under the human rights regime, individuals are entitled to enumerated fundamental rights.²⁷ Human rights, such as basic economic, political, social, and cultural rights, have risen to the

21. This argument has met with mixed results in the United States. In an interview with Cheryl Martinez, Director of the Denver Central American Refugee Project, in Denver, Colorado (Jan. 20, 1987), Ms. Martinez related the Denver Immigration Judge's statement that he did not believe an armed conflict that fell within the 1949 Geneva Conventions existed in El Salvador, but if he believed that such a conflict existed, he would consider the nonrefoulement argument valid.

22. 1 INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 147-49 (E. Lauterpacht ed. 1970).

23. Goldman & Martin, *International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law*, 5 HUM. RTS. Q. 302 (1983). This contention is supported by article 2 of the Universal Declaration of Human Rights.

24. Elias, *New Perspectives and Conceptions in Contemporary Public International Law*, 10 DEN. J. INT'L L. & POL'Y 409, 411 (1981). This idea is supported in L. HENKIN, *HOW NATIONS BEHAVE* (1979); and Eide, *The Human Rights Movement and the Transformation of the International Order*, 11 ALTERNATIVES 367 (1986).

25. See Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, 1982 MICH. Y.B. INT'L LEGAL STUD. 339 (treatment of human rights law as the basis for refugees' rights).

26. Hyndman, *Refugees Under International Law With a Reference to the Concept of Asylum*, 60 AUSTRALIAN L.J. 148 (1986).

27. See generally W. LAQUEUR & B. RUBIN, *THE HUMAN RIGHTS READER* (1979); see also M.S. McDUGAL, H.D. LASSWELL & L.C. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

level of customary international law and, therefore, bind all states.²⁸ There is also growing acceptance of the idea that all individuals have the right to develop their full potential as human beings.²⁹ Thus, using the human rights approach, the definition

28. For example, see the following provisions:

The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions The State Parties . . . recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 Annex, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

"Every human being has the inherent right to life No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment Everyone has the right to liberty and security of person Everyone shall have the right to recognition everywhere as a person before the law." International Covenant on Civil and Political Rights, G.A. Res. 2200 Annex, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

While the above provisions do constitute customary international law because of the number of countries which have become signatories to the Covenants, a vast difference exists between the law and international practice. See *HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS* (A. Henkin ed. 1979).

29. Often the concept of right to development is looked upon as a right of a developing state to economic development. This ambiguity is created by some authors attempting to give a state a human right. The right to development discussed in this paper refers to developing the entire individual: a person has the right to material and non-material items/conditions that are essential for self-realization. See Baxi, *The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development*, 23 INDIAN J. INT'L L. 225 (1983); Nanda, *Development as an Emerging Human Right Under International Law*, 13 DEN. J. INT'L L. & POL'Y 161 (1984); *HUMAN RIGHTS AND BASIC NEEDS IN THE AMERICAS* (M. Crahan ed. 1982).

It is more appropriate to see the right to development as the legal framework for economic development. The right to development mandates that certain aspects of an individual's life cannot be sacrificed for growth in a country's Gross National Product (GNP). The right to development does not mandate any particular economic system or means to development. As long as an individual's fundamental rights are met, economic development can occur through a capitalist, socialist, or communist growth model, or the Basic Needs method which rejects the logic of the growth models. There is a great deal of literature, debate, and confusion concerning economic development. See M. BRONFENBRENNER, W. SICHEL & W. GARDNER, *ECONOMICS* 369-82 (1984); H.H. VILLARD, *ECONOMIC DEVELOPMENT* (1959); N. BUKHARIN, *IMPERIALISM AND WORLD ECONOMY* (1929). For a critical overview of the ideas of underdevelopment and growth, see Samater, *From "Growth" to "Basic Needs" The Evolution of Development Theory*, 36(5) MONTHLY REV. 1 (1984).

The interaction of the right to development and economic development is also debated. See Theberge, *Law and Economic Development*, 9 DEN. J. INT'L L. & POL'Y 231 (1980) (argues that development does not and should not mean the wholesale importation of western values); but see Valdez, *Legal Development and Social Change in Latin America and the Caribbean*, 62 A.B.A. J. 484 (1976).

of a refugee would no longer be constricted to political persecution.³⁰ Accordingly, a state must allow for, or provide for, conditions in which physical security, vital subsistence, liberty of political participation and physical movement are possible. Beneath this threshold, the basic social compact or bond between individual and sovereign is lost.³¹ Refugees exist when: 1) individuals are deprived of their fundamental rights; 2) individuals have taken action in reliance on international institutions; and 3) when no recourse to individuals' home governments is possible.³² To send individuals back to their homeland when these three conditions exist would be a violation of the refugees' human rights.³³

The fundamental rights approach definition of a refugee, which is grounded in human rights law, reflects today's reality.³⁴

30. The rationale for this position argues that "a necessitous individual is not a free individual." See Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 AM. U. J. INT'L L. & POL'Y 67 (1986); see also Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283 (1986) (discussion of human rights violations that also lead to refugee flows).

31. Shacknove, *Who is a Refugee?* 95 ETHICS 274, 281 (1985); see H. SHUE, *BASIC RIGHTS—SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1980); see also Grahl-Madsen, *Protection of Refugees by Their Country of Origin*, 11 YALE J. INT'L L. 362 (1986) (related alternative approach to the refugee problem).

32. Shacknove, *supra* note 31, at 282.

33. Some may claim that this definition is overbroad and unworkable. While this definition does encompass many more people than the Convention definition, the problem is not overbreadth, but instead it is disarray in world order. At present, all states are bound by human rights law. The implementation of these laws varies by country. In Europe, enforcement is better than most other regions because of the European Human Rights Court. See L. MIKAELSEN, *EUROPEAN PROTECTION OF HUMAN RIGHTS* (1980); see also M. Pellonpää, *Expulsion in International Law—A Study in International Aliens Law and Human Rights with Special Reference to Finland*, ANNALES ACADEMIAE SCIENTIARUM FENNICA—DISSERTATIONES HUMANARUM LITTERARUM 39 (Helsinki 1984) (extensive treatment of the relationship between refuge and human rights).

34. This is not to say that if states interpreted the current law liberally, as the UNHCR suggests, that the law would adequately protect all refugees. See UNHCR, *Handbook on Procedure and Criterion For Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979). Coherent and well-reasoned arguments can be made to show how all refugees, whether fleeing war, gross human rights abuses, coups, natural disasters, or political persecution, can fit within the definition. See Tsamenyi, *The "Boat People": Are They Refugees?* 5 HUM. RTS. Q. 348 (1983). The problem is that the treatment of refugees would still be limited to sovereign privilege and discretion. Grounding the treatment of refugees in human rights is necessary to avoid abuse of discretion by a government, and to make governments understand that their actions have an impact on refugee flows.

The Organization of African Unity (OAU) Convention Governing the Special Aspects of Refugee Problems in Africa incorporates many of the fundamental rights ideas into its definition of a refugee:

[E]very person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.³⁵

While no African nation is included in this article's analysis,³⁶ the article investigates how non-parties to the OAU Convention are adjusting their law and practices to reflect the fundamental rights approach highlighted in the OAU Convention.

II. COMPARISON OF REFUGEE LAW AND PRACTICE

*United States*³⁷

Scholars have posited that the United States is the most generous country in the world with respect to the acceptance of refugees.³⁸ This statement could only be true if the greatest

35. *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 8 INT'L LEGAL MATERIALS 1288-98 (1969).

36. For an extensive treatment of the refugee problem and responses in Africa, see Nanda, *The African Refugee Dilemma: A Challenge for International Law and Policy*, 32 AFRICA TODAY, 61 (1985). For the most part African nations have kept to their obligations under the OAU even though the refugee situation there is extreme. See Hailbronner, *supra* note 2, at 877.

37. To understand a domestic issue it is often useful to see how municipal legal systems form relationships with international law and trends, rather than simply comparing dry legal procedures. In order to highlight the relationship of the United States to international law and trends, a comparative analysis was conducted for other countries with similar legal traditions and/or economic well-being. See Butler, *Comparative Approaches to International Law*, 190 RECUEIL DE COURS 9 (1985).

38. "The United States is the most generous country in the world in admitting immigrants and refugees for permanent resettlement. In 1980, the United States admitted 800,000 immigrants and refugees, more than twice as many as were admitted by the rest of the world combined." LeMaster & Zall, *Compassion Fatigue: The Expansion of Refugee Admissions to the U.S.*, 6 B.C. INT'L & COMP. L. REV. 447 (1983). "Today, immigration to the United States is massive, and it is out of control. The United States accepts for permanent resettlement twice as many immigrants as do all the other countries of the world combined." R. LAMM & G. IMHOFF, *THE IMMIGRATION TIME BOMB* 1 (1985).

sheer number is equivalent to most generous.³⁹

The United States is a party to the 1967 Protocol to the 1951 Geneva Convention on the Status of Refugees, and is thereby bound to both the 1951 and 1967 agreements.⁴⁰ With the passage of the 1980 Refugee Act, the United States adopted the wording of the Convention definition.⁴¹ United States refugee law can be subdivided into four areas: refugee resettlement, Extended Voluntary Departure, political asylum, and withholding of deportation.⁴²

In numbers of people, the United States refugee program consists almost completely of the refugee resettlement pro-

39. "Generous" is a value-laden term. It does not account for a country's self-interest in its policy, nor does one accurate measure reflect that quality. Many countries could dispute the claim that the United States is most generous. Many African and Central American countries take in more refugees in proportion to Gross Domestic Product (GDP) than the United States does, and some countries take in more refugees per capita (e.g., Australia and Canada). See Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91 (discussion of the numerical limits of American generosity); Delli Sante, *Central American Refugees: A Consequence of War and Social Upheaval*, 15 DEN. J. INT'L L. & POL'Y (to be published in the 1987 issue).

40. Convention and Protocol, 19 U.S.T. 6223; see also Hagel, *Alien's Rights—the Refugee Act of 1980 as a Response to the 1967 Protocol Relating to the Status of Refugees: the First Test*, 14 VAND. J. TRANSNAT'L L. 561 (1981) (detailed discussion of U.S. obligations under the 1967 Protocol).

41. In spite of the wording in the 1980 Act, the United States still did not consider itself a country of first refuge, and continued to believe that it would be able to pick and choose which refugees to accept. The previous bias of presuming that all refugees who are in the United States who apply for political asylum are economic migrants continues. Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984).

It should be noted that since early U.S. refugee law, refugees from communist countries have been favored. Only since 1965 has it been possible to be a refugee under U.S. law by fleeing an ideology other than communism; the ideological and geographical preferences were only removed from the law in 1980. See Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 867-69 (1982) (citing U.S. refugee/immigration law from 1921, 1948, 1950, 1953, and 1965 to support this contention).

Empirical data support the hypothesis that the Executive Branch's discretionary implementation of U.S. refugee law has solidified the past ideological practices. The result is that less than 5% of the refugees who were admitted to the United States have a non-communist country of origin. *Id.* at 879.

42. This discussion does not include attaining refugee status through: a Private Bill, Parole, or Emergency Legislation. All three are discretionary and all three are unlikely. There is no formalized application process, nor is there any appeal. Private bills and emergency legislation require influence on Capitol Hill, and most refugees do not have such influence. Parole supposedly was eliminated with the passage of the 1980 Act, but it has been used since 1980 in cases of large influxes of refugees, e.g., the Cuban boatlift.

gram.⁴³ In this discretionary program, the President sets out numerical quotas for different regions, and then applicants from those regions are screened to see if they fit within the Convention definition.⁴⁴ Thus, refugees who do not fit within the narrow Convention definition of refugee may gain refugee status if they are from the "correct" region.⁴⁵

The relief of Extended Voluntary Departure (EVD) is the United States version of nonrefoulement with the exception that in the refugee resettlement program no automatic right to EVD exists. Rather, EVD is granted by executive discretion as a privilege from the sovereign.⁴⁶ Experience with EVD shows that the United States often applies a standard broader than the Convention definition and the Convention nonrefoulement provision of article 33. EVD has been granted following coups and during armed conflicts, allowing refugees to stay in the United States

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

Immigration and Nationality Act, 66 Stat. 163 as added by Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 651, (current version at 8 U.S.C. § 1101(a)(42) (1986)) [hereinafter INA].

44. See Martin, *supra* note 39, at 111-12 (detailed discussion of the workings of the resettlement program, and ways in which standards applied in resettlement are more lax than in asylum cases).

45. At times, administrators of the refugee resettlement program pay little or no attention to the specification in the law that the person applying for refugee status is applying because of political persecution. See, e.g., Suhrke, *A New Look at America's Refugee Policy*, 10 INDOCHINA ISSUES 1 (Sept. 1980); D. GALLAGHER, S. FORBES & P.W. FAGEN, *OF SPECIAL HUMANITARIAN CONCERN: U.S. REFUGEE ADMISSIONS SINCE PASSAGE OF THE REFUGEE ACT* (1985).

46. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION PROCESS AND POLICY* (1985), § D, at 726, 727 n.30, 728-43 (citing INS policy memorandum found in Interp. Rel., 61 American Council for Nationalities Service No. 6, at 103 (Feb. 10, 1984)).

until conditions improve in their home country.⁴⁷ Bias in favor of granting EVD to communist-dominated countries has been asserted, but the courts are unwilling to force the executive into setting out objective criteria for the EVD grant.⁴⁸

Related are two other forms of relief, political asylum⁴⁹ and withholding of deportation.⁵⁰ The difference between them is a matter of timing.⁵¹ To apply for political asylum, one usually "affirmatively files" or voluntarily presents a claim to the Immigration and Naturalization Service (INS) (at the border or inside the United States). Withholding of deportation is relief available only when a person is subject to deportation proceedings. Withholding deportation could be considered a political asylum claim to prevent deportation. Given INS practices, only recently could either claim be considered a right.⁵²

In political asylum and withholding of deportation cases, two aspects are determinative: the burden of proof placed on the

47. EVD has been used on 15 occasions since 1960, to refugees from countries which have included Ethiopia, Uganda, Poland, Iran, Afghanistan, and Nicaragua. See T. Aleinikoff & D. Martin, *supra* note 46, at 728.

48. A recent case brought by El Salvadorans attempted to force the executive into setting out standards. The EVD claim was denied because the court did not want to "impose a humanitarian standard on the Attorney General," nor did the court want "to open up irresponsibly the floodgates to illegal aliens." *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502, 508 (1984).

Denial of temporary refuge to those fleeing war conditions is a violation of the 1949 Geneva Convention. Weiner, *The Agony and the Exodus: Deporting Salvadorans in Violation of the Fourth Geneva Convention*, 18 N.Y.U. J. INT'L L. & POL. 703 (1986).

49. Political asylum applicants must show they are refugees as defined in the statute: 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. INA § 101(a)(42)(A) (1980).

50. "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 243(h)(1) (1980).

51. An unsuccessful affirmative request for political asylum will result in deportation proceedings. Once deportation proceedings begin, the individual's political asylum application collapses into an application for withholding of deportation.

52. Under current law, undocumented persons subject to deportation must be informed of their right to apply for political asylum or, where more appropriate, withholding of deportation. See, e.g., *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376-78 (C.D. Cal. 1982).

applicant, and the mandatory consideration of an application by the State Department. Within the burden of proof issue, a presumption has arisen that an applicant from a communist country has a legitimate political asylum or withholding of deportation claim if the applicant is from a communist country, but that an applicant from a non-communist country is an economic migrant.⁵³ The burden of proof issue was modified recently by the Supreme Court decision in *INS v. Cardoza-Fonseca*.⁵⁴ Prior to *Cardoza-Fonseca*, no real distinction existed in the burden of proof for a political asylum or withholding of deportation claim.⁵⁵ The new Supreme Court ruling leaves unclear whether a distinction will result in the application of the two forms of relief.⁵⁶

While progress may have been made on the burden of proof issue by the recent Supreme Court decision, whether the State Department consultation process is objective or politically

53. It is unclear whether this presumption is official policy. Statistics indicate severe bias on the basis of ideology. See Koehn, *Selected Political Issues and Problems in U.S. Immigration Law and Policy*, 16 DEN. J. INT'L L. & POL'Y (to be published in the 1987 issue). Many INS Districts do use a presumption in favor of individuals fleeing communist countries. See, e.g., *Key Federal Aide Refuses to Deport Any Nicaraguans—Cites Sandinista Cruelty—Official in Florida Acts as U.S. Drafts Plan on Refugees of Communist Countries*, N.Y. Times, April 17, 1986, at A1, col. 1; however, this is not the only area of immigration law that still is affected by an ideological hangover. See Note, *The Ideological Exclusion of Invited Aliens: Should the United States Require a Higher Level of Tolerance By Its Citizens Than It Must Demonstrate Itself?*, 1 GEORGETOWN IMMIG. L.J. 61 (1985).

54. *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987). Perhaps the new decision will result in an interpretation of the 1980 Act that is more consistent with international Conventions. E.g., Note, *Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act*, 8 HASTINGS INT'L & COMP. L. REV. 305 (1985).

55. On its face, the withholding law seems to be more generous than the affirmative filing law, and it seemingly mandates non-refoulement; in reality, interpretations of the two sections of the Act have varied. Steinberg, *The Standard of Proof in Asylum Cases After INS v. Stevic*, 13 NAT'L LAW. GUILD IMMIGR. NEWSL. (July-Aug. 1984). The Supreme Court tackled the discrepancies in applications in *Stevic*, stating in dicta that the standard for withholding was actually stricter than that of affirmative filings, *INS v. Stevic*, 467 U.S. 407, 425 (1984); however, the distinction drawn by the Court has been ignored and the current standards of review are basically the same for the two forms of relief. Most jurisdictions require the refugee to prove that it is more likely than not that she will be singled out for persecution (i.e., a clear probability of persecution) upon return to her country of origin, based on any of the enumerated Convention factors. See, e.g., Development, *Immigration Policy and Rights of Aliens*, 96 HARV. L. REV. 1286, 1355 (1983).

56. Taylor, *High Court Rules U.S. Must Ease Rule in Granting Political Asylum*, N.Y. Times, March 10, 1987, at A1, col. 3.

tainted remains a crucial issue that dominates United States refugee law.⁵⁷ Not only do practitioners believe that the State Department's advisory opinions are politically biased, but some Justice Department employees see the entire process as a political decision.⁵⁸

Appeal is possible only from an unsuccessful determination of refugee status in a deportation hearing, before an immigration judge.⁵⁹ No appeal is available from a denial of an overseas resettlement claim, EVD, or affirmative request for political asylum.⁶⁰

Oddly, the United States appears to be in a kind of time warp. Although a party to the 1967 Protocol, the United States insists upon applying the 1951 Convention definition premised upon the assumption that fleeing communism is equivalent to fleeing political persecution.⁶¹

57. The rationale for having to consult the State Department on every application is that neither the INS District Director nor the Immigration Judge is likely to have any expertise in situations involving refugees or the conditions existing in foreign countries, and the regulation assumes that the advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA) would be better informed on the issue. 8 C.F.R. §§ 208.7 and 208.10(b) (1987).

58. A letter from Peter Nowinski, United States Attorney, Eastern District of California, to Mayor Evans of Davis, California, (Sept. 16, 1986), regarding the Davis "City Sanctuary" resolution, contains the statement: "Courts have, furthermore, recognized that the question of asylum is a political question and is essentially a matter of foreign policy." This statement is in direct contradiction to the plain wording of the 1980 Refugee Act.

In keeping with this unwritten policy, no positive State Department recommendation has ever been received in a Salvadoran or Guatemalan case since the inception of the Central American Refugee Project of Denver in 1982. Additionally, not one of the negative State Department recommendations was overruled by the local Immigration Judge. Interview with Cheryl Martinez, Director of the Denver Central American Refugee Project, Denver, Colorado (Feb. 12, 1987).

59. An unfavorable decision is appealable to the Board of Immigration Appeals. From there, an appeal is made in a U.S. District Court or a Federal Court of Appeals depending on the reason for appeal. Eventual judicial review of a Board decision by the U.S. Supreme Court is possible. T. ALENIKOFF & D. MARTIN, *supra* note 46, at 643.

60. In denying the relief sought by a political asylum applicant whose application had been denied by an INS District Director for failure to exhaust administrative remedies, the Seventh Circuit noted that the decision made by the District Director "involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the political branches of the government." *Kashani v. INS*, 793 F.2d 818, 828 (7th Cir.), *cert. denied*, 107 S. Ct. 644 (1986). The status of this rather peculiar decision is uncertain given the decision in the *Cardoza-Fonseca* case.

61. For an extensive discussion of the current misapplication of international refugee law by the United States in favor of ideologic categories, see Sautman, *The Meaning of*

This ideological interpretation of the definition of refugee has lead to a bifurcated approach in determining refugee status. The standard applied to a person who is fleeing a communist country arguably is broader than the fundamental rights approach.⁶² On the other hand, the United States has narrowly interpreted its obligations under the 1967 Protocol regarding applicants from non-communist countries to the point of legitimizing a nonsensical interpretation of its obligation.⁶³

There are no indications that the United States is internationalizing its domestic refugee policy or practice. United States law fails to provide any role for the United Nations High Commissioner for Refugees (UNHCR).⁶⁴ Refugee law and procedure is still tied to immigration law and its institutions.⁶⁵

"Well-Founded Fear of Persecution" in *United States Asylum Law and in International Law*, 9 FORDHAM INT'L L.J. 483 (1986); see also Seidenberg, *Withholding of Deportation: Burdening the Refugee in Contravention of International Standards*, 11 BROOKLYN J. INT'L L. 379 (1985).

62. E.g., Suhrke, *supra* notes 11 and 45. The communist/non-communist country dichotomy applies in about 80% of the cases. For a well-documented study of the different standards applied by country of origin, see Koehn, *Persistent Problems and Political Issues in U.S. Immigration Law and Policy*, 15 DEN. J. INT'L L. & POL'Y (to be published in the 1987 issue).

63. The standard applied prior to the *Cardoza-Fonseca* decision was "a clear probability of persecution," which the Court has held is incongruent with the intent of the 1980 Refugee Act and the U.S. obligation under the 1967 Protocol. The Court has ordered the INS to apply the "well founded fear of persecution" standard. *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1222.

Under the clear probability of persecution standard, an applicant had to prove that he or she would be singled out for persecution in his or her home country. This standard defeated the purpose of the 1967 Protocol, for the Protocol and Convention define a refugee as anyone who has a well-founded fear on the basis of race or one of the other enumerated categories. The U.S. has legitimized its refugee law by applying the 1967 Protocol inappropriately. For example, according to the old U.S. application of the international standard, a black South African applying for asylum must prove how he or she is singled out for persecution. Given that all black South Africans suffer political persecution at the hands of the illegal apartheid system, it would be difficult to prove the applicant is singled out for persecution, but nonetheless he or she certainly is a victim of political persecution within the 1967 Protocol. See Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450 (1985).

In response to a telephone inquiry to the local INS office in Denver, Colorado on September 22, 1986, to inquire as to the number of South Africans who had applied for political asylum in the last few years, the officer laughed and asked, "South Africa, what grounds would they have for asylum?"

64. Goodwin-Gill, *The Obligation of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees*, 1982 MICH. Y.B. INT'L LEGAL STUD. 291, 316 (1982).

65. Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19

Although many scholars see a clear inconsistency between the obligations of the United States and its application of refugee law,⁶⁶ the United States courts are just beginning to see the inconsistency.⁶⁷ The bifurcated application of refugee law to the four major methods of relief in the United States highlights how susceptible to manipulation the current body of international refugee law is when the sovereign applies the definition of a refugee. While the Supreme Court has demonstrated movement toward the application of a more objective definition of a refugee, continued progress will be limited by the grounding of the refugee definition in sovereign privilege. Given the newness of the recent Supreme Court decision in *INS v. Cardoza-Fonseca*, it is impossible to speculate accurately about the extent to which United States refugee law and policy will move toward the fundamental rights approach. Currently there seems to be little, if any, movement in that direction.

On the other hand, the United States has recognized the connection between its foreign policy activities and refugee flow.⁶⁸ Currently, however, the limited conception of a refugee

STAN. J. INT'L L. 235, 343 (1983).

66. The United States supported establishing a mandatory obligation of nonrefoulement during the Convention on Territorial Asylum. See Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L L. 151, 167 (1979). "In light of what the United States has said and done in international meetings, we [the U.S.] are now in a very inconsistent position." *Proceedings: Conference on International Human Rights Law in State and Federal Courts*, 17 U.S.F. L. REV. 1, 52 (1982) (comments of Mike Posner: The Haitian Cases and the Detention of Immigrants).

Senator Simpson, co-author of the 1986 amendments to the Immigration and Nationality Act, would disagree: "One thing is absolutely clear. We must be selective. We cannot admit everyone who wants to enter the United States, even everyone in desperate condition When the issue of selectivity is raised in this arena, it has always been zeroed in on as being a racist policy or a prejudicial policy. That is not what it is" Quoted in Nanda, *supra* note 6, at 473.

67. In the *Stevic* case, the Supreme Court recognized that Congress intended the Refugee Act to bring United States asylum practices into harmony with the nation's obligations under the U.N. Protocol, and it stated there were no conflicts between the two. *INS v. Stevic*, 467 U.S. 407 (1984).

The Supreme Court recently has changed its mind concerning U.S. practices and its obligation under the 1967 Protocol. Currently, those practices are mandated to change. *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207.

68. The extent of the connection seems to vary from administration to administration. See Warren, *Refugees, A Global Issue*, Dep't of State Bull. 53 (Sept. 1980); Schoultz, *U.S. Policy Toward Human Rights in Latin America: A Comparative Analysis of Two Administrations*, 8 DEN. J. INT'L L. & POL'Y 591 (1979); Nanda, *Human Rights and U.S. Foreign Policy Under Carter: Continuity and Change*, 8 DEN. J. INT'L L. &

(one fleeing communism) serves to distort United States policies aimed at refugee flow. Former Secretary of State Alexander Haig used refugee outflow to justify United States policies of intervention in Central America.⁶⁹ President Reagan has answered critics of that same intervention with the warning that: "a string of anti-American Marxist dictatorships [in Central America will result in] a tidal wave of refugees seeking safe haven from Communist repression."⁷⁰

While the minimization of refugee flow is an important foreign policy objective,⁷¹ the overly constrained definition of a refugee the United States applies will defeat the realization of this goal. Bombing a village in El Salvador or supporting contra attacks in Nicaragua leave communities unable to provide for their basic needs, thus stimulating refugee flows. Every day armed military action is carried on in Central America with the assistance of the United States government in order to prevent a "string of marxist takeovers."⁷² Current United States foreign policy may in fact have more to do with the creation of refugee flows, than averting them. Redefining who is a refugee, as the United States has done with regard to those who have fled the effects of United States foreign policy in Central America, does not curtail the existence of refugees and in fact obfuscates the need for a policy change to reach the professed goal of reducing refugee flow.⁷³

POL'Y 517 (1979).

69. Haig expressed the concern that the U.S. would be flooded with refugees if the radicalization of the hemisphere continued, therefore, U.S. intervention was needed to avoid the flood of refugees. *Haig Fears Exiles From Latin Areas May Flood the U.S.*, N.Y. Times, Feb. 23, 1982, at A1, col. 6, quoted in Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38 INT'L. ORG. 429, 434 (1984).

70. Addressing the Central American question, President Reagan said that "to disarm our friends" would produce a string of Marxist dictatorships. He continued: "the result could be a tidal wave of refugees—and this time they'll be 'feet people' not 'boat people'—swarming into our country seeking a safe haven from Communist repression to our south." *Reagan Says His Opponents Risk Central American Influx*, N.Y. Times, June 21, 1983, at A14, col. 1, quoted in Teitelbaum, *id.* at 435.

71. Immigration also can be an extension of foreign policy, as it is in the United States. Leibowitz, *Comparative Analysis of Immigration in Key Developed Countries in Relation to Immigration Reform and Control Legislation in the United States*, 7 HUM. RTS. L.J. 1 (1986).

72. See Schoultz, *supra* note 68, at 592-93 (lists many scholarly works discussing U.S. support for repressive governments).

73. In contrast, U.S. food and development aid have been changed repeatedly, Wal-

Canada

The Canadian system of law dealing with refugees has been developing for many years and is well respected in the world community.⁷⁴ Canada even boasts about its humanitarian tradition in its refugee law.⁷⁵ Canada is a party to the 1951 Convention and the 1967 Protocol on Refugees,⁷⁶ which have been incorporated into Canadian law.⁷⁷

Canadian refugee law can be divided into two categories: discretionary and non-discretionary relief. Discretionary relief includes a refugee resettlement program which utilizes a broader definition of refugee than the Convention. This program admits victims of natural disasters, civil wars, and other dire circumstances.⁷⁸ Until recently the Canadian government automatically granted admission to any person seeking refuge from a list of 18 countries.⁷⁹ Non-discretionary relief includes the right to

czak, *New Directions in U.S. Food Aid: Human Rights and Economic Development*, 8 DEN. J. INT'L L. & POL'Y 543 (1979), and have been subjected to a great deal of criticism, e.g., Sheperd, *The Tributary State and "People's Rights" in Africa: The Banjul Charter and Self-Reliance*, 32 AFRICA TODAY, 37 (1985), and H. MAGDOFF, *THE AGE OF IMPERIALISM—THE ECONOMICS OF U.S. FOREIGN POLICY* (1969).

74. See Gilbert, *supra* note 19, at 644.

75. Regulations Respecting the Designation of a Political Prisoner and Oppressed Persons Designated Class, in *THE ANNOTATED IMMIGRATION ACT OF CANADA* 212, § 3 (F. Marrocco & H. Goslett 1984).

76. Canada, like most common law derived systems, must enact federal legislation to give effect to its treaties. See *Transnational Legal Problems of Refugees*, Appendix III, *Review of Foreign Laws*, 1982 MICH. Y.B. INT'L LEGAL STUD., 553, 560 [hereinafter *Foreign Laws Appendix*].

77. See Cox, "Well Founded Fear of Being Persecuted": *The Sources and Application of A Criterion of Refugee Status*, 10 BROOKLYN J. INT'L L. 333, 363 nn. 219-20 (1984) (citing Immigration Act, 1976, ch. 52, § 2(1), 1976-77 Can. Stat. 1193; GOVERNMENT OF CANADA, OFFICE OF THE MINISTER OF EMPLOYMENT AND IMMIGRATION, IMMIGRATION MANUAL § 3.07(1)(a) (1982)).

78. Wydrzynski, *Refugees and the Immigration Act*, 25 MCGILL L.J. 154, 166 (1979). For those fleeing undesirable circumstances, discretionary relief is usually granted by country. For example, execution of removal orders has been suspended for El Salvadorans. Cox, *supra* note 77, at 336 (citing GOVERNMENT OF CANADA, OFFICE OF THE MINISTER OF EMPLOYMENT AND IMMIGRATION, IMMIGRATION MANUAL §§ 26(2), 26(7)).

79. Between May 21, 1986 and February 23, 1987, a person from any one of the 18 countries was free to enter Canada and remain in Canada for one year, during which time the person could apply for political asylum. Because of the Canadian government's policy not to deport rejected applicants to areas involved in civil disturbances, the policy allowed anyone from the 18 countries to enter and remain in Canada. The list of countries included El Salvador, Guatemala, and Iran. After February 23, 1987, people from those countries must go through the regular channels to enter and remain in Canada.

nonrefoulement⁸⁰ and asylum for those either already in Canada or those in a foreign country who can prove their eligibility according to the Convention definition.⁸¹

In determining a non-discretionary claim, the Minister of Employment & Immigration (MEI) refers the claim and the transcript of the applicant's interview to the Refugee Status Advisory Committee (RSAC) for consideration.⁸² The RSAC's decision is usually accepted by the Minister.⁸³ Two areas of this process merit further discussion: 1) the burden of proof or standard used by the RSAC; and 2) the composition of RSAC and the sources of information upon which it relies.

The RSAC standard liberalizes the character of the Convention definition, and a deprivation of fundamental rights is considered, to an extent, a basis for a legitimate claim of refugee status.⁸⁴

Telephone interview with Steve Holly, Immigration Department of the Canadian Consulate of San Francisco (March 11, 1987).

80. Wydrzynski, *supra* note 78, at 157.

81. "Convention Refugee" means 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 or, by reasons of such fear, is unwilling to avail himself of the protection of that country, or (b) not having a country of his nationality, is outside the country of his former habitual residence and is unable or by reason of such fear, is unwilling to return to that country.

Immigration Act, 1976, ch. 52, §2(1), 1976-77 Can. Stat. 1193, reprinted in 2(8) Canada Gazette, Pt. III.

82. Avery, *supra* note 65, at 259-60.

83. Immigration Act, *supra* note 81, at § 45(4).

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

Avery, *supra* note 65, at 266 (1983) (citing *New Refugee Status Advisory Guidelines on Refugee Definition and Assessment of Credibility* (Feb. 20, 1982), reprinted in REFUGE: CANADA'S NEWSL. ON REFUGEES, Mar.-Apr. 1982, at 5-6).

Canada is more likely to consider generalized conditions in the home country, and the effect of those conditions on the refugee's well-being, in considering an application.

While the refugee decision-making process is not completely removed from immigration decisions,⁸⁵ RSAC, with the majority of the decision-making power, is a semi-autonomous body devoted to refugee issues.⁸⁶ In addition, a UNHCR representative serves as an observer and an adviser who is able to provide RSAC members with a balanced collection of human rights information.⁸⁷ The RSAC is conscious of the possibility of undue influence by the Department of External Affairs,⁸⁸ and, therefore, it seeks out a variety of sources upon which to base a decision.⁸⁹

If a negative determination from RSAC is affirmed by the Minister, it is appealable to the Immigration Appeals Board (IAB).⁹⁰ The board reviews the application to determine whether it falls within the Immigration Act.⁹¹ The board may also determine whether any humanitarian grounds exist to allow the applicant to remain in Canada, even though the applicant is not within the provisions of the Act.⁹² The procedure for non-Convention refugees (e.g., victims of natural disasters, civil wars, and other dire circumstances that do not fit into the liberal interpretation of the Convention) is determined in a discretionary fashion by the Cabinet and the ministry of employment and immigration.⁹³

The most important recent development in Canadian refugee law is congruent with the internationalization of Canada's definition of a refugee and its procedures for dealing with refugees. Canada is moving toward grounding its refugee law in human rights law, as opposed to international refugee law. A re-

Delli Sante, *supra* note 39.

85. The initial interview is made by an Immigration official, who ordinarily is not trained in refugee matters. Howard, *Contemporary Canadian Refugee Policy: A Critical Assessment*, 6 CAN. PUB. POL'Y 366 (1980); but see Avery, *supra* note 65, at 259-60 (describing a new program conducted by RSAC and the UNHCR designed to train these officials).

86. For a complete discussion of the composition of RSAC, see Avery, *supra* note 65, at 260-66.

87. *Id.* at 260, 273.

88. *Id.* at 261.

89. Sexton, *supra* note 1, at 764.

90. Cox, *supra* note 77, at 364.

91. *Foreign Laws Appendix*, *supra* note 76, at 561.

92. Wydrzynski, *supra* note 78, at 165; see also Avery, *supra* note 65, at 271.

93. *Foreign Laws Appendix*, *supra* note 76, at 562.

cent Canadian case⁹⁴ held that article 7 of the Charter of Rights and Freedoms applied to all individuals who were within the boundaries of Canada, regardless of residency status.⁹⁵ As one commentator observed, refugee status decisions are "inherently political and value-laden,"⁹⁶ but, by grounding the decision in human rights law, the value judgment has been made and the ad hoc political decision is no longer necessary.

Thus, Canada is moving toward a fundamental rights approach grounded in human rights law.⁹⁷ To an extent, its procedures are also being internationalized. Inherent in the decision-making procedure seems to be an understanding that refugee flows are created by factors other than simply the flee from communism.⁹⁸ To an extent, the disbursement of foreign aid is linked with human rights.⁹⁹ Moreover, other factors indicate

94. *Singh v. Minister of Employment and Immigration*, 1 S.C.R. 177 (1985). Even though the UNHCR had previously approved the Canadian refugee program, the court found the program inadequate to meet its obligations under human rights law.

95. Article 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accord with the principles of fundamental justice." This principle can be considered an embodiment of Canada's obligations under the 1967 U.N. Human Rights Covenants. See Hayward, *International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications*, 23 U. W. ONTARIO L. REV. 9 (1985).

96. Wydrzynski, *Immigration Law—Determination of Refugee Status—Charter of Rights and Freedoms*, 64 CAN. BAR REV. 172, 174 (1986).

97. There is some controversy concerning the direction in which Canada is headed. One faction sees a need to place further restrictions on all forms of immigration, along with a stricter application of the law, and it makes no distinction between refugees and immigrants. Berger, *Principles and Procedures of Immigration to Canada*, 1985 INT'L LEG. PRACT. 120, 127 (1985). The second faction complains that the current changes are not happening fast enough and more needs to be done. According to the second faction, the intimate connection between the Minister of Employment and Immigration and the Foreign Ministry should be severed, and the treatment of applicants by the Commission should better reflect refugees' needs. *E.g.*, Avery, *supra* note 65, at 259-61. The recent modification of open entry procedure does not affect Canadian refugee law, and it may even have a liberalizing effect on out-of-country asylum applications. While deprivation of fundamental rights of all residents from 18 countries is possible, the Canadian program is discretionary. A clearer trend toward the fundamental rights approach is evidenced by the recent court decision giving all people in Canada rights, regardless of their residency status. *Singh v. Minister of Employment Immigration*, 1 S.C.R. 177 (1985).

98. Even the new conservative government is unwilling to see the world in terms of an east-west, good-evil dichotomy. Bromke & Nossal, *Canada: Foreign Policy Outlook After the Conservative Victory*, 40 THE WORLD TODAY 462 (1984).

99. A country that practices gross and systematic human rights abuses receives no aid from Canada. Nolan, *The Influence of Parliament on Human Rights in Canadian Foreign Policy*, 7 HUM. RTS. Q. 373 (1985).

that Canadian developmental aid is no longer trade based, but rather that the aid programs are directed at improving the fundamental rights situation.¹⁰⁰ Canadian policies, both refugee and foreign, are beginning to reflect the fundamental rights approach, thereby exhibiting an understanding of the dual nature of the contemporary refugee problem and have taken steps toward effectively dealing with it.

Australia

Australia has shown great compassion by accepting on a per capita basis more refugees than any other country.¹⁰¹ Australia is also a party to both the 1951 Convention and 1967 Protocol.¹⁰²

Of the three ways to gain refuge in Australia, the most frequently used avenue is the regular immigration procedure.¹⁰³ Only a fraction of the total refugee applicants are Convention refugees, who either apply for asylum if they are in Australia or apply from overseas.¹⁰⁴

Prior to 1980, no statutory basis for refugee determinations existed in Australia.¹⁰⁵ In 1985, the Australian High Court held that the Minister for Immigration and Ethnic Affairs has authority to grant refugee status under a 1980 amendment to the

100. Debate concerning the mutual exclusivity of the two is unimportant for this discussion, because the focus of Canada's program is what has changed. See THE NORTH-SOUTH INST., NORTH-SOUTH ENCOUNTER: THE THIRD WORLD AND CANADIAN PERFORMANCE (1977).

101. E.g., North, *Down Under Amnesties: Background, Programs and Comparative Insights*, 18 INT'L MIG. REV. 524 (1984).

102. See *Transnational Legal Problems of Refugees*, Appendix I, *International Instruments* 1982 MICH. Y.B. INT'L LEGAL STUD., 495, 515, 521, app. I [hereinafter *International Instruments Appendix*]. Although "these instruments have not been enacted by the Australian Parliament and therefore do not carry the force of law internally," *Foreign Laws Appendix*, *supra* note 76, at 553, the Committee that decides refugee status in Australia applies the definitions from those documents. Goodwin-Gill, *supra* note 64, at 308.

103. *Foreign Laws Appendix*, *supra* note 76, at 553. Besides normal immigration, refugees may obtain legal status through asylum from the Committee for the Determination of Refugee Status, or protection from extradition for "crimes" that may be associated with their status as refugees. *Id.* at 553-54.

104. Goodwin-Gill, *supra* note 64, at 307.

105. Amendment s.6A(1)(c) to the Migration Act 1958, AUSTL. ACTS P. No. 62 (1958), basically incorporated the Convention standard; see also Lancy, *Minister for Immigration and Ethnic Affairs v. Mayer*, 15 MELBOURNE U. L. REV. 536, 537 (1986).

Immigration Act.¹⁰⁶

Currently, all refugee applications are forwarded by the Minister of Immigration and Ethnic Affairs to the Standing Interdepartmental Committee on Refugees for the Determination of Refugee Status (DORS) Committee. The DORS committee makes a recommendation to the Minister, who invariably follows it.¹⁰⁷ The DORS Committee is composed of representatives from many different governmental agencies and a non-voting representative from UNHCR, who provides balanced and extensive information to the Committee.¹⁰⁸

The standard applied in Australia to define a refugee seems to follow closely the Convention definition.¹⁰⁹ No appeal is available from the denial of an overseas application,¹¹⁰ nor is appeal available if the DORS Committee or the Minister denies an asylum application from an applicant who is in the country. The only formal provision for reconsideration allows the Minister to refer a case back to the DORS Committee if new information becomes available.¹¹¹

Although an asylum seeker is in a precarious position in Australia, the rights afforded a refugee are increasing.¹¹² For ex-

106. Minister for Immigration and Ethnic Affairs v. Mayer, 61 A.L.R. 609, 618 (1985).

107. Goodwin-Gill, *supra* note 64, at 307.

108. Many sources of information are used to prevent bias. See Avery, *supra* note 65, at 246-47.

109. According to the UNHCR representative in Australia, the standard has been applied in an equitable and not overly restrictive fashion where no bias in favor of or against certain nationalities is present. *Id.* at 249.

110. Goodwin-Gill, *supra* note 64, at 307. Australian law does not prohibit summary expulsion of refugee applicants by border authorities, but the general practice allows the applicant to remain until her claim is processed. Avery, *supra* note 65, at 245. The 1980 Immigration (Unauthorized Arrivals) Act, AUSTRAL. ACTS P. No. 112 (1980), passed in response to the influx of boat people, imposes substantial penalties on persons who bring to Australia large numbers of prohibited immigrants. *Foreign Laws Appendix, supra* note 76, at 553.

111. In certain limited circumstances it may be possible to appeal under the Administrative Appeals Tribunal Act of 1975 and/or the Administrative Decisions (Judicial Review) Act. Goodwin-Gill, *supra* note 64, at 308-09. One final appeal possibility exists for those challenging error in administrative procedure, in which the applicant may request that the Ombudsman or administrative "watchdog" review the procedure. Avery, *supra* note 65, at 248.

112. Lancy, *supra* note 105, at 538. A distinction is drawn between an asylum seeker, one who is using the procedures for asylum, and a refugee, one who has been deprived of fundamental rights. While relief is improving for a refugee in Australia, that relief does not necessarily come from the asylum procedure.

ample, under the 1985 High Court decision, a written justification must accompany the denial of an applicant's refugee status.¹¹³

The membership of the UNHCR representative on the DORS committee illustrates the internationalization of Australia's refugee determination process. Some suggested changes indicate further internationalization, such as a revision of the format for the initial interview and a suggested provision of a voting right for the UNHCR representative on the DORS Committee.¹¹⁴

The fact that Australia has not broadened significantly the Convention definition of a refugee does not negate the inference that it has moved toward an adoption of a fundamental rights approach. It must be remembered that asylum is only a small part of an entire refugee program. Standard immigration procedures, using criteria broader than the fundamental rights approach, are used by the bulk of refugees. There is, however, little movement to redefine the bounds of each separate program.

Australia recognizes a connection between foreign policy, individuals meeting their basic needs, and refugee flows. Migration from underdevelopment and conflict is not, to Australia, a viable long-run alternative to a global solution to the problem of refugees. Thus, Australia uses its foreign policy as a mechanism to stem problems that contribute to refugee flows.¹¹⁵ Australia's foreign aid policy embodies a combination of motives: humanitarian, strategic, and economic. The foremost objective, however, is the accommodation of global concerns.¹¹⁶ In Australia, a global awareness is growing, for not only domestically is Australia's refugee policy moving toward the fundamental rights approach, but Australian foreign policy is beginning to stress fundamental rights in order to avert potential refugee flows.¹¹⁷

113. *Minister for Immigration and Ethnic Affairs v. Mayer*, 61 A.L.R. 609 (1985).

114. Avery, *supra* note 65, at 249-50.

115. Australia's heavy concentration of economic and development aid in the Asian-Pacific makes sense not only in terms of defense, but as a preventive refugee measure. Jackson, *Australia's Foreign Aid*, 39 AUSTRALIAN OUTLOOK 13 (1985).

116. *Id.*

117. Stent, *The Jackson Report: A Critical Review*, 39 AUSTRALIAN OUTLOOK 33 (1985).

United Kingdom

The United Kingdom's homogenous history is evidence that it has never been a country of immigrants. Today, although the population profile of the country is shifting as a result of the influx of refugees and immigrants from developing nations, the net migration is negative.¹¹⁸ Moreover, the United Kingdom's immigration policies have been severely criticized as sexist, racist and blatantly unfair.¹¹⁹ Against this backdrop of criticism the government juxtaposes a British tradition of taking in those fleeing persecution, and thus is attempting to create a more generous refugee policy within a strict immigration policy.¹²⁰

The United Kingdom is also a party to the 1951 Convention and the 1967 Protocol.¹²¹ It is difficult to delineate the United Kingdom's refugee policy because no law directly relates to refugees.¹²² Rather, the "law" is formed from the rules, regulations, and procedures of the Home Office (the immigration authority).¹²³ Basically, an individual can gain refuge in the United Kingdom by one of three avenues: 1) as an overseas refugee;¹²⁴ 2) under the Convention definition in an application for asylum;¹²⁵ or 3) pursuant to an application for an "exceptional leave

118. COMMISSION FOR RACIAL EQUALITY, IMMIGRATION CONTROL AND PROCEDURES: REPORT OF A FORMAL INVESTIGATION 134 (1985) [hereinafter *Racial Equality*].

119. *E.g.*, *Immigration Out of Step With Public*, *The Guardian* (Manchester, England), May 9, 1984; *Immigration Report Reveals Raw Deal for Blacks*, *The Guardian* (Manchester, England), Feb. 13, 1985; *Britain Set Poser by Entry Ruling*, *The Guardian* (Manchester, England), May 29, 1985, at 1, col. 1 (article discusses how Britain was reprimanded by the European Court of Human Rights because its immigration laws are discriminatory).

120. HOME AFFAIRS COMMITTEE, FIRST REPORT, (hereinafter *HOME AFFAIRS*).

121. *International Instruments Appendix*, *supra* note 102, at 515, 521.

122. Avery, *supra* note 65, at 326.

123. L. GRANT & I. MARTIN, IMMIGRATION LAW AND PRACTICE 323 (1982).

124. The six countries accepting the highest numbers of Vietnamese "boat people," in rank order according to the number accepted, were the U.S., Canada, France, Australia, the Federal Republic of Germany, and the U.K. *HOME AFFAIRS*, *supra* note 120, at vii.

125. Before 1984 there was a difference between asylum with refugee status and asylum without refugee status. *Id.* See also L. GRANT & I. MARTIN, *supra* note 123, at 333. The standard applied is:

A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant

to remain," which may be granted both by country and upon individual application.¹²⁶ This third basis for refugee protection applies to all those who have a general fear of returning to a country that is in a state of disruption, where disorder is widespread, severe, and of long duration.¹²⁷

Once an application for refugee status has been made, the Home Office evaluates the application and interviews the applicant to determine if the applicant is due any relief. The decision of the Home Office is made by the Refugee Unit.¹²⁸ Many scholars and practitioners believe that the Home Office relies too heavily upon information provided by the Foreign Office, thus skewing decisions to reflect current foreign policy. It has been suggested that a UNHCR representative should play a decision-making role and that information from a UNHCR representative should be used to balance the information of the Home Office.¹²⁹ No such role is currently played by the UNHCR.¹³⁰

Areas of ambiguity arise from the disparate treatment a refugee receives on the basis of her location—within the United Kingdom, or at the border; her documentation—with visa, or without visa; and her choice of application forum and procedure—applying affirmatively or in a deportation proceeding.¹³¹

circumstances.

In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Paras. 134, and 165 of the Immigration Rules (1972).

126. Under the country rubric as of 1984 the countries included Afghanistan, Iran, Lebanon, Poland, Uganda, and El Salvador. *HOME AFFAIRS*, *supra* note 120, at xlv.

127. The basis of Exceptional Leave to Remain allows the person to remain in the U.K. until it is secure to return to her home country. There have been some complaints that this method of relief has been politically influenced; for example, Sri Lankan Tamils in 1984 were not granted exceptional leave to remain. Instead, only a moratorium on their removal was established. *Id.* at xlvi.

128. L. GRANT & I. MARTIN, *supra* note 123, at 328.

129. Avery, *supra* note 65, at 323.

130. *Id.* at 323, 325.

131. The applications of those refugees standing at the border were previously screened by immigration officers. Complaints of unfair screening have led to the development of a new process, and all asylum requests are now granted an interview. The immigration officer then forwards a transcript of the interview to the Immigration and Nationality Department's Home Office.

Refugee applicants already present in the U.K. are interviewed by an official from

These distinctions are important both in processing a refugee's application and in the possibility of an appeal.¹³² Realistically, an appeal of a denial is possible only for those who have visas, because those who do not have visas can appeal only after they have left the United Kingdom.¹³³

The definition of refugee used in the United Kingdom can at times be much broader than the Convention definition of a refugee, but it stops short of the fundamental rights approach definition of a refugee.¹³⁴ Neither the criteria for asylum nor the exceptions allowing a refugee to remain in the United Kingdom are set out clearly in the law.¹³⁵ Thus, it is argued that many refugee decisions are politically influenced.¹³⁶ In fact, the United Kingdom might be seen as having a bifurcated approach to refugees, similar to that of the United States, except that in the United Kingdom, the decisional biases are related to both past colonial practices and ideology.¹³⁷

Important recent developments have occurred in cases brought before the European Court of Human Rights where potential refugees argued that their rights were violated by the United Kingdom's laws and procedures. The cases point out the United Kingdom's obligations under the Covenant on Civil and

the Immigration and Nationality Department, who usually has some knowledge of asylum and of refugees. The transcript of the interview is then forwarded to the Home Office. See L. GRANT & I. MARTIN, *supra* note 123, at 327.

132. Many complaints regarding denial of valid claims at the border resulted in inappropriate expulsions. For a discussion of the 1980 change in the immigration rules designed to discontinue this practice, see Sexton, *supra* note 1, at 747.

133. Generally, all appeals are heard first by the immigration appeals adjudicators. From there, appeal is available to the Immigration Appeal Tribunal. Judicial review is then possible by way of certiorari. Mandamus first judicial appeal goes to the Divisional Court, then to the High Court, and then, by leave, to the Court of Appeals and the House of Lords. See L. GRANT & I. MARTIN, *supra* note 123, at 330; Avery, *supra* note 65, at 323.

134. In the U.S., refugee applicants from El Salvador are almost always rejected as not fitting into the Convention definition. According to a study conducted in the U.K., there were 42 applicants from El Salvador from 1980-82. Of the 32 applications actually processed, 3 were withdrawn, 12 applicants were granted refugee status, 11 applicants were granted asylum, and 6 applications were rejected (the system of classification has since changed). The study did not indicate whether the 6 rejected applicants applied for exception to remain. Cox, *supra* note 77, at 363.

135. Avery, *supra* note 65, at 326.

136. *E.g.*, Racial Equality, *supra* note 118, at 127, 128.

137. Kreisberg, The Political Nature of Refugee Recognition in the United Kingdom (unpublished manuscript); see also Racial Equality, *supra* note 118.

Political Rights and the European Convention on Human Rights, and have been successful in helping to expand refugee rights.¹³⁸ This development illustrates a gradual shift in the grounding of the United Kingdom's refugee law from international refugee law to human rights law.

Whether the United Kingdom recognizes or acts upon the connection between foreign policy and refugee flow is unclear. For the most part, developmental aid is given to former colonies and members of the commonwealth, with the goal of facilitating trade.¹³⁹ Rhetorically, the Labour party has been concerned with international welfare, while the Conservative party would like to use aid for each country's "maximum mutual advantage." In reality neither party's foreign policy program has had the assurance of fundamental rights as an important goal.¹⁴⁰

Overall, the United Kingdom, like the United States, uses Convention refugee law to legitimize its current unjust practices. The major difference between the two countries is that the United Kingdom's practices are now under challenge in the European Court of Human Rights. This development, when combined with public opinion in favor of liberalizing immigration and refugee policies, will move the United Kingdom gradually toward the fundamental rights approach. Presently, however, the United Kingdom is far from the realization that foreign policy must be conscious of the causes of refugee flows and take steps to avert them.

138. In one case a Moroccan army officer sought asylum in the U.K., but was turned away at the border. Upon his return to Morocco, he was killed. The officer's wife brought suit in the European Court of Human Rights. No decision was made because the U.K. settled with the claimant. See United Kingdom Immigrants Advisory Service, Annual Report 11 (1982-3); see also Runnymede Trust, Runnymede Report on Immigration in the United Kingdom (1985) (detailed study of the application of human rights law to expand refugee rights in the U.K.); Curtis, *The Impact of the Treaty of Rome Upon Certain Aspects of the United Kingdom's Immigration Law*, 18 CASE W. RES. J. INT'L L. 443 (1986).

139. EUROPEAN DEVELOPMENT POLICIES (B. Dinwiddy 1973).

140. Cunliffe, *British Economic Aid Policy and International Human Rights: A Comparative Analysis of Conservative and Labour Policies in the 1970's*, 33 POL. STUD. 101 (1985).

France

The current public debate on refugees in France is created by a set of circumstances almost completely opposite to those that have created the debate on refugees in the United Kingdom.¹⁴¹ While France is not a country of immigrants, it has a long tradition of generously granting asylum.¹⁴² Even the French Constitution contains references to asylum.¹⁴³ France is a party to the 1951 Convention and the 1967 Protocol, and both documents are binding as law in France. Given the fact that French practices were already more generous than the minimum set out in the Convention,¹⁴⁴ their adoption was basically a formality.

Although conditions in France have changed greatly in the last 30 years, neither significant change in refugee law nor much debate about refugees occurred until 1986.¹⁴⁵ During the last 30 years, the changes wrought by post-colonialism and the arrival of foreign guest workers created a significant foreign-born population within France.¹⁴⁶ No major issues grew out of these political and demographic changes until the recent economic downturn, when, according to commentators, foreigners were viewed as scapegoats.¹⁴⁷ France's lax immigration practices and gener-

141. Both grow out of the lack of a clear distinction drawn between refugees and immigrants; however, the traditions are completely different, as are the current directions of reform (or lack thereof).

142. Avery, *supra* note 65, at 295.

143. For example, the preamble to the 1946 and 1958 French Constitutions read: "Anyone persecuted because of his activities in the cause of freedom has the right to asylum within the territories of the Republic." See *Foreign Laws Appendix*, *supra* note 76, at 564-66.

144. See F. JACOMET, F. TIBERGHIGN, *Preface* to *La Protection des Refugies en France* 21 (1984) (requirements for persecution because of factors such as political, religious, racial, national origin and membership in a social group; discusses ways in which the French definition is more generous than the Convention).

145. See, e.g., *Une Trentaine d'Associations Jugent Extrêmement Dangereux—le Projet de Loi sur les Etrangers*, *Le Monde* (Paris) June 20, 1986. For an account of the lack of change in the law, see R. Salomon, *Les Refugies*, in *Que Status Je?* (1963), for support of the contention from the liberal tradition, and to show practices have not changed much in the past 30 years. Compare Aleinikoff, *supra* note 41, at 215.

146. See, e.g., Safran, *The Mitterand Regime and Its Policies of Ethnocultural Accommodation*, 18 *COMP. POL.* 41 (1985).

147. Despite increased terrorist activities in France, President Mitterand has voiced his opinion that France will not react against refugees, that France was able to distinguish immigrants from refugees, and would not fall prey to xenophobia. Amnesty International reports that, unfortunately, there is growing xenophobia among the French, due mainly to the sluggish economy. The differentiation cited by the President is disappear-

ous political asylum then became the focus of public debate.¹⁴⁸ Some claim the presence of foreigners exacerbates unemployment in France, while others protest the proposals for constricting immigration practices as racist and xenophobic.¹⁴⁹ The debate thus far has resulted only in the passage of a minor amendment to a 1945 law, and is intended to make false applications less likely to succeed.¹⁵⁰

Currently, three basic ways exist to attain refuge or to remain in France: 1) through the resettlement program; 2) through an application for asylum or refugee status; and 3) through de facto nonrefoulement. The main criterion for entry under the refugee resettlement program is family reunification. Hence, it is not directly related to the Convention definition of a refugee.¹⁵¹

An individual may apply for asylum or refugee status at the border or within France, either by an affirmative filing or through a deportation proceeding.¹⁵² An applicant must show that she has a fear of persecution and that the fear is reasonable. The decision whether a reasonable fear exists is not based upon the likelihood of persecution, but on a plausible account of fear.¹⁵³

ing, and non-Convention refugees who have decided to remain in France are being treated as second class citizens. See *Droit d'asile attention fragile*, Chronique (Amnesty International Section Francaise, Feb. 1986) at 1; letter from Iona Bocikis, Amnesty International member, Toulouse, France (Feb. 21, 1986) (discussing refugee situation in France).

148. E.g., *Sole l'Entree et le Sejour des Etrangers—Un Projet Rabote*, Le Monde (Paris), July 8, 1986.

149. E.g., *Le Debat sur l'Immigration*, Le Monde (Paris), July 10, 1986.

150. The change in the law itself is not major, and does not change the overall complexion of the refugee system, but it is very important for it marks the first notable constriction on refugee law in France and may point France in a new direction. See Journal Officiel De La Republique Francaise 11035 (Sept. 12, 1986) (text of the change). The law was first overturned by the *Recours au Conseil constitutionnel* as unconstitutional, but was later changed to withstand constitutional scrutiny. See *Etrangers, LIBERATION*, Aug. 14, 1986, at 6. Basically, the law sets out new stricter practices for border agents to reject spurious claims and stop clandestine immigration. The new law seems to contradict the extensive protection an applicant has from immediate expulsion at the border. See Sexton, *supra* note 1, at 749-50.

151. Aleinikoff, *supra* note 41, at 217 n.122.

152. See Goodwin-Gill, *supra* note 64, at 310-11, and *Foreign Laws Appendix*, *supra* note 76, at 565. A thin distinction exists between permanent asylum and refugee status. See Sexton, *supra* note 1, at 775-76.

153. Cox, *supra* note 77, at 359, 360; see also LIBERTES PUBLIQUES, JURISPRUDENCE AJDA 609 (Nov. 20, 1980) (discusses the claim of Black Panther activist Eldridge Cleaver to refuge under the political persecution rubric); LIBERTIES PUBLIQUES, JURISPRU-

De facto nonrefoulement (or refuge by default) occurs when an applicant receives notice that her asylum claim has been denied, for France will not forcibly remove or deport her. Thus, it is often possible that a person unwilling to return to her country of origin may be able to stay in France despite the denial of refugee status.¹⁵⁴

All applications for asylum are funneled to the *Office Français de Protection des Réfugiés et Apatrides* (French Office for the Protection of Refugees and Stateless Persons, "OFPRA"), for processing and status determination.¹⁵⁵ OFPRA is an independent agency specializing in refugees and asylum, and is composed of representatives from different ministries, and a representative from the UNHCR who fulfills an observer/advisor role.¹⁵⁶ Overall, most scholars and practitioners agree that OFPRA operates free of political interference and bias.¹⁵⁷

Appeal from an OFPRA decision denying asylum or refugee status lies first with the *Commission de Recours des Réfugiés (de Recours)* which is composed of a three member panel.¹⁵⁸ The three members include a representative from OFPRA, a UNHCR representative, and a member of the *Council d'Etat* (the administrative Supreme Court).¹⁵⁹ Most cases end at *de Recours*, but an additional appeal to the *Council d'Etat* is possible. Review, however, is strictly limited to legal issues.¹⁶⁰ By

DENCE DROIT ADMINISTRATIF 481 (Sept. 20, 1983) (discussion of racial persecution).

The French take pride in the generosity of their asylum provisions. "The right of asylum is secure. France has taken pride in it for two centuries. It will be strictly respected. Candidates for refugee status can feel assured of guaranteed impartiality, understanding and assistance." M. Claude Cheysson, French Minister for External Relations, *quoted in Cox, supra* note 77, at 358 n.170.

154. Aleinikoff, *supra* note 41, at 222-23. If a person has applied for asylum, France will not return that person to her country of origin. On occasion, however, France has deported an applicant who is found to be a threat to the public order to a third country. See Sexton, *supra* note 1, at 775.

155. Aleinikoff, *supra* note 41, at 215; see also *Droit d'asile attention fragile*, CHRONIQUE 6 (Amnesty International Section Française, Feb. 1986).

156. Representatives include the ministers of justice, interior, finance, labor, and health, and a representative of voluntary agencies. Aleinikoff, *supra* note 41, at 215-17; see also Goodwin-Gill, *supra* note 64, at 310. The representatives usually have a background in law and human rights. Avery, *supra* note 65, at 290.

157. Aleinikoff, *supra* note 41, at 219.

158. Avery, *supra* note 65, at 291.

159. Cox, *supra* note 77, at 358. Appeals to the *Commission de Recours* take between two and four years, during which time the appellant may remain in France. *Id.* at 359.

160. Aleinikoff, *supra* note 41, at 216-17.

the end of both the OFPRA determination and the appeal process, approximately 80% of the asylum claims are granted.¹⁶¹ While present French law on asylum is generous and apparently impartial in application, observers worry that the new law will begin a trend toward the politicization of the French process and create a change in French policies toward human rights.¹⁶² In fact, some French practices have been questioned recently by the Counsel of Europe.¹⁶³

When faced with constrictions of French policies, refugee advocates have turned to human rights law and the European human rights institutions to prevent a degradation of refugees' rights. By grounding refugee law in human rights, advocates hope to sustain France's generous refugee policy and possibly expand it.

How close the refugee definition used by the French is to the fundamental rights approach definition of a refugee is not clear. It appears that asylum applicants in France who fit within the Convention definition of a refugee or those applicants fleeing a coup or armed conflict are favored. However, France's de facto nonrefoulement policy and possible support for a new international definition of a refugee based on the deprivation of fundamental rights indicate France is moving toward an adoption of the fundamental rights approach.¹⁶⁴

It also appears that France recognizes a connection between fundamental rights and refugee flow,¹⁶⁵ but it is difficult to determine to what extent that realization motivates French policy.

161. See *id.* at 217-219 (discussion of percentage of grants of asylum at each stage).

162. Sole, *Les Etrangers dans le Collimateur*, *Le Monde* (Paris) May 31, 1986, at 9. An example of the basis for the feeling of some commentators that the change indicates a trend against France's historic commitment to human rights, the European Court of Human Rights reprimanded France for the first time for a violation of human rights in the summer of 1986. Fortier, *La France est Condamnee par la Cour Europeenne des Droits de l'Homme*, *Le Monde* (Paris) July 20, 1986.

163. France has shown concern that French asylum policies do not meet the Counsel of Europe's standards. Quatremer, *Le Droit d'Asile dans la CEE*, *LIBERATION*, Dec. 20, 1986.

164. See *CHRONIQUE*, 5-9 (Amnesty International Section Francaise, Feb. 1986) (calling for France to lead Western Europe in adopting the fundamental rights (OAU-type) definition, and citing France's support for the 1985 Amnesty resolution calling for a broader definition of refugee).

165. A study by the French government correlated development in North Africa with migration and refugee flow. See M. TREBOUS, *MIGRATION AND DEVELOPMENT—THE CASE OF ALGERIA* (1970).

France has spoken in terms of human rights and North-South cooperation with respect to development but, for the most part, developmental aid goes to former colonies and is connected to strategic interests and political ties that may not contribute to real development.¹⁶⁶ While the domestic side of French refugee policy is leading the trend in effectively protecting fundamental rights, French foreign policy is lagging behind in the ensurance of fundamental rights for all people and the ultimate effect this has on refugee flow.

Sweden

Sweden plays the role of world ombudsman in the area of refugees. It focuses on providing assistance to those refugees who have not yet received assistance from other states.¹⁶⁷ Many scholars believe Sweden's program is politically biased,¹⁶⁸ but it can be argued that this bias exists in order to balance the bias present in the refugee programs of other countries.¹⁶⁹ Until recently the Nordic countries all had similar refugee admission laws, which enjoyed popular support.¹⁷⁰ The world economic situation has affected Nordic refugee policies, however, and the policies are now undergoing revision in each of the Nordic countries.¹⁷¹ Some critics contend the charges are an outgrowth of xenophobic tendencies growing in the Nordic countries.¹⁷²

Sweden is a party to the 1951 Convention and the 1967 Pro-

166. See Balta, *French Policy in North Africa*, 40 MIDDLE EAST J. 238 (1985); Seiberg, *Frankreichs Bindungen zur Dritten Welt Tradition, Wirtschaftsinteresse, Prestige*, 19 AUS POLITIK UND ZEITGESCHICHTE 27 (May 11, 1985).

167. Currently, Sweden focuses on giving refuge to individuals from Latin America. Telephone interview with Mr. Tilforch, Swedish Embassy, Washington, D.C. (Feb. 6, 1987). These actions could be perceived as a response to U.S. prejudice against Latin American refugees.

168. E.g., Teitelbaum, *supra* note 69.

169. Avery, *supra* note 65, at 309.

170. Melander, *Nordic Refugee Law and Policy*, 1982 MICH. Y.B. INT'L LEGAL STUD. 229 [hereinafter Melander, *Nordic Refugee Law*].

171. For the first time, major differences are developing in refugee law and policy among the Nordic countries. In 1986, Denmark amended its Aliens Act with the purpose of constricting refugee admissions. Danish Aliens Act No. 226 (8 June 1983), amended by Act No. 232 (6 June 1985), Act No. 574 (Dec. 1985), and Act. No. 686 (17 Oct. 1986) (official English translation). The standard still meets the requirements under the Convention. See, e.g., *Rights and Duties of Refugees in Denmark* (1985).

172. Letter from Carl Henrik Flach to Todd Howland (Nov. 12, 1986)(discussing change in public opinion concerning refugees in the Nordic countries).

tocol as well.¹⁷³ The incorporation of the Convention into Swedish law was a formality, since Sweden has a tradition that is more generous than the minimum standard set out in the Convention.¹⁷⁴ Before the passage of the new refugee law in 1980, Sweden's law was generous, but very convoluted.¹⁷⁵

Refugee status or the right to remain in Sweden may be obtained in four ways: 1) through the resettlement program; 2) through the grant of refugee status or nonrefoulement; 3) through a grant of de facto refugee status or b-status; or 4) through the Ministry of Labor's prohibition of deportation. Because of Sweden's geographic location it is not usually the country of first refuge.¹⁷⁶ Thus, probably the most important refugee program is the resettlement program, and the Swedish Parliament annually adopts a quota for the admission of persons from refugee camps.¹⁷⁷ Applications for refugee status or nonrefoulement may be made either at the Swedish border or from within Sweden. Sweden respects the rights of asylum and nonrefoulement,¹⁷⁸ and the definitional standard applied to those attempting to gain refugee status is close to the Convention definition.¹⁷⁹

De facto refugee status or b-status is designed to assist people who are not technically within the Convention definition, but who are unwilling to return to their home country because of the political situation or an armed conflict that exists there.¹⁸⁰ This relief is usually granted as a normal option in the review of an asylum application. When the Minister of Labor believes a country to be in an exceptional state of crisis, she can exercise her discretionary authority and prohibit deportation to that

173. *International Instruments Appendix*, *supra* note 102, at 515, 521.

174. Broberg, *Sweden and the Refugee Question*, REPR. AWR. BULLETIN II, 23 (1973).

175. *E.g.*, Melander, *The Protection of Refugees*, SCANDINAVIAN STUD. L. 151 (1979).

176. Melander, *Nordic Refugee Law*, *supra* note 170, at 229.

177. *Foreign Laws Appendix*, *supra* note 76, at 583.

178. Melander, *Nordic Refugee Law*, *supra* note 170, at 230.

179. Fear of persecution because of one of the enumerated factors in the Convention (*e.g.*, race, religion) is the standard applied in Sweden. Melander, *Nordic Refugee Law*, *supra* note 170, at 233. The standard now seems to be tightening, to require that the fear of persecution be life threatening. See Grahl-Madsen, *World in Transition*, *supra* note 5, at 69-70.

180. The discussion is applicable to "[a]n alien . . . who, although not a refugee, is unwilling to return to his home country on account of the political situation there, and is able to plead powerful circumstances to this effect . . ." Aliens Act § 6, *cited in* Melander, *Nordic Refugee Law*, *supra* note 170, at 232.

country.¹⁸¹

An application for refugee status is made with the Alien Police, which forwards all reasonable claims for asylum and all claims for nonrefoulement to the Central Immigration Board.¹⁸² The Board is partially autonomous, not affiliated with any particular ministry, and its membership is considered politically balanced.¹⁸³ Both a finding by the Alien Police that a claim is unfounded and a negative decision on refugee status by the Board are appealable to the Immigration and Equity Division of the Ministry of Labor.¹⁸⁴ The Division's decision is final.¹⁸⁵ Approximately 60% of the applications for refugee status eventually are successful.¹⁸⁶

The definition of refugee applied to Sweden's applicants for de facto refugee or b-status is considerably broader than a strict construction of the Convention definition of refugee.¹⁸⁷ It does not, however, meet the fundamental rights approach. The b-status program has been criticized,¹⁸⁸ not because it is too generous, but because it does not go far enough. A fundamental rights approach has been offered as the alternative.¹⁸⁹

Sweden has been very supportive of the internationalization

181. Avery, *supra* note 65, at 305. Lebanon recently has been added to the list of countries to which deportation is not allowed.

182. The controversy over the legitimacy and fairness of the prescreening process by the Alien Police, has resulted in a change of practice. See Avery, *supra* note 65, at 304.

183. There is no UNHCR representative on the Board, perhaps as a result of the low influx of refugees, given Sweden's geographic location. Occasionally, advice has been sought from the UNHCR and applied in individual cases. See Avery, *supra* note 65, at 305, 307-08.

184. See *Foreign Laws Appendix*, *supra* note 76, at 583; see also Melander, *Nordic Refugee Law*, *supra* note 170, at 242-43.

185. The Division may collect more information, and occasionally will ask the Alien Police to re-interview the applicant. See Avery, *supra* note 65, at 307.

186. The Board originally accepts only 30% of the applications. The Division reverses about 45% of the Board's refusals. *Id.*

187. Sweden considers itself bound to the Geneva Convention of 1949 and has shown an unwillingness to repatriate individuals to a zone of armed conflict. Unfortunately, Sweden has also exhibited a tendency to redefine a situation in order to meet its international obligations, as opposed to changing its practice to reflect reality. For example, Sweden declared the conflict in Lebanon to be over before deporting Lebanese to their home country. See Perluss & Hartman, *supra* note 2, at 565.

188. See Melander, *Nordic Refugee Law*, *supra* note 170, at 235.

189. "A refugee shall not without grave reasons be refused asylum in Sweden when he has need of such protection." § 3 of the Aliens Act, *quoted in Foreign Laws Appendix*, *supra* note 76, at 582. See also Grahl-Madsen, *supra* note 5, at 71.

of the refugee problem. Although Sweden's self-appointed task of balancing world refugee acceptance has created legitimate internal complaints,¹⁹⁰ its efforts to internationalize the refugee problem have been praised.¹⁹¹

Sweden recognizes the interdependence of countries,¹⁹² and has expressed as a goal for its developmental aid to "increase wealth, economic and social equalization, and support democratic change toward national and economic independence."¹⁹³ Although some have criticized the implementation of these goals as overlooking certain worldwide problems, overall the Swedish approach to foreign policy is to facilitate the realization of fundamental rights.¹⁹⁴

Sweden's domestic refugee policy, while relatively generous, is not moving very rapidly toward a fundamental rights approach. Rather, Sweden's foreign policy is attempting to alleviate refugee flow at its source, the deprivation of fundamental rights.

CONCLUSION

The refugee problem has two aspects: refugee creation and refugee acceptance. Little work has been done in the area of refugee creation and its link to foreign policy. To a large extent this is so because the international definition of a refugee points to a specific problem: individual political persecution. This definition misstates the current reality of the causes of refugee flows, the deprivation of fundamental human rights. While ensuring fundamental rights is not a simple task, applying the concept to the

190. For a discussion of possible country bias influencing asylum decisions, see Avery, *supra* note 65, at 308-09.

191. E.g., Melander, *Nordic Refugee Law*, *supra* note 170, at 229. The contributions of the Nordic countries to the UNHCR make up 22% of the Commission's total budget. *Id.*

192. Sundelius, *Interdependence, Internationalization and Foreign Policy Decentralization in Sweden*, 19 COOP. & CONFLICT 93 (1984).

193. Rudebeck, *Swedish Development Aid in Times of Economic Realities*, 72(4) SCANDINAVIAN REV. 49 (1984).

194. One scholar finds the Swedish goals laudable, but believes more attention must be paid by Sweden to the structures that create underdevelopment and conflict (e.g., trade dependencies and world financing). See Jinadu, *The Political Economy of Sweden's Development Policy in Africa*, 19 COOP. & CONFLICT 177 (1984); see also E. MICHANEK, *THE WORLD DEVELOPMENT PLAN—A SWEDISH PERSPECTIVE* (1971) (Sweden's ideas of international social justice).

refugee problem reframes the problem in such a way as to highlight its dual aspects.

This comparison has investigated the extent to which states have shed the inadequate definition of a refugee contained in the international instruments that protect refugees and examined the extent of movement toward a new, more reflective definition, one that can handle effectively the synergistic nature of a refugee.¹⁹⁵ A new workable definition is one that is grounded in human rights law, in order to avoid the difficulties presented by sovereignty and the sovereign privilege of granting the "right to asylum." The rights that must be discussed are a person's fundamental rights, including the right to refuge when the necessary social fabric of one's homeland disintegrates.

Many states are drifting in a direction that may realistically lead to a better world, but some states are legitimizing their straggling positions by pointing to the international legal definitions of a refugee. It is time that international law in this field regains its place so that, when achieved, it will contribute positively to a just world order, as opposed to exacerbating an unjust one.

195. The Convention definition and other legal protections for refugees attempt to create a legal category that recognizes a person as a refugee if the enumerated circumstance causes a refugee to flee. There are many factors which cause a person to flee. For example, a person from El Salvador could flee because: 1) there is a war going on and the person does not want to get caught in the cross-fire; 2) membership in an opposition political party makes the person susceptible to political persecution; 3) conditions have deteriorated to such an extent in her country that there is no longer adequate work to be found. The list could go on, but the point is that it is the totality of the circumstances, not just one factor, that causes or creates a refugee. Only the fundamental rights approach adequately accounts for this synergistic causation.