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ASYLUM IN PRACTICE: SUCCESSES, FAILURES, AND THE CHALLENGES AHEAD

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I. INTRODUCTION

Most informed observers asked to describe the changes wrought in asylum practices in Europe and North America during the 1990s could name dozens of new legal provisions, rules, and programs designed to control the entry and admission of asylum seekers into the advanced industrial states of the West. None, however, could refer to even two or three systematic evaluations of these changes.

Numbers? Yes, we know how many individuals apply for asylum, how many are granted, and how many are denied. We also know that many asylum seekers come from countries that have produced or continue to produce significant numbers of Convention¹ refugees and people fleeing serious civil disorder. What we don't know is just how well or poorly the asylum systems in various countries or regions function. Do they protect the vast majority of Convention refugees? What happens to those who are fleeing violent conditions as opposed to persecution? Do the asylum systems deter abuses by those with no claim to protection? With respect to economic migrants denied asylum, are they returned? How seriously are smuggling organizations penetrating the asylum system, and with what results? Does detention act as a deterrent? When detention is used to ensure that asylum seekers appear at their hearings, is it managed efficiently and humanely?

The asylum system of any country must accomplish two principal goals. First, the system must protect those fearing persecution or serious danger (civil conflict, serious human rights violations). Second, to maintain public support for that first goal, the asylum system must deter abuse.

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1. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention].

How have the asylum changes put into place this decade affected these dual goals? Critics argue that changes such as safe third country and expedited processing have seriously restricted the access of bona fide Convention refugees to asylum. Many governments, on the other hand, believe that the new controls enable them to deter significant abuse.

The Workshop on Refugee and Asylum Policy in Practice in Europe and North America was organized to facilitate a transatlantic dialogue aimed at understanding just how well these asylum systems are balancing the dual goals. The Workshop was convened by the Institute for the Study of International Migration (ISIM) of Georgetown University and the Center for the Study of Immigration, Integration and Citizenship Policies (CEPIC) of the *Centre Nationale de Recherche Scientifique*, with the support of the German Marshall Fund of the United States. It was held on July 1-3, 1999, at Oxford University.

The workshop examined key issues as to the workings of the U.S. and European asylum systems: decision making on claims, deterrence of abuse, independent review, return of rejected asylum seekers, scope of the refugee concept, social rights and employment, international cooperation, and data and evaluation. In this opening paper, we explain the significance of these issues and raise central questions about them.

II. IMPROVING DECISION-MAKING

Governments and NGOs have pursued four main avenues to improve decision-making in asylum systems: developing the expertise of the adjudicators; establishing accurate information on human rights conditions in most of the world's countries; building the capacity to ensure that asylum seekers are represented by competent counsel or other legal representatives; and issuing guidelines to help adjudicators understand and approach certain categories of asylum seekers, such as children.

A. *Professionalization of the Decision-makers*

For most of the advanced Western nations, signing the 1951 Refugee Convention² or 1967 Protocol³ did not immediately translate into an infrastructure blessed with well trained, capable decision-makers, an efficient yet fair process, and resources adequate for the challenges of asylum. Most countries had their migration or border personnel in place to handle cross-border movements. The idea of creating a specialized corps of professional asylum officers came later.

The United Nations High Commissioner for Refugees Executive Committee noted in 1977 that only a limited number of parties to the Convention or

2. *Id.*

3. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

Protocol had established procedures for the formal determination of refugee status.⁴ The Executive Committee recommended two basic requirements related to decision-makers. First, the Executive Committee called for the regular immigration or border control authorities to refer asylum seekers to higher-level decision-makers: “the competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory . . . should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.”⁵ Second, decision-making in the first instance should reside with “a clearly identified authority wherever possible a single central authority.”⁶

Governments have developed their adjudicatory staff in three ways: recruitment, training, and specialization. Recruitment has been used in two different ways. First, governments have used recruitment opportunities to hire adjudicators with either appropriate educational backgrounds or work experience in the field. For example, in developing the U.S. Asylum Officer Corps in the early 1990s, the head of that U.S. office implemented a nationwide recruitment drive.⁷

This type of recruitment often occurs as countries shift the asylum function from border guards and immigration officers to an independent, dedicated asylum corps. Such special asylum agencies exist in several of the major European receiving countries: Austria, Belgium, Germany, France, Italy, and Switzerland.⁸ The French refugee office was one of the first such agencies, established in the early 1950s.⁹ The Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et Apatrides*) (OFPRA) is attached to the Minister of Foreign Affairs, who appoints the director for a three-year term. The director is a senior official with at least five years of experience in charge of an embassy or a consulate general.¹⁰

Governments have also recruited significant numbers of adjudicators in order to deal with ever increasing case loads. In 1989, for example, the volume of applications prompted the French government to increase the staff to some 400. Together with computerization, the additional staff resources enabled OFPRA to issue decisions in months, rather than years, thereby eliminating its refugee processing backlog.¹¹ Other European governments also staffed their asylum offices with considerable numbers of adjudicators and administrative staff. In 1992, Germany’s asylum staff numbered 3500,

4. See *Executive Committee Conclusion No. 8: Determination of Refugee Status*, U.N. High Comm’r for Refugees (UNHCR) 28th Sess., at 6 (1977).

5. *Id.*

6. *Id.* at 17.

7. Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT’L J. REFUGEE L. 453, 467 (1992).

8. See REBECCA WALLACE, *REFUGEES AND ASYLUM: A COMMUNITY PERSPECTIVE* 7 (1996).

9. See *id.* at 84 n.4.

10. See Christopher Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT’L L. 235, 290 (1983)

11. See WALLACE, *supra* note 8, at 84-85 n.4.

Sweden's was 800, and the Netherlands' was 750.¹² When the United States first created an asylum corps in April 1991, it only hired 82 officers. Another 68 asylum officers entered service in March 1992, but it was not until 1994 that Congress appropriated funding for more than 150 additional officers.¹³

Training of asylum adjudicators occurs in two different ways: an initial course and regular in-service training. Upon recruitment, for example, U.S. adjudicators attend a five-week Asylum Officer Basic Training Course.¹⁴ The intensive program focuses on international human rights law, U.S. immigration law, decision writing, interviewing techniques, and country conditions research. In addition to government experts, trainers include experts from UNHCR and NGOs. Each of the seven Asylum Offices in the United States has a Quality Assurance Training officer who addresses the in-service training needs of particular offices, such as newly evolving events in a particular country, or cultural information regarding a particular ethnic group more frequently applying for asylum.¹⁵ Finally, as new legislation is passed and guidelines are issued, asylum officers receive training on how to implement these changes.¹⁶

Training continues to be considered a crucial issue. Only recently, the European Council on Refugees and Exiles (ECRE) issued procedural guidelines for refugee status determinations. ECRE recommends that all officials who come in contact with asylum seekers receive appropriate training necessary to recognize an asylum claim and refer the claim to the competent authority.¹⁷ With regard to decision-makers, training in asylum law and relevant international human rights law should be coupled with training on country condition information, cultural awareness, and sensitive issues such as gender, torture, post-traumatic symptoms, and child development.¹⁸ ECRE also emphasizes the need for training on interview techniques, working with interpreters, and analytical decision-making techniques.¹⁹ Finally, ECRE recommends that experts from UNHCR and NGOs should be consulted and invited to participate in training programs, and that all training programs should be evaluated.²⁰

Finally, specialization is another mechanism governments have used to improve decision-making. Because OFPRA is located in one central office (in Paris), officers specialize and acquire considerable expertise in particular

12. See Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, in IMMIGRATION LAW: UNITED STATES AND INTERNATIONAL PERSPECTIVES ON ASYLUM AND REFUGEE STATUS 43, 50 n.45 (AM. U. J. INT'L L. & POL'Y & LOY. L.A. INT'L & COMP. L.J. eds., 1994).

13. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM REFORM: 5 YEARS LATER 9 (2000) [hereinafter ASYLUM REFORM].

14. See *id.* at 10.

15. See *id.* at 10-11.

16. See *id.* at 11.

17. See EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE), GUIDELINES ON FAIR AND EFFICIENT PROCEDURES FOR DETERMINING REFUGEE STATUS ¶ 135 (1999).

18. See *id.* ¶ 136.

19. See *id.* ¶¶ 137, 140.

20. See *id.* ¶ 142.

regions or countries of origin.²¹ OFPRA officers review and propose a decision on each application. Decisions proposed by officers are subject to approval by the head of the particular geographic region and to review by the director.²² For many years, decisions were normally taken based solely on the written documents filed by the asylum seeker. Since 1993, OFPRA has been holding interviews in the majority of cases.²³

Many Western nations have professionalized their refugee determination system. It would be useful to understand what approaches to professionalization have worked best and what training models have been successful. This information would be helpful not only to nations with developed asylum systems, but also to those governments now building new systems.

B. Documentation Centers

One of the key human rights developments in the second half of the twentieth century has been the documentation of conditions in most of the world's countries. These records of human rights violations have become a major source of information for asylum decision-makers where available and used.

In 1992, UNHCR's Centre for Documentation and Research (CDR) responded to an increasing need for current, reliable country-of-origin information by collecting a full range of sources on country conditions and human rights. In 1996, CDR published the first edition of *Refworld*, a collection of databases, including databases on country conditions. The databases come from international, governmental, and non-governmental sources. CDR established information exchange agreements with documentation centers in Canada, Switzerland, and the United States, as well as with such NGOs as Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, and the U.S. Committee for Refugees. *Refworld* is available on the world wide web and on CD-ROM.²⁴

Several states have developed sophisticated information centers. In Canada, for example, the Immigration and Refugee Board's (IRB) Research Directorate provides adjudicators as well as the public with current and reliable information related to human rights and refugee and migration issues. Information is gathered from a variety of sources, including national and international governmental and non-governmental organizations, human rights monitors, academics, publications, and on-line news services. The Research Directorate uses multiple sourcing to ensure that the information is accurate, balanced and corroborated, and that the most comprehensive picture possible is given of conditions in the countries of origin of asylum

21. See *id.*

22. See Avery, *supra* note 10, at 290-91.

23. See HELENE LAMBERT, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 29 (1995).

24. See UNHCR, *Centre for Documentation and Research: A Brief History*, REFORLD (7th ed. CD-ROM 1999); UNHCR, *Refworld: Country Information*, REFORLD (7th ed. CD-ROM 1999).

seekers. The primary role of the Directorate is to meet the information needs of the Convention Refugee Determination division of the IRB. The Research Directorate's products and services are made available to the general public through the Board's Resource Centre at Headquarters and four public access Regional Documentation Centres.²⁵

In the United States, the 1990 reforms established a Resource Information Center (RIC) to provide information on human rights conditions in countries throughout the world. The RIC mainly assists the 300 asylum officers who make domestic asylum decisions as well as the immigration and asylum officers determining refugee status overseas for the U.S. resettlement program. In response to requests from the field, RIC produces information packets and reports on developments abroad, such as the Kosovo crisis, the impact of Hurricane Mitch on Central America, the Shining Path in Peru, and the re-emergence of social cleansing death squads in El Salvador. In addition, RIC produces the biweekly News Summary for Asylum Adjudicators, a compilation of news articles that address country, and topical information of relevance to the asylum program.²⁶ RIC-produced documentation is available to the public through two sources: the Human Rights Documentation Exchange in Austin, Texas, and UNHCR's *Refworld* database.

The U.S. Department of State provides an additional source of country information through its Country Reports on Human Rights Practices. Mandated by Congress,²⁷ these reports are issued annually and cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights.²⁸ Information for these reports is gathered throughout the year from a variety of sources across the political spectrum, including government officials, jurists, military sources, journalists, human rights monitors, academics, and labor activists. The annual report contains information on almost 200 countries and is included in UNHCR's *Refworld*.

Another database included in *Refworld* is that developed by the Federal Office for Refugees of Switzerland.²⁹ The Country Information Sheets are compiled in German and French by the Country of Origin Information Desk of the Federal Office for Refugees. The countries described are selected according to the number of asylum applications which have already been or are expected to be submitted by nationals of those countries.

One of the pioneer centers in Europe is the Refugee Documentation Center (*Zentrale Dokumentationsstelle der freien Wohlfahrtspflege für Flüchtlinge*)

25. See Immigration and Refugee Board of Canada, *The Research Program of the Immigration and Refugee Board* (visited Mar. 1, 2000) <http://www.cisr.gc.ca/research/about/index_e.stm>.

26. See ASYLUM REFORM, *supra* note 13, at 11-12.

27. The reports are mandated by sections 116(d)(1) and 502B(b) of the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151n(d)(1), 2304(b) (Supp. IV 1998), and section 504 of the Trade Act of 1974, 19 U.S.C. § 2464 (Supp. IV 1998).

28. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/811 (1948).

29. UNHCR, *Switzerland*, REFORLD (7th ed. CD-ROM 1999).

(ZDWF), an independent center founded in 1979 and located in Bonn.³⁰ The ZDWF organizes and disseminates human rights information from governmental and non-governmental sources, both national and international. The ZDWF service is used by government officials, courts, and various organizations in Germany and other countries. Until quite recently, funding came from the Ministry of Youth, Welfare, and Health, as well as from various volunteer agencies in Germany.³¹ The Ministry experienced a serious shortfall in 1998, eliminating all government funding to ZDWF.³²

With respect to these documentation resources, several issues need to be assessed: whether and how these documentation centers have improved decision-making; the credibility and utility of the information; and whether and to what extent those making asylum determinations use the information in a systematic fashion.

C. Representation

The asylum process in any state is very difficult to navigate for the untrained, let alone for individuals who often do not speak the language of the adjudicators and come from very different legal cultures. Moreover, the law itself, with developments from gender-related claims to the Torture Convention,³³ is complex. Expertise on human rights conditions in many of the world's countries is needed. In the United States, for example, claims are made annually bearing on conditions in some 175 countries.

The data shows just how significant representation is, for example, in the U.S. system. First, represented claims are much more likely to be approved than pro se claims. In FY 1999, the immigration courts granted asylum claims four to six times as often where the claimant was represented.³⁴ Second, more than eighty percent of those who fail to appear at their hearings lack representation.³⁵

Many adjudicators and practitioners believe that when aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system. Issues presented for decision by the immigration courts and on appeal are more readily narrowed. Simply put, these observers argue, when aliens in proceedings or on appeal have legal representation, the system works better.

30. See Avery, *supra* note 10, at 283. The current name of the organization is Informationsverbund Asyl / ZDWF e.V. See *Informationsverbund Asyl* (visited May 21, 2000) <<http://www.asyl.net>>.

31. See Avery, *supra* note 10, at 284.

32. See *Deutsches Haus*, JUNGLE WORLD (Dec. 9, 1998) <http://www.nadir.org/nadir/periodika/jungle_world/_98/50/09b.htm>.

33. United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment, GA Res. 39/46, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

34. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT ASYLUM DECISIONS: FY 1999 (1999).

35. *Id.*

In U.S. law, an alien placed in proceedings is guaranteed the privilege of being represented by an attorney or other qualified legal representative, but at no expense to the government.³⁶ Senator Moynihan introduced a bill in January 1999 that would pilot test a court-appointed counsel system for those in removal proceedings.³⁷ In arguing for the pilot, the Senator noted that the current system has created great expense and delay for the federal government because cases are often continued for lengthy periods while aliens try to find pro bono counsel or counsel they can afford.³⁸ The bill calls for a study of the impact of representation at government expense on overall DOJ costs in order to determine whether the program should be extended nationwide.

While the European systems also generally guarantee a right to legal counsel at the claimant's expense,³⁹ several states appoint lawyers to take up cases at government expense. The Danish Refugee Appeals Board, for example, does so.⁴⁰ Legal aid has been available in a similar fashion at the Refugee Appeals Commission in France since 1991.⁴¹ In the Netherlands and Sweden, applicants are entitled to legal aid in the first instance.⁴² Where legal aid is provided, however, free legal advice may be limited or the amount of financial legal aid inadequate.⁴³ The European Council on Refugees and Exiles, an umbrella organization of refugee NGOs, advocates that legal aid payments should reflect the time and disbursements required for competent representation and be administered by a body independent of the executive arm of government.⁴⁴

Despite the suggestive U.S. data noted above, we do not have a systematic evaluation of the effect of representation on the asylum system. Such an evaluation should be able to tell us whether and to what extent representation facilitates the recognition of bona fide refugees, filters out weak cases, and results in a more efficient and effective process for the government.

D. Guidelines

The changing nature of forced migrants has made it important for governments to provide guidance to asylum adjudicators on new developments. Two particular developments have attracted both international and national governmental attention.

36. See Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (1996).

37. S. 173, 106th Cong. § 1 (1999).

38. 145 CONG. REC. S603 (1999) (statement of Senator Moynihan).

39. See Pieter Boeles & Ashley Terlouw, *Minimum Guarantees for Asylum Procedures*, 9 INT'L J. REFUGEE L. 472, 481 (1997) (citing paragraph 13 of the EU Justice and Home Affairs Council's "Resolution on minimum guarantees for asylum procedures" adopted in June 1995).

40. See UNHCR REGIONAL BUREAU FOR EUROPE, LEGAL FACT SHEETS ON ASYLUM PROCEDURES IN WESTERN EUROPE 9 (1993).

41. See *id.* at 15.

42. See *id.* at 32, 44.

43. See EUROPEAN COUNCIL ON REFUGEES AND EXILES, *supra* note 14, ¶ 134.

44. See *id.* ¶ 148.

1. *Gender Guidelines*

Gender-based claims have been challenging adjudicators in the 1990s to determine the extent to which various forms of harm suffered by women are covered by the refugee definition. Gender-based fears of persecution range from being stoned or burnt to death for not bringing enough dowry or for choosing one's own husband to female genital mutilation. Decision-makers have frequently encountered claims based on rape by military or paramilitary personnel, often times outside the context of ethnic cleansing.

The European Parliament, followed by UNHCR in Executive Committee Conclusion No. 39, has urged the recognition as a particular social group "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live."⁴⁵ In October 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence.⁴⁶ This recognizes that asylum seekers who have suffered sexual violence should be treated with particular sensitivity, and recommends the establishment of training programs designed to ensure that those involved in the refugee status determination process are adequately sensitized to issues of gender and culture.

In July 1991, UNHCR issued "Guidelines on the Protection of Refugee Women."⁴⁷ While these guidelines focused especially on protection issues for refugee women in camps, they also addressed gender-related persecution and recommended procedures to make the refugee adjudication process more accessible to women. With respect to grounds for establishing refugee status, the guidelines address three special issues of concern: the transgression of social mores and persecution on account of social group; gender discrimination; and attacks on women by military personnel.⁴⁸ As far as access to a hearing is concerned, the guidelines discuss how women who arrive as part of a family unit are sometimes not interviewed about their experiences, even where they have been the targets of persecution.⁴⁹ Finally, the guidelines focus on the special problems that women face in telling adjudicators about various forms of sexual assault they may have suffered.⁵⁰

Both Canada and the United States have adopted official guidelines on the analysis of gender-related claims to asylum. The Canadian guidelines⁵¹ were

45. *Executive Committee Conclusion No. 39: Refugee Women and International Protection*, UNHCR, 36th Sess. (1985).

46. *See Executive Committee Conclusion No. 73: Refugee Protection and Sexual Violence*, UNHCR, 44th Sess. (1993).

47. *Information Note on UNHCR's Guidelines on the Protection of Refugee Women*, UNHCR Sub-Comm. of the Whole on Int'l. Protection, 42nd Sess., U.N. Doc. EC/SCP/67 (1991). Susan Martin prepared the guidelines as a consultant for UNHCR.

48. *See id.* ¶¶ 54-56.

49. *See id.* ¶ 57.

50. *See id.* ¶¶ 58-60.

51. IMMIGRATION AND REFUGEE BOARD (IRB), GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION 1 (1993).

promulgated in 1993 by the IRB, Canada's administrative adjudicatory body. The U.S. guidelines⁵² followed in 1995 and were produced by the Office of International Affairs of the Immigration and Naturalization Service as a memorandum for distribution to asylum officers. Both efforts were developed collaboratively after consultations with interested governmental and non-governmental experts.⁵³

The Canadian guidelines provide an analysis of four issues: (1) To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition? (2) Under what circumstances does sexual violence, or a threat thereof, or other prejudicial treatment towards women constitute persecution? (3) What are the key evidentiary elements which decision-makers have to look to when considering a gender-related claim? (4) What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about? The Chairman of the IRB issued an update of the guidelines in 1996.⁵⁴

The U.S. guidelines examine the elements of the refugee definition with respect to women's claims and discuss relevant case law. With respect to the seriousness of the harm, the guidelines address sexual violence and violation of fundamental beliefs as persecution. As U.S. law focuses special attention on the "on account of" requirement, the guidelines consider actual or imputed political opinion as well as membership in a particular social group, defined by gender and by family membership. Finally, with regard to the role of government, the memorandum looks at the government as persecutor or as unable or unwilling to control the persecutor and the availability of protection elsewhere in the country.

2. *Guidelines on Children's Asylum Claims*

The international community has recognized that refugee children have different requirements from adult refugees when they are seeking refugee status. In 1996, Canada established special procedures to make the asylum process sensitive to the unique needs of children. UNHCR published guidelines on unaccompanied children seeking asylum in 1997, and the United States issued guidelines for children's asylum claims on Human Rights Day in 1998.

In issuing *Child Refugee Claimants: Procedural and Evidentiary Issues*,⁵⁵ the Canadian IRB became the first government agency adjudicating asylum claims to address the ways in which children refugees are a particularly vulnerable group. The guidelines acknowledge that children may not be able

52. Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* 3 (1995).

53. *See id.*

54. IRB, *WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION UPDATE* (1996).

55. IRB, *GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: CHILD REFUGEE CLAIMANTS: PROCEDURAL AND EVIDENTIARY ISSUES 2* (1996).

to articulate their claims to refugee status in the same way as adults, they establish special procedures for adjudicating children's claims, and they adopt the best interests of the child as the relevant standard for assessing a child's claim. Specifically, the guidelines address the designation of a representative and evidentiary issues. The IRB developed the guidelines after consultation with international, national, local, and legal organizations involved with refugee children.

In 1997, UNHCR published *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*.⁵⁶ The purpose of the guidelines was threefold: to increase awareness of the special needs of unaccompanied children and the rights reflected in the Convention on the Rights of the Child;⁵⁷ to highlight the importance of a comprehensive approach to child refugee issues; and to stimulate discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are being met.

Both the Canadian and UNHCR guidelines influenced the development of the U.S. guidelines. Like their Canadian counterpart, the U.S. guidelines developed out of a collaborative effort after consultations with interested governmental and NGO experts, as well as with UNHCR. The INS guidelines recognize that "human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution."⁵⁸ Special attention is paid to "child soldiers," children under the age of fifteen who are recruited into military operations. The guidelines also recognize that children experience persecution differently from adults and have special needs when it comes to presenting testimony at the asylum interview. For years, States have been criticized for running asylum systems where one size fits all.

The INS guidelines lay out procedural, evidentiary and legal standards that take into account the limited capacity of a child to present an asylum claim, while at the same time ensuring that the child's voice is heard throughout the process. All asylum officers will receive training geared to help them use the new guidelines and develop their awareness of children's and cultural issues.⁵⁹ The INS Resource Information Center (RIC) will also issue country conditions information to inform asylum officers of the legal and cultural situation of children in their countries of origin, on the incidence of exploitation and other victimization, and on the adequacy of state protection afforded to children.⁶⁰

56. UNHCR, *GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM* (1997).

57. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989).

58. Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, INS, *Guidelines For Children's Asylum Claims* 1 (Dec. 10, 1998) (on file with the authors).

59. *See id.* at 6.

60. *See id.* at 16.

To ensure that the child's best interests are met, the guidelines allow a trusted adult to accompany and participate with the child at the asylum interview.⁶¹ The guardian's role is to bridge the gap between the child's culture and the asylum interview, to assist the child psychologically, and to serve as a source of comfort and trust for the child. The guidelines encourage the asylum officer to allow the trusted adult to help the child explain his or her claim, and, at the same time, ensure that the child has the opportunity to express him or herself. While the INS guidelines do not mandate the appointment of a trusted adult, experts believe that the guardian role is essential to make the asylum process work for the child. The Women's Commission for Refugee Women and Children is asking the INS to develop a corps of professionals with child welfare experience and familiarity with children asylum seekers' cultures, to be lodged outside the INS with an appropriate NGO or in another Justice Department branch.

The Executive Office for Immigration Review has not yet adapted the guidelines to its own adjudication process, a potential problem, since many children's cases are decided by immigration judges. Also, there are no comparable guidelines for INS officers involved in other activities, such as apprehension, investigations, detention, and removal, though such officers have contact with children.

With regard to both the gender and children's guidelines, it would be worthwhile to understand what effect these international and national guidelines have had on decision-making. To the extent that these guidelines could be implemented more effectively, we should try to understand how that can be accomplished. With respect to the children's guidelines, for example, it would be useful to consider making the appointment of a guardian mandatory and establishing a professional corps of such guardians, as proposed by the Women's Commission. It would also be worth understanding whether the immigration court, which decides the vast majority of asylum claims, should adapt the guidelines to the hearing process.

III. DETERRING ABUSE

Most of the major asylum reforms in Western states have aimed at deterring abuse. Many of these reforms have been quite controversial, from expedited procedures to lengthy detention and safe third country policies.

A. *Making the Regular Asylum System More Efficient*

All the major receiving countries found themselves unprepared for large numbers of asylum seekers in the 1980s. Without significant commitments of staff and computer resources, the Western nations faced lengthy processing times and large backlogs. These problems encouraged abuse and left the public with the sense that the government was failing to deal with a major

61. See *id.* at 5.

flow of asylum seekers. To address these problems, governments streamlined processing and invested extensively in staff and computerization.

The first U.S. overhaul of the asylum system in 1990 established a relatively small staff of asylum officers, despite the fact that this corps, described above, inherited a considerable and rapidly growing backlog in applications, dominated by Central Americans. On October 1, 1990, the INS had a backlog of approximately 90,000 asylum claims.⁶² The limited resources of a small corps (about seventy-five to start) was simply not enough to handle a burgeoning class of Central American asylum seekers, as well as an emergency in the Caribbean (36,000 Haitian asylum seekers brought to Guantanamo Bay Naval Base in 1992),⁶³ and the processing of employment authorization requests for asylum seekers.⁶⁴ By December 1994, when the Department of Justice issued a final rule to implement a second set of reforms,⁶⁵ the backlog amounted to over 425,000 cases.⁶⁶

The second reforms resulted in three important sets of changes. The first involved the process itself. Previously, the asylum officer issued grants and denials with explanations as to the rationale of the decision. Referral of the denials to Immigration Court with a formal deportation charge was discretionary. Under the 1995 reforms,⁶⁷ the Asylum Corps role was considerably streamlined. For those applicants who entered the United States illegally or were otherwise out of status, the asylum officer could approve the claim punctually or promptly refer it to an immigration judge for a final decision in the course of what are now called "removal" hearings. The asylum officer and immigration judge had to hear and decide claims within 180 days from the date of filing.

The second major change de-linked work authorization from the asylum application. Work permits could not be issued until the asylum officer or immigration judge granted the claim, unless they were not able to make that decision within the 180 day period. Finally, the Clinton Administration proposed doubling the number of asylum officers and immigration judges.

European governments also invested significantly in staff, streamlining, and computerization in the 1990s. According to one study, most countries decreased the time required to process asylum applications in the first instance from about ten months in 1989 to seven to eight months by 1994, but the results varied from one month in the Netherlands and Austria to twelve months in Germany.⁶⁸ Of course, in 1989, it took twenty-four months for the first decision in Germany. The United Kingdom's Asylum Division of the

62. See 59 Fed. Reg. 14,780 (1994). A single claim often includes the principal applicant as well as other family members.

63. See U.S. COMM. FOR REFUGEES, 1993 WORLD REFUGEE SURVEY 146.

64. See Beyer, *supra* note 12, at 50.

65. 59 Fed. Reg. 62,284 (1994).

66. See 71 INTERPRETER RELEASES 1578 (1994).

67. 59 Fed. Reg. 62,284 (1994).

68. See INTERNATIONAL CTR. FOR MIGRATION POLICY DEV., THE KEY TO EUROPEAN COMPARATIVE ANALYSIS OF ENTRY AND ASYLUM POLICIES IN WESTERN COUNTRIES 78 (1994).

Home Office increased staff (including administrative personnel) from 120 in 1991 to 723 in 1995.⁶⁹ Despite these increases, the U.K. adjudicators are facing considerable pressures from a rapid and significant flow of asylum seekers in 1999.⁷⁰

In 1998, some 366,000 asylum seekers lodged applications in Europe. In FY 1998, about 36,000 asylum claims were filed in the U.S. (where each claim may include more than one person).

These reforms should be evaluated to understand whether these changes have resulted in systems with limited abuse that still ensure the recognition of bona fide refugees. It would be particularly helpful to know what systems best accomplish these goals. We should understand why some systems result in significant numbers of asylum seekers who do not appear at their hearings. We should also examine the effects of system incentives to show up for hearings. For example, the Austrian model makes it possible to cut off social assistance to those who do not appear. In the United States, adjudicators issue final orders of removal to claimants who received notice of their asylum hearing but do not appear.

B. *Expedited Processing*

The European nations were the first to create rapid asylum procedures. These were aimed particularly at identifying “manifestly unfounded” applications at the airports and other ports of entry. By 1994, rapid procedures were practiced in the major European countries.⁷¹

Applicants arriving from “safe states” (discussed more fully below) are screened out of the regular asylum process and into an accelerated determination system.⁷² In Germany, for example, the asylum seeker in this situation has forty-eight hours to apply.⁷³ Rejected asylum seekers are given three days to file an appeal with an administrative court, but the courts are instructed to grant a stay of deportation only in cases where there is a serious doubt as to the legality of the measure. Following a negative decision, applicants are to be swiftly deported back to the “safe states.” In the United Kingdom, asylees from “safe” countries are returned within twenty-four hours.⁷⁴ In the Czech Republic, asylum seekers are required to make an application within forty-eight hours of entering the country.⁷⁵

69. See Colin Harvey, *Restructuring Asylum: Recent Trends in United Kingdom Asylum Law and Policy*, 9 INT'L J. REFUGEE L. 60, 63 (1997).

70. See Martin Hickman, *Over Ambitious Immigration Project Criticised as Backlog Mounts*, Press Assoc. News, Jan. 26, 2000 (regarding streamlined procedures established to handle a backlog of over 100,000 cases); Jo Butler, *Number of Asylum Seekers at Record High*, Press Assoc. News, Jan. 25, 2000 (noting that over 71,000 applications were received in the U.K. in 1999, compared to 46,000 in 1998).

71. See WALLACE, *supra* note 8, at 7; see also LAMBERT, *supra* note 23, at 21-27, 34-38 (describing expedited asylum procedures in Belgium, Germany, and Switzerland)

72. See Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees From Safe Countries?*, 26 GA. J. INT'L & COMP. L. 375, 391 (1997).

73. See *id.*

74. See *id.* at 392.

75. See *id.*

In Germany, the airport procedure is completed within three days.⁷⁶ Very few asylum seekers are successful with this procedure. Nor are many successful when applying at the border, particularly because of the safe third country policy. Yet 99,000 asylum seekers lodged applications in Germany in 1998.⁷⁷ In many cases, apparently, applicants tell the German authorities that they do not know what route they took to reach the interior of Germany.

In the United States, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁷⁸ created an expedited removal procedure upon entry. The 1996 legislation mandates the expedited removal of individuals who are inadmissible because of certain forms of fraud, misrepresentation or faulty documentation. Under the new procedures, individuals who request asylum must demonstrate that they have a credible fear of persecution in order to continue with their asylum application.⁷⁹ The law anticipates that the “credible fear” determination will be made swiftly and requires that the immigration judge’s review of that determination be completed in no more than one week.⁸⁰

The “credible fear” provisions were introduced in response to what appeared to be abuse of the asylum system at airports of entry by individuals who used fraudulent documents or destroyed the documents they had used to board flights to the United States. During 1995 and 1996, however, significant steps, such as sustained detention of such asylum seekers, were taken to control this abuse of the asylum process. In FY 1996, about 3600 individuals requested asylum at ports of entry.⁸¹

A 1998 study by the General Accounting Office (GAO) reported that the number of asylum seekers subject to expedited removal remained small (about 1400 in the first seven months of operation).⁸² Most importantly, the GAO study showed that eighty-three percent of asylum seekers demonstrated a credible fear of persecution and were allowed to proceed through the normal process in immigration court. The new gatekeeping process thus sends almost all asylum seekers through to regular asylum hearings.

It would be very worthwhile understanding whether these expedited procedures deter “manifestly unfounded” claims and whether they keep out Convention refugees and others deserving of protection. An evaluation of

76. Wolfgang Bosswick, *Asylum Policy in Germany*, in *EXCLUSION AND INCLUSION OF REFUGEES IN CONTEMPORARY EUROPE 69-70* (Philip Muus ed., 1997).

77. UNHCR, *Refugees and Others of Concern to UNHCR—1998 Statistical Overview, Global Asylum Applications and refugee status determination, Table IV.1* (visited May 18, 2000) <http://www.unhcr.ch/statist/98oview/tab4_1.htm>.

78. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

79. See INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (Supp. IV 1998).

80. See INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. IV 1998).

81. See U.S. COMM’N ON IMMIGRATION REFORM, 1997 REFUGEE POLICY REPORT TO CONGRESS, U.S. REFUGEE POLICY: TAKING LEADERSHIP 31 (1997).

82. GENERAL ACCOUNTING OFFICE, REPORT NO. GAO/GGD-98-81, *ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES* 86 (1998).

their cost effectiveness would be useful as well, particularly where most of those screened are placed in regular asylum hearings.

C. *Detention*

In the asylum context, states use detention for two purposes: deterrence and compliance. With regard to deterrence, officials see detention as a serious disincentive to economic migrants who apply for asylum in order to gain entry or remain in a Western nation. Compliance is usually thought of in connection with the legal procedures of the asylum and removal systems: appearing at hearings, and if denied, submitting to actual removal.

Just how detention should be used to accomplish these goals is the major issue. Since the purpose of deterrence is to dissuade economic migrants from abusing the asylum system, we should expect the detention policies to apply to such migrants but not to asylum seekers with reasonable claims.

The role of detention with regard to compliance is more complex. Here there may be a range of policies that would be effective in ensuring appearance at hearings, for example. Detention may be appropriate for those who do not have good claims or are deemed security or public safety risks. For asylum seekers with legitimate claims, supervised release, an approach more in keeping with the humanitarian nature of asylum, may result in compliance at a much lower cost than detention. Supervised release also allows governments to use detention space more efficiently.

What is occurring in practice? With respect to the detention of asylum seekers who make their claims at ports of entry, the 1996 U.S. legislation generally requires detention throughout the initial stages of consideration by the inspector and asylum officer.⁸³ The implementing regulations permit release on parole, at the discretion of the District Director, of those who meet expedited removal's "credible fear" standard.⁸⁴ Claimants thus can be released as they prepare for and undergo the full asylum hearing before an immigration judge. In practice, some districts rarely release individuals who have been found to have a credible fear, whereas others are more likely to do so based on public safety and likelihood of absconding.⁸⁵

With the introduction of expedited procedures for "manifestly unfounded" and "safe third country" cases in Europe, there has been a rise in the number of asylum seekers detained while awaiting a decision on their admissibility to the determination procedures and/or to the territory of the host country concerned. As in the United States, detention is not usually a measure applied to in-country applicants, but is largely reserved for border applicants in countries such as Austria, Belgium, Germany and the United

83. See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. IV 1998).

84. 62 Fed. Reg. 10,312, 10,320 (1997).

85. KAREN MUSALO, ET AL. THE EXPEDITED REMOVAL STUDY: REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL 35-36, 141(1999).

Kingdom. In Austria and Germany, for example, approximately ninety percent of asylum seekers enter by land from neighboring states, all of which are designated "safe countries."⁸⁶ Pre-admission detention often focuses on the need, due to a lack of documentation, to establish the asylum seeker's identity or travel route.

With the exception of the United Kingdom and some parts of Austria, detention during the full determination procedure (after a claim has been determined to have some foundation and prior to the first rejection) is rare.⁸⁷ With respect to pre-deportation detention, western European countries generally follow one of two models. Some detain individuals when the claim is rejected in the first instance and while it is on appeal. They do so on the suspicion that the rejected asylum seeker will abscond. Other countries issue a compulsory exit order or pre-deportation reporting requirements and then detain if these are disregarded.⁸⁸ The United States issues a "bag and baggage" letter, commonly known as a "run" letter, to all individuals with final removal orders. The INS does not generally make any effort to locate and detain the ninety-five percent who do not comply with this exit order.⁸⁹

Conditions of detention have been widely criticized on both sides of the Atlantic. Problems include mixing of asylum seekers with criminal detainees, mixing children with adults, lack of access to relatives and counsel, and substandard living conditions. Comprehensive standards regarding the treatment of asylum seekers in detention do not exist.

The demand for and inefficient use of detention space led the INS to contract with the Vera Institute of Justice in late 1996 to implement a demonstration project aimed at increasing appearances in immigration court and a more efficient use of detention. Vera is testing a community supervision program to assess the impact of supervision on appearance rates and compliance with the removal process, as well as the cost-effectiveness of such a program. Their research report should be issued towards the end of 1999, but preliminary data suggest that the detention of those properly screened for supervision is not necessary to ensure compliance with the removal process when appropriate supervision is available.

It would be helpful to know whether detention deters abuse. With that goal in mind, we should also learn what practices, if any, ensure that those deserving protection are not detained. An evaluation of the best alternatives to detention is sorely needed.

86. See Jane Hughes & Ophelia Field, *Recent Trends in the Detention of Asylum Seekers in Western Europe*, in DETENTION OF ASYLUM SEEKERS IN EUROPE: ANALYSIS AND PERSPECTIVES 5, 17 (Jane Hughes & Fabrice Liebaut eds., 1998).

87. See *id.* at 22-23.

88. See *id.* at 23-24.

89. See U.S. COMM'N ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 131 (1997).

D. *Safe Third Country and Safe Country of Origin*

Most advanced Western nations have adopted the principle in their asylum laws that the first safe haven country to which a refugee flees should be the one in which he or she seeks asylum. This constrains the ability of asylum seekers to choose their country of asylum application.

In Europe, arrangements are designed to prevent asylum seekers from "shopping" for asylum: being denied in one place, then trying again somewhere else. The Dublin Convention⁹⁰ and Schengen Implementation Treaty⁹¹ are two such agreements that identify the country responsible for making the one and only asylum determination on behalf of all signatories, a determination that all other signatories then pledge to respect.

Many refugee advocates recommend a narrowing of any constraints embodied in such multilateral agreements to limiting an applicant's asylum status determination to the decision of the country of first *application*, not to the country of first *arrival*. They note that asylum seekers may have relatives or other good reasons or equities to apply in a particular country. The Dublin Convention sets out several criteria for determining which state is responsible for examining asylum applications and, importantly, prioritizes those criteria. The order of responsibility is set out as follows:

1. The state where the applicant has a close family member with recognized refugee status;
2. The state issuing a residence permit or entry visa, or if more than one, the state issuing the permit or visa with the longest validity or the latest expiration date.
3. If a transit visa was issued, the responsibility rests with either the destination state or the state where the application is lodged, depending on particular circumstances.
4. In cases of demonstrable illegal entry, the first entry state will usually be responsible unless an asylum application is made in another state where the applicant stayed for longer than six months.
5. In cases of legal entry, the state that waived the requirement for a visa.
6. If none of the above criteria apply, the state where the application is lodged.

The asylum laws of Germany and Finland explicitly name the countries considered as safe third countries.⁹² For Germany, all EU and EFTA states, as

90. Convention Determining the State Responsible for Examining Applications for Asylum Requests Lodged in one of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (1991).

91. Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84.

92. See § 26a Asylum Procedure Act of June 26, 1992, v. 1.7.1992 (BGBl. I S.1430) (Annex I) (Germany); Nina Lassen & Jane Hughes eds., Danish Refugee Council, *Safe Third Country Policies in*

well as Poland and the Czech Republic, are named.⁹³ Most states provide general criteria for assessing whether a third country is to be considered as a safe country or not. Austrian law states that all countries which apply the Refugee Convention are to be considered safe third countries.⁹⁴

The issue that the safe third country principle has raised in Europe is whether the countries to the immediate east of the EU provide for full and fair asylum determinations. With a broader law such as the Austrian one, that issue extends further. Over 130 nations have signed the Convention or the Protocol, including Rwanda and Yugoslavia.

In the United States, the 1995 administrative reforms granted the Attorney General the discretion to deny asylum if the claimant can be returned to a country: (1) through which he traveled en route to the United States; (2) in which he would have access to a full and fair procedure for determining his claim; (3) in which the alien would not face harm or persecution; and (4) which has a bilateral or multilateral arrangement with the United States.⁹⁵ The 1996 law included a similar provision prohibiting asylum applications from those who can be returned to a safe third country pursuant to a bilateral agreement.⁹⁶ The United States and Canada initiated negotiations to create such an agreement before the 1996 law was enacted. The asylum changes in that law raised questions on the Canadian side regarding full and fair procedures, and the negotiations have not gone forward since that time.

In order to facilitate the scrutiny of manifestly unfounded asylum claims, some countries have established the concept of safe countries of origin. Switzerland and Germany pioneered this concept in 1990 and 1992, respectively. When they were first created, both sets of laws explicitly named Bulgaria, the Czech Republic, Gambia, Ghana, Hungary, Poland, Romania, Senegal, and the Slovak Republic.⁹⁷

The United Kingdom streamlined processing in May 1995 for asylum applicants from certain states: Ghana, India, Nigeria, Pakistan, Poland, Romania and Uganda.⁹⁸ Under this pilot, applicants were interviewed at the time of application and required to make further representations within a five-day period, after which a decision was taken. Since November 1995, the pilot has been extended to include a larger group of states and has been applied as well at some ports of entry. The refusal rate is almost 100%: by the end of June 1996, there were 5735 refusals, 3 grants, and 996 pending cases.⁹⁹

European Countries 2 (last modified Jan. 14 1998) <<http://www.drc.dk/eng/pub/safe3rd/finland.html>> (Finland).

93. § 26a Asylum Procedure Act, *supra* note 92.

94. See WALLACE, *supra* note 8, at 74.

95. See 59 Fed. Reg. 62,284 (1994).

96. See INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (Supp. IV 1998).

97. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 348, nn. 98-99 (2nd ed. 1998)

98. See *id.*

99. See *id.* at 64 n.17.

We should examine whether safe third country and safe country of origin policies have deterred "asylum shopping" and other forms of abuse. We should also understand the extent to which these policies have resulted in the return of refugees to countries where they did not have access to asylum. Finally, we should examine the standards used to select safe third countries and safe countries of origin.

IV. INDEPENDENT REVIEW

Most Western asylum systems permit varying degrees of review of the initial asylum decision. Many have recently imposed restrictions on such review in certain cases. The review function is also being streamlined in order to address large caseloads.

The 1996 U.S. law, for example, made the immigration court the final arbiter of the merits in credible fear proceedings.¹⁰⁰ These determinations are not appealable to the BIA or the federal courts. In addition, IIRIRA made the Attorney General, which in most cases means the immigration court and the BIA, the final arbiter of determinations regarding several new provisions restricting eligibility for relief: safe third countries, the one-year filing deadline, and changed conditions.¹⁰¹

In enacting these provisions, Congress thought that a somewhat swifter removal process with fewer levels of review would result in the removal of those who do not qualify for relief. While anecdotal evidence is available to support the concern that some applicants abuse the system by prolonging their appeals, no systematic empirical study has ever reached such a conclusion.

The current bottleneck in the U.S. system lies with the BIA, which reviews the immigration judge decisions. Both are part of the Department of Justice's Executive Office for Immigration Review (EOIR). EOIR issued a proposed rule in September 1998 to permit the BIA to affirm immigration judge orders (including orders removing aliens) by the decision of a single BIA member, without any opinion.¹⁰²

The proposal came as the BIA attempts to deal with a burgeoning caseload and significant backlog. In 1984, the BIA received less than 3000 cases and consisted of five members. In 1994, it received more than 14,000 cases.¹⁰³ The next year, the Attorney General increased the BIA's size to twelve members, and in 1996 to fifteen members. In 1997, more than 25,000 new appeals were filed.¹⁰⁴

The public comments filed in response to the proposal included alternative ways that the BIA could deal with the increased caseload and backlog.¹⁰⁵

100. See INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. IV 1998).

101. See INA §§ 208(a)(2)(A), (B), (D), 8 U.S.C. §§ 1158(a)(2)(A), (B), (D) (Supp. IV 1998).

102. See 63 Fed. Reg. 49,043 (1998).

103. See *id.* at 49,043-49,044.

104. See *id.*

105. See 64 Fed. Reg. 56,135, 56,137-56,141 (1999).

Many commenters noted that the “summary affirmance” proposal combined two very different streamlining methods: eliminating written decisions in many cases, and substituting single members for three-judge panels in such cases. These commenters argued that written decisions are central to appellate deliberation and urged EOIR to continue the practice of providing a statement of reasons that addresses the appellant’s contentions. In the interest of streamlining the appellate process, they suggested that the statement of reasons need not be elaborate with a full statement of facts, analysis of the law, and citations to authority. The most important aspect of the decision, they argued, was addressing the appellant’s contentions, or in the case of unrepresented aliens, any obvious errors. To further address the need for streamlining, commenters also suggested that individual members be assigned to decide each case. If the case appeared to the single member to be of considerable significance, the member could ask that members consider the matter jointly.

EOIR issued a final rule in October 1999.¹⁰⁶ The final rule states that the BIA reviews a significant number of cases in which the decision under appeal is correct and will not be changed on appeal. According to the new rule, an affirmance without opinion will be issued only if the result below was correct, any errors in the decision below were harmless or immaterial, and either the issues in the case are controlled by precedent or the factual or legal issues raised are so insubstantial that a three-member panel review is not warranted. The streamlined procedure, says EOIR, will promote fairness by enabling the BIA to render decisions in a more timely manner, while allowing it to concentrate its resources primarily on those cases in which the decision under appeal may be incorrect, or in which a new or significant legal or procedural issue is presented.

Germany and France provide the two different types of review generally found in Europe. In Germany, asylum applicants are entitled to appeal their claim to a single judge of the German Administrative Court.¹⁰⁷ German administrative court judges are appointed for life and thus have a certain degree of independence. The judges are selected and promoted to higher courts by the Minister of Justice, making some observers question their degree of independence.¹⁰⁸ The court system is largely decentralized, and administrative courts are established in each *Land* (state or province). Appeals of an administrative court decision are dealt with by a higher administrative court. Like in other civil law countries, there is no rule of binding precedence. In practice, however, lower courts tend to respect decisions of higher courts, particularly recent ones.¹⁰⁹

The French appellate commission, the *Commission de Recours des Réfugiés*, reviews negative determinations made by OFPRA. An independent

106. *Id.*

107. See LAMBERT, *supra* note 23, at 52.

108. See *id.* at 53.

109. See *id.*

administrative authority, the Commission sits in a panel of three members composed of a judge, a member of the board of OFPRA, and a representative of UNHCR. The judge who chairs the panel may be a member of the *Conseil d'Etat*, the *Cour des Comptes*, an administrative appeal court, or an administrative tribunal.¹¹⁰ The Commission commonly questions appellants and has the power to ask for supplementary information. Its decision is communicated to the appellant and to OFPRA.¹¹¹

In several nations, including Germany, the United Kingdom and France, rejected asylum seekers from "safe" states cannot remain in the countries to which they fled pending appeal. Effectively, this may very well deny such claimants the right to appeal.¹¹²

We should consider what kind of independent review is appropriate for the asylum system. It would be helpful to understand the extent to which courts are necessary to ensure such independence. We should also examine what the best models are today.

V. RETURN MECHANISMS

States can afford to be more generous in providing protection up front if they return those determined to be ineligible or no longer eligible for protection at the back end of the process; so runs a common argument. The issue concerns both failed asylum seekers as well as those provided temporary protection.

Return mechanisms, to the extent used, vary significantly. Some countries have tried assisted return to help failed asylum seekers reintegrate in their home countries. In other instances, officials in certain European countries have used unacceptable force when returnees resist deportation. Finally, the United States generally does not return failed asylum seekers.

Several European nations, including Germany and Switzerland, have assisted failed asylum seekers in their return by providing them with assistance once they reach their home country. The model is a voluntary one, where the host country pays the cost of return travel, provides a small amount of money for the trip as well as some in-kind goods, and sends a more significant amount of funds after verifying in the home country that the individual is there. Both Germany and Switzerland have done this with the assistance of the International Organization for Migration with respect to select countries of origin. Have these programs been successful in reintegrating? Have many who received this type of assistance returned to the country that rejected their asylum application or to other European countries?

On the other extreme, several deaths have been incurred in Europe by the use of force in deporting failed asylum seekers who resist return. While no

110. See *id.* at 58.

111. See *id.* at 60.

112. See Whitney, *supra* note 72, at 392.

one finds this acceptable, these events continue to occur. What are the appropriate procedures to use in the event of resistance?

In the United States, as indicated above, many asylum seekers who, at the end of the day, are denied any form of relief, are never returned to their home country. The INS does not consider the removal of failed asylum seekers a high priority. The INS interior enforcement strategy focuses on activities such as removing criminal aliens, disrupting alien smuggling operations, and minimizing document fraud.¹¹³ Does this undermine efforts to demonstrate that the United States is serious in its commitment to a credible asylum system?

In approaching the removal of failed asylum seekers, it is important to distinguish between two categories of individuals denied relief. Some applicants are seeking a way to stay in the United States for economic reasons primarily. Others may not have a fear of persecution, but they may have fled from serious civil strife. As discussed below, the Attorney General only designates temporary protection for certain countries; thus some portion of rejected asylum seekers in the United States are likely not to have any protection available if they are fleeing serious violence. Return to conditions of serious violence would be inappropriate for them.

With regard to economic migrants, removal is a question of INS enforcement priority and capability. Since it has never been done, we do not know what the effect would be. If they knew that they would be removed, perhaps it would deter those who have no valid claim for protection. But even if such a deterrent effect could not be empirically demonstrated, the policy may be important enough simply because it goes to the integrity of the protection system: ensuring that the system is not abused so that the public supports it in time of need (which is all too constant).

VI. SCOPE OF THE REFUGEE CONCEPT

What does the Convention definition of a refugee mean as we close the twentieth century? Given the vast changes in forced migration over the last two decades, we should consider just how well a definition created in 1951 addresses an age when the agents of persecution may be a non-state actor or a spouse abuser. Moreover, since civilians fleeing serious danger have become so commonplace among forced migrants, we should also understand how governments treat such individuals in contrast to those who flee persecution.

A. *Non-State Actors*

One of the marked substantive law disagreements among states concerns the agents of persecution. The Convention definition does not explicitly

113. See INS, *Strengthening the Nation's Immigration System*, FACT SHEET (visited Mar. 13, 2000) <<http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/summfs.htm>>; *News Release: INS Enhances Interior Enforcement Strategy; Plans Deployment of New FY 1999 Resources* (visited Mar. 13, 2000) <<http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/qrt.htm>>.

resolve this dispute, as it neither states who a refugee must be persecuted by, nor explains what it means for the refugee to be "unable" to avail herself of the protection of her country.

The problem emerges in two important contexts. First, this issue arises with respect to the common situation of internal conflict whereby non-state actors, asserting themselves like the state, persecute certain citizens. U.S. and Canadian refugee law, for example, define agents of persecution to include forces the state cannot or will not control.¹¹⁴ German courts, however, have interpreted the definition narrowly, excluding the acts of the Taliban, for example, in Afghanistan.¹¹⁵ EU countries have declined to recognize state responsibility where failure of protection is not deliberate, but follows from the absence of an effective national authority from which to seek protection, or simply from inability or lack of resources to effectively respond to the protection needs of its citizens.¹¹⁶

The second context concerns violence against women by private citizens. In such cases, the state allows private persons or groups to act freely and with impunity to the detriment of rights recognized by the international human rights regime.

Given that states are interpreting the same international law, the integrity of the law would be best served if a mechanism could be developed that would resolve such fundamental disputes over the meaning of the refugee definition. We should consider what possible mechanisms could accomplish that task.

B. *Past Persecution*

In incorporating the Convention definition into a domestic statute, the United States decided to recognize refugee status when one is outside the country of origin "because of *persecution or a well-founded fear of persecution.*"¹¹⁷ The central question in the Convention definition and in most countries' refugee law, however, relates to the fear of future persecution. Decision makers thus focus on trying to determine what is likely to happen to the individual in the future if she returns to the home country.

A leading U.S. jurist, Judge Posner, discussed the relationship between past and future persecution as follows:

If . . . the ultimate issue is what will happen to the alien when he is deported, one may wonder why past persecution figures at all in the

114. See JAMES C. HATHAWAY, *THE LAW OF REFUGEES* 132 (1991).

115. Interviews by Susan Martin with officials from the German Federal Office for the Recognition of Foreign Refugees (June 23, 1998).

116. See Elizabeth Adjin-Tettey, *Failure of State Protection Within the Context of the Convention Refugee Regime with Particular Reference to Gender-Related Persecution*, 3 J. INT'L LEGAL STUD. 53, 78 (1997).

117. INA § 101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (1994).

decisional process. Why isn't the orientation of the inquiry entirely forward-looking? The answer is twofold. The past is sufficiently predictive of the future to warrant a shifting of the burden of production. But . . . the past has an additional significance, independent of prediction and therefore not necessarily affected by a demonstration that the alien is in no danger of being persecuted in the future. The experience of persecution may so sear a person with distressing association with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution. Very few of the surviving German Jews returned to Germany after the destruction of the Nazi regime, and it would have been cruel to force them to do so on the ground that by-gones are by-gones.¹¹⁸

One way in which this humanitarian concept impacts actual refugees occurs in the U.S. overseas resettlement program. The United States has been resettling Bosnian refugees who suffered serious past persecution. Most of these refugees had been granted temporary protection by Germany. When Germany terminated temporary protection and initiated repatriations, the United States offered to resettle those Bosnians who had actually suffered persecution in the forced labor camps, by rape, or through other serious harm. That program continues today.

We should consider whether past persecution should be established as an international standard.

C. *Temporary Protection*

How does the asylum system deal with those who flee danger rather than persecution? Many advanced Western countries provide temporary protection or some other temporary status to individuals in such circumstances. Generally, this is done outside of the asylum decision.

Should these protection decisions be made in the same process? To begin to answer this question, it is helpful to note the differences between temporary protection in Europe and the United States. In many European countries, temporary protection is the initial type of protection offered to both Convention refugees and those fleeing serious danger in mass migration emergencies. Those who receive temporary protection generally cannot apply for asylum until temporary protection is terminated.

The U.S. approach is quite different. Asylum is always available, but the U.S. temporary protection system is a limited version that only applies to nationalities designated by the Attorney General and to individuals who happen to be in the United States at the time that their country is so designated. Thus, some portion of rejected asylum seekers in the United States are likely not to have any protection available if they are fleeing

118. *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991).

serious violence. Elsewhere, we have proposed a coordinated asylum/temporary protection system to address this problem in the United States.¹¹⁹

A fuller discussion of the implementation of temporary protection policies in Europe and North America is found in the report on a German Marshall Fund workshop on the subject held in Washington, D.C. in March 1999.¹²⁰

VII. SOCIAL RIGHTS AND EMPLOYMENT

What are the appropriate rights and benefits that states should provide to asylum seekers and asylees? During the period of application, these policies must balance the responsibility to treat bona fide refugees with dignity and respect and the need to limit the incentives to apply for those who are not genuine. Post-approval policies, on the other hand, need to address issues regarding the integration of refugees into the host society.

With respect to asylum seekers, both Europe and the United States limit rights and benefits during the process. Most European countries provide basic social support (food and shelter) for the period of the asylum application. Some, such as Germany, distribute asylum seekers throughout the country so as not to create any uneven cost for particular localities. Several European countries keep asylum seekers in centers during the application process, which effectively limits their movement in the host society. Family reunion is generally not permitted until an asylum application is approved.

The United States provides no assistance whatsoever to the asylum seeker during the period of application. As noted above, this is a change from when asylum seekers were able to receive work authorization based on the application. Now, work authorization generally comes only after the approval. Asylees in the United States are also eligible for certain welfare benefits, though usage is relatively low. This may be in part because the asylees had to survive during the application period by working, even if the government did not authorize it. Recognized refugees are allowed to bring their family to the United States. As to language learning, there are special funds for language courses through the Office of Refugee Resettlement. These are designed for refugees resettled from overseas, but asylees are eligible as well.

With respect to longer-term integration, the Refugee Convention encourages, but does not require, the naturalization of refugees.¹²¹ U.S. law permits asylees to become legal permanent residents one year after their asylum application is approved.¹²² That year counts toward the five years generally required for naturalization. European practice is varied. The requirements

119. See Susan Martin et al., *Temporary Protection: Towards A New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543 (1998).

120. Nadia Yakoob, Workshop Report, *Report on the Workshop on Temporary Protection: Comparative Policies and Practices*, 13 GEO. IMMIGR. L.J. 617 (1999).

121. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 176 (art. 34).

122. See INA § 209(b), 8 U.S.C. § 1159 (Supp. IV 1998).

range from as little as two years to as many as eight to ten years for obtaining citizenship.

We should understand the extent to which access to social welfare or asylum acts as a magnet for abuse. We also need to examine how efforts to contain any such abuse serve to inhibit the integration of recognized refugees. Where the adjudication of asylum claims takes a long time, we should consider whether it is appropriate to keep close family members separate.

VIII. BILATERAL AND MULTILATERAL COOPERATION

Most states are finding it necessary to work with other states when managing the protection process. How will the new arrangements affect the balance of protection and control?

Multilateral cooperation is most advanced in Europe. In fact, the harmonization of asylum procedures has comprised an important part of the European integration process. The Schengen Implementation Agreement, which was signed in 1990 and entered into force in 1995, sought to pinpoint responsibility for handling individual asylum claims and thus avoid "asylum shopping." Several European states adopted this agreement in large part to create a check-free zone for their nationals.

The Dublin Convention, which also was signed in 1990 and entered into force in 1997, brought all the EU member states into agreement on which member state would be responsible for handling a particular claim. This agreement establishes more detailed criteria for determining state responsibility, including the presence of close relatives with refugee status, issuance of a residence permit, visa or transit visa, point of illegal entry, and visa waiver. If none of these criteria apply, the state in which the asylum application was lodged is responsible.

In the Americas, much of the multilateral discussion has addressed common enforcement issues, particularly with regard to smuggling. Perhaps the most interesting bilateral development in the Americas was the attempt by Canada and the United States to establish an agreement on the adjudication of asylum requests. In general, most observers see the Canadian asylum system as being somewhat more generous than the U.S. system. When Congress added restrictive provisions to the U.S. asylum system as discussed above, the Canadians, already concerned about the differences between the U.S. and Canadian systems, recognized that an agreement as to who would have primary responsibility for which asylum seekers would be difficult to achieve.

We need to examine the effects of these bilateral and multilateral developments on the asylum practice. We should consider which developments, if any, best balance the dual goals of protection and control. Finally, we should understand the extent to which courts affect bilateral and multilateral policies and practices.

IX. DATA AND EVALUATION

The statistics presently kept by governments on their asylum systems answer one of the hotter political questions for nations that have experienced significant surges and major backlogs: how many new applications are filed? Governments also know trends in terms of source countries.

Most governments cannot tell their publics, though, just how well or poorly their asylum system is doing. In the conclusion below, we suggest the type of information that would allow analysts to measure the successes and failures of the asylum systems. A useful recommendation by this workshop would be to identify the appropriate measures for sound evaluation of the asylum systems and to urge governments to collect and publish the data needed for such measures.

X. CONCLUSION

Information on the following topics would enable governments to measure the successes and failures of their asylum systems:

1. Barriers to the asylum system that prevent bona fide refugees from seeking asylum.
2. Weaknesses in the asylum system that permit mala fide applicants to gain access.
3. The accuracy of status determination decisions, and the degree to which review ensures accuracy.
4. The extent to which most individuals who flee persecution or serious danger find some type of protection.
5. The degree to which detention is effective in deterring abuse and ensuring compliance without penalizing bona fide refugees, and an assessment of better alternatives to accomplish these policy goals.
6. The extent to which failed asylum seekers are returned, and the best models to assist returnees (whether failed asylum seekers or those provided temporary protection who can return in safety and dignity) to reintegrate in their home countries.
7. The degree to which (a) social and employment rights provided to asylum seekers encourage abuse and (b) efforts to contain such abuse by limiting such rights serve to inhibit the integration of recognized refugees.
8. Improvements in the asylum systems resulting from bilateral and multilateral cooperation among States, and models of cooperation that best serve the dual goal of protection and control.

To stimulate this assessment process, this workshop brought together scholars and experts from Europe and North America. Participants came from government, academia, and NGOs. In addition to participating in the meetings, several participants prepared papers on specific issues.

Two participants wrote about the importance of access to a fair process. In "An Asylum Seeker's Bill of Rights in a Non-Utopian World," Stephen Legomsky identifies the basic elements of a fair adjudication procedure, including the need for an independent adjudicator. Professor Legomsky also describes the modern trend in North America and Western Europe to discourage or bar selected categories of asylum seekers from gaining access to the determination system. Sabine Weidlich analyzes the problems in bypassing the safeguards of an in-depth interview in "First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?" Her paper explores the challenges decision-makers face in judging the likelihood that an individual will experience future persecution, particularly given the limited types of evidence they consider.

Christopher Stone writes about the latest developments with regard to alternatives to detention. He reports on the successful results of the Vera Institute demonstration project testing a community supervision program that aims for compliance with the adjudicatory and administrative removal process as well as a more efficient and humane use of detention space.

On temporary protection, Matthew Gibney assesses what return in safety and dignity means for those who have held this humanitarian status. At the workshop, Joan Fitzpatrick presented an analysis of legal standards that should govern the determination that forced migrants no longer need protection and return can begin. Her paper has already been published in a previous issue of the *Georgetown Immigration Law Journal*.¹²³

In his paper on "Economic and Social Rights of Refugees and Asylum Seekers in Europe," Ryszard Cholewinski examines these issues for Western, Central and Eastern Europe (including Russia, Belarus and Ukraine). He particularly focuses on health, housing, social assistance, education and employment rights under international refugee law and international human rights law. John Fredriksson analyzes the U.S. approach to the social and economic rights of refugees and explains, in particular, the history of the U.S. reliance on the private sector for the provision of social services.

Discussing European cooperation on asylum in "Asylum Policy in the European Union" Randall Hansen explains how two accords with very similar origins and philosophies resulted in very different outcomes from the governmental point of view: the Schengen acquis a broad success, the Dublin Convention a relative failure.

These papers follow. The final article is a summary report that outlines the major points of discussion and the areas of consensus at the Workshop and identifies the issues in need of further information and analysis. That report concludes with several recommendations.

123. Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection*, 13 GEO. IMMIGR. L.J. 343 (1999).

