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## Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law

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# Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law

Inna Nazarova

## **Abstract**

Snapshot of the state of asylum seekers’ rights in the United States and the UK at the time it was written. It provides an overview of U.S. and UK obligations to asylum seekers under international human rights law. The Comment also discusses the basics of U.S. and UK domestic law and procedure relevant to claims for asylum. The author advocates that the United States and the UK adopt a comprehensive approach to preserve asylum seekers’ rights and concludes that domestic law should not become a pretext for human rights violations of asylum seekers in the post-September 11th world.

# ALIENATING "HUMAN" FROM "RIGHT": U.S. AND UK NON-COMPLIANCE WITH ASYLUM OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Inna Nazarova\*

## INTRODUCTION

"Let the terrorists among us be warned," said the U.S. Attorney General John D. Ashcroft in a speech at the U.S. Conference of Mayors on October 25, 2001.<sup>1</sup> "If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will work to make sure that you are put in jail and kept in custody as long as possible."<sup>2</sup>

The U.S. Attorney General's statement conflates terrorist status with immigrant status.<sup>3</sup> It reflects the blurring of meanings of "terrorist" and "asylum seeker"<sup>4</sup> occurring in the United States

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\* J.D. Candidate, 2003, Fordham University School of Law. Much appreciation and love to Reuben for ideas, patience, and for living next to me while I lived inside this Comment; and to my mother for the vision, the example, and the perspective.

1. See Dan Eggen, *Tough Anti-Terror Campaign Pledged; Ashcroft Tells Mayors he Will Use New Law to Fullest Extent*, WASH. POST, Oct. 26, 2001, at A1. Ashcroft also stated: "Some will ask whether a civilized nation, a nation of laws and not of men, can use the law to defend itself from barbarians and remain civilized. Our answer unequivocally is yes." *Id.* See also Karen Masterson, *Ashcroft is Ready to Unleash Power; Anti-Terror Bill Awaits Bush OK*, HOUS. CHRON., Oct. 26, 2001, at 1; Scott Fornek, *Rumsfeld: "I Think We're Going to Get bin Laden; Secretary Changes His Tune; Anthrax at State Department?"* CHI. SUN-TIMES, Oct. 26, 2001, at 3.

2. Eggen, *supra* note 1; Masterson, *supra* note 1; Fornek, *supra* note 1.

3. See Nancy Chang, *The USA Patriot Act: What's so Patriotic About Trampling on the Bill of Rights?*, in RIGHTS ON THE LINE: CONSEQUENCES AND IMPLICATIONS OF THE USA PATRIOT ACT AND OTHER ANTI-TERRORISM MEASURES, Reader for Continuing Legal Education Program 2 (Jan. 26, 2002) (commenting on Attorney General conflating terms immigrant and terrorist in his speech).

4. This Comment understands the term "asylum seeker" to mean an individual applying for refugee protection while in the United States or the United Kingdom ("UK") or at the borders of either of the two countries. This meaning is synonymous with the term "asylee" under U.S. law. See Immigration and Naturalization Service [hereinafter INS], *Basic Law Manual*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 7 (June 13-14, 2001) [hereinafter BLM] (distinguishing between three categories of persons who may seek to enter United States because of persecution). These are refugees, or individuals applying for refugee protection while outside of the United States; withholders, or individuals asking not to be returned to a specific country or countries; and asylees. *Id.* From a legal perspective, the adjudication of refugee and asylum claims in U.S. courts are very similar. *Id.* at 8. In the UK, the law has in the past distinguished between asylum seekers and refugees but today, this distinction is only relevant in specific cases and irrelevant with regard to immigra-

and the United Kingdom ("UK")<sup>5</sup> today.<sup>6</sup> Additionally, the statement underscores the dubious effects the recent U.S. and UK anti-terrorism measures have on asylum seekers' rights.<sup>7</sup>

These developments are a far cry from the humanitarian ideals,<sup>8</sup> which accompanied the establishment of the Office of

tion appeals. See IAN MACDONALD & NICHOLAS J. BLAKE, *MACDONALD'S IMMIGRATION LAW AND PRACTICE* 372 (4th ed. 1995).

5. References to the UK in this Comment imply references to England, Northern Ireland, Scotland, and Wales.

6. See American Arab Anti-Discrimination Committee, *Preliminary Lists of Anti-Arab Hate Crimes*, available at <http://www.globalexchange.org/september11/hateCrimes091301.html> (quoting various hate mail received by organization, conflating "Arab" and "terrorist"); Cathleen Falsani, *Hate Groups Crank It Up*, CHIC. SUN-TIMES, Nov. 11, 2001, at 11 (discussing how white supremacists fuel anti-Muslim rhetoric); Peter Ford, *Xenophobia Follows US Terror*, VILLAGE VOICE, Oct. 11, 2001 (describing xenophobia not only in United States but world-wide); Rosalind Yarde, *Demons of the Day*, GUARDIAN, Nov. 12, 2001 (commenting that "Muslim," "terrorist," and "asylum seeker" stereotypes have become interwoven and confused); David Williams & Ben Taylor, *Asylum Seeker Who Helped the Hitmen*, DAILY MAIL, Sept. 19, 2001, at 7 (referring to asylum seeker running Islamic fundamentalist organization in Britain).

7. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001*, Pub. L. No. 107-56, § 802 (2001) [hereinafter USA PATRIOT Act]; *Anti-Terrorism, Crime and Security Act of 2001* (c. 24) (Eng.), available at [http://www.hmso.gov.uk/cgi-bin/htm\\_h13?URL=http://www.hmso.gov.uk/si/si2001/20014019.htm&STEMMER=en&WORDS=antiterror+&COLOUR=red&STYLE=s#muscat\\_highlighter\\_first\\_match](http://www.hmso.gov.uk/cgi-bin/htm_h13?URL=http://www.hmso.gov.uk/si/si2001/20014019.htm&STEMMER=en&WORDS=antiterror+&COLOUR=red&STYLE=s#muscat_highlighter_first_match) [hereinafter Anti-Terrorism Act 2001]; see also Amy Goldstein et al., *A Deliberate Strategy of Disruption*, WASH. POST, Nov. 4, 2001, at A1 (stating that Department of Justice has detained more than 1,100 immigrants without charge, while only small number of these people are held as material witnesses to September 11th events); Tom Brune, *U.S. to Question Immigrants; Terror Probe Seeks 5,000 Who Fit Profile*, NEWSDAY, Nov. 14, 2001, at A62 (remarking that there are rumors of instituting national identification cards and budget increases for FBI and other federal agencies); Rachel Sills, *'Islamic Scum' Hate Mail Sent to Mosques*, UK NEWSQUEST REG. PRESS, Oct. 6, 2001 (reporting dramatic increase of racist attacks against Muslims in UK, including bomb threats against mosques, beatings, verbal abuse, and gang assaults, targeting Arab and South Asian men and women); John Dillon, *Don't Hate Me Because I Am a Muslim*, MIRROR, Oct. 24, 2001, at 41 (discussing backlash against Muslims); Hamish MacDonell & David Scott, *Blunkett Toughens Up Anti-Terror Laws*, SCOTSMAN, Oct. 4, 2001, at 11 (remarking on upsurge in anti-Muslim crime).

8. See Micheline Ishay & David Goldfisher, *Human Rights and National Security: A False Dichotomy*, in *THE HUMAN RIGHTS READER* 377, 389, 397 (Micheline Ishay ed., 1997) (stating that triumph over fascism set stage for global implementation of universal rights worldwide); RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 3 (2000) (asserting that international human rights law developed as part of new international order designed to ensure that atrocities of another world war would never recur); Charles B. Keely, *Changing International Refugee Policy and Practice: How International Regimes Emerge and Change*, in *IMMIGRATION TODAY* 37, 39 (Lydio F. Tomasi & Mary G. Powers eds., 2000) (remarking that human rights consciousness developed when Western States realized that forced repatriation was not viable solution to refugee cri-

the United Nations<sup>9</sup> High Commissioner for Refugees ("UNHCR").<sup>10</sup> Nor do the new measures echo the promises the United States and the UK made when they ratified the Universal Declaration on Human Rights ("UDHR"),<sup>11</sup> the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention")<sup>12</sup> and its 1967 Protocol ("Refugee Protocol").<sup>13</sup> By acceding to these international human rights instruments, the

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sis). See generally JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* (1985) (discussing nature of human rights and competing theories and approaches to human rights).

9. See EDWARD LAWSON, *ENCYCLOPEDIA ON HUMAN RIGHTS* 1482 (2d. ed. 1996) (stating that United Nations ("U.N.") was established on October 24, 1945 when fifty-one original member countries ratified U.N. Charter, U.N.C.I.O. XV, 335 (June 26, 1945)). The United Nations (U.N.) consists of six principal organs: the General Assembly, the Security Council, the Secretariat, the International Court of Justice, the Economic and Social Council, and the Trusteeship Council. *Id.* at 1482-83. Article 1 of the U.N. Charter lists U.N. purposes and principles, including maintenance of international peace and security, international co-operation in solving international problems, and respect for human rights. *Id.*; HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 137 (2d ed. 2000) (explaining that Charter states U.N.'s basic purpose of securing and maintaining peace); Ishay & Goldfischer, *supra* note 8, at 389 (remarking that in post Second World War years U.N. represented ideal of global implementation of new vision of rights); ROGER STENSON CLARK, *A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS* 13-32 (1972) (outlining U.N. enforcement procedures and techniques to promote and protect human rights).

10. See Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 [V] (Dec. 14, 1950), GAOR, 5th Sess., Supp. No. 20, at 46-48, U.N. Doc. A/1775 (1950) (authorizing establishment of Office of United Nations High Commissioner for Refugees ("UNHCR") and specifying that work of UNHCR will be entirely non-political, but humanitarian and social). See also W.R. SMYSER, *REFUGEES: EXTENDED EXILE* 42-44 (1987) (remarking that UNHCR stands at center of structure of refugee protection and care being both conscience and agent of world community); Keely, *supra* note 8, at 39 (explaining that UNHCR is U.N. agency charged with supervising refugee protection); LAWSON, *supra* note 9, at 689-92 (summarizing UNHCR's mandate).

11. See Universal Declaration of Human Rights, G.A. Res. (217) (III) (A) (Dec. 10, 1948) [hereinafter UDHR].

12. See 1951 United Nations Convention Relating to the Status of Refugees, G.A. Res. 429 [V], 189 U.N.T.S. 137 (Dec. 14, 1950) [hereinafter Refugee Convention]. Although the United States is not a party to the Refugee Convention, by acceding to the Refugee Protocol, it undertook obligations under Refugee Convention. See DANIEL G. PARTAN, *THE INTERNATIONAL LAW PROCESS* 796 (1992) (explaining that by ratifying Refugee Protocol Relating to Status of Refugees ("Refugee Protocol") United States undertook to apply substantive provisions of Refugee Convention).

13. See Refugee Protocol, G.A. Res. 2198 [XXI], 606 U.N.T.S., 267 (Dec. 16, 1996); see also MACDONALD & BLAKE, *supra* note 4, at 374-75 (explaining that Refugee Protocol expands rights of Refugee Convention to all refugees, not just those affected by events occurring prior to January 1, 1951); LAWSON, *supra* note 9, at 1272-74 (stating that purpose of Refugee Protocol is to remove date contained in definition of refugees of Article 1 and make Refugee Convention applicable to all refugees).

United States and the UK bound themselves to respect the right to seek asylum,<sup>14</sup> the international definition of a "refugee,"<sup>15</sup> and the principle of *nonrefoulement*.<sup>16</sup>

At the same time, stereotypes, xenophobia, and legislation curbing asylum seekers' rights are hardly new trends in the history of asylum in the United States and the UK.<sup>17</sup> The recent

14. See UDHR, *supra* note 11, art. 14. Article 14 states: "Everyone has the right to seek and enjoy in other countries asylum from persecution." *Id.*

15. See Refugee Convention, *supra* note 12, art. I(A)(2) (defining refugee). Article I(A)(2) defines a refugee as any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.

*Id.*; see also Immigration and Naturalization Act, Pub. L. No. 82-414 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) [hereinafter INA] (amending Refugee Convention definition). The INA defines refugee as:

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.

*Id.* Cf. Asylum and Immigration Appeals Act 1993, § 2 (C. 23) (Eng.) [hereinafter Immigration Act 1993] (retaining Refugee Convention definition in UK domestic law). Section 2 states: "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which could be contrary to the [Refugee] Convention." *Id.*

16. See Refugee Convention, *supra* note 12, art. 33(1). Article 33(1) states: "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." *Id.*; see also SIR FRANCIS VALLAT, INTERNATIONAL LAW AND THE PRACTITIONER 5 (1966) (explaining that international legal obligations are binding on States and any deficiencies in domestic law do not excuse parties from breach); CLARK, *supra* note 9, at 14 (stating that treaties, once ratified, involve legally binding obligations); Louis Henkin, *Politics of Law-Making*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 18 (Charlotte Ku & Paul F. Diehl eds., 1998) [hereinafter *Politics of Law-Making*] (asserting that nations generally comply with their obligations under international law for number of reasons); Tony Evans, *Power, Hegemony, and the Universalization of Human Rights*, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 7 (Tony Evans ed., 1998) (describing how human rights became metaphor for being American). The human rights rhetoric became part of a wider strategy to exploit U.S. position as global giant and to gain access to world markets. *Id.* at 6-7.

17. See Richard Delgado, *Rodrigo's Book: Brimelow, Bork, Herrnstein, Murray and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929, 1952

developments echo the anti-immigrant sentiments glimpsed in the United States and the UK in the 1980s<sup>18</sup> and abloom in these countries in the 1990s.<sup>19</sup> Although the United States and the UK

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(1998) (reviewing range of books dealing with prejudicial attitudes toward immigrants); Angeliqe Chrisafis, *Under Siege—Britain has a Poor Record for its Treatment of Muslims*, GUARDIAN, Dec. 8, 2001, at 22 (stating that UK has appalling record of fostering understanding of Muslims); Yarde, *supra* note 6 (citing history of xenophobia in UK); Steve Platt, *The Barbarous Coast*, INDEPENDENT, March 4, 2000 (describing anti-immigrant feelings abloom in media and among UK population); Daniel McGrory, *Refugee Tide Causes Wave of Unrest*, TIMES OF LONDON, Aug. 5, 1999 (describing hostility toward asylum seekers among people of Dover). See generally UNHCR, *After the Terror: The Global Fallout*, in 4 REFUGEES 4, 7 [hereinafter *After the Terror*] (claiming that asylum seekers are subjects of considerable mistrust in many countries).

18. See Keely, *supra* note 8, at 42 (asserting that 1980s were turning point in U.S. asylum law and policy); Kevin Costello, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503 (2001) (stating that federal courts were forced to draw lines in immigration law in 1980s when Fidel Castro allowed 125,000 Cubans to emigrate to United States as part of Mariel Boatlift). The U.S. government at first encouraged and then opposed this informally arranged Cuban-sponsored boatlift from Cuban port of Mariel to Florida. *Id.*; Birgitta I. Sandberg, *Is the United States Government Justified in Indefinitely Detaining Cuban Exiles in Federal Prisons?*, 10 DICK. J. INT'L L. 383 (1992) (reporting history of Mariel Cubans). See also Dallal Stevens, *The Case of UK Asylum Law and Policy: Lessons from History?*, in CURRENT ISSUES OF UK ASYLUM LAW AND POLICY 9, 28 (Frances Nicholson & Patrick Twomey eds., 1998) (explaining that 1980s were important period in development of asylum policy in UK); Anne Owers & Madeline Garlick, *Protection and Process: Towards Fair and Effective Asylum Determination Procedures*, in CURRENT ISSUES OF UK ASYLUM LAW AND POLICY 199, 201-03 (Frances Nicholson & Patrick Twomey eds., 1998) (showing that UK's asylum policy began to change in 1980s); Ann Dummett & Andrew Nicol, *The Law and Human Rights*, in SUBJECTS, CITIZENS, ALIENS AND OTHERS 260-61 (1990) (explaining that during 1980s most Western countries began to interpret their Refugee Convention obligations much more strictly). The Western governments asserted that many asylum seekers were really economic migrants fleeing from poverty. *Id.*

19. See INS, *Toward INS 2000: Accepting the Challenge* 8 (1994) available at <http://www.ins.usdoj.gov/graphics/aboutins/inmission/mission.htm> (explaining that 1990s heralded worldwide refugee crisis, which resulted from convergence of political and economic instability in many parts of globe with increased development and availability of international travel and communications); Peter Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1, 5 (2001) (distinguishing between push and pull factors of population movements). Contemporary conditions, like better and cheaper communications, sharpened many traditional migratory spurs, like population pressures, persecution, and warfare. *Id.*; W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 4 (1999) (discussing astonishing advances in technology and transportation); Human Rights Watch, *50 Years On: What Future For Refugee Protection?*, in HUMAN RIGHTS WATCH WORLD REPORT 2001, at 509 (2000) [hereinafter *50 Years On*] (explaining that several factors changed political environment for refugees in 1990s). In addition to coinciding with changes in communications and transportation, the end of the Cold War made refugees lose their political and geopolitical significance. *Id.* at 509-10. Refugees became scapegoats of domestic problems, blamed for threatening security, draining countries' resources, and rising crime. *Id.* at 509.

welcomed refugees after the Second World War,<sup>20</sup> as the number of asylum seekers from non-European sources increased, both countries feared that these movements might include terrorists.<sup>21</sup> The two countries were also concerned that economic migrants were looking to misuse their asylum systems.<sup>22</sup> In response, the United States and the UK set up complex asylum determination procedures.<sup>23</sup> Commentators opine that ulti-

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20. See Keely, *supra* note 8, at 39-46 (describing U.S. liberal policy toward refugees, permitting large resettlements of Indochinese in mid-1970s and boat people from Southeast Asia in early 1980s); SMYSER, *supra* note 10, at 52-64 (discussing Indochinese refugees' flight to United States); Owers & Garlick, *supra* note 18, at 201-03 (showing that in post-war years, UK welcomed refugees fleeing Hungarian uprising in 1956, defecting from Soviet Union, and leaving Vietnam and Chile in 1970s).

21. See Keely, *supra* note 8, at 42 (detailing both countries' fear of terrorist activities in response to growing number of asylum seekers from Third World countries). The United States and the UK also expressed fear that the political opponents of developing country regimes would use them as bases for political opposition or military operation. *Id.*; SMYSER, *supra* note 10, at 93 (highlighting how generosity to refugees became widely known while conditions in Asian and African countries deteriorated). Wars and natural disasters in their home countries prompted new movements of refugees to go West. Reisman, *supra* note 19, at 4, 20-30 (inferring that technology of transportation advanced to point where it is increasingly easy to plan and implement destructive terrorist actions); Lori Fisler Damrosch, *Sanctions Against Perpetrators of Terrorism*, 22 *Hous. J. INT'L L.* 63 (1999) (comparing deterrence of terrorism through force and sanctions). See also S.C. Res. 1189, U.N. SCOR, 3915th mtg. at 1, U.N. Doc. S/RES/1189 (1998) (expressing U.N. Security Council's declaration that suppression of acts of international terrorism is essential for international peace and security and calling upon States to adopt measures for security cooperation in accordance with international law).

22. See Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agenda's in Immigration Matters: The Case of Haitian Asylum Seekers*, 7 *Geo. Immigr. L.J.* 1, 4 (1993) (explaining that perception of Haitian asylum seekers as economic migrants virtually precluded them from being able to obtain entry into United States); Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 *Geo. Immigr. L.J.* 747, 763 (1993) (discussing how migrants who are fleeing economic conditions are not refugees under Refugee Convention definition). This limitation is sharply criticized because it fails to acknowledge that governments routinely impose economic sanctions against individuals for purely political reasons. *Id.*; C. Randall, *An Asylum Policy for the UK*, in *STRANGERS AND CITIZENS, A POSITIVE APPROACH TO MIGRANTS AND REFUGEES* 212-13 (S. Spencer ed., 1994) (asserting that asylum seeking and illegal entry became enmeshed when Haitian and Central American aliens were perceived to include many economic migrants). Critics contended that these aliens used asylum as a ruse to gain entry. *Id.*

23. See BLM, *supra* note 4, 1-14 (summarizing basic developments of U.S. law); Stevens, *supra* note 18, at 9-34 (summarizing development of UK asylum system); see also Lawyers' Committee for Human Rights [hereinafter LCHR], *Is This America? The Denial of Due Process to Asylum Seekers in the United States*, Oct. 2000, available at [http://www/lchr.org/refugee/is\\_this\\_america.htm](http://www/lchr.org/refugee/is_this_america.htm) [hereinafter *Is This America?*] (detailing persistent human rights violations of asylum seekers in United States); LCHR, *Refugees Behind Bars*, Aug. 1999 [hereinafter *Refugees Behind Bars*] (critiquing detention practices in United States); HUMAN RIGHTS WATCH, *WORLD REPORT 1998*, available at <http://>



mately, the U.S. and the UK asylum policies beginning in the 1980s aimed to deter asylum seekers from travelling to these countries.<sup>24</sup>

Experts contend that the aftermath of the September 11th attacks on the World Trade Center and the Pentagon<sup>25</sup> exacerbates these developments.<sup>26</sup> The new anti-terrorism laws implemented in the two countries threaten to circumvent the right to seek asylum and the *nonrefoulement* principle in unprecedented

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[www.hrw.org/reports98/us-immig/Ins989-03.htm](http://www.hrw.org/reports98/us-immig/Ins989-03.htm) (reporting findings on extensive investigation of detention centers); AMNESTY INTERNATIONAL, *REFUGEES: HUMAN RIGHTS HAVE NO BORDERS* (1997) (discussing violations of asylum seekers' rights world-wide).

24. See Keely, *supra* note 8, at 37-51 (discussing factors that led to more complex and restrictive asylum regimes in Western world); Costello, *supra* note 18, 509-10 (remarking on increasing willingness to deport aliens for specified offenses); Stevens, *supra* note 18, at 27 (asserting that Immigration Act 1993 was first specific legislation on asylum in UK). After subsequent legislation in 1996, 1998, and 1999, by the year 2000, the number of asylum applications in UK reached 97,000, the largest of any European country, meanwhile initial recognition rates dropped to five percent. *Id.* See generally *The Road to Refuge and Destination UK: Countries of Origin*, BBC NEWS ONLINE, available at [http://news.bbc.co.uk/hi/english/static/in\\_depth/world/2001/road\\_to\\_refuge/foreign\\_land/map.stm](http://news.bbc.co.uk/hi/english/static/in_depth/world/2001/road_to_refuge/foreign_land/map.stm) (discussing recent immigration trends and issues); *Destination UK: Countries of Origin*, BBC NEWS ONLINE, available at [http://news.bbc.co.uk/hi/english/static/in\\_depth/uk/2001/destination\\_uk/default.stm](http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/destination_uk/default.stm) (discussing immigration statistics).

25. See *Special Report*, ECONOMIST, Sept. 15-21, 2001, at 15-21 (discussing events of September 11th). See also Robert F. Turner, *Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power*, 22 HOUS. J. INT'L L. 77, 78-79 (1999) (reflecting almost prophetically that many Americans had not died due to terrorist attacks prior to September 11th because of America's remarkably good fortune and stating that Americans were simply lucky). See generally Christopher L. Gadouri, *Should the United States Officially Recognize the Taliban? The International Legal and Political Considerations*, 23 HOUS. J. INT'L L. 385 (2001) (providing overview of Taliban government and U.S. relations to it prior to September 11th events).

26. See Manuel D. Vargas, *New Developments in Representing Non-Citizens Post-September 11*, in RIGHTS ON THE LINE: CONSEQUENCES AND IMPLICATIONS OF THE USA PATRIOT ACT AND OTHER ANTI-TERRORISM MEASURES, Reader for Continuing Legal Education Program 2 (Jan. 26, 2002) (describing general reassignment of law enforcement resources to war against terrorism, including INS reassignment of more than half of its investigators to searching for suspects); Eggen, *supra* note 1 (quoting Attorney General vowing to step up detention efforts); Chrisafis, *supra* note 17 (discussing insidious prejudice against all Muslims); MacDonell & Scott, *supra* note 7 (discussing Anti-Terrorism Act 2001). See generally Human Rights Watch, *No Safe Refuge: The Impact of the September 11 Attacks on Refugees, Asylum Seekers and Migrants in the Afghanistan Region and Worldwide*, available at <http://www.hrw.org/backgrounder/refugees/afghan-bck1017.htm> [hereinafter *No Safe Refuge*] (remarking that Home Secretary announced plans to place restrictions on entry into UK, to curb asylum seekers' appeal rights, and to institute new identity cards). The Home Secretary promised that the Home Office will soon introduce new security measures, including enhanced arrest powers and ability to arrest and interrogate anyone suspected or with knowledge of terrorist activities. *Id.*

ways.<sup>27</sup> Scholars also warn that violations of asylum seekers' rights may become a pretext for civil rights violations of regular citizens.<sup>28</sup>

This Comment is a snapshot of the state of asylum seekers' rights in the United States and the UK today. Part I of this Comment overviews U.S. and UK obligations to asylum seekers under international human rights law. Part II of the Comment discusses the basics of U.S. and UK domestic law and procedure relevant to claims for asylum. Part III compares U.S. and UK domestic legislation and analyzes how each country's laws fall short of its international asylum obligations. Part III advocates that the United States and the UK adopt a comprehensive approach to preserve asylum seekers' rights. This Comment concludes that domestic law should not become a pretext for human rights violations of asylum seekers in the post-September 11th world.

## I. INTERNATIONAL HUMAN RIGHTS LAW: A PRESUMPTION OF INCLUSION

Experts define international human rights law as law to con-

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27. See *After the Terror*, *supra* note 17, at 7 (remarking on increasing abuse of asylum seekers' and refugees' rights world-wide); Amnesty International, *Justice Not Revenge—The Aftermath of 11 September*, available at <http://www.amnesty.org.uk/action/crisis/in dex.shtml> [hereinafter *Justice Not Revenge*] (claiming that events of September 11th are resulting in massive abuses of human rights around world); Amnesty International, *United States of America: Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, Sept. 25, 2001, available at <http://web.amnesty.org/802568F7005C4453/0/E7EA69A4BB5FA3B980256B7B006439B7?Open> [hereinafter *Amnesty International's Concerns*] (expressing concern about increased detention of asylum seekers); *Terror Probe Detentions "Violate Rights"*, BBC NEWS ONLINE, Mar. 14, 2002, available at [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1873000/1873365.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1873000/1873365.stm) (critiquing arbitrary detention practices in aftermath of September 11th attacks).

28. See Chang, *supra* note 3, at 5-9 (remarking that anti-terrorism legislation permitted FBI to infiltrate groups and diminish privacy rights); Jim McGee, *An Intelligence Giant in the Making: Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, WASH. POST, Nov. 4, 2001, at A4 (contending that most controversial aspects of U.S. anti-terrorist legislation involve civil liberties of U.S. citizens); John Lancaster & Walter Pincus, *Proposed Anti-Terrorism Laws Draw Tough Questions; Lawmakers Express Concerns to Ashcroft, Other Justice Officials About Threat to Civil Liberties*, WASH. POST, Sept. 25, 2001, at A5 (discussing civil liberties concerns resulting from anti-terrorism legislation); Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5 (stating that following visit to World Trade Center site, U.S. Supreme Court Justice Sandra Day O'Connor predicted that people in United States are likely to experience more restrictions on personal freedom than has ever been case).

trol how States behave toward their own inhabitants.<sup>29</sup> International human rights law is contained in conventions, custom, and general principles of law recognized by civilized nations.<sup>30</sup> Under international law, treaty and customary law obligations are binding upon the United States and the UK.<sup>31</sup> A lack of powerful enforcement mechanisms, however, permits the two countries to deviate from these international norms.<sup>32</sup> Treaty reserva-

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29. See Louis Henkin, *Future of International Law*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 551, 552 (1998) (stating that how State treats its own inhabitants is now staple of international politics and law); Louis Henkin, *Idealism and Ideology*, in HOW NATIONS BEHAVE 228 (2d ed. 1979) [hereinafter *Idealism and Ideology*] (tracing international human rights ideology to end of Second World War); STEINER & ALSTON, *supra* note 9, at v (stating that human rights movement was born out of disasters of Second World War); PETER MALANCZUK, AKENHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 207 (7th ed. 1997) (remarking that human rights vision was heralded by four freedoms). These were freedom of speech and expression; freedom of religion; freedom from economic want; and freedom from fear of aggression. *Id.*

30. See Statute of the International Court of Justice [hereinafter ICJ], 59 Stat. 1055, 1060, art. 38 (1945) [hereinafter ICJ Statute]. The Statute lists the following sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59 [which provides that "The decision of the court has no binding force except between the parties and in respect of that particular case"] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law.

*Id.* See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT (THIRD)] (stating that there are three major sources of international law: treaties or international agreements; international custom; and general principles common to major legal systems of world); CLARK, *supra* note 9, at 13-14 (asserting that international law is ambiguous concept because there is no clearly defined international legislature, executive, or judiciary behind it).

31. See VALLAT, *supra* note 16, at 5 (explaining that deficiencies in domestic law do not excuse breach of international legal obligations); CLARK, *supra* note 9, at 14 (stating that treaties are legally binding documents); *Politics of Law-Making*, *supra* note 16, at 18 (asserting that nations comply with international law obligations for number of reasons).

32. See *Politics of Law-Making*, *supra* note 16, at 20 (claiming that major weakness of human rights law lies in its weak enforcement); *Idealism and Ideology*, *supra* note 29, at 232 (contending that weak enforcement in human rights law is far greater problem than in any other area of international law). Since a violation by a State of the rights of its own inhabitants does not usually infringe national interests of other parties to the agreement, they have no compelling interest to scrutinize the violating behavior and call it into account. *Id.*; Charlotte Ku & Paul F. Diehl, *International Law as Operating and Normative Systems: An Overview*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 3, 4 (1998) (explaining that diffusion and lack of regulation are inherent in system consisting of multiple sovereign actors). One way to respond to this weakness of

tions and non-participation in custom creation further undermine the two countries' compliance with their international obligations to asylum seekers.<sup>33</sup>

#### A. *Treaties and Customary International Human Rights Law*

Commentators discuss that there are two basic sources of international human rights law: treaties and custom.<sup>34</sup> International treaties are multilateral<sup>35</sup> or bilateral<sup>36</sup> agreements be-

international law is institutional enforcement. *Id.*; John H.E. Fried, *International Law—Neither Orphan Nor Harlot*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 25, 26-27 (Charlotte Ku & Paul F. Diehl eds., 1998) (contending that international law is continuously criticized for being weak and defenseless, vague and inchoate).

33. See RESTATEMENT (THIRD), *supra* note 30, § 313 cmt. g (stating that declarations, like understandings, modify obligations that State purports to enter under treaty); § 313 cmt. g (stating that understanding is interpretation of agreement State Party makes in treaty); § 313 (defining reservation, under international law, as unilateral statement made by State when entering into treaty that limits or modifies legal obligations undertaken by that State); SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 77 (1973) (concluding that questions regarding distinction between declarations and permissible and impermissible reservations are among most complex issues in law of treaties). See also *Idealism and Ideology*, *supra* note 29, at 228-29 (stating that governments submit to international scrutiny only reluctantly). Officials of national governments tend to look at efforts to enforce human rights law as disruptive of real international politics and detrimental to friendly relations between nations. *Id.* Forces that induce compliance in international human rights law are necessarily different from any other law because there is no other State that is the victim of another State's human rights violations. *Id.* at 235-37; Ku & Diehl, *supra* note 32, at 13 (remarking that piercing of shell of State sovereignty is perhaps most dramatic in field of human rights); Fried, *supra* note 32, at 37 (remarking that another problem related to efficacy of international regime is that States are judges of their own lawful behavior); Jarat Chopra & Thomas G. Weiss, *Sovereignty is no Longer Sacrosanct: Codifying Humanitarian Intervention*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 377 (Charlotte Ku & Paul F. Diehl eds., 1998) (arguing that supremacy of sovereignty over law is no longer tenable).

34. See John King Gamble, Jr., *The Treaty/ Custom Dichotomy*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 75-76 (Charlotte Ku & Paul F. Diehl eds., 1998) (describing treaties and custom as principal sources of international law); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 368 (1985) (explaining that treaties and custom are two major sources of international law); STEINER & ALSTON, *supra* note 9, at 104 (claiming that treaties have become primary expression of international law and can serve number of purposes). At the same time, treaties and custom are complexly interrelated and there is often a question regarding the extent to which a treaty should be read in light of a pre-existing custom. *Id.* at 71. Moreover, treaties may give birth to customary international law. *Id.* at 72; PAUL REUTER, *INTRODUCTION TO THE LAW OF TREATIES* 139 (Jose Mico & Peter Haggmacher trans., 1995) (explaining that while treaties contribute to emergence of customary international law, custom may be embodied in treaty).

35. See HENKIN ET AL., *INTERNATIONAL LAW* 70 (2d ed. 1987) [hereinafter *INTERNATIONAL LAW*] (distinguishing multilateral treaties from other types of agreements); REU-

tween nations.<sup>37</sup> Scholars agree that international custom consists of principles that nations observe out of a sense of legal obligation or *opinio juris*.<sup>38</sup>

### 1. International Treaties

The international treaties significant in the asylum context are the International Covenant on Civil and Political Rights ("ICCPR"),<sup>39</sup> the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>40</sup> and the Refugee Convention,<sup>41</sup> amended by its Protocol.<sup>42</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") is the right-specific treaty, which pertains to asylum litigation.<sup>43</sup> The regional treaties of

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TER, *supra* note 34, at 35-38 (stating that most obvious means of classifying treaties is by nature and number of parties). The number of parties is the most important factor in treaty-making and multilateral treaties require specific long and short treaty-making procedures. *Id.* at 60, 62-66; STEINER & ALSTON, *supra* note 9, at 104 (claiming that multilateral treaties have become most effective, if not only, path toward international regulation of number of contemporary problems).

36. See INTERNATIONAL LAW, *supra* note 35, at 71 (distinguishing bilateral treaties from other types of agreements); REUTER, *supra* note 34, at 61-62 (reviewing long and short bilateral treaty-making procedures).

37. See 1969 Vienna Convention on the Law of Treaties, art. 2(1), U.N. Doc. A/CONF 39/27, 63 A.J.I.L. 875 (1969) [hereinafter Vienna Convention] (defining treaty); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 40-41 (1996) (stating that Vienna Convention has status of customary international law). See also VALLAT, *supra* note 16, at 7 (remarking that treaties are agreements between two or more nations); CLARK, *supra* note 9, at 14 (stating that treaties may be called covenants, agreements, conventions, or protocols). Treaties are not to be confused with declarations and recommendations, which do not impose binding legal obligations. *Id.*; REUTER, *supra* note 34, at 29 (claiming that there is no precise nomenclature for international treaties and they may be called agreements, conventions, or protocols). Further, the meaning of most terms used in a treaty is extremely variable, changing from country to country. *Id.*

38. See ICJ Statute, *supra* note 30, art. 38; CLARK, *supra* note 9, at 147 (explaining that *opinio juris* requires not only establishment of specific practice but subjective belief by States that this practice is rendered obligatory by existing rule of law): Custom develops from resolutions, declarations, and unratified treaties, through repetition of the same practice on the same matter in the same, or in diverse organizations. *Id.* at 143-48. See also VALLAT, *supra* note 16, at 11-12 (describing custom as set of principles nations perceive as binding).

39. See International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200 A (xxi), 999 U.N.T.S. at 171 & 1057 U.N.T.S. at 407 (Dec. 16, 1966) [hereinafter ICCPR].

40. See International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. at 3 (Dec. 19, 1966) [hereinafter ICESCR].

41. See Refugee Convention, *supra* note 12.

42. See Refugee Protocol, *supra* note 13.

43. See Convention Against Torture and Other Cruel, Inhuman or Degrading

relevance to asylum seekers are the American Convention on Human Rights ("American Convention")<sup>44</sup> and the European Convention on Human Rights and Fundamental Freedoms ("ECHR").<sup>45</sup>

#### a. The International Bill of Human Rights

The ICCPR and the ICESCR, together with the UDHR, compose what is known as the Universal Bill of Human Rights.<sup>46</sup> Although the ICCPR and the ICESCR do not explicitly mention the right to seek asylum, protection of the right is implied in these documents.<sup>47</sup> Commentators agree that the two Covenants transform the provisions of the UDHR into binding, detailed rules of law.<sup>48</sup> The UDHR guarantees the right to seek asylum

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Treatment or Punishment, 23 I.L.M. 1027 (Sept. 1984), *modified by* 24 I.L.M. 535 (March 1985) [hereinafter Torture Convention]. Other right-specific treaties may be relevant in particular contexts. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination ("Anti-Discrimination Convention"), U.N.G.A. Res. 2106 [XX] (defining and disallowing racial discrimination on all grounds); United Nations Convention on the Rights of the Child ("CRC"), U.N.G.A. Res. 44/25 (defining and forbidding discrimination against children on all grounds); Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), U.N.G.A. Res. 34/180 (defining and disallowing discrimination against women on all grounds).

44. *See* American Convention on Human Rights, "Pact of San Jose," Aug. 27, 1979, Vol. 1144, I-17955 (entered into force July 18, 1978) [hereinafter American Convention].

45. *See* European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR].

46. *See* STEINER & ALSTON, *supra* note 9, at 141 (referring to UDHR and two Covenants as Universal Bill of Rights); LAWSON, *supra* note 9, at 812 (stating that this Bill also consists of Optional Protocol and Second Optional Protocol to ICCPR, which aims at abolition of death penalty).

47. *See* ICCPR, *supra* note 39, pmbl. (citing UDHR and its ideal of free human beings enjoying civil and political freedom and freedom from fear and want). Individuals are responsible for promoting and observing the ICCPR rights, which embody the UDHR principles. *Id.*; ICESCR, *supra* note 40, pmbl. (recognizing that UDHR ideals may only be achieved if everyone enjoys his or her economic, social, cultural, civil, and political rights). *See also* MALANCZUK, *supra* note 29, at 215 (remarking that ICCPR and ICESCR translate UDHR into enforceable rule of law as well as provide for monitoring systems); INTERNATIONAL LAW, *supra* note 35, at 989 (explaining that ICCPR spells out specific UDHR rights in greater detail).

48. *See* Hurst Hannum, *Human Rights*, in UNITED NATIONS LEGAL ORDER 327 (Oscar Schachter & Christopher C. Joyner eds., 1995) (describing two Covenants as most comprehensive statements of conventional human rights law yet adopted); STEINER & ALSTON, *supra* note 9, at 237 (explaining that two Covenants transformed UDHR provisions into binding documents); INTERNATIONAL LAW, *supra* note 35, at 989 (noting that ICCPR created binding legal obligations and as result, required enforcement machinery).

and freedom from torture.<sup>49</sup> As a result, these rights are protected through a series of civil, political, social, economic, and cultural rights enumerated in the two Covenants.<sup>50</sup>

The ICCPR defines the civil and political rights it aims to protect, including non-derogable guarantees<sup>51</sup> like recognition as a person before the law<sup>52</sup> and prohibitions against torture<sup>53</sup> and deprivation of life.<sup>54</sup> Additionally, the ICCPR establishes a monitoring organ, the Human Rights Committee, which receives State Party complaints and issues General Comments.<sup>55</sup>

The ICESCR imposes a duty on States Parties to secure equal treatment in social and cultural rights, including self-determination,<sup>56</sup> adequate living standard,<sup>57</sup> health,<sup>58</sup> family,<sup>59</sup> and

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49. UDHR, *supra* note 11, arts. 14, 5.

50. See ICCPR, *supra* note 39; ICESCR, *supra* note 40; STEINER & ALSTON, *supra* note 9, at 237 (explaining that two Covenants encapsulate provisions of UDHR); Hanum, *supra* note 48, at 327 (contending that ICCPR and ICESCR provisions represent basic human rights norms).

51. See ICCPR, *supra* note 39, art. 4. Article 4(1) states, in relevant part:

In time of public emergency that threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law.

*Id.* Article 4(2) lists non-derogable guarantees. *Id.* See also LAWSON, *supra* note 9, at 348 (defining derogation as refusal or failure of State Party to fulfill obligation under treaty).

52. See ICCPR, *supra* note 39, art. 16. Article 16 states: "Everyone shall have the right to recognition everywhere as a person before the law." *Id.*

53. See *id.* art. 7. Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Id.*

54. See *id.* art. 6(1). Article 6(1) states: "Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

55. See *id.* part IV. See also MALANCZUK, *supra* note 29, at 215 (asserting that this reporting system lacks teeth because it can only lead to conciliation attempt and there is no judicial body entitled to make judicial decision). The various reservations States Parties make when they accede to the ICCPR further undermine its effective implementation. *Id.* Although the Optional Protocol to the ICCPR permits complaints by individuals, neither the United States nor the UK have ratified it. See United Nations Treaty Series, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp#N8> (citing list of parties which ratified Optional Protocol). See also Optional Protocol to the ICCPR, G.A. Res. 2200 A (XXI), art. 1 (Dec. 16, 1966).

56. See ICESCR, *supra* note 40, art. 1. Article 1 states, in relevant part: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Id.*

57. See *id.* art. 11. Article 11 states, in relevant part: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for

development.<sup>60</sup> The ICESCR does not mandate immediate compliance and the States Parties may aspire to achieve the ICESCR goals progressively, to the maximum of available resources.<sup>61</sup> There is no provision for interstate complaints and the Committee on Economic, Social and Cultural Rights ("ICESCR Committee")<sup>62</sup> submits annual reports on State Parties' activities to the U.N. Economic and Social Council ("ECOSOC").<sup>63</sup>

#### b. The Refugee Convention and the Refugee Protocol

The Refugee Convention,<sup>64</sup> as modified by the Refugee Protocol<sup>65</sup> provides a definition of refugees,<sup>66</sup> creates exemptions from the definition, and sets out circumstances when a person may cease to be a refugee.<sup>67</sup> The Refugee Convention lists a series of rights to be accorded to refugees, including access to

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himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." *Id.*

58. *See id.* art. 12. Article 12 states, in relevant part: "The States Parties to the present Covenant, recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.*

59. *See id.* art. 10. Article 10 states, in relevant part: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." *Id.*

60. *See id.* art. 2.1 (determining that persons in need have claims upon wealthy nations for assistance): Article 2.1 states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

*Id.*

61. *See id.* art. 2.1.

62. *See arts.* 16-25 (referring to creation and powers of Committee on Economic, Social and Cultural Rights ("ICESCR Committee")).

63. *See* STEINER & ALSTON, *supra* note 9, at 248 (discussing ICESCR Committee's functions); INTERNATIONAL LAW, *supra* note 35, at 1014 (noting that functions of ICESCR Committee are substantively similar to those of ICCPR Human Rights Committee); CLAYTON & TOMLINSON, *supra* note 8, at 92 (describing functions of ICESCR Committee); MALANCZUK, *supra* note 29, at 215-16 (claiming that ICESCR, although relevant, has been unhelpful in asylum litigation because enforcement mechanisms are virtually non-existent). The ICESCR merely has a reporting system and is formulated as a program, not a list of binding obligations. *Id.*

64. *See* Refugee Convention, *supra* note 12, art. 1(A).

65. *See* Refugee Protocol, *supra* note 13.

66. *See* Refugee Convention, *supra* note 12, art. 1(A).

67. *See id.* art. 1(D)-(F) (listing persons to whom Convention does not apply).



courts,<sup>68</sup> employment,<sup>69</sup> and housing,<sup>70</sup> provided that the refugees fully conform to the laws and regulations of their respective host countries.<sup>71</sup> The Refugee Convention contains an absolute prohibition against *refoulement*.<sup>72</sup> This prohibition does not apply to individuals considered dangerous to the security of the receiving country.<sup>73</sup>

### c. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Torture Convention<sup>74</sup> obligates States Parties to take effective measures to prevent torture,<sup>75</sup> not to expel or return individuals to States where they are likely to be tortured,<sup>76</sup> and to ensure that all torture constitutes criminal offense under domes-

68. *See id.* art. 16. Article 16 states, in relevant part: "A refugee shall enjoy in the Contracting State in which he has habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance." *Id.*

69. *See id.* art. 17. Article 17(1) states: "The Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment." *Id.*

70. *See id.* art. 21. Article 21 states:

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.

*Id.*

71. *See id.* art. 2. Article 2 states: "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order." *Id.*

72. *See id.* art. 33(1). *See also id.* art. 32 (providing reasons for expulsion). Refugees lawfully on States Parties' territories have a right not to be expelled save on grounds of national security or public order. *Id.* Even if they are expelled, the expulsion process must comply with due process of law, and provide for the possibility of appeal and representation before a competent authority. *Id.*

73. *See id.* art. 33(2). Article 33(2) states: "The benefit of the [*nonrefoulement*] provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." *Id.*

74. *See* Torture Convention, *supra* note 43.

75. *See id.* art. 2. Article 2 states, in relevant part: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." *Id.*

76. *See id.* art. 3(1). Article 3(1) states: "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *Id.*

tic law.<sup>77</sup> The Torture Convention defines torture broadly to include physical and mental pain or suffering<sup>78</sup> and all rights under the Torture Convention are non-derogable.<sup>79</sup> The Torture Convention mandates that States Parties submit reports to the monitoring Committee against Torture every four years to demonstrate State compliance.<sup>80</sup>

## 2. Regional Treaties

The United States is party to the Charter of the Organization of American States ("OAS"),<sup>81</sup> which drafted the American Convention.<sup>82</sup> The UK is part of the Council of Europe,<sup>83</sup> which

77. *See id.* arts. 4-7. Articles 4-7 mandate that each State Party ensure that all acts of torture are offences under its criminal law (art. 4); take necessary measures to establish jurisdiction over offences related to torture; (art. 5); take violators of Article 4 into custody (art. 6); and prosecute these violators (art. 7). *Id.*

78. *Id.* art. 1. Article 1 defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

*Id.* *See also* Immigration Officer Academy, *Asylum Officer Basic Training, Lesson Two: International Human Rights Law*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 17 (June 13-14, 2001) [hereinafter Immigration Officer Academy, *Lesson Two*] (asserting that because only States are parties to Torture Convention, definition of torture is limited to severe harm inflicted by officials or individuals acting in official capacity). For the purposes of determining whether an individual is a refugee, torture may also include acts by non-government actors. *Id.*

79. *See* Torture Convention, *supra* note 43, art. 2(2) (providing that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture").

80. *See id.* arts. 21-22. Article 21 permits complaints by States against other States. *Id.* art. 21. Article 22 allows complaints by individuals against States. *Id.* art. 22.

81. *See* LAWSON, *supra* note 9, at 1112 (defining Organization of American States ("OAS") as regional intergovernmental organization developed out of International Union of American Republics); STEINER & ALSTON, *supra* note 9, at 868-69 (indicating that OAS is part of regional Inter-American human rights system); INTERNATIONAL LAW, *supra* note 35, at 1033 (stating that OAS was concerned with human rights since Second World War).

82. *See* American Convention, *supra* note 44.

83. *See* LAWSON, *supra* note 9, at 310 (defining Council of Europe as regional intergovernmental organization which endeavors to promote unity among its members to facilitate economic and social progress).

sponsored the drafting of the ECHR.<sup>84</sup> The two regional treaties play significantly different roles in the United States and the UK respectively.<sup>85</sup>

a. The American Convention on Human Rights

The American Convention builds upon guarantees embodied in the American Declaration.<sup>86</sup> Unlike either the ICCPR or the ECHR, the American Convention grants individuals the right of asylum.<sup>87</sup> Unlike the ECHR, the American Convention prohibits *refoulement*.<sup>88</sup> Additionally, the American Convention guarantees the rights to life;<sup>89</sup> freedom from torture and inhumane treatment;<sup>90</sup> liberty,<sup>91</sup> and fair trial.<sup>92</sup> It grants expanded

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84. See ECHR, *supra* note 45.

85. See MALANCZUK, *supra* note 29 (referring to OAS as regional system less effective than European regional model); Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 871 (Henry J. Steiner & Philip Alston eds., 2000) (critiquing Inter-American Commission as ineffective); David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 874 (Henry J. Steiner & Philip Alston eds., 2000) (outlining enforcement shortcomings of Inter-American Commission of Human Rights ("Inter-American Commission") and OAS). Cf. Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37-38 (2002) (stating that ECHR was modern Magna Carta of human rights and democracy in Europe).

86. See American Convention, *supra* note 44; INTERNATIONAL LAW, *supra* note 35, at 1034 (claiming that American Convention is substantially similar to ICCPR). Some terms of the American Convention are significantly different from the ICCPR, however. *Id.* Meanwhile, the American Declaration is substantially similar to the UDHR. *Id.* The American Declaration, unlike the UDHR, contains articles pertaining to individuals' duties to the State. *Id.*

87. See American Convention, *supra* note 44, art. 22.7. Article 22.7 states: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes." *Id.*

88. See *id.* art. 22.8-22.9. Article 22.8 provides:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

*Id.* art. 22.8. Article 22.9 states: "The collective expulsion of aliens is prohibited." *Id.* art. 22.9.

89. See *id.* art. 4. Article 4 provides, in relevant part: "Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." *Id.*

90. See *id.* art. 5(1)-(2). Article 5(1) provides: "Every person has the right to have his physical, mental, and moral integrity respected." *Id.* Article 5(2) states: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treat-

authority to the Inter-American Commission of Human Rights<sup>93</sup> to review State violations of the American Convention and the American Declaration.<sup>94</sup>

b. The European Convention for the Protections of Human Rights and Fundamental Freedoms

The ECHR<sup>95</sup> is the first comprehensive international human rights treaty ever drafted.<sup>96</sup> The rights granted by the ECHR include, in Article 3, a non-derogable guarantee against torture, and inhuman and degrading treatment or punishment.<sup>97</sup> The guarantee has a broader scope than the Refugee Convention right because it does not require mistreatment

ment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." *Id.*

91. *See id.* art. 7 (declaring that every person has right to personal liberty and security). Article 7(3) guarantees that no one shall be subject to arbitrary arrest or imprisonment. *Id.* Articles 7(4)-(7) ensure due process in detention. *Id.*

92. *See id.* art. 8 (declaring that everyone has right to presumption of innocence and to be heard by independent and impartial tribunal).

93. *See id.* arts. 33-51 (establishing Inter-American Commission and detailing its functions and procedures); STEINER & ALSTON, *supra* note 9, at 871 (commenting on development of Inter-American system); INTERNATIONAL LAW, *supra* note 35, at 1035 (stating that Inter-American Commission was created in 1960 and elevated to status of organ in 1970). The Inter-American Commission still reflects the tension between its activist and judicial roles. *Id.* The Inter-American Court of Human Rights ("Inter-American Court") is the second organ responsible for States' Parties' adherence to the American Convention. *Id.* at 1035-36.

94. *See* Medina, *supra* note 85, at 871 (analyzing how Inter-American Commission functions); Harris, *supra* note 85, at 874 (outlining Commission's and OAS's enforcement mechanisms). *See also* INTERNATIONAL LAW, *supra* note 35, at 1035-36 (stating that United States never recognized jurisdiction of Inter-American Court); American Convention, *supra* note 44, art. 62 (declaring that State Party may recognize jurisdiction of Inter-American Court on case-by-case basis). *Id.*

95. *See* ECHR, *supra* note 45.

96. *See* STEINER & ALSTON, *supra* note 9, at 786 (explaining that ECHR is very important in development of human rights law because it preceded UDHR and was first treaty to establish international complaints procedure and international court); INTERNATIONAL LAW, *supra* note 35, at 1026 (noting that ECHR established more comprehensive and often more effective human rights program than that of U.N.); Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernization of Rights in the Old World*, 33 U. MICH. J. L. REFORM 497, 504 (2000) (claiming that ECHR is most important instrument of international law to emanate from Council of Europe).

97. *See* ECHR, *supra* note 45, art. 3. A number of cases have analyzed the meanings of terms "torture," "inhuman treatment or punishment," and "degrading treatment or punishment." *See e.g.*, Soering v. UK, 11 Eur. H.R. Rep. 439, para. 88 (1989); Chahal v. UK, 23 Eur. H.R. Rep. 413, para. 79 (1987); Ireland v. UK, 2 Eur. H.R. Rep. 25 (1979).

based on the five enumerated grounds.<sup>98</sup> The decision in *D v. UK* showed that the touchstone of the conduct prohibited by Article 3 is interference with human dignity.<sup>99</sup> Other provisions of the ECHR include the right to life;<sup>100</sup> the right to liberty, including freedom from unlawful detention;<sup>101</sup> the right to a fair trial;<sup>102</sup> and respect for private and family life.<sup>103</sup> The machinery supervising implementation of the ECHR consists of the European Commission of Human Rights ("European Commis-

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98. See ECHR, *supra* note 45, art. 3. Cf. Refugee Convention, *supra* note 12. See also Alison Stanley, *Safe Harbour—The Effects the New Legislation Will Have on Immigration Issues*, 97 LAW SOCIETY'S GAZETTE 32 (2000) (claiming that otherwise well-founded applicant can be excluded from protection of Refugee Convention on number of grounds). The Refugee Convention includes special persecution criteria, procedural requirements for assessment of risk of ill treatment, and prohibition on dilution of protection by exclusion or derogation. *Id.*; Walker & Weaver, *supra* note 96, at 506 (explaining that number of Article 3 cases initiated profound changes in UK law).

99. See 24 Eur. H.R. Rep. 423 (1997) (showing that Article 3 is violated by sending gravely ill person to country where there is no adequate health provision). There is an absolute prohibition on expulsion of a convicted drugs smuggler, suffering from terminal stages of AIDS, where medical facilities to permit him to die in dignity are unavailable in his homeland. *Id.* See also *East African Asians v. UK*, 3 Eur. H.R. Rep. 76 (1981) (showing that discrimination on basis of race can amount to violation of Article 3); *Abdulaziz, Cabales and Balkandali v. UK*, 7 Eur. H.R. Rep. 471 (1985) (showing that serious discrimination on grounds of race, sex, or, potentially, sexual orientation can amount to degrading treatment within meaning of Article 3); *Chahal v. UK*, 23 Eur. H.R. Rep. 413, para. 78 (1987) (holding that once ECHR Article 3 risk is shown, State may not refool individual). The State cannot take into account any balancing issues, such as risk to public order or the individual's immigration history. *Id.*

100. See ECHR, *supra* note 45, art. 2 (stating that everyone's right to life is protected by law).

101. See *id.* art. 5.1 (requiring that power to detain must be clear, precise, and foreseeable). States must put in place adequate safeguards against arbitrary detention and give proper reasons for detention. *Id.* There should be a presumption of liberty and a speedy and effective right of review, with legal assistance where necessary. *Id.*

102. See *id.* art. 6. Article 6 ensures a fair public trial, presumption of innocence, and a right to legal counsel. *Id.* See also INTERNATIONAL LAW, *supra* note 35, at 1030 (noting that Article 6 claims come before European Court of Human Rights ("European Court") frequently). In response to Article 6 challenges, the European Court has found that any unreasonable delays in trial violate Article 6(1). *Id.*; Stanley, *supra* note 98, at 32 (stating that to date, European Court ruled that immigration rights do not raise issues under Article 6).

103. See ECHR, *supra* note 45, art. 8 (proclaiming, in relevant part, that everyone has right to respect for his private and family life, home, and correspondence). See also Stanley, *supra* note 98, at 32 (explaining that Article 8 guarantee is particularly useful in cases of deportation or removal and family reunion). Article 8 rights are not absolute and the State can justify a breach under Article 8(2), where doing so is necessary for the prevention of disorder or crime. *Id.*

sion”);<sup>104</sup> the European Committee of Ministers;<sup>105</sup> and the European Court of Human Rights (“European Court”).<sup>106</sup>

### 3. International Custom

Critics assert that international custom shapes the core of international human rights law.<sup>107</sup> Custom often forms the basis for treaties, while treaties sometimes give birth to custom.<sup>108</sup> The right to seek asylum and freedom from torture are recognized principles of international customary law.<sup>109</sup>

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104. See ECHR, *supra* note 45, arts. 20-37 (describing set up and functions of European Commission).

105. See *id.* art. 32 (describing set up of European Committee of Ministers). The Committee of Ministers decides by two-thirds vote whether there is a violation of the ECHR and this decision is binding on States Parties. *Id.*

106. See *id.* arts. 38-56 (describing functions of European Court). Complaints by individuals and States first come before the Commission. See *id.* arts. 27-30. See also INTERNATIONAL LAW, *supra* note 35, at 1029 (charting in detail enforcement mechanisms under ECHR); STEINER & ALSTON, *supra* note 9, at 797-801 (commenting on structure of European regional system and recent reform). If the Commission's attempt to reach a friendly settlement fails, the Commission may transmit a report of its opinion on the case to the Council of Ministers or the European Court. See ECHR, *supra* note 45, arts. 30-31, 47-48. Articles 30-31 explain how the European Commission refers reports to the Committee of Ministers. *Id.* Articles 47-48 outline European Court's jurisdiction. *Id.*

107. See RESTATEMENT (THIRD), *supra* note 30, § 102 (2) (defining *opinio juris*); CLARK, *supra* note 9, at 147 (explaining that *opinio juris* requires establishment of specific practice and subjective belief by States that this practice is part of legal obligation). See also *Politics of Law-Making*, *supra* note 16, at 21 (explaining that process of making customary international law is informal, haphazard, even partly unintentional and at worst, consent and acquiescence can be bought by political pressure or other circumstances); *Future of International Law*, *supra* note 27, at 552 (arguing that although traditionally customary law is made over time on basis of *opinio juris*, today's customary law no longer results from long practice, but can be made purposefully and quickly).

108. See STEINER & ALSTON, *supra* note 9, at 71 (claiming that treaties and custom are complexly interrelated). There is often a question regarding the extent to which a treaty should be read in the light of a pre-existing custom. *Id.* Moreover, treaties may provide foundation for developing customary international law. *Id.* at 72; REUTER, *supra* note 34, at 139 (explaining that while treaties contribute to emergence of customary international law, custom may be embodied in treaties).

109. See STEINER & ALSTON, *supra* note 9, at 69-71 (remarking that right to seek asylum amounts to customary norm); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (holding that torture is renounced by international consensus that recognizes basic human rights); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (stating that international law confers fundamental right upon all people to be free from torture).

B. *Application of International Human Rights Law in the United States and the United Kingdom*

Under international law, every treaty is binding upon the parties to it.<sup>110</sup> International custom is binding upon all nations.<sup>111</sup> At the same time, States may adopt declarations,<sup>112</sup> understandings,<sup>113</sup> and reservations<sup>114</sup> to limit treaty application.<sup>115</sup> Nations may opt out of a developing international custom by clearly and consistently indicating their intent not to be bound to it.<sup>116</sup>

1. The United States

In the United States, self-executing international treaties form part of domestic law.<sup>117</sup> The Refugee Convention and the Torture Convention are the human rights treaties of most significance to asylum seekers in this country.<sup>118</sup> Critics agree that the

110. See Vienna Convention, *supra* note 37, arts. 24-25; VALLAT, *supra* note 16, at 5 (stating that any deficiency in domestic law will not excuse treaty breach); CLARK, *supra* note 9, at 14 (stating that treaties, once ratified, involve legally binding obligations); KLABBERS, *supra* note 37, at 2 (stating that treaties are considered relatively clear and reliable source of international law).

111. See *Politics of Law-Making*, *supra* note 16, at 18 (explaining that all nations accept some international customary law as price of membership in international society). International customary law provides nations with a number of benefits: it keeps international society running, contributes to order and stability, and provides a basis for common enterprise. *Id.*; VALLAT, *supra* note 16, at 5 (explaining that international law is potentially binding on all nations).

112. See RESTATEMENT (THIRD), *supra* note 30, § 313 cmt. g (defining declarations).

113. See *id.* (defining understandings).

114. See *id.* § 313 cmt. a (defining reservations).

115. See *id.* § 313 cmts. See also STEINER & ALSTON, *supra* note 9, at 106-07 (stating that traditional treaty rules require acceptance by all parties). Pervasive lack of unanimity with regard to international human rights treaties raises the question of their validity. *Id.*

116. See *id.* § 313 cmt. d (stating that in principle State that indicates its dissent from practice while law is still in development is not bound by that rule of law even after it matures); INTERNATIONAL LAW, *supra* note 35, at 66 (explaining that States may opt out of developing international customary law obligation).

117. See Lillich, *supra* note 34, at 368 (explaining that self-executing treaty when implemented by Congress supercedes all inconsistent state and local laws); PARTAN, *supra* note 12, at 224-25 (referring to Vienna Convention on Treaties to conclude that treaties are binding legal instruments); RESTATEMENT (THIRD), *supra* note 30, § 102 cmt. f (stating that treaties may create obligations enforceable domestically and may contribute to customary international law).

118. See Immigration Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.) [hereinafter 1980 Act] (codifying Refugee Convention via Refugee Protocol into U.S. law); Foreign Affairs Reform and Restructuring Act of 1998,

United States is bound to respect customary right to seek asylum and freedom from torture.<sup>119</sup>

#### a. Status of International Law

The United States Constitution provides that international treaties are part of the "supreme law" of the land.<sup>120</sup> The caveat is whether a particular treaty is self-executing.<sup>121</sup> Whether a

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Pub. L. 105-227, § 2242(b) [hereinafter Foreign Affairs Act of 1998] (adopting Torture Convention into U.S. law).

119. See *Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that international custom can form part of U.S. domestic law); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 394 (1997) (arguing that customary international law is part of U.S. law); RESTATEMENT (THIRD), *supra* note 30, § 102(2) (stating that customary international law results from general and consistent practice of States (generality) followed by them from sense of legal obligation (*opinio juris*)). See also STEINER & ALSTON, *supra* note 9, at 69-71 (remarking that right to seek asylum is customary norm which all nations should abide by); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (holding that torture is universally renounced by international consensus that recognizes basic human rights); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (stating that international law confers fundamental right to be free from torture); VALLAT, *supra* note 16, at 5 (explaining that international legal norms are binding on States and any deficiencies in domestic law do not excuse parties from breach).

120. See U.S. CONST. art. VI, § 2 (stating that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Article II, section 2 of the U.S. Constitution qualifies article VI by providing that ratification by two-thirds of the Senate is necessary to authorize the President to enter into international treaties. See U.S. CONST. art. II, § 2. See also Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (arguing that text, structure, and doctrine of Constitution clearly confer on treaties status of domestic law); RESTATEMENT (THIRD), *supra* note 30, § 111 (stating that courts in United States are bound to give effect to international law and international agreements, except that non-self-executing agreements will not be given effect of law in absence of necessary implementation).

121. See STEINER & ALSTON, *supra* note 9, at 1025 (defining self-executing treaties as treaties that create individual legal rights and obligations enforceable in U.S. courts without legislative implementation). Treaties that require implementing legislation are considered non-self-executing, and are not enforceable in U.S. courts until Congress passes legislation to implement them. *Id.* See also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (holding that self-executing treaties can be deemed equivalent of legislative acts). The last expression of sovereign will must control. *Id.*; *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (determining that self-executing treaties are equivalent to legislative acts); Lillich, *supra* note 34, at 368 (stating that treaties that are self-executing are considered federal law and trump prior inconsistent statutes under last-in-time principle); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999) (arguing that careful examination of history shows that framers intended treaties to be self-executing). Cf. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the*



treaty is self-executing depends on the intent of the parties; whether the treaty terms address obligations to the legislature or require legislative action; and whether the treaty confers a cause of action on the individual seeking its enforcement.<sup>122</sup>

The United States Constitution does not specifically mention custom as the supreme law of the land.<sup>123</sup> Critics claim that U.S. courts are bound to construe domestic statutes consistently with international obligations where there is no conflicting treaty, judicial precedent, or controlling executive or legislative act.<sup>124</sup> Generally, U.S. courts consider international law when adjudicating asylum seekers' claims.<sup>125</sup>

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*Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (contesting view that treaties are generally self-executing and enforceable).

122. See RESTATEMENT (THIRD), *supra* note 30, § 111 (stating that international agreements of United States are not self-executing if they manifest intention not to become effective as domestic law without implementing legislation; or if Senate, Congress, or Constitution require implementing legislation); see also § 111 cmt. h (providing that intention of United States determines whether agreement is self-executing). If the intention of the United States is unclear, the Senate's or congressional expression must be taken into account. *Id.* See also STEINER & ALSTON, *supra* note 9, at 1026 (stating that specific types of treaties have traditionally been understood to be self-executing). Examples include bilateral treaties giving reciprocal rights to nationals of each country. *Id.* Certain treaties cannot be self-executing and require implementing legislation to become law of land. *Id.* See generally Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (arguing that separation of powers concerns trigger designation of treaty as self-executing).

123. See U.S. CONST. art. VI.

124. See *Paquete Habana*, 175 U.S. at 700 (contending that U.S. courts should pay deference to international obligations); *Charming Betsy*, 6 U.S. 64, 117-18 (1804) (holding that ambiguous statute must be interpreted so as to comply with international law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (confirming that international law is federal law). See also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 865-66 (1987) (noting how incorporation of international law into U.S. domestic law has roots in corresponding status of international law in English law and law of American Colonies); Stephens, *supra* note 119, at 393 (arguing that international law is federal law and thus enforceable in federal courts and binding on all states).

125. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980) (stating that where there is no treaty or controlling executive or legislative act or judicial decision, customs and usages of civilized nations become point of reference). The works of jurists and commentators are evidence of these sources of law. *Id.* The *United Nations Handbook on Procedures and Criteria for Determining Refugee Status Under Refugee Convention and Refugee Protocol Relating to Status of Refugees* ("U.N. Refugee Handbook") has been cited in numerous court decisions. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994); *Aguirre-Aguirre v. INS*, 121 F.3d 521 (9th Cir. 1997); *Matter of Acosta*, 19 I.&N. Dec. 211 (BIA 1985). See also Immigration Officer Academy, *Lesson Two*, *supra* note 78, at 6 (stating that U.S. courts consider guidance provided by UNHCR). Moreover, the Attorney General mandated through regu-

## b. Treaty Obligations

The United States is bound to comply with the UDHR provisions, by virtue of the UDHR's alleged status as customary international law.<sup>126</sup> The United States is a party to the ICCPR with an explicit understanding that the Covenant is not self-executing.<sup>127</sup> It is not a party to the ICSECR.<sup>128</sup>

The U.S. Immigration Act of 1980 ("1980 Act") codified the Refugee Convention, as modified by the Refugee Protocol, into domestic law.<sup>129</sup> It thus adopted the Refugee Convention's defi-

lation that all Asylum Officers be instructed in international human rights law. See 8 C.F.R. § 208(b) (creating Asylum Corps, corps of professional asylum officers who must receive special training in international human rights law); Immigration Officer Academy, *Asylum Officer Basic Training Course: Eligibility Part I*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 10, 13-14 (June 13-14, 2001) [hereinafter Immigration Officer Academy, *Eligibility Part I*] (instructing Asylum Officers to use *UNHCR Handbook* as guide in determining asylum seekers' nationality, multiple nationalities, or statelessness as well as in defining what constitutes persecution); Immigration Officer Academy, *Asylum Officer Basic Training Course, Asylum Eligibility Part II: Well-Founded Fear*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 5-6 (June 13-14, 2001) [hereinafter *Asylum Eligibility Part II*] (citing *UNHCR Handbook* in determining whether asylum seeker's fear is well-founded).

126. See Lillich, *supra* note 34, at 54 (stating that UNHCR contributes to understanding of customary international law and is generally considered part of international law); RESTATEMENT (THIRD), *supra* note 30, § 701 cmt. d (asserting that it is increasingly accepted that States Parties to Charter are legally obligated to respect some rights recognized in UDHR). Cf. Noam Chomsky, *The United States and the Challenge of Relativity*, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 24, 24-58 (Tony Evans ed., 1998) (critiquing persistent U.S. violations of number of UDHR provisions).

127. See STEINER & ALSTON, *supra* note 9, at 1043-44 (citing extensive debates surrounding ratification of ICCPR including Senate hearings; proposals by Bush administration; and effects of reservations); Evans, *supra* note 16, at 11 (stating that U.S. ratified ICCPR after years of procrastination and with many reservations, understandings, and declarations).

128. See STEINER & ALSTON, *supra* note 9, at 1033 (indicating that there has never been sustained debate in Senate or broader political arena about participation in ICESCR); Chomsky, *supra* note 126, at 32-33 (stating that U.S. representative to U.N. Commission for Human Rights emphasized in 1990 that civil and political rights are U.S. priority and claimed that certain economic and social rights are preposterous, empty vessels and even dangerous incitement).

129. See 1980 Act, *supra* note 118. See also Immigration Officer Academy, *Overview of the Asylum Process*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 6-7 (June 13-14, 2001) [hereinafter Immigration Officer Academy, *Overview of the Asylum Process*] (listing number of regulatory bodies established in years between issuance of Interim and Final Regulations for implementing 1980 Act). These included Central Office Refugee, Asylum and Parole Division ("CORAP") that oversees adjudication of asylum applications, and Asylum Policy and Review Unit ("APRU") that reviews certain asylum decisions forwarded by District Directors. *Id.*

nition of a refugee and made *nonrefoulement* mandatory.<sup>130</sup> The U.S. statute modified the Convention definition, however, recognizing refugee status based on past persecution;<sup>131</sup> persecution on account of opposition to a coercive population control program;<sup>132</sup> and included persons within a country of nationality or last habitual residence.<sup>133</sup> At the same time, the definition contained mandatory bars to refugee status.<sup>134</sup>

The Torture Convention furnishes an independent form of relief for asylum seekers in the United States.<sup>135</sup> The United States consented to the Torture Convention with a significant

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130. See 1980 Act, *supra* note 118.

131. See INA, § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B). See also Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, in PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 1231-50 (2001) (describing in detail steps in proving refugee status). Cf. Refugee Convention, *supra* note 12, art. 1, paras. (C)5-6, (focusing on well-founded fear of future persecution only).

132. See INA, § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(A). The provision reads: a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

*Id.* This provision was added in 1996 by § 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amending various sections of 8 U.S.C. [hereinafter IIRIRA].

133. See INA, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). Cf. Refugee Convention, *supra* note 12, art. 1(A) (defining refugee only as person outside of his or her country of last habitual residence).

134. See INA, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (stating that refugee does not include any person who ordered, incited, assisted, or otherwise participated in persecution of any person on account of race, religion, nationality, membership in particular social group or political opinion). See also INA, § 241(b)(3), 8 U.S.C. § 1231(b)(3) (listing classes of persons ineligible for withholding of removal). These include persons who have participated in persecution of others; persons who have been convicted of especially serious crime and constitute a danger to the United States community; persons who committed a serious non-political crime outside of the United States; and persons who can reasonably be regarded as security risks to the United States. *Id.* See generally Mark R. von Sternberg, *Outline of Asylum Law for Presentation at the Association of the Bar of the City of New York*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 27-32 (June 13-14, 2001) (discussing ineligible classes).

135. See Foreign Affairs Act of 1998, *supra* note 118 (adopting Torture Convention into U.S. law). See also Dep't of Justice, Interim Regulation, 64 FED. REG. 8478 (1999) (permitting individuals to seek relief under Torture Convention); von Sternberg, *supra* note 134, at 32-34 (discussing Torture Convention as source of relief).

understanding regarding the standard of proof.<sup>136</sup> An asylum seeker qualifies for this type of relief upon showing that it is more likely than not that she will be tortured upon return to a particular country.<sup>137</sup>

Although the United States has not ratified the American Convention, commentators argue that the American Convention clarifies obligations of all Parties to the OAS.<sup>138</sup> The American Commission is one of the few bodies which actually undertakes criticizing the United States.<sup>139</sup> Experts discuss that the reviews of the American Commission have little effect on the U.S. asylum activity or policy today.<sup>140</sup>

## 2. The United Kingdom

Unlike the United States' monist approach to international human rights treaties, the UK has a dualist approach.<sup>141</sup> The

136. See 136 CONG. REC. at S17, 491-92 (daily ed. Oct. 27, 1990) (understanding phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 to mean "if it is more likely than not that he will be tortured"). See also U.S. Dep't of Justice, *Operating Policies and Procedures Memorandum No. 99-5: Implementation of Article 3 of the UN Convention Against Torture*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 27-32 (June 13-14, 2001) (introducing Torture Convention and requirements for claim under it).

137. See Foreign Affairs Act of 1998, *supra* note 118; STEINER & ALSTON, *supra* note 9, at 1048 (stating what is required to qualify for relief); INTERNATIONAL LAW, *supra* note 35, at 1033-34 (noting that American States are legally bound to respect rights of individual and principles of universal morality as enunciated in American Charter and clarified in American Convention).

138. See STEINER & ALSTON, *supra* note 9, at 869 (stating that American Convention binds United States). Moreover, the American Declaration may be binding on the United States as incorporated through the American Charter or as an indication of customary international law. *Id.* See also Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U.J. INT'L L. & POL'Y 311, 311-12 (1996) (outlining obligations of States Parties of OAS).

139. See Christina M. Cerna, *International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration*, 19 HOUS. J. INT'L L. 731, 737 (1997) (stating that United States is subject to jurisdiction of Inter-American Commission); Schuck, *supra* note 19, at 1 (showing that U.S. asylum practices are influenced by regional migratory pressures). The social and political conditions in Central and South America created a vast pool of poor and unemployed migrants headed for United States. *Id.*

140. See Cerna, *supra* note 139, at 737 (explaining that U.S. position in OAS is atypical because it is superpower); Jarmul, *supra* note 138, at 311 (concluding that OAS has not been effective in enforcement of its provisions in Member States, including United States). See also *Politics of Law-Making*, *supra* note 16, at 18 (stating that international human rights law must resort to different enforcement mechanisms than other areas of law). These mechanisms include naming and shaming. *Id.*

141. See VALLAT, *supra* note 16, at 8-9 (stating that ratification of treaty in UK is purely executive act, which requires no legislative authority and is prerogative of

human rights treaties of greatest significance in the UK are the Refugee Convention and the ECHR.<sup>142</sup> The UK courts consider international customary law, which does not conflict with pre-existing domestic legislation.<sup>143</sup>

#### a. Status of International Law in the UK

Under UK domestic law, every international human rights treaty requires ratification and enabling legislation to become the law of the land.<sup>144</sup> Generally, the UK judiciary will consider international customary law when terms of a domestic statute are ambiguous, common law is uncertain, and court discretion or public policy is involved.<sup>145</sup> Experts agree that the UK recog-

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Crown). This approach is called "dualist" approach. *Id.* See also CLAYTON & TOMLINSON, *supra* note 8, at 59-61 (discussing implementation of human rights instruments into domestic law in UK); STEINER & ALSTON, *supra* note 9, at 1004-05 (contrasting monist and dualist systems).

142. See Asylum and Immigration Appeals Act 1993 (Eng.); Human Rights Act 1998 (Eng.) [hereinafter HRA]. See also CLAYTON & TOMLINSON, *supra* note 8, at 96 (asserting that ECHR is most pertinent document in UK human rights litigation). As of June 30, 2000, UK appeared as respondent in 115 ECHR-based complaints. *Id.* at 74-75. The UK also ratified the European Convention for the Prevention of Torture and Inhuman Treatment or Punishment ("European Torture Convention"), which aims to prevent breaches of ECHR Article 3 by obligating the UK to permit visits to detention sites. *Id.* The European Committee for Prevention of Torture and Inhuman Treatment or Punishment submits reports alleging UK violations, to which the UK must respond in writing. *Id.* See generally Sacerdoti, *supra* note 85, at 37-38 (stating that ECHR was first international treaty providing for collective enforcement of number of human rights set out in UDHR).

143. See Walker & Weaver, *supra* note 96, at 510 (discussing rule that UK judges prefer interpretation of issues that renders English law compliant with international law); MACDONALD & BLAKE, *supra* note 4, at 42 (remarking that peculiar feature of UK immigration law is that large proportion of it is administered by exercise of discretion); VALLAT, *supra* note 16, at 4 (stating that principles of international customary law are potentially binding on all nations).

144. See Vallat, *supra* note 16, at 8-9 (claiming that both ratification and enabling legislation are necessary to give treaty force of law); STEPHEN GROSZ ET AL., HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION 1 (2000) (explaining necessity of legislative requirement to give treaties in UK force of law). See also Walker & Weaver, *supra* note 96, at 520 (discussing that British constitutional theory stresses concept of Crown prerogative and parliamentary sovereignty rather than popular sovereignty of rights).

145. See CLAYTON & TOMLINSON, *supra* note 8, at 70-71 (showing that attempts to comply with international legal obligations may bring about executive actions, legislation, or various kinds of administrative measures). The ECHR, for instance, is consistently used as a common law aid; a tool in statutory construction; a regulation of court and administrative discretionary power; and a guide to public policy. *Id.* at 74-75; Walker & Weaver, *supra* note 96, at 509-11 (maintaining that international law may bring about new legislation and can assist in statutory interpretation); MACDONALD &

nizes the international right to seek asylum and freedom from torture.<sup>146</sup>

### b. Treaty Obligations

The UK is subject to the provisions of the UDHR by virtue of the UDHR's status as customary international law.<sup>147</sup> It is a signatory to the ICCPR and the ICESCR, but neither Covenant has a significant effect on UK domestic litigation.<sup>148</sup> The UK Asylum and Immigration Appeals Act 1993 ("1993 Act") incorporated the Refugee Convention, as modified by the Refugee Protocol, into UK law, adopting the refugee definition without modifications and acceding to the principle of *nonrefoulement*.<sup>149</sup> The UK consented to the Torture Convention with a number of

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BLAKE, *supra* note 4, at 1 (asserting that conventions not incorporated into UK law affect domestic legislation in varying degrees).

146. See GROSZ, *supra* note 144, at 188-90 (discussing possibility of bringing asylum claim); RICHARD GORDON Q.C. & TIM WARD, *JUDICIAL REVIEW AND THE HUMAN RIGHTS ACT* 56, 58, 66, 106 (2000) (discussing asylum claims adjudication in UK); John Fitzpatrick, *Flight From Asylum: Trends Toward Temporary "Refugee" and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13, 14 (1994) (claiming that regionalization of UK law brings into single framework previously disparate mechanisms concerning foreign policy, national security, justice, and home affairs). In this new framework, immigration and asylum issues figure prominently. *Id.*

147. See VALLAT, *supra* note 16, at 5 (showing that international customary obligations are binding on UK courts); CLAYTON & TOMLINSON, *supra* note 8, at 90-91 (discussing role of UDHR in UK law); Walker & Weaver, *supra* note 96, at 510 (claiming that UK judiciary makes effort to interpret domestic laws consistently with international norms).

148. See CLAYTON & TOMLINSON, *supra* note 8, at 91 (noting that ICCPR is little known to legal profession in UK and in 1984 UK government representative to U.N. Human Rights Committee could not identify single case in which British courts referred to Covenant). Since then, the ICCPR was cited more frequently but almost without impact, except for the Article 14(6) guarantee that in the event of a miscarriage of justice the Secretary of State shall pay compensation to the victim. *Id.* Courts have notably cited Article 7 (prohibition against torture), Article 14(1) (right to a full and fair public hearing), and Article 26 (right to equal protection of law), but in conjunction with the UDHR. *Id.* at 92. Critics believe that the ICCPR will likely become important with regard to rights not included in the ECHR, such as Article 13 (right of aliens to be expelled lawfully); Article 14(5) (right of appeal and prohibition of double jeopardy); and Article 26 (right to equal protection of the law and non-discrimination). *Id.*; Walker & Weaver, *supra* note 96, at 505 (stating that prime protectors of human rights in UK remain national and to extent, regional, rule-making authorities).

149. See Immigration Act 1993, *supra* note 142, § 2 (emphasizing that Refugee Convention definitions remain as guide); see also Immigration Rules, part 11, para. 327 (providing that asylum applicant is person who claims that it would be contrary to UK's obligations under Refugee Convention and Refugee Protocol to remove him). See generally MACDONALD & BLAKE, *supra* note 4, at 16-17 (discussing beneficial changes for asylum seekers' rights contained in Immigration Act 1993).

understandings and reservations, including a refusal to recognize the Committee's competence to receive individual complaints.<sup>150</sup>

Unlike the United States, which has largely ignored the American Convention,<sup>151</sup> the UK has been highly receptive to its obligations under the ECHR.<sup>152</sup> Scholars opine that while the terms of other human rights treaties remain largely unknown in the UK,<sup>153</sup> the ECHR has played a major role in the UK generally, and in asylum adjudication specifically.<sup>154</sup> Scholars opine that the ECHR's significance reflects the regionalization of UK asylum law and policy, as introduced by the Treaty of the European Union ("Maastricht Treaty").<sup>155</sup>

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150. See United Nations Treaty Collection, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp> (showing UK understandings and reservations). See also CLAYTON & TOMLINSON, *supra* note 8, at 96 (highlighting fact that UK authorized Committee to receive interstate complaints under Article 21, but not individual complaints under Article 22).

151. See Cerna, *supra* note 139, at 737 (explaining lack of U.S. compliance under OAS enforcement mechanisms); Jarmul, *supra* note 138, at 311 (remarking that OAS has not effectively enforced Inter-American agreements among Member States, including United States). See also *Politics of Law-Making*, *supra* note 16, at 18 (stating that international human rights law resorts to specific enforcement techniques not common in other areas of law).

152. See ECHR, *supra* note 45. See also MACDONALD & BLAKE, *supra* note 4, at 455 (remarking on great importance ECHR plays in UK litigation); CLAYTON & TOMLINSON, *supra* note 8, at 70 (asserting that ECHR is only treaty which had significant impact in UK domestic courts even before enactment of HRA); MALANCZUK, *supra* note 29, at 219 (stating that ECHR is most sophisticated and practically advanced international system in protection of human rights).

153. See CLAYTON & TOMLINSON, *supra* note 8, at 147-49 (remarking that human rights treaties are generally not reflected in UK legislation or in court, and many are promulgated under aegis of U.N.). The enactment of the HRA encouraged the UK government to re-examine its existing human rights obligations, particularly under the European Torture Convention, and to reconsider ratification of other human rights instruments. *Id.* The government has focused particular attention on granting an individual petition right under the ICCPR's Optional Protocol and the European Torture Convention. *Id.* See also MACDONALD & BLAKE, *supra* note 4, at 455 (remarking that other international treaties are relatively unknown in UK).

154. See GROSZ, *supra* note 144, at 188-90 (providing detailed look at ECHR, as incorporated into UK law by HRA, and addressing asylum specifically); GORDON & WARD, *supra* note 146, at 56, 58, 66, 106 (addressing changes HRA brings to practice of public law generally and nature of judicial review of asylum claims specifically); Walker & Weaver, *supra* note 96, at 505-12 (explaining that while potential for invocation of ECHR is tremendous, several considerations limited ECHR's actual use).

155. See Treaty establishing the European Community, O.J. C 340/3 (1997), *incorporating changes made by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, Oct. 2,

The Human Rights Act 1998 ("HRA") incorporated the ECHR into UK law.<sup>156</sup> The HRA became the only human rights treaty to give individual UK citizens a right of petition.<sup>157</sup> Commentators assert that the enactment of HRA heralded a human rights-oriented approach in UK immigration and asylum decision-making and policies.<sup>158</sup> It allowed adjudication of human rights by reference to a set of defined principles in a country

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1997, O.J. C 340/1 (1997) [hereinafter Maastricht Treaty]. See also Dieter Kugelmann Mainz, *The Maastricht Treaty and the Design of a European Federal State*, 8 TEMP. INT'L & COMP. L.J. 335 (1994) (describing Maastricht Treaty's aspirations). The Maastricht Treaty established the policy that asylum matters were of common interest to all European Union Members and the Amsterdam Treaty transferred significant legislative and judicial powers over asylum law and policy to Community competence. *Id.*; MACDONALD & BLAKE, *supra* note 4, at 9-10 (discussing that Maastricht Treaty was part of Member States' quest for cooperation in creating common visa policy, common external frontiers, and coordination in immigration rules and procedures); Owers & Garlick, *supra* note 17, at 203 (claiming that UK's asylum law and policy formed part of burden-sharing arrangements for managing refugee flows through Fortress Europe). See generally John J. Kavanagh, *Attempting to Run Before Learning to Walk: Problems of the EU's Common Foreign and Security Policy*, 20 B.C. INT'L & COMP. L. REV. 353 (1997) (critiquing EU's common system); MACDONALD & BLAKE, *supra* note 4, at 10 (describing how, since their inception, regional EU procedures are consistently challenged because States reach inter-governmental agreements outside auspices of Community institutions). Although the provisions of inter-governmental agreements are part of domestic law in some Member States, they are not so in the UK. *Id.* In the UK, they are not susceptible to domestic court review, and threaten to circumvent the absolute protection of *nonrefoulement* and the effective asylum status on State-crafted terms. *Id.*

156. See HRA, *supra* note 142, §§ 2, 3(1), 8, 8(4). HRA section 2 provides that, to the extent possible, the HRA must be read and given effect in a way compatible with the ECHR. *Id.* § 2. HRA section 3(1) intimates that because there is no doctrine of precedent in the UK, the decisions interpreting the ECHR are not binding on the UK domestic courts. *Id.* § 3(1). HRA section 8 provides that although the HRA does not extend to cases where both parties are private, courts still comply with the ECHR, including by interpreting statutes in accordance with section 3(1) and by considering common law. *Id.* § 8. HRA section 8(4) provides that the UK courts have the same remedies under the HRA as under the ECHR. *Id.* § 8(4).

157. See *id.* § 7 (showing that anyone, if they are victim, as defined in decisions under ECHR, may bring proceedings against public authority on ECHR grounds alone and may rely on any ECHR rights in any legal proceedings). See also CLAYTON & TOMLINSON, *supra* note 8, at 70 (claiming that no other document gives UK citizens right of petition).

158. See CLAYTON & TOMLINSON, *supra* note 8, at 42-46 (remarking that enactment of HRA culminated long campaign for statutory Bill of Rights). This campaign began in the 1970s and initially debate for and against Bill of Rights was prevalent in the House of Lords. *Id.* Commentators likened the HRA to special documents like the Magna Carta, Bill of Rights, and Statute of Westminster. *Id.* at 109; Walker & Weaver, *supra* note 96, at 518 (remarking that enactment of HRA was proximately caused by Labour Party's revised agenda, which emphasized policy of monitoring and promoting human rights); Stanley, *supra* note 98, at 32 (discussing policy change favoring human rights guaranteed by HRA).



with no written constitution.<sup>159</sup>

Critics of the HRA note that it became law through indirect incorporation and therefore, has no legislative status.<sup>160</sup> Moreover, the HRA fails to incorporate Article 1, which obliges States to secure the ECHR rights and freedoms to all citizens.<sup>161</sup> Further, the HRA fails to incorporate Article 13, which promises an effective remedy before a national authority to anyone whose ECHR rights are violated.<sup>162</sup>

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159. See CLAYTON & TOMLINSON, *supra* note 8, at 66 (noting that enactment of HRA marked turning point in UK legal and constitutional history). Moreover, the HRA will have an unprecedented impact on the role of the judiciary. *Id.* The UK courts will for the first time acquire a constitutional role and will be decisive arbiters of conflicts between human rights and public authorities. *Id.* In addition, the HRA came simultaneously with the most significant changes in immigration appeals system since its inception—the arrival of appeal rights. *Id.* As the HRA came into effect, section 65 of the Immigration and Asylum Act of 1999 (c. 33) (Eng.) [hereinafter Immigration Act 1999] came into force, providing the right of appeal on human rights grounds in immigration and asylum cases. *Id.*; Stanley, *supra* note 98, at 32 (asserting that HRA presented major shift in way adjudicators approach decision-making). *Cf.* Walker & Weaver, *supra* note 96, at 499 (questioning whether HRA signifies dawn of new British radicalism and analyzing why HRA was enacted at this particular historical moment).

160. See HRA, *supra* note 142; *cf.* ECHR, *supra* note 45. See also CLAYTON & TOMLINSON, *supra* note 8, at 108-09 (stating that if domestic statute is inconsistent with HRA, statute must prevail). Indirect incorporation means that the ECHR is justiciable in courts by indirect route of making it unlawful for public authorities to act in a manner incompatible with ECHR. *Id.* The government chose this type of incorporation out of concern for parliamentary sovereignty. *Id.*; GROSZ, *supra* note 144, at 7-10 (explaining that HRA does not contain force of law provision and therefore forms new kind of non-statutory or common law).

161. See ECHR, *supra* note 45, art. 1. *Cf.* HRA, *supra* note 142. The HRA only requires that public authorities act in accordance with Articles 2-12 and 14 of the ECHR; Articles 1-3 of the First Protocol; and Articles 1 and 2 of the Sixth Protocol; and it permits derogations and reservations. *Id.*

162. See CLAYTON & TOMLINSON, *supra* note 8, at 143-52 (listing extensive critiques of HRA). Experts highlight ECHR's failure to guarantee due process or fair trial rights before deportation; lack of minimum standards for detention outside of Article 3; and lack of positive detainee rights, like access to counsel. *Id.* Further, experts allege that the ECHR gives very limited protection to social and economic rights. *Id.* at 144-45. The HRA grants the government widely drawn entitlement to restrict rights, employing such notoriously vague references to national security, the prevention of disorder, or the protection of health and morals. *Id.* See also Stanley, *supra* note 98, at 32 (asserting that date for introduction of ECHR Article 5 guarantees of liberty and adequate detention standards is postponed). The manner in which the system will work in practice remains to be seen. *Id.* For now, in an attempt to head off applications under Article 5, section 44 of Immigration Act of 1999 provides for a system of routine bail hearings and section 46 for a general presumption in favor of bail. *Id.* This is a step forward from Immigration Act of 1971 ("1971 Act"), the fundamental legislation on which immigration law is built. *Id.* The 1971 Act contained extensive powers to arrest and detain asylum seekers for an unlimited period and provided them with little protection. *Id.*;

## II. DOMESTIC LEGISLATION IN THE UNITED STATES AND THE UNITED KINGDOM: A PRESUMPTION OF EXCLUSION

Commentators opine that the United States and the UK make thorough use of the truism that individuals have the right to be granted asylum but no right to seek it.<sup>163</sup> Because, under international law, the United States and the U.K. have no duty to guarantee asylum, both countries manage to circumvent their obligations to asylum seekers in distinct ways.<sup>164</sup> Experts discuss that the new anti-terrorism legislation in the United States and the UK exacerbates these systems' deficiencies and threatens further human rights violations.<sup>165</sup>

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Walker & Weaver, *supra* note 96, at 524-27 (discussing desirability of ECHR as domestic Bill of Rights).

163. See SMYSER, *supra* note 10, at 21-22 (asserting that in spite of expansion of international protection functions, asylum right remains most jealously preserved prerogative of States). During the preparatory negotiations for the UDHR, there were proposals that Article 14 should read "everyone has the right to seek and to be granted asylum" but this language was not accepted. *Id.* at 22. In the end, the balance at stake is a State's need to control its borders and a refugee's need to find a safe haven. *Id.*; Christine Chinkin, *International Law and Human Rights*, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 105, 107 (Tony Evans ed., 1998) (remarking that sovereign equality of States is foundational doctrine of international law). In any case, the international legal system lacks procedural mechanisms for law enforcement. *Id.* at 117. See also Fitzpatrick, *supra* note 146, at 13 (outlining three specific responses to migration in North America and Western Europe that resulted in erosion of access to asylum). These responses were: onerous deterrents to asylum applicants; the more regularized and formalized practice of granting temporary refuge; and internationally-monitored "safe zone" within the country of origin of victims. *Id.* at 15-17.

164. See Thomas J. White Center on Law and Government, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, NOTRE DAME J. L. ETHICS & PUB. POL'Y, at 144 (2000), available at <http://www.uchastings.edu/ers> [hereinafter White], (discussing U.S. response to increased asylum applications and addressing U.S. system's shortcomings); North Birmingham Race Partnership, *Shattered Homelands, Scattered Dreams* (2001), available at <http://www.iarp.org.uk/shattered.pdf> [hereinafter *Shattered Homelands, Scattered Dreams*] (outlining main features of UK asylum system and presenting critiques of system).

165. See Vargas, *supra* note 26, at 2 (describing reassignment of law enforcement resources to war against terrorism); Eggen, *supra* note 1 (quoting Attorney General vowing to step up detention efforts); Chrisafis, *supra* note 17 (discussing insidious prejudice against Muslims); MacDonell & Scott, *supra* note 7 (discussing Anti-Terrorism Act 2001). See generally *No Safe Refuge*, *supra* note 26 (remarking that Home Secretary announced plans to place restrictions on entry into UK, to curb asylum seekers' appeal rights, and to institute new identity cards).

### A. U.S. Laws and Procedures Relevant to Asylum Seekers

Scholars explain that the U.S. Constitution vests in Congress virtually unfettered authority to promulgate, implement, and enforce laws governing U.S. immigration policy.<sup>166</sup> In 1952, Congress passed the Immigration and Nationality Act ("INA"),<sup>167</sup> placing most of the laws regulating immigration into a single statute.<sup>168</sup> The Board of Immigration Appeals ("BIA") is the highest administrative body charged with interpreting and applying laws and regulations under the INA.<sup>169</sup> The BIA decisions are subject to abuse of discretion review by the Attorney General

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166. See U.S. CONST. art. I, § 8.4 (granting Congress authority to promulgate uniform rule of naturalization of citizens). See also Alexandra E. Chopin, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents' Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1265-67 (2000) (describing congressional plenary power in setting immigration policy); *Edye v. Robertson*, 112 U.S. 580, 591 (1884) (holding that congressional power to regulate immigration emanates from power to regulate commerce with foreign nations). The U.S. Supreme Court has given long-standing support to the congressional discretion to establish criteria for admitting and excluding foreign nationals. See, e.g., *Harisiades v. Shaughnessy*, 343 U.S. 936 (1952) (upholding congressional act requiring deportation of legal resident alien due to communist party membership); *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976) (upholding validity of statute denying medicare to certain alien residents).

167. See INA, 8 U.S.C. §§ 1-1646.

168. See *id.* See also Immigration and Nationality Act, available at <http://www.ins.usdoj.gov/graphics/lawsregs/INA.htm> (explaining that INA was created in 1952 from variety of statutes governing immigration law). By collecting and codifying these existing provisions, the INA reorganized the structure of immigration law. *Id.* Although the INA stands alone as a body of law, it is also contained in Title 8 of the United States Code. *Id.* See also Public Laws Amending the INA, available at <http://www.ins.usdoj.gov/graphics/lawsregs/AMENDINA.HTM> (citing list of public laws amending INA).

169. See U.S. Dept. of Justice, *Board of Immigration Appeals*, available at <http://www.usdoj.gov/eoir/biainfo.htm> (explaining that BIA is most important agency charged with interpreting and applying immigration laws); INS, *Making Immigration Law*, available at <http://www.ins.usdoj.gov/graphics/lawsregs/MAKELAW.HTM> (explaining that BIA is separate agency within U.S. Department of Justice that issues appellate administrative decisions upon review of immigration cases). These decisions are binding on the INS nationwide. *Id.* The Immigration and Naturalization Service ("INS"), the Department of Labor, and the Department of State issue regulations, which allow these agencies to apply the general INA provisions to specific situations. See 8 C.F.R., available at <http://www.ins.usdoj.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-9511?f=templates&fn=document-frame.htm#slb-8cfr> (citing list of INS regulations). The C.F.R. has the force of law. *Id.*; U.S. Dep't Of Labor, available at <http://www.dol.gov/dol/compliance/comp-ina.htm> (listing Department of Labor regulations); U.S. Dep't of State, available at <http://www.state.gov/search.htm> (providing link to recent Department of State regulations).

and the federal courts.<sup>170</sup>

### 1. Domestic Legislation

U.S. legislation relevant to asylum evolved significantly over the years.<sup>171</sup> Experts opine that the changes in U.S. asylum laws were often harnessed to U.S. foreign policy objectives.<sup>172</sup> The most significant amendments to the INA include the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),<sup>173</sup> the Torture Convention,<sup>174</sup> and the USA PA-

170. See INA §§ 245A (f)(4), 210(e)(3); 8 U.S.C. §§ 1255A (f)(4), 1160(e)(3). See also BLM, *supra* note 4, at 15-16 (indicating that BIA's decisions are subject to review by Attorney General and federal courts); Robert Pauw, *Judicial Review of "Pattern and Practice" Cases: What to do When the INS Acts Unlawfully*, 70 WASH. L. REV. 779 (1995) (stating that federal appeal courts are authorized to review BIA decisions on case-by-case basis).

171. See UNHCR, STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION 173 (2000) [hereinafter STATE OF THE WORLD'S REFUGEES] (claiming that although United States welcomed refugees during Cold War, its system was designed to deal with relatively small number of asylum applications). When the United States faced an influx of asylum seekers in the 1980s, it struggled to find the right balance between refugee protection and immigration control. *Id.* See also Keely, *supra* note 8, at 42 (claiming that 1980s marked turning point in U.S. asylum law); SMYER, *supra* note 10, at 93 (describing how wars and natural disasters in Asian and African countries in 1980s prompted large scale asylum movements to Western world, including United States). The Western countries were forced to respond by amending their immigration laws. *Id.*

172. See Michael Cavosie, *Defending the Golden Door: The Resistance of Ad Hoc and Ideological Decision-Making in U.S. Refugee Law*, 67 IND. L. J. 411, 412-13, 424-35 (discussing how in spite of congressional efforts to achieve contrary result, political and ideological concerns continue to influence development of U.S. refugee policy). See also STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (explaining that U.S. executive branch has considerable latitude in shaping refugee policy); Hughes & Crane, *supra* note 22, at 761 (showing that politics play central role in granting of parole). Since at least 1956, the President has used parole authority to inject political considerations into immigration decisions. *Id.*

173. See IIRIRA, *supra* note 132. See also Gavan Montague, Note, *Should Aliens be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1443-44 (2001) (stating that IIRIRA made three significant changes to prior law). IIRIRA removed the distinction between excludable and deportable aliens, making each one subject to single removal proceedings; expanded offenses for which aliens can be removed or deported; and mandated that aliens be removed within ninety days once they are determined to be removable. *Id.*; Costello, *supra* note 18, at 510 (explaining that IIRIRA is considered harshest immigration control measure in this century); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 371 (1999) (describing IIRIRA as policy failure).

174. See Torture Convention, *supra* note 43. See also von Sternberg, *supra* note 134, at 32-34 (introducing Torture Convention as important alternative source of relief for asylum seekers in United States); Immigration Officer Academy, *Lesson Two*, *supra* note 78, at 19 (comparing Torture Convention Article 3 with Refugee Convention Article 38

TRIBUT Act.<sup>175</sup>

a. The Cold War Years

Throughout the Cold War years, the United States opened its doors to refugees from the Communist block.<sup>176</sup> Experts explain that these refugees had political value and were therefore guaranteed a warm welcome in the United States.<sup>177</sup> From the mid-1970s, the United States resettled large numbers of Indochinese refugees, as well as those fleeing from Romania, Cuba, and Vietnam.<sup>178</sup> Scholars explain that the resettlement program was rooted in a sense of obligation toward former allies and a fear that refugee flows could destabilize the remaining non-communist countries.<sup>179</sup>

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prohibition on *refoulement*). Unlike the Refugee Convention, the Torture Convention does not require torture to be tied to the five enumerated grounds and contains no bars for criminals to obtain the Torture Convention protection. *Id.* Distinctions between the Torture Convention and the Refugee Convention provisions include motive and standard of proof requirements. *Id.*

175. See USA PATRIOT Act, Pub. L. No. 107-56. See also *Amnesty International's Concerns*, *supra* note 27 (discussing concerns about increased detention of asylum seekers); Chang, *supra* note 3, at 5-9 (remarking that USA PATRIOT Act gave FBI power to diminish privacy rights); Lancaster & Pincus, *supra* note 28 (discussing civil liberties concerns heralded by enactment of USA PATRIOT Act).

176. See Ira Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 872 (1982) (noting that prevalent norm is for Congress to tolerate Executive's inclination to provide protection to refugees from countries hostile to United States); Hughes & Crane, *supra* note 22, at 762-63 (indicating that United States routinely applies less restrictive refugee admissions policy toward aliens from communist countries); Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 712 (1993) (remarking that United States will tolerate human rights violations so long as violator loudly denounces communism).

177. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 173 (claiming that throughout Cold War years, political value of accepting refugees from communist countries guaranteed European refugees warm welcome); Lennox, *supra* note 176, at 712 (stating that refugees from communist countries had political value); *50 Years On*, *supra* note 19, at 509 (indicating that during Cold War, refugees from communist world had political and geopolitical significance). See generally National Immigration Forum, *Immigration Policy Handbook 2000*, at 63-67 (2000) [hereinafter *Immigration Policy Handbook*] (presenting chronology and cycles of U.S. immigration movements and demonstrating preference for refugees from communist countries).

178. See Keely, *supra* note 8, at 39-46 (citing to large resettlements of Indochinese and boat people from mid 1970s to early 1980s); SMYSER, *supra* note 10, at 52-64 (detailing Indochinese refugees' flight to United States). See generally STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (explaining that late 1970s witnessed establishment of Office of U.S. Coordinator for Refugee Affairs and incorporation of Refugee Convention into U.S. law). President Jimmy Carter highlighted the promotion of human rights as the centerpiece of U.S. foreign policy. *Id.*

179. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (asserting that

## b. The early 1980s to the early 1990s

Scholars opine that the 1980 Act permitted the executive branch significant latitude in shaping U.S. refugee policy.<sup>180</sup> Experts explain that this latitude resulted in a system that promoted U.S. foreign policy while trampling U.S. obligations under the Refugee Convention.<sup>181</sup> The widely critiqued discriminatory treatment of Salvadoran, Guatemalan,<sup>182</sup> and Haitian asylum seekers illustrates this point.<sup>183</sup>

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U.S. resettlement program was product of ties with countries in Southeast Asia and fear of spread of communism); Keely, *supra* note 8, at 40 (showing that resettlement further reinforced anti-communist sentiment and provided anti-communist propaganda value); SMYSER, *supra* note 10, at 52-64 (discussing reasons for U.S. open-armed policy toward asylum seekers from Southeast Asia, including sense of obligation and anti-communist agenda).

180. See 1980 Act, *supra* note 118. See also STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (claiming that executive branch retained substantial discretion in shaping refugee policy after implementation of 1980 Act); Doris Meissner, *Reflections on the U.S. Refugee Act of 1980*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 57, 57-58 (David A. Martin ed., 1988) (discussing that discretion granted to Attorney General under 1980 Act raised concerns that executive power infringed on statutory power of Congress to admit persons to United States). See generally Gregg A. Beyer, *Affirmative Asylum in the United States*, 6 GEO. IMM.L.J. 253 (1992) (summarizing relevant procedures and issues under 1980 Act).

181. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 173 (claiming that United States was not ready for mass flows of asylum seekers in 1980s and it implemented policies which threatened to breach U.S. obligations under international law); Costello, *supra* note 18, at 503 (showing that mass influx of asylum seekers forced U.S. courts to draw strict lines in immigration legislation); *50 Years On*, *supra* note 19, at 509 (contending that after Cold War refugees became scapegoats of domestic problems, blamed for threatening security, draining resources, and rising crime).

182. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (suggesting that U.S. discriminatory practices toward Salvadoran and Guatemalan asylum seekers were reflection of U.S. foreign policy); Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295 (1985) (discussing denial of claims of asylum seekers from el Salvador); Hughes & Crane, *supra* note 22, at 781-82 (claiming that Salvadoran asylum seekers encountered resistance in pursuing their asylum claims). Cf. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (declaring that foreign policy and border enforcement considerations should not be relevant to assessing asylum claim validity).

183. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 176-77 (reviewing allegations of bias in U.S. treatment of Haitian as opposed to Cuban asylum seekers); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Asylum in the United States*, 60 BROOK. L. REV. 841, 845-46 (1994) (describing U.S. policy toward asylum seekers from Haiti as deeply ambivalent); Hughes & Crane, *supra* note 22, at 748 (asserting that Haiti is only country in world with which United States has agreement permitting interdiction and repatriation). Haitians are significantly prejudiced by this policy. *Id.*

i. Salvadorans and Guatemalans

Beginning in the early 1980s, asylum seekers from el Salvador and Guatemala fled to the United States seeking safe haven from civil wars in their home countries.<sup>184</sup> The United States denied the asylum claims of the majority of these applicants maintaining that they did not qualify as refugees, but were instead economic migrants.<sup>185</sup> Critics contended that these individuals were denied fair asylum procedures because they were fleeing right-wing governments supported by the United States.<sup>186</sup> In 1985 advocacy groups challenged this biased treatment in court.<sup>187</sup> In 1990, the U.S. government agreed to settle the case and to review the claims of Salvadoran and Guatemalan applicants who were denied asylum between 1980 and 1990.<sup>188</sup>

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184. See Miguel Helft, *2000 Miles and Counting*, available at <http://www.journalism.sfsu.edu/www/pubs/prism/oct95/2000.html> (discussing flight of Central Americans from civil war-torn countries to United States only to face denial of their claims by INS); *North America: Central Americans*, 4 *MIGRATION NEWS* (1997), available at [http://migration.ucdavis.edu/mn/archive\\_mn/aug\\_1997-03mn.html](http://migration.ucdavis.edu/mn/archive_mn/aug_1997-03mn.html) (describing factors leading Guatemalans and Salvadorans to seek asylum in United States); Hughes & Crane, *supra* note 22, at 782 (noting that civil war in el Salvador was force behind influx of asylum seekers from that country into United States); FELIX ROBERTY MASUD-PILOTO, *WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES* (1988) (discussing political situation in el Salvador and reasons for migration of many Salvadorians to United States).

185. See *STATE OF THE WORLD'S REFUGEES*, *supra* note 171, at 174 (stating that U.S. government maintained that majority of Salvadorian and Guatemalan asylum seekers were either economic refugees or did not suffer or fear suffering persecution); Keely, *supra* note 8, at 44 (asserting that asylum seekers from Central America were perceived as economic migrants); Romig, *supra* note 182, at 295 (discussing discriminatory treatment of Salvadoran asylum seekers and perception that they were economic migrants rather than refugees).

186. See MASUD-PILOTO, *supra* note 184, at 120 (discussing how granting asylum to Salvadorans would have suggested that United States, which was providing billions of dollars in aid to el Salvador government, was supporting system that persecuted its nationals); *STATE OF THE WORLD'S REFUGEES*, *supra* note 171, at 174 (explaining that U.S. government did not grant Salvadoran and Guatemalan asylum seekers relief because they fled from governments that United States supported); Hughes & Crane, *supra* note 22, at 782 (explaining that U.S. refusal to accept asylum seekers from certain Central American countries was politically motivated).

187. See *Am. Baptist Churches*, 760 F. Supp. at 796.

188. See *id.* This settlement coincided with the enactment of the Immigration Act of 1990, which established a new system to determine asylum claims. See Immigration Act of 1990, Pub. L. 101-649, available at <http://www.ins.gov/lpBin/lpext.dll/inserts/publaw/publaw-2709?f=templates&fn=document-frame.htm#publaw-pl101649>. The Immigration Act of 1990 specifically designated El Salvador as a country from which persons are entitled to Temporary Protected Status ("TPS"). See INA, § 244, 8 U.S.C. § 1254(a). TPS is a temporary immigration status granted to eligible nationals of desig-

## ii. Haitians

Haiti's long history of dictators, corruption, class and linguistic divisions, prompted many Haitians to flee their country and seek asylum in the United States.<sup>189</sup> Experts opine that the U.S. pattern of exclusion of asylum seekers from Haiti<sup>190</sup> began with the "Haitian Program" in the late 1970s.<sup>191</sup> Critics contend that a series of government policies through the 1980s and the 1990s circumvented fair asylum procedures and resulted in multiple instances of *refoulement* to Haiti.<sup>192</sup> The questionable U.S.

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nated countries. *Id.* TPS gives temporary authorization to find employment and temporarily precludes deportation. *Id.*; see also 8 C.F.R. § 244 (listing specific TPS eligibility requirements and procedures).

189. See Hughes & Crane, *supra* note 22, at 750-55 (maintaining that uneasy political situation in Haiti prompted Haitians to seek asylum in United States). See generally CHARLES R. FOSTER & ALBERT VALDMAN, *HAITI, TODAY AND TOMORROW: AN INTERDISCIPLINARY STUDY* (1984) (outlining Haiti's troubled history); ROBERT DEBS HEINL, JR. & NANCY GORDON HEINL, *WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE* (1978) (presenting overview of Haiti's culture and history).

190. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 176 (contending that since 1970s U.S. government consistently restricted Haitian asylum seekers' access to appropriate procedures); Hughes & Crane, *supra* note 22, at 765 (explaining that through improper screening and arbitrary detention, U.S. government has consistently demonstrated its bias against Haitians); LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *REFUGEE REFOULEMENT—THE FORCED RETURN OF HAITIANS UNDER THE U.S. HAITIAN AGREEMENT* 49 (1990) (describing U.S. treatment of Haitian asylum seekers in violation of Refugee Convention guarantees).

191. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 176 (describing how in 1978 U.S. government instituted "Haitian Program" aimed at deterring Haitian asylum seekers from entering United States); Hughes & Crane, *supra* note 22, at 765-68 (relating how under "Haitian Program" asylum applications were subject to expedited processing). The program was instituted by the Miami office of the INS, which was faced with approximately 7,000 unprocessed Haitian asylum claims. *Id.*; *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 511-13 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (remarking that "Haitian Program" was instituted to eliminate backlog of asylum claims as rapidly as possible). Not one of the Haitians processed during this program was granted asylum. *Id.* The program included such measures as holding simultaneous hearings involving the same attorney and processing an average of fifty-five hearings per day. *Id.* The district court found that the "Haitian Program" was discriminatory—while programs set up for other asylum seekers allowed aliens to stay in the United States, the goal of the "Haitian Program" was expedited expulsion. See *Haitian Refugee Ctr.*, 503 F. Supp. at 514. Cases from the Fifth Circuit illustrate the problems faced by Haitian asylum seekers between 1972 and 1980. See, e.g., *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975) (upholding immigration judge's ruling that required applicants to prove fear of persecution beyond reasonable doubt; refusal to take administrative notice of conditions in Haiti; and denial of requests for asylum); *Pierre v. United States*, 547 F.2d 1281 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977) (dealing with Haitian asylum seekers' claims of denial of equal protection due to inability to assert claims for asylum in exclusion proceeding).

192. See Hughes & Crane, *supra* note 22, at 747, 785-86 (describing U.S. policies



practices included detention procedures begun in the 1980s;<sup>193</sup> interdiction under President Reagan's program, begun with a 1981 Executive Order;<sup>194</sup> President Bush's Kennebunkport Or-

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toward Haitian asylum seekers as unprecedented and harsh and citing number of instances where Haitian asylum seekers were denied basic procedural safeguards); *Haitian Refugee Ctr. v. Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), *aff'd* 872 F.2d 1555 (11th Cir. 1999), *aff'd sub. nom. McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991) (denying Haitian asylum seekers opportunity to challenge denial of asylum based on lack of Creole interpreters and witnesses); STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 174 (summarizing series of steps U.S. government took to deny Haitian asylum seekers access to U.S. and to undermine Refugee Convention guarantees).

193. See THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 412-13 (2d ed. 1991) (showing that in 1980s detention was revived to apply particularly to Haitians); Hughes & Crane, *supra* note 22, at 768-69 (discussing that detention practices in 1980s were primarily aimed at Haitians and Cubans); *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982) *aff'd in part*, 711 F.2d 1455 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985) (discussing how change in policy away from parole and to detention was in part directed at Haitians and made initially without any formal rule-making). See also *Haitian Ctrs. Council v. Sale*, 817 F. Supp. 336 (E.D.N.Y. 1993) (discussing fate of group of asylum seekers from Haiti). These individuals were pre-screened and found eligible for asylum but detained because they were HIV positive. *Id.* Eventually these asylum seekers were not admitted into the United States, but merely paroled. *Id.*; see also INA, § 212 (d)(5)(A), 8 U.S.C. § 1182 (d)(5)(A) (showing that parole is specifically considered not being admitted to United States). See generally *Harisiades v. Shaughnessy*, 343 U.S. 936 (1952) (upholding use of indefinite detention for excludable aliens).

194. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 176 (describing how in late 1981, following agreement with Haitian authorities, Ronald Reagan ordered U.S. Coast Guard to interdict Haitian vessels and to return undocumented aliens on those vessels to Haiti). Although the Reagan administration instructed the Coast Guard not to return people who might be refugees, the procedures it put in place made it virtually impossible for these individuals to apply for asylum. *Id.* In 1991, the Coast Guard began screening interdicted Haitians on a U.S. naval base in Guantanamo Bay, Cuba before returning them to Haiti. *Id.* See also A.G. Miriam, *International Law and the Preemptive Use of State Interdiction Authority on the High Seas: The Case of Suspected Illegal Haitian Immigrants Seeking Entry into the U.S.*, 12 MD. J. INT'L L. & TRADE 211, 231 (1988) (explaining that interdiction is novel and unprecedented instrument for U.S. enforcement of its immigration laws); Jon L. Jacobson, *At Sea Interception of Alien Migrants: International Law Issues*, 28 WILLIAMETTE L. REV. 811 (1992) (analyzing policy of interdiction in context of international law and discussing concerns interdiction raises); *Haitian Refugee Ctr. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd*, 809 F.2d 794, 838 (D.C. Cir. 1987) (upholding Reagan interdiction program on constitutional and statutory grounds). A series of cases decided within a two-month time span dealt with denial of attorney access to Haitians detained at Guantanamo Bay and with the issue of forced repatriation. See *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991), *remanded* 949 F.2d 1109 (11th Cir. 1991), *cert. denied* 112 S. Ct. 1245 (1992) [hereinafter Baker I] (dissolving district court's injunction preventing Haitians' repatriation and concluding that prevention of repatriation was not remedy for denial of attorney access); *Haitian Refugee Ctr. v. Baker*, 950 F.2d 685 (11th Cir. 1992) [hereinafter Baker II] (staying and suspending district court's order preventing Haitians' repatriation); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied* 112 S. Ct. 1245 (1992) [hereinafter Baker III] (specifically instructing district court to dismiss ac-

der for repatriation of Haitians without any screening for asylum;<sup>195</sup> and President Clinton's support of Bush's policy after he became president in 1993.<sup>196</sup> U.S. government statistics demonstrate that between 1981 and 1991, over 22,000 Haitians were interdicted at sea, while only twenty-eight of these individuals were permitted to enter into the United States.<sup>197</sup>

Critics point out that not only was U.S. treatment of asylum seekers from Haiti unfair, it was also discriminatory when compared to the U.S. treatment of asylum seekers from Cuba.<sup>198</sup> Critics argue that the U.S. government treated Cubans as refu-

tion enjoining repatriation). The Supreme Court denied *certiorari* of both cases after the Solicitor General indicated that the United States would screen intercepted aliens followed by full consideration of asylum rights. See *McNary*, 969 F.2d at 1357.

195. See Exec. Order No. 12,807, 57 *FED. REG.* 23133 (1992), reprinted in 8 *U.S.C.* § 1182 (1993) (providing for return of vessels and passengers to countries from which they came and specifically foreclosing any procedures to determine whether person is refugee); *STATE OF THE WORLD'S REFUGEES*, *supra* note 171, at 176 (describing how in May 1992, President Bush ordered that all interdicted Haitians be returned to Haiti, without cursory refugee screening); Hughes & Crane, *supra* note 22, at 776-77 (describing impact of Bush's order). The Bush policy contributed to a decline in boat traffic from Haiti to the United States. *Id.* at 777. The Second Circuit considered Bush's policy in *McNary* and found that the President's power to order repatriation was limited. See *McNary*, 969 F.2d at 1326.

196. See Marvin H. Morse & Lucy M. Moran, *Troubling the Waters: Human Cargos*, 33 *J. MAR. L. & COM.* 1, 29 (stating that Clinton terminated Bush's direct return policy); *STATE OF THE WORLD'S REFUGEES*, *supra* note 171, at 176 (relating how in June 1994, President Clinton instituted new procedure, where United States carried out refugee determination on board of *USNS Comfort*, anchored off coast of Jamaica). A record number of Haitians processed on the *Comfort* received refugee status. *Id.* As a result, the United States ended the on-board processing, sending those still on the *Comfort* and the newly interdicted Haitians to Guantanamo. *Id.* The Haitians could remain in Guantanamo as long as it was unsafe for them to return to Haiti, but they would not be permitted to enter into the United States. *Id.* The policy of interdiction at sea remains in force to this day. *Id.*

197. See *STATE OF THE WORLD'S REFUGEES*, *supra* note 171, at 176 (citing U.S. government statistics); Villiers, *supra* note 183, at 854 (claiming that approval rate for Haitian asylum applicants remains among lowest of all applicants); Hughes & Crane, *supra* note 22, at 765 (showing consistent discriminatory treatment of Haitian asylum seekers which resulted in very few actual entrants into United States).

198. See Hughes & Crane, *supra* note 22, at 778-79 (stating that Cubans have been beneficiaries of U.S. policies favoring their entry since Castro regime began). These policies included favorable parole proceedings and Cuban Adjustment Act allowing Cuban nations in the United States to achieve permanent resident status through a special process. *Id.* at 779; Cavosie, *supra* note 172, at 412 (stating that refugees from countries hostile to United States invariably receive protection while equally worthy refugees from friendly countries have less success); Villiers, *supra* note 183, at 853-54 (asserting that influx of Cuban refugees into United States shows preferential treatment toward that group, as opposed to asylum seekers from Haiti).

gees because they were fleeing a communist government.<sup>199</sup> At the same time, the U.S. government viewed Haitians as economic migrants, despite evidence of widespread persecution in Haiti.<sup>200</sup>

In the early 1990s, advocacy groups challenged the U.S. interdiction policy in the federal courts, and the issue was appealed to the Supreme Court.<sup>201</sup> In *Sale v. Haitian Ctrs. Council Inc.*, the Supreme Court ruled that U.S. obligations under Article 33 of the Refugee Convention did not apply outside of the United States territory, where Haitian asylum seekers were interdicted.<sup>202</sup> The Court made use of the concept of "entry"<sup>203</sup> to

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199. See GILBERT LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS—REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 66 (1986) (referring to Cubans as special favorites of United States); LENNOX, *supra* note 176, at 697 (arguing that welcoming Cubans who fled communist country was politically advantageous); HUGHES & CRANE, *supra* note 22, at 780 (remarking that opening door to Cubans while repelling Haitians was arguably justified U.S. policy).

200. See Michael S. Teitelbaum, *Asylum in Theory and Practice*, 76 *PUB. INT.* 74, 77-78 (1984) (showing that many viewed asylum as growth industry and Haitians as savvy immigrants who sought short-cut to permanent residency); VILLIERS, *supra* note 183, at 847-48 (arguing that many saw Haitian asylum seekers as economic migrants seeking to misuse U.S. asylum procedure). Some experts emphasize that this perception has foundations in racial prejudice. *Id.* at 853. See generally MEISSNER, *supra* note 180, at 59 (arguing that over time refugee flows lose much of their refugee character and become migration streams).

201. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993). The case began with a lawsuit filed in federal district court in New York, complaining, *inter alia*, that Haitians were denied access to lawyers. See *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated sub. nom. Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 918 (1993). In May, the complaint was amended to include challenge to the Bush Kennebunkport Order. See *Sale*, 969 F.2d at 1354. In July 1992, the Second Circuit affirmed the district court injunction, holding that the obligation of *nonrefoulement* applied to Haitians on high seas. *Id.* It also affirmed a prohibition against repatriation of "screened-in" Haitians unless they were given an opportunity to communicate with an attorney. *Id.* It did not uphold the district court's injunction, which gave advocacy organizations access to Haitians on Guantanamo. *Id.*

202. See *Sale*, 509 U.S. at 177-88 (determining that although return of refugees to country from which they fled may violate international law, it does not violate U.S. law). Justice Blackmun dissented, finding it extraordinary that the United States would intercept fleeing refugees and force them to return to their persecutors. See *Sale*, 509 U.S. at 188-208.

203. See INA, § 101(a)(13), 8 U.S.C. § 1101(a)(13) (defining entry as "any coming of an alien to the United States from a foreign port or place or from an outlying possession, whether voluntarily or otherwise"). See also *Leng May Ma v. Barber*, 357 U.S. 185, 186-89 (1958) (holding that entry is not accomplished unless alien is free from official restraint). Entry is an anomalous concept in U.S. law. See, e.g., *In re Pierre*, 14 I&N Dec. 467 (BIA 1973) (finding that Haitian refugees on small boat which became distressed and then towed into U.S. port by American vessel had not "entered"). Cf. *In re*

hold that the *nonrefoulement* obligation did not apply to interdicted Haitians, because they had not entered the United States.<sup>204</sup>

### c. The mid to late 1990s

As the number of asylum applications filed in the United States increased,<sup>205</sup> the INA regulations underwent extensive amendment in 1995<sup>206</sup> intended to speed up the immigration

Ching and Chen, 19 I&N Dec. 203 (BIA 1984) (finding that Chinese aliens who were refused admission at airport, and who abandoned their passports and baggage and escaped from detention lounge into United States, had "entered" country). Under the 1980 Act, an alien who entered the United States legally and became removable had significantly greater substantive and procedural rights than an alien who had not entered and was therefore excludable. See AUSTIN T. FRANGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 1.5(b) (1992). IIRIRA removed the long-standing distinction between removable and excludable aliens. See Pub. L. No. 104-208, div. C, § 301, 110 Stat. 10009-546, 575 (codified at 8 U.S.C. §§ 1182(a), 1227). Under IIRIRA, excludable aliens and aliens who have illegally entered the country are termed "inadmissible" and, along with aliens who have legally entered the United States, are subject to uniform removal proceedings. See *id.* § 304, 110 Stat. 3009-546, 587 (codified at 8 U.S.C. § 1229(a)).

204. See INA, § 243(h)(1), 8 U.S.C. § 1153(h)(1) (prohibiting return of any alien to country where she would be threatened). The Court concluded that INA § 243(h)(1) did not apply extraterritorially. See *Sale*, 509 U.S. at 183. Justice Blackmun protested that to deny extraterritoriality was to read into the section's mandate the very language Congress removed. See *Sale*, 509 U.S. at 188-208. This pronouncement resolved a conflict between the Second Circuit's decision in *McNary* and Eleventh Circuit's decision in *Baker III*, by vacating the Second Circuit's decision. See *Sale*, 509 U.S. at 188.

205. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 178 (citing increase from 20,000 applications in 1985 to 148,000 in 1995); see also *Immigration Policy Handbook 2000*, *supra* note 177, at 9 (stating that backlog of unadjudicated applications in 1990s reached overwhelming numbers); Fitzpatrick, *supra* note 146, at 27 (discussing how early 1990s witnessed accelerated application rates and marked almost hysterical perception of asylum seekers as out of control).

206. See Fed. Reg. Notices 1995, available at <http://www.ins.usdoj.gov/lpbin/lpext.dll/inserts/fr/fr-12559/fr-12574?f=templates&fn=document-frame.htm#fr-fr-32-95-32-final-32-regs> (listing Federal Register notices, proposed, interim, and final regulations issued during 1995). The Federal Register is a daily publication created by the Federal Register Act of 1935, 44 U.S.C. chapter 15. See Federal Register Publication System: What It Is and How to Use It, available at <http://www.nara.gov/fedreg/frtu/frtu000.pdf> (explaining Federal Register). The Federal Register is a centralized means of publishing important government documents such as regulations, presidential documents, and notices. *Id.* Most rules are published first as proposals and the public may comment on them before they become final and have the force of law. *Id.* Interim and final rules have the force of law. *Id.*; *Immigration Policy Handbook 2000*, *supra* note 177, at 62-63 (presenting brief chronological overview of legislation from late 1700s to INA to 1995 reforms); Costello, *supra* note 18, at 509-10 (describing significant laws prior to 1995, which restricted judicial review and procedural protections for aliens).

process; decrease the backlog of unadjudicated applications; and address the asylum system's increased vulnerability to fraud and abuse.<sup>207</sup> Experts assert that the year 1996 became a turning point in U.S. immigration history, because Congress passed legislation, which dramatically limited asylum seekers' rights.<sup>208</sup>

On April 24, 1996 the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")<sup>209</sup> became law, creating a process by which the U.S. government could designate certain organizations as foreign terrorist organizations.<sup>210</sup> Certain persons involved in these organizations were ineligible for asylum or alternative remedies.<sup>211</sup> Meanwhile on September 30, 1996, President Clinton signed IIRIRA.<sup>212</sup> Among other provisions,<sup>213</sup>

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207. See Hughes & Crane, *supra* note 22, at 764-65 (commenting on changing attitude of American public toward refugees and asylum seekers); Johnson, *supra* note 22, at 5 (discussing how American public grew increasingly concerned about domestic issues such as crime and sagging economy and developed fears about sharing scarce jobs and other resources with new arrivals); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L.REV. 69, 74 (1998) (describing how governmental agencies, scientific institutions and United States Census can formalize negative stereotypes about immigrants); Delgado, *supra* note 17, at 1952 (1998) (reviewing range of books dealing with prevalent prejudicial attitudes toward immigrants); Reisman, *supra* note 19, at 4, 20-30 (showing that fears of terrorism fuel anti-immigrant sentiment).

208. See Dan Danilov, *U.S. Courts Offer no Protection from Latest Immigration Law*, SEAT. POST-INTELLIGENCER, Dec. 17, 1996, at A19 (remarking that 1996 legislation potentially involves most draconian measures enacted since late 1800s); David M. Grable, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821-22 (1998) (remarking that expedited removal procedures under new legislation potentially violated aliens' due process rights); Chopin, *supra* note 166, at 1275-77 (analyzing historical foundation of 1996 immigration legislation). See also *Immigration Policy Handbook 2000*, *supra* note 177, at 164 (listing legislation aimed to mitigate 1996 legislation). This legislation includes the Haitian Refugee Immigration Fairness Act; the American Competitiveness and the Workforce Improvement Act; and the Agricultural Research, Extension, and Education Reform Act. *Id.*

209. See Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, amending various sections of 8 U.S.C. [hereinafter AEDPA].

210. See *id.* § 302, amending 8 U.S.C. § 1181.

211. See *id.* § 421, amending 8 U.S.C. § 1158(a) (providing that Attorney General may not grant alien asylum if specific conditions are satisfied).

212. See IIRIRA, *supra* note 132. See also Montague, *supra* note 173, at 1443-44 (reviewing significant changes brought by IIRIRA); Costello, *supra* note 18, at 510 (explaining that IIRIRA was considered harshest immigration control measure in this century); Schuck & Williams, *supra* note 173, at 371 (describing IIRIRA as policy failure).

213. See Immigration Officer Academy, *Overview of the Asylum Process*, *supra* note 129, at 12-13 (reviewing changes under IIRIRA); 64 FED. REG. 76121 (1996) (issuing final rule amending 8 C.F.R. § 208 in response to IIRIRA).

IIRIRA created new restrictions for applying for asylum,<sup>214</sup> added penalties for the filing of frivolous asylum applications,<sup>215</sup> and established a process for expedited removal, which took effect on April 1, 1997.<sup>216</sup>

## 2. Grounds for Relief

INA distinguishes between two kinds of relief: straight asylum<sup>217</sup> and withholding of removal.<sup>218</sup> Asylum is universal and an alien cannot be deported while in valid asylum status.<sup>219</sup> Moreover, asylum is converted into a legal permanent resident ("LPR") status after an alien has been in the country for one year.<sup>220</sup> Withholding of removal, on the other hand, is country

214. See INA, §§ 208(a)(2), 207(a)(5); 8 U.S.C. §§ 1158(a)(2), 1157(a)(5). Under INA § 208(a)(2), those aliens who have been in the United States more than one year without filing; those who were denied asylum in the past; and those who can be returned to a "safe" country may no longer apply for asylum. *Id.* Under INA § 207(a)(5), no more than 1,000 persons who resist coercive population control programs may be admitted as refugees or granted asylum in any fiscal year. *Id.*

215. See INA, § 208(d)(6), 8 U.S.C. § 1158(d)(6) (stating that aliens who file frivolous applications become permanently ineligible for benefits under INA); see also Immigration Officer Academy, *Asylum Officer Basic Training, Lesson: Mandatory Bars to Asylum and Discretion*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 1 (June 13-14, 2001) (reviewing changes under IIRIRA).

216. See INA, § 235(b)(1), 8 U.S.C. § 1225(b)(1) (describing steps in expedited removal proceeding). See also Michele R. Pistone and Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 2 (2001) (maintaining that expedited removal provision causes hardship to particularly vulnerable and deserving group of would-be immigrants); Montague, *supra* note 173, at 1439 (stating that harsh detention policy led to riots and suicide attempts among detainees and prompted criticism from international human rights community); Yvette M. Mastin, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 137, 152 (2000) (noting that indefinite detention has become form of exclusion for asylum seekers in United States); White, *supra* note 164, at 1 (stating that policy of expedited removal was implemented to deter illegal immigration, confront mounting INS backlogs, and address fears of terrorism).

217. See INA, § 208(a), 8 U.S.C. § 1158(a).

218. See INA, § 241(b)(3), 8 U.S.C. § 1231(b)(3).

219. See INA, § 208(c), 8 U.S.C. § 1158(c); see also von Sternberg, *supra* note 134, at 2 (stating that valid asylum status restricts possibility of deportation); Matter of Pula, 19 I&N Dec. 467 (BIA 1987) (holding that grant of asylum is at discretion of immigration judge, who must take into account totality of circumstances and actions of alien in his flight from country in which he fears persecution). See generally Immigration Officer Academy, *Eligibility Part I*, *supra* note 125 (reviewing asylum proof requirements).

220. See INA, § 208(a), 8 U.S.C. § 1158(a). See also von Sternberg, *supra* note 134, at 2 (explaining that asylee receives LPR status after one year); Helton, *supra* note 131, at 256-57 (explaining that asylum is valid for indefinite period of time and immediate family abroad may accompany or follow applicant).

specific.<sup>221</sup> Withholding of removal cannot be converted into any kind of permanent residence.<sup>222</sup> Both forms of relief are premised on fear of future persecution<sup>223</sup> or a showing of past persecution<sup>224</sup> on account of five enumerated statutory grounds: race, religion, nationality, membership in a particular social group, and opinion.<sup>225</sup> In a 1987 decision, *INS v. Cardoza-Fonseca*, the U.S. Supreme Court determined that the "well-founded fear" of future persecution standard requires only proof of a "reasonable possibility of persecution."<sup>226</sup>

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221. See INA, § 241(b)(3), 8 U.S.C. § 1231(b)(3). See also von Sternberg, *supra* note 134, at 2 (stating that under this type of relief, applicant can be deported to country other than one where persecution is claimed). To claim withholding of removal, an alien must show a clear probability of future persecution and once proof is made, granting of withholding is mandatory. *Id.*

222. See INA, § 241(b)(3), 8 U.S.C. § 1231(b)(3).

223. See INA, §§ 208(a), 241(b)(3); 8 U.S.C. §§ 1158(a), 1231(b)(3). See also *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (defining standard for determining whether fear is well founded); *Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (modifying standard set forth in *Matter of Acosta*). Under the current test, an applicant must show that he possesses a characteristic or belief, which the persecutor aims to overcome in others; the persecutor knows or could know that applicant possesses this characteristic or belief; the persecutor can punish the applicant and intends to do so. *Id.* See generally *Immigration Officer Academy, Asylum Eligibility Part II*, *supra* note 125, at 1-24 (presenting standard of proof needed to establish well-founded fear of future persecution and relevant factors in this determination). The Regulations adopted in December 2000 supply further specifics on establishing well-founded fear of future persecution. *Id.*

224. See INA, § 208(b), 8 U.S.C. § 1158(b); see also *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989) (establishing requirements for proof of past persecution); von Sternberg, *supra* note 134, at 4-5 (discussing proof of past persecution); *Immigration Officer Academy, Asylum Eligibility Part II*, *supra* note 125, at 25-28 (asserting that past persecution raises presumption of future persecution).

225. See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). See generally von Sternberg, *supra* note 134, at 11-26 (discussing issues that arise in practice in dealing with five enumerated grounds); see also *Immigration Officer Academy, Asylum Officer Basic Training, Eligibility Part III: Nexus and Five Protected Grounds*, in REFUGEE ASSISTANCE TRAINING, COMMUNITY OUTREACH LAW PROGRAM, Reader 1 (June 13-14, 2001) (discussing relevant factors in determining whether persecution is on account of each of enumerated grounds). The definition of persecution is a liberal one. *Id.* at 5. The definition includes violations of basic human rights, minimum standards of humanity in internal and international conflicts established under Geneva Conventions of August 12, 1949, and deliberately inflicted physical and mental harm in violation of the Torture Convention. See *Matter of T-*, 20 I&N Dec. 571 (BIA 1992); Geneva Convention IV, 6 U.S.T. 3516, T.I.A.S. 3365, common art. 3; Torture Convention, *supra* note 43, art. 1.

226. See 480 U.S. 421, 441 (1987) (noting that asylum applicant may have well-founded fear of persecution even when he has only ten percent chance of being shot, tortured, or persecuted in another manner). See also *Mogharrabi*, 19 I&N Dec. at 445 (recognizing difficulty asylum applicants face in obtaining documentation supporting their claims and holding that alien's testimony alone may be sufficient where it is consistent, believable, and sufficiently detailed); *In re Villalta*, 20 I&N Dec. 142, 143, 147

Another potential basis for relief for asylum seekers in the United States is Article 3 of the Torture Convention.<sup>227</sup> Relief under the Torture Convention involves withholding<sup>228</sup> and deferral of removal.<sup>229</sup> While withholding of removal contemplates release from detention, deferral of removal does not.<sup>230</sup> Thus, relief under the Torture Convention implies remaining in the United States only so long as the threat of torture persists, and the claimant can be removed to any country where such a threat does not exist.<sup>231</sup>

### 3. The Asylum Determination Procedure

The most controversial aspect of the U.S. asylum determination procedure is expedited removal and mandatory detention.<sup>232</sup> Detention center conditions are subject of especially sharp criticisms.<sup>233</sup> Lack of a statutory right to government-ap-

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(1990) (holding that asylum applicant met his burden of proof where he submitted general documentation about human rights conditions in el Salvador, without producing evidence corroborating his specific claims of persecution).

227. See Torture Convention, *supra* note 43. See also INA, § 241(b)(3), 8 U.S.C. § 1231(b)(3) (listing persons ineligible for relief under Torture Convention). These are persons who have participated in persecution of others; persons who have been convicted of especially serious crimes that constitute danger to U.S. community; persons who committed serious non-political crimes outside of the United States; persons who can reasonably be regarded as security risks to the United States. *Id.* See also INA, § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A) (precluding adjudicator from granting asylum if sections substantially similar to INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) apply). See generally von Sternberg, *supra* note 134, at 27-32 (discussing ineligible classes in further detail).

228. See 8 C.F.R. § 208.16.

229. See *id.* § 208.17.

230. See *id.* §§ 208.16-208.17. See also von Sternberg, *supra* note 134, at 32-34 (maintaining that relief under Torture Convention does not involve claim for asylum and does not lead to permanent status). See generally Helton, *supra* note 131, at 260-62 (discussing steps in obtaining relief under Torture Convention).

231. See 8 C.F.R. §§ 208.16-208.17.

232. See Pistone & Schrag, *supra* note 216, at 1 (critiquing current system and proposing changes); Costello, *supra* note 18, at 510 (critiquing INS harsh practices under IIRIRA); Schuck & Williams, *supra* note 173, at 371 (describing IIRIRA as failing strategy).

233. See *Refugees Behind Bars*, *supra* note 23 (examining violations of asylum seekers' rights in detention); Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, 1-2 (Sept. 1998), available at <http://www.hrw.org/reports98/us-immig/Ins989> [hereinafter *Locked Away*] (discussing abhorrent detention center conditions); *Detainees Held in Prison-Like Conditions*, EPISCOPAL LIFE, available at <http://www.episcopalchurch.org/episcopal-life/Detainee.html> (describing how officials from major religious organizations visited INS detention facilities, were shocked, and appealed to Congress to correct its immigration laws); Martha W. Barnett, *President's Mes-*



pointed counsel is another frequently-cited criticism of the system.<sup>234</sup>

#### a. Application Process

There are two types of applications for asylum: affirmative applications and applications by arriving aliens.<sup>235</sup> An alien makes an affirmative application for asylum before the Asylum Office of the INS, subject to procedural barriers imposed by the IIRIRA.<sup>236</sup> If the Asylum Office cannot approve the case, it refers it to the Office of the Immigration Judge, where the asylum seeker becomes removable.<sup>237</sup>

Applications by arriving asylum seekers usually involve individuals who present themselves for admission at a port of entry, carrying false documents and no passports.<sup>238</sup> Under IIRIRA, an

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*sage: Dark Discoveries, New Hope: The ABA Aids Immigrant Detainees Facing Uncertain Future* (Feb. 2001), available at <http://www.abanet.org/scripts/PrintView.asp> (presenting INS detention statistics and critiquing INS detention practices).

234. See Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 INTER. REL. 1569, 1570 (Oct. 8, 2001) (remarking on difficulty of obtaining lawyer); *Refugees Behind Bars*, *supra* note 23, at 21-22 (discussing particular difficulty asylum seekers face in obtaining legal representation); *Locked Away*, *supra* note 233, at 63-68 (discussing detainees' problems in obtaining legal representation); *Is This America?*, *supra* note 23, at 43 (discussing how 1993 law stripped asylum procedure of safeguard of legal representation).

235. See INA, §§ 208(d), 241(b)(3); 8 U.S.C. §§ 1158(d), 1231(b)(3) (providing guidelines regarding filing of asylum and withholding of removal applications); von Sternberg, *supra* note 134, at 7-8 (overviewing asylum application process); Immigration Officer Academy, *Overview of the Asylum Process*, *supra* note 129, at 18-22 (summarizing application filing procedures and considerations). See generally Helton, *supra* note 131, at 1275 (reviewing application filing requirements).

236. See INA, §§ 208(a)(2)(B)-(D); 8 U.S.C. §§ 1158(a)(2)(B)-(D). INA section 208(a)(2)(B) states that asylum application must be filed within one year of arrival in United States. *Id.* INA section 208(a)(2)(C) provides that an application will not be accepted if an alien previously applied for asylum and was denied. *Id.* INA section 208(a)(2)(D) lists exceptions to these limitations for *refugees sur place*—those refugees who can show that circumstances in their home country have changed since their arrival in the United States and those who can prove extraordinary circumstances as grounds for delay in filing application. *Id.* See generally Helton, *supra* note 131, at 1231-50 (describing IIRIRA procedure).

237. See 8 C.F.R. § 108.14 (discussing approval, denial, referral, and dismissal of asylum application); see also von Sternberg, *supra* note 134, at 7 (stating that asylum seeker becomes removable either after Asylum Office conducts interview or concludes that alien waived her right to interview, with special procedures established for stowaways).

238. See von Sternberg, *supra* note 134, at 8 (stating that typical asylum seekers carry false documents and no passports). See also SMYSER, *supra* note 10, at 87 (pointing out that United States has rarely been country of first asylum). It is generally a resettle-

INS officer has the power to summarily deport any individual who enters the United States without valid documentation.<sup>239</sup> This power is subject to a perfunctory supervisory review and an asylum seeker has no right to attorney representation or appeal.<sup>240</sup>

#### b. Expedited Removal and Mandatory Detention

In an expedited removal proceeding under IIRIRA, an individual who expresses intent to apply for asylum or a fear of returning to her country is referred for a "credible fear of persecution" interview.<sup>241</sup> An individual who is deemed not to have a "credible fear" is summarily removed from the United States.<sup>242</sup> An individual who shows a "credible fear" is subject to mandatory detention before she presents her claim in a removal proceeding under IIRIRA.<sup>243</sup> She is fingerprinted, handcuffed or shackled in most cases, and transported to a detention center or prison.<sup>244</sup> Commentators assert that although some asylum

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ment country to which refugees come after screening by U.S. immigration officials in another country through U.S. overseas program. *Id.*; Immigration Officer Academy, *Overview of the Asylum Process*, *supra* note 129, at 15-16 (citing distinctions and differences between overseas refugee program and asylum process).

239. See INA, § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (granting INS officers this power).

240. See INA, §§ 235(b)(1)(B)(iii)(III), 235(b)(1)(C); 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III), 1225(b)(1)(C) (outlining scope of supervisory review). See also Helton, *supra* note 131, at 258-60 (discussing asylum seekers' right to appeal and review of immigration officer decision); Nugent & Schulman, *supra* note 234, at 1569-70 (remarking on difficulty of obtaining lawyer). See generally White, *supra* note 164, at 1 (discussing shortcomings of asylum system).

241. See INA, § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (determining that credible fear standard involves significant possibility of persecution, taking into account credibility of statements made by alien and any other facts known to immigration officer); see also Helton, *supra* note 131, at 251-60 (detailing steps in expedited removal proceeding); Chopin, *supra* note 166, at 1267-69, 1278-82 (discussing mandatory detention policy and practices); *Is This America?*, *supra* note 23, at 18 (citing INS statistics showing that in fiscal year 1999 only 0.6% of 89,035 people put into expedited removal were referred for credible fear interview).

242. See INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

243. See INA §§ 235(b)(1)(B)(iii)(III)-(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(III)-(IV). INA § 235(b)(1)(B)(iii)(III) states that an alien who does not pass the interview can request a review, which must occur within seven days. *Id.* INA § 235(b)(1)(B)(iii)(IV) mandates that during this process, the alien must remain in detention. *Id.*

244. See *Refugees Behind Bars*, *supra* note 23, at 9-12 (noting how asylum seekers remain locked up for months or years in deplorable conditions); *Is This America?*, *supra* note 23, at 27-29 (discussing abusive handcuffing and shackling INS practices);

seekers qualify for parole, the parole guidelines are not effectively administered and these people are often detained.<sup>245</sup>

### c. Critique of the System

Experts assert that the expedited removal process is inherently unfair to refugees.<sup>246</sup> Commentators further remark that the U.S. system is flawed because of frequent mistaken deportations; abuse of discretionary shackling and handcuffing; use of excessive physical force by INS officers; invasive body searches and verbal abuse; and absence of adequate interpretation.<sup>247</sup> Moreover, INS mandatory detention costs U.S.\$500 million per year in taxpayer money.<sup>248</sup>

Conditions inside INS detention facilities are subject to ex-

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Sigourney Weaver, *Stop Treating Refugees Like Criminals*, L.A. TIMES, Apr. 27, 2000, at A3 (critiquing shackling and detention).

245. See INA §§ 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225 (b)(1)(B)(iii)(IV) (stating that once asylum seeker has established credible fear of persecution and is no longer subject to expedited removal proceedings, she may be eligible for parole). An individual is eligible for parole if a U.S. citizen or other legal family members are willing to house and support her and if she has means of legal representation in the United States. *Id.* See also Elizabeth Llorente, *Asylum Seekers Live in Jail-Like Conditions*, RECORD, Apr. 11, 1999, available at <http://199.173.2.7/news/ccanew19990411.htm> (documenting INS' failure to effectively implement parole procedure); White, *supra* note 164, at 112-13 (discussing experience of one asylum seeker who was eligible for parole, but INS held him in detention).

246. See *Is This America?*, *supra* note 23, at 7 (stating that impact of IIRIRA has been enormous, with majority of persons subject to expedited removal procedure being turned away from United States without further review); White, *supra* note 164, at 1 (analyzing experiences of persons subject to expedited removal procedure); *Refugees Behind Bars*, *supra* note 23, at 1 (stating that shackling, handcuffs, and imprisonment greet people fleeing from persecution). See generally Barnett, *supra* note 233 (stating that INS estimates that by end of year 2001, more than 23,000 individuals will be in immigration detention). INS houses its detainees in more than 900 sites around the country, 60% of which are local jails. *Id.*

247. See *Is This America?*, *supra* note 23, at 24-37 (citing number of human rights violations); *Refugees Behind Bars*, *supra* note 23, at 9-13 (discussing abusive treatment of detained asylum seekers); Montague, *supra* note 173, at 1439 (addressing indefinite detention from legal and public policy perspectives and discussing negative effect of indefinite detention practices on U.S. stance as global leader in human rights).

248. See Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INT'L REL. 40, 1436 (Oct. 19, 1998) (advancing proposition that by end of year 2001, approximately 23,000 persons will be detained at cost of U.S.\$500 million). See also Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, at iii, 27 (2000) (documenting 93% appearance rate for asylum seekers paroled through supervised release program). Supervised release programs in place of detention may result in tremendous fiscal savings for American taxpayers. *Id.*; *Refugees Behind Bars*, *supra* note 23, at 20-21 (discussing tremendous costs of INS detention for U.S. taxpayers).

tensive criticisms by human rights and religious group organizations.<sup>249</sup> Detained asylum seekers are typically mixed with criminals.<sup>250</sup> They sleep in large locked rooms with no windows, and their only access to the outdoors often consists of a small internal courtyard.<sup>251</sup> Detainees' only way to communicate with relatives or friends is usually by phone, however phone card rates are exorbitant.<sup>252</sup> Furthermore, detainees are subject to repeated strip searches; segregation; use of tear gas and stun guns; sexual violence; beatings; and other human rights violations.<sup>253</sup>

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249. See *Locked Away*, *supra* note 233, at 11 (relating that 1995 and 1996 hunger strikes at Queens, NY and Elizabeth, NJ facilities called attention to inhumane conditions of INS mandatory detention); *Refugees Behind Bars*, *supra* note 23, at 3, 9 (showing that during strikes in INS detention facilities, frustrations escalated to such extent that several detainees attempted to kill themselves). Testimony of Fauziya Kassindja, a nineteen-year old asylum seeker from Togo, fleeing female genital mutilation practices ("FGM") and detained for over one year, highlighted concerns about mistreatment of asylum seekers and prompted investigations by various NGO groups. *Id.* at 10. See also Chopin, *supra* note 166, at 1267-69, n. 220 (stating that since 1987, indefinite detainees initiated prison riots and hostage crises, burned prison facilities, and murdered guards in at least four separate prisons and INS holding facilities); Armando Villafranca, *Jail Standoff a Product of Cuban Detainees' Legal Limbo*, HOUS. CHRON., Dec. 18, 1999, at 1 (describing how in December 1999, seven indefinitely detained aliens took seven hostages for nearly week at prison in St. Martinsville, Louisiana in exchange for their release from prison and country); EPISCOPAL LIFE, *supra* note 233 (discussing religious leaders' visit to INS detention facilities and their shock at detention conditions).

250. See *Refugees Behind Bars*, *supra* note 23, at 10 (attesting to asylum seekers being mixed with criminals); *Locked Away*, *supra* note 233, part IV Findings, 4 (explaining that some jails categorize INS detainees as maximum security prisoners); Allen S. Keller, M.D., *Written Testimony in Support of the Refugee Protection Act (2001)*, available at <http://www.phrusa.org/research/refugees/testimony.html> (discussing faulty techniques INS uses to distinguish children asylum seekers from adults, with result that children are often intermixed with adults in maximum security prisons).

251. See *Refugees Behind Bars*, *supra* note 23, at 11 (discussing asylum seekers' sleeping arrangements); *Locked Away*, *supra* note 233, part IV Findings, 6-10 (detailing INS detainees' living conditions and recreation); Keller, *supra* note 250 (relating how many INS detention centers are windowless warehouses with little or no opportunity for detainees to see light of day).

252. See *Refugees Behind Bars*, *supra* note 23, at 11-12 (discussing detainees' inability to make phone calls); *Locked Away*, *supra* note 233, part IV Findings, 15 (explaining that most INS detention sites do not offer coin-operated phones).

253. See *Refugees Behind Bars*, *supra* note 23, at 11-12 (citing numerous human rights violations); *Locked Away*, *supra* note 233, part IV Findings, 29-32 (reporting on physical mistreatment of asylum seekers); *Is This America?*, *supra* note 23, at 35 (noting that in 1999, UNHCR pointedly critiqued INS' interviewing techniques, accuracy of information given to applicant about process, and failure to convey all options available to applicant). Mandatory detention under IIRIRA violates the mandates of UNHCR Executive Committee, of which United States is member. See UNHCR Executive Committee Conclusion on International Protection, No. 85 (1998). The UNHCR Executive Committee concluded that detention practices are inconsistent with established human

Commentators report that detainees lack sufficient food and adequate healthcare, and that tuberculosis is common.<sup>254</sup> Moreover, detention conditions may cause depression, nightmares, feelings of isolation and hopelessness, prompting many detainees to attempt suicide.<sup>255</sup> INS detainees have no right to government-appointed counsel and many are held at local or county jails in remote areas where they have difficulty obtaining a lawyer.<sup>256</sup>

#### 4. The USA PATRIOT Act

Six weeks after the September 11th terrorist attacks on the World Trade Center and the Pentagon,<sup>257</sup> the U.S. Congress ap-

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rights standards and urged State parties to explore all feasible alternatives to detention. *Id.* Mandatory detention also violates the UNHCR Guidelines on the Detention of Asylum Seekers, which urge presumption against detention and affirm that use of detention often conflicts with norms and principles of international law. *Id.*

254. See *Refugees Behind Bars*, *supra* note 23, at 11-12 (describing lack of health care and spread of diseases in detention); *Locked Away*, *supra* note 233, 10-11, 16-19 (critiquing inhumane conditions in INS detention and proposing improvements to expedited removal and mandatory detention procedures); Keller, *supra* note 250 (stating that detained asylum seekers often have difficulty accessing health services, particularly mental health services).

255. See *Locked Away*, *supra* note 233, at 19-21 (discussing mental health complications asylum seekers face); Erin Eileen Gorman, *Reno v. Flores: The INS' Automatic Detention Policy for Alien Children*, 23 GEO. IMMIGR. L.J. 435, 440 (1993) (stating that anxiety, boredom, and depression overwhelm asylum seekers and they often opt for voluntary deportation and abandon their asylum requests). See also Elizabeth Llorente, *Dreams Turn to Despair*, BERGEN COUNTY REC., May 24, 1999 (commenting that detention is particularly traumatizing for asylum seekers who are survivors of torture and may be suffering from its psychological and physical after-effects); Nugent & Schulman, *supra* note 234, at 1570 (stating that experience of being locked up can trigger panic attacks and flashbacks and is particularly traumatic for survivors of torture).

256. See Nugent & Schulman, *supra* note 234, at 1569-70 (remarking on difficulty of obtaining lawyer); *Locked Away*, *supra* note 233, at 21-24 (discussing difficulties asylum seekers face in obtaining lawyer as well as difficulties lawyers face in traveling to detention sites and gathering necessary documentation). Internal INS procedures require that detainees receive a list of legal service providers upon their initial detention. *Id.* Human Rights Watch found that this rarely happened, while many detainees received such a list only when brought to the immigration court—too late to make a difference. *Id.* Even when detainees received this list in a timely manner, it was likely to be outdated and full of incorrect, essentially useless leads and information. *Id.* at 23. As many as 90% of detained asylum seekers never obtain legal representation and most either opt for voluntary deportation or are forced to represent themselves *pro se*. *Id.* See also Chopin, *supra* note 166, at 1269-75 (discussing aliens' due process rights); Helton, *supra* note 131, at 255 (discussing role of counsel in expedited removal proceedings).

257. See September 11th Web Archive, available at <http://september11.archive.org> (offering analysis and commentary on September 11th events and world response since then); ECONOMIST, *supra* note 25 (offering number of perspectives on September 11th

proved the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act").<sup>258</sup> The legislation was passed over vigorous protests of human rights and civil liberty organizations.<sup>259</sup> It came in the midst of an Anthrax scare in the Congressional offices and warnings of forthcoming terrorist assaults.<sup>260</sup>

#### a. A Suspected International Terrorist

Since 1987, the U.S. government has defined terrorism as pre-meditated or politically motivated violence targeted against

events). *See also* Turner, *supra* note 25, at 78-79 (finding that mass tragedy like September 11th was foreseeable for some time).

258. *See* USA PATRIOT Act, Pub. L. No. 107-56.

259. *See After the Terror, supra* note 17, at 7 (expressing concerns regarding asylum seekers' rights post-September 11th and cautioning against impulsive unilateral responses); *Justice Not Revenge, supra* note 27 (claiming that events of September 11th may result in massive abuses of human rights around world); American Civil Liberties Union, "Don't Let Terrorism Rewrite the Constitution" *New ACLU Advertisement Urges*, Oct. 1, 2002, available at <http://www.aclu.org/news/2001/n100101a.html> (reminding that basic freedoms must be protected even in times of national emergency). *See also* USA PATRIOT Act, Pub. L. No. 107-56, § 892, amending 18 U.S.C. § 2331 (creating new federal crime of domestic terrorism). The crime extends to acts dangerous to human life that violate criminal laws and appear intended to influence government policy by intimidation or coercion, and occur primarily in the United States. *Id.* *See also* Chang, *supra* note 3, at 4 (discussing critiques of this provision). The USA PATRIOT Act places First Amendment rights to freedom of speech and political association in jeopardy because the broad terms of this section can affect environmental activists, anti-globalization activists, and other political dissenters with no connection to terrorists. *Id.* The legislation also reduces Fourth Amendment privacy protections. *Id.* at 5-9. The legislation permits law enforcement agencies to circumvent the Fourth Amendment's requirement of probable cause when conducting wiretaps and gathering of foreign intelligence. *Id.* at 9-10. The USA PATRIOT Act also allows for the sharing of information between criminal and intelligence operations and, experts assert, thereby opens the door to domestic spying by the Central Intelligence Agency ("CIA"). *Id.* at 11. *See also* David L. Sobel, *Pen Registers, the Internet and Carnivore Under the USA PATRIOT Act*, in *RIGHTS ON THE LINE: CONSEQUENCES AND IMPLICATIONS OF THE USA PATRIOT ACT AND OTHER ANTI-TERRORISM MEASURES*, Reader for Continuing Legal Education Program 1 (Jan. 26, 2002) (showing types of devices government may use to infiltrate privacy).

260. *See* Chang, *supra* note 3, at 2 (discussing panic connected to Anthrax and Congress' hasty decision-making). The House vote was 356-to-66, and the Senate vote was 98-to-1. *Id.* The legislation was unaccompanied by a conference or a committee report and it spans 342 pages. *Id.* *See also* Adam Clymer, *Bush Quickly Signs Measure Aiding Antiterrorist Effort*, N.Y. TIMES, Oct. 27, 2001, at B5 (discussing hasty adoption of new legislation); Adam Clymer, *A Nation Challenged: The Mood; Cramped and Scattered, Congress Resumes Work*, N.Y. TIMES, Oct. 24, 2001, at A1 (discussing chaotic context of Bill passage).

civilians.<sup>261</sup> Section 411 of the USA PATRIOT Act expands the class of individuals that can be removed on terrorism grounds.<sup>262</sup> Critics claim that this provision imposes guilt by association, which is tantamount to a First Amendment violation.<sup>263</sup>

Under section 411, the term "terrorism" encompasses any crime that involves the use of a weapon or a dangerous device, other than for personal monetary gain.<sup>264</sup> The phrase "to engage in terrorist activity" now includes soliciting funds, membership in, and providing material support for a terrorist organization, even when the organization has legitimate ends and an individual only aims to support those ends.<sup>265</sup> Furthermore, the term "terrorist organization" is no longer limited to an organization so officially designated,<sup>266</sup> but includes any group of two or more individuals, organized or not, engaging in specified terrorist activities.<sup>267</sup>

261. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2000, Introduction (2001) (defining terrorism as premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence audience); Reisman, *supra* note 19, at 6-13 (tracing various definitions and uses of term "terrorism," particularly before U.S. Congress issued its own definition).

262. See USA PATRIOT Act, Pub. L. No. 107-56, § 411, *amending* 8 U.S.C. § 1227 (a)(4)(A)-(B) (stating that non-citizens who have or are engaged in terrorist activities or activities that threaten national security are subject to removal from United States).

263. See Chang, *supra* note 3, at 12 (claiming that USA PATRIOT Act violates basic civil liberties); McGee, *supra* note 28 (contending that USA PATRIOT Act involves civil liberties of U.S. citizens); Lancaster & Pincus, *supra* note 28 (discussing civil liberties concerns resulting from USA PATRIOT Act). See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (holding that guilt by association contravenes democratic traditions).

264. See USA PATRIOT Act, Pub. L. No. 107-56, § 411(a), *amending* 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). See also Chang, *supra* note 3, at 12 (stating that under this definition immigrant who grabs knife in midst of heat of moment altercation, may be subject to removal for being terrorist); Immigration Act of 1990, *supra* note 188, 8 U.S.C. § 1227(a)(4)(B) (Supp. IV 1998) (providing that designation as terrorist group has variety of consequences including that group members have restrictions on their ability to obtain visas to enter United States).

265. See USA PATRIOT ACT, Pub. L. No. 107-56, § 411(a), *amending* 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb)-(cc);(V)(bb)-(cc); (VI)(cc)-(dd).

266. See *id.*, *amending* 8 U.S.C. § 1182(a)(3)(B)(vi)(I) (including as terrorist organization any foreign organization so designated by Secretary of State under 8 U.S.C. § 1189). See also Chang, *supra* note 3, at 12 (alleging that under prior law designated terrorist organizations were published in Federal Register for public knowledge). In order to qualify as a "foreign terrorist organization," the Secretary of State had to find that an organization was a foreign organization that engaged in a terrorist activity and this activity threatened U.S. nationals or national security. *Id.*

267. See USA PATRIOT Act, Pub. L. No. 107-56, § 411(a), *amending* 8 U.S.C.

### b. Right to Seek Asylum

Section 411 of the USA Patriot Act restricts the entry of certain individuals into the United States.<sup>268</sup> These individuals include representatives of political or social groups whose public endorsement of a terrorist activity is deemed by the U.S. Secretary of State to undermine the U.S. efforts to reduce terrorist activities.<sup>269</sup> Individuals who have used their prominent position to endorse terrorist activities in any country are also barred from entry if the Secretary of State determines that their speech undermines the U.S. anti-terrorism efforts.<sup>270</sup> Critics claim that these restrictions violate asylum seekers' due process and First Amendment guarantees.<sup>271</sup>

### c. Detention

Section 412 of the USA PATRIOT Act permits the Attorney General to detain individuals who are removable on terrorist grounds under section 411.<sup>272</sup> Upon the Attorney General's certification establishing reasonable grounds to believe that an alien is engaged in terrorist activities, that alien can be detained for up to seven days without charge of violation.<sup>273</sup> If an alien is

§ 1182(a)(3)(B)(vi)(III). *See also* 8 U.S.C. § 11882(a)(3)(B)(iv)(I)-(III) (describing requisite terrorist activities).

268. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 411, *amending* 8 U.S.C. § 1182. *See generally* Vargas, *supra* note 26, at 2 (discussing effect of this section on legal representation of asylum seekers).

269. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 411(a), *amending* 8 U.S.C. § 1182 (a)(3)(B)(I)(IV)(bb).

270. *See id.*, *amending* 8 U.S.C. § 1182(a)(3)(B)(I)(VI).

271. *See* Chang, *supra* note 3, at 14 (alleging that Due Process Clause applies to all persons within United States, including aliens, whether their presence is unlawful or lawful). *See generally* McGee, *supra* note 28 (contending that USA PATRIOT Act threatens civil liberties of U.S. citizens); Lancaster & Pincus, *supra* note 28 (discussing civil liberties violations implicated by enactment of USA PATRIOT Act).

272. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 412(a), *adding* 8 U.S.C. § 1226A(a). *See also* President of the United States, *Military Order of November 13, 2001*, 66 FED. REG. 578333 (2001) (outlining U.S. government's new power to detain terrorist suspects). *See generally* Costello, *supra* note 18, at 524-25 (emphasizing that Supreme Court accepted practice of detaining U.S. citizens in interest of protecting public safety as early as 1980s); *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that government's regulatory interest in community safety can outweigh individual's liberty interest).

273. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 412(a), *adding* 8 U.S.C. § 1226A(a)(3), (5). *See also* Chang, *supra* note 3, at 13-14 (alleging that this low level of suspicion falls short of finding probable cause under Fourth Amendment). *See also* 66 FED. REG. 48334-35 (2001) (publicizing interim regulation permitting Attorney General



charged with an immigration violation, she is subject to mandatory detention, and is ineligible for release until removal or the Attorney General's determination that she should no longer be certified as a terrorist.<sup>274</sup> Even where an alien who is found removable is eligible for asylum, section 412 forecloses her release.<sup>275</sup> Further, where an alien is found removable but removal in the near future is unlikely, she may be detained for additional periods of six months.<sup>276</sup>

#### d. Appeal

The USA PATRIOT Act requires the Attorney General to review his certification of a suspected terrorist every six months.<sup>277</sup> Under section 412 of the USA PATRIOT Act, the Attorney General is not required to inform the individual of the evidence on which he based the certification, nor to provide her with an opportunity to contest that evidence at an administrative review procedure.<sup>278</sup> Rather, commentators explain that section 412 limits an individual's ability to seek review of the certification to a habeas corpus proceeding filed in federal district court.<sup>279</sup>

### B. *United Kingdom Laws and Procedures Relevant to Asylum Seekers*

In the UK, leave to enter or remain, removal, and deporta-

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to detain non-citizens for extended periods of time). Congress denied the Attorney General's request to codify this regulation in the USA PATRIOT Act. *Id.*

274. See USA PATRIOT Act, Pub. L. No. 107-56, § 412(a), adding 8 U.S.C. § 1226A(a)(2).

275. See *id.*, adding 8 U.S.C. § 1226A(a)(3), (5).

276. See *id.*, adding 8 U.S.C. § 1226A(a)(6) (specifying that this section applies when release of alien will threaten national security of United States). See also *id.*, adding 8 U.S.C. § 1226A(b)(1) (specifying that only habeas review of this determination is available). See also American Civil Liberties Union, *Rights Groups Seek to Question Govt. Officials on "Incomplete and Inaccurate" Records of Detainees*, available at <http://www.aclu.org/features/f012302a.html> (critiquing government detention practices in aftermath of September 11th).

277. See USA PATRIOT Act, Pub. L. No. 107-56, § 412(a), adding 8 U.S.C. § 1226A(a)(7).

278. See *id.*, adding 8 U.S.C. § 1226A(a)(7). See also Chang, *supra* note 3, at 14 (claiming that asylum seekers get no appeal rights).

279. See U.S. CONST. amend. vi. See also Chang, *supra* note 3, at 14 (stating that these proceedings are civil, not criminal in nature, and Sixth Amendment does not obligate government to provide non-citizens with free counsel in this instance); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that non-citizens are not entitled to free counsel).

tion are governed by the Immigration Act of 1971 ("1971 Act") and the Immigration Rules under it.<sup>280</sup> The 1971 Act was substantially amended and supplemented by subsequent legislation, the most recent of which is the Immigration and Asylum Act 1999 ("1999 Act").<sup>281</sup> The Immigration Rules under the 1971 Act were recast and consolidated on numerous occasions, with the most recent version being the Immigration and Asylum Appeals (Procedure) Rules 2000 ("Immigration Rules 2000").<sup>282</sup> A vast body of case law accumulated from the decisions of the High Court and the Immigration Appeal Tribunal provides guidance on applying the law and the Rules.<sup>283</sup>

### 1. Domestic Legislation

Commentators opine that the evolution of asylum law and policy in the UK is inseparable from the evolution of asylum in

280. See MACDONALD & BLAKE, *supra* note 4, at 1 (stating that 1971 Act is cornerstone of UK immigration law). The 1971 Act, however, must yield preference to European Community ("EC") law whenever EC law is applicable. *Id.* at 33; SATVINDER S. JUSS, IMMIGRATION, NATIONALITY, CITIZENSHIP 32-48 (Blackburn ed., 1993) (discussing legislation leading up to 1971 Act and analyzing 1971 Act's aims and effects). Whether the Immigration Rules are binding is a matter of frequent debate. *Id.* at 158. Generally, Immigration Rules are characterized by informality of approach and flexibility. *Id.* at 161; Stevens, *supra* note 18, at 27 (discussing overhaul of immigration and asylum law by 1971 Act).

281. See MACDONALD & BLAKE, *supra* note 4, at 1-19 (listing amendments to 1971 Act and providing comprehensive outline of 1971 Act's history). Amendments to the 1971 Act include British Nationality Act 1981 (Eng.); Immigration (Carriers' Liability) Act 1987 (Eng.); Immigration Act 1988 (Eng.); Immigration Act 1993, *supra* note 142; Asylum and Immigration Act 1996 (Eng.); and most recently, Immigration Act 1999. *Id.* at 1; Stevens, *supra* note 18, at 27-32 (analyzing legislation modifying 1971 Act and presenting controversial issues regarding current asylum system and policy); JUSS, *supra* note 280, at 130 (discussing legislation modifying UK appeals system).

282. See MACDONALD & BLAKE, *supra* note 4, at 1-19 (describing change in rules from 1971 Act on); see also Immigration and Asylum Appeals (Procedure) Rules 2000 (L. 21) (Eng.), available at <http://www.hms.gov.uk/si/si2000/20002333.htm> [hereinafter Immigration Rules 2000].

283. See MACDONALD & BLAKE, *supra* note 4, at 1 (stating that these bodies' decisions may be found in specialist reports, *Immigration Appeal Reports*). Further, the growing apparatus of domestic law is monitored by independent voluntary organizations, such as the Joint Council for the Welfare of Immigrants ("JCWI"), whose publications are invaluable source of practical information. *Id.* at 1-2. The Immigration Appeals and Advisory Service ("IAAS") and the Refugee Legal Centre ("RLC") are government-funded bodies that hear appeals, and the RLC is the most important single representative in asylum appeals. *Id.* at 2; JUSS, *supra* note 280, at 140-42 (reporting general lack of interest in immigration law and discussing important role of voluntary organizations like the Joint Council for Welfare of Immigrants ("JCWI") in promoting immigration awareness).

Europe as a whole.<sup>284</sup> After the initial influx of forty million refugees following the Second World War,<sup>285</sup> the UK confronted refugee movements from Hungary and Czechoslovakia in the 1950s and the 1960s,<sup>286</sup> and from Latin America in the 1970s.<sup>287</sup> In the 1980s, the number of asylum seekers from Asia, Africa, Latin America and the Middle East increased dramatically,<sup>288</sup> while the fall of the Berlin Wall in November 1989 heralded a new wave of concerns about uncontrollable floods of people pouring into Western Europe.<sup>289</sup> The mass arrival of refugees

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284. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 156-72 (reviewing significant developments in law and policy in Europe from Second World War to today); MACDONALD & BLAKE, *supra* note 4, at 20 (stating that control of immigration in UK occurs within framework of 1971 Act and EC law); JUSS, *supra* note 280, at 102-20 (discussing EC legal order and its role in UK domestic laws); C.J. Harvey, *Taking Human Rights Seriously in the Asylum Context: A Perspective on the Development of Law and Policy*, in CURRENT ISSUES OF UK ASYLUM LAW AND POLICY 216 (Frances Nicholson & Patrick Twomey eds., 1998) (marking that evolution of asylum law in UK is inherently international phenomenon).

285. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 13 (explaining that displacement of over forty million people following Second World War was largest in modern history); CLARK, *supra* note 9, at 40 (describing how ailing International Refugee Organization, specialized agency, single-handedly grappled with massive refugee problems left over from Second World War); Owers & Garlick, *supra* note 18, at 201 (explaining that in immediate post-war years, UK viewed *nonrefoulement* of displaced persons and refugees as its positive responsibility).

286. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 156 (analyzing refugee flows in Europe until 1980s); Owers & Garlick, *supra* note 18, at 201-02 (describing how UK welcomed refugees fleeing from Hungarian uprising in 1956); SMYSER, *supra* note 10, at 93 (discussing influx of asylum seekers in Europe in 1950s and 1960s).

287. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 156 (showing that refugees from Latin America fled to Europe as result of military coups in Chile and Uruguay in 1973, and in Argentina in 1976). The asylum movements in the 1970s also included those fleeing from Indochina. *Id.*; Owers & Garlick, *supra* note 18, at 203 (describing movements from Chile); SMYSER, *supra* note 10, at 52-64 (describing flight of asylum seekers from Latin America).

288. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 156 (citing increase in application toll from under 70,000 in 1983 to over 200,000 in 1989). This increase was due to a number of internal conflicts and serious human rights violations world-wide. *Id.* The influx was also due to changes in immigration policy following the steep increase in oil prices in the 1970s. *Id.*; Fitzpatrick, *supra* note 146, at 27-30 (discussing factors that influenced erosion of access to asylum in Europe). The composition of the pool of asylum applicants altered during the 1980s, as improved transport and the emergence of organized smugglers facilitated arrival of asylum seekers from the developing world. *Id.* at 29; SMYSER, *supra* note 10, at 52-92 (detailing progressive increase in numbers of asylum applicants from Third World countries).

289. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 158 (stating that fall of Berlin Wall put international refugee protection system in Western Europe under more serious pressure than in 1980s). It was at this point that anti-refugee sentiments in the UK and Europe at large began to grow. *Id.* at 157. Many European governments

from former Yugoslavia,<sup>290</sup> combined with new arrivals from Third World countries to overwhelm Western European asylum systems.<sup>291</sup> The Western European governments responded by establishing temporary protection regimes, known in shorthand as "Fortress Europe".<sup>292</sup> The four types of measures taken on the

suspected that the primary motivation of asylum seekers was economic. *Id.* In addition, many European governments were no longer in need of migrant workers. *Id.* at 156. See also Dummet & Nicol, *supra* note 18, at 260-61 (explaining that Western European nations asserted that asylum seekers were really economic refugees seeking to misuse European hospitality); Fitzpatrick, *supra* note 146, at 29 (explaining that disintegration of former Soviet Union and crumbling of Berlin Wall signified that totalitarian regimes were surprisingly fragile). Increasing number of refugees and asylum seekers heightened uncertainty about social impact of new arrivals, giving rise to racist and xenophobic resistance to generous asylum policies. *Id.*; Chrisafis, *supra* note 17 (tracing UK anti-immigrant sentiment in history).

290. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 165-68 (describing conflict in former Yugoslavia and new temporary protection approach taken toward refugees fleeing from region). These refugee flows combined with chaotic exodus from Albania to Italy. *Id.* at 158; Fitzpatrick, *supra* note 146, at 18 (explaining that sudden popularity and codification of temporary protection in Western Europe is explained almost entirely by shared impulse to avoid conferring asylum status on victims of events in former Yugoslavia); Stephanie Grant, *Refugees—The Dilemma*, 143 NEW L.J. 608 (1993) (discussing how refugee flow from Yugoslavia made Western European States reconsider balance between refugee protection and border control).

291. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 158 (describing how tens of thousands of asylum seekers from Ghana, Iraq, Iran, Sri Lanka, and other countries sought refuge in Western Europe). The Western European States were not prepared for such large numbers of asylum seekers and their asylum systems were quickly overwhelmed. *Id.*; Fitzpatrick, *supra* note 146, at 13-14 (discussing how following Cold War, questions concerning immigration and asylum assumed increasingly prominent place in political agenda of EU, sparking debate of growing intensity). See also Charles B. Keely & Sharon S. Russell, *Responses of Industrial Countries to Asylum-Seekers*, 47 J. INT'L AFF. 399, 403 (1994) (discussing how European officials met on over one hundred occasions in 1991 to discuss asylum and immigration issues in EU).

292. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 165-68 (describing temporary protection regimes in context of Yugoslavia). The term "Fortress Europe" became the shorthand for the new restrictive policies in Western Europe aimed to combat illegal immigration. *Id.* at 161. The effort of Western European States to control asylum flows coincided with efforts to establish a closer economic and political market. *Id.* at 162. Thus, EU members executed a number of binding conventions and non-binding inter-governmental agreements, aimed to harmonize their policies in immigration and asylum, including the Dublin Convention, the Schengen Convention, the Maastricht Treaty, and the Treaty of Amsterdam. *Id.*; Fitzpatrick, *supra* note 146, at 16 (discussing that one of most noteworthy international responses to asylum movements in Europe is regularization of temporary protection practice). The most innovative measures to provide safety for victims of mass repression or civil conflict are motivated less by a desire to improve the system of protection, than by an imperative to deflect large flows away from traditional asylum. *Id.* at 18. See also Report of the United Nations High Commissioner for Refugees, U.N. GAOR, 48th Sess., Supp. No. 12, at 7-10,

Europe-wide level were non-arrival policies;<sup>293</sup> diversion policies;<sup>294</sup> restrictive application of the "refugee" definition;<sup>295</sup> and

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U.N. Doc. A/48/12 (1993) (advocating regime of preventive protection but warning against erosion of asylum procedures).

293. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 161 (explaining that non-arrival policies included visa requirements and carrier sanctions). As channels for legal entry began to close, asylum seekers, along with other migrants, turned increasingly to smugglers and traffickers to reach Western Europe. *Id.* at 160; Fitzpatrick, *supra* note 146, at 33 (noting that Europe's response to its perceived asylum crisis included barriers to entry and border exclusion measures); DANIELE JOLY ET AL., REFUGEES: ASYLUM IN EUROPE? 38-39 (1992) (discussing visa requirements imposed on refugee-producing countries); Hans Ulrich Jessurun d'Oliveira, *Fortress Europe and (Extra-Communitarian) Refugees: Cooperation in Sealing Off the External Borders*, in *Free Movement of Persons in Europe*, in FREE MOVEMENT OF PERSONS IN EUROPE: LEGAL PROBLEMS AND EXPERIENCES 166, 179-81 (Schermers et al. eds., 1993) (discussing imposition of carrier sanctions). See also Nicholas Blake, *Entitlement to Protection: A Human Rights-Based Approach to Refugee Protection in the United Kingdom*, in CURRENT ISSUES IN THE UK ASYLUM LAW AND POLICY 234-35 (Frances Nicholson & Patrick Twomey eds., 1990) (contending that new regime created "catch 22" situation for asylum seekers, who could not apply for visas until they left their country, but could not leave their country without visas). The regime also spurned sophisticated networks of agents who provided false documents and routes for substantial sums of money. *Id.*; Randall, *supra* note 22, at 212-13 (noting that asylum seekers with false documents posed problem for receiving country in terms of establishing identity and nationality). See generally SMYSER, *supra* note 10, at 94 (discussing how these policies resulted in human trafficking and smuggling syndicates); Katrin Corrigan, Note, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151 (2001) (discussing international trafficking of women in sex trade).

294. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 161 (showing that these policies included "safe third countries" principle). The "safe third countries" policy permitted receiving States to send asylum seekers back to the first safe country in which they landed, usually in Central and Eastern Europe. *Id.* These arrangements rarely contained any guarantees for asylum seekers and created a risk of chain deportations or *refoulement* in violation of Refugee Convention guarantees. *Id.*; Blake, *supra* note 293, at 235 (asserting that absence of harmonization for asylum criteria meant that claims could be treated with significant differences in different countries, potentially resulting in *refoulement*); Harvey, *supra* note 284, at 224 (stating that under "safe third countries" doctrine, as applied, *refoulement* may be likely outcome). See generally Kay Hailbronner, *The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective*, 5 INT'L J. REFUGEE L. 31 (1993) (presenting rationales and critiques of "safe third countries" concept).

295. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 162 (showing that narrow interpretation of Refugee Convention's definition of "refugee" permitted European States to *refoul* individuals or to grant them immigration status with less guarantees than that of asylum); Fitzpatrick, *supra* note 146, at 16 (emphasizing that circumstance of arriving as part of mass influx, rather than cause of flight, frequently determined whether asylum seekers received relief they deserved); James C. Hathaway, *Harmonization for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L. J. 719 (1993) (critiquing erosion of Refugee Convention system in Western Europe); Daniele Joly, *The Porous Dam: European Harmoniza-*

various deterrent measures.<sup>296</sup>

The most recent amendment to the 1971 Act relevant to asylum seekers in the UK is the 1999 Act.<sup>297</sup> As part of the effort to modernize and integrate the UK immigration and asylum system,<sup>298</sup> the 1999 Act introduced a system of dispersal of asylum seekers on a no choice basis to areas with less pressure on accommodation than in London and other parts of the South-East.<sup>299</sup> The 1999 Act also replaced cash support for asylum seekers through the Income Support system or Social Services

*tion on Asylum in the Nineties*, 6 INT'L J. REFUGEE L. 159 (1994) (criticizing effect European harmonization has on asylum seekers' rights).

296. See STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 162 (demonstrating that deterrent measures adopted Europe-wide included increased likelihood of detention and restricted access to employment); Fitzpatrick, *supra* note 146, at 31-40 (discussing various structural revisions in European asylum systems). See generally Immigration Law Practitioners' Association, *Borders and Discrimination in the European Union*, Jan. 2002, available at <http://www.ilpa.org.uk> (analyzing shortcomings of Europeanization of border control).

297. See Home Office, Immigration and Nationality Directorate, *The Immigration and Asylum Act 1999: Introduction* (Eng.), available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=353#Introduction>.

298. See *id.* (explaining that Immigration Act 1999 was meant to implement key ideas from Government's White Paper); *Fairer, Faster and Firmer—A Modern Approach to Immigration and Asylum*, July 27, 1998, available at <http://www.archive.official-documents.co.uk/document/cm40/4018/4018.htm>. See also White Paper, *Secure Borders, Safe Haven*, Feb. 7, 2002, available at <http://www.official-documents.co.uk/document/cm53/5387/cm5387.pdf> (describing UK government's most recent review of immigration policy); *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 4 (asserting that in 2001 asylum seekers in UK were promoted by politicians and media as important election issue).

299. See Sue Willman, *Looking for Refuge—The Introduction of Dispersal of Asylum Seekers Aimed to Spread the Burden Across the Country, but it has Caused More Problems than it has Solved*, 97 L. SOCIETY'S GAZETTE 26 (2000) (discussing debate regarding dispersal procedure and highlighting its failure to provide asylum seekers with adequate accommodation and support services); Harvey, *supra* note 284, at 213-14 (indicating that conviction that economic migrants were seeking to misuse asylum determination procedure fueled evolution of dispersal and voucher schemes); Alan Travis & Ian Traynor, *Britain's Little Refugee Problem*, GUARDIAN (Oct. 22, 1997) (describing how disbelief in good faith of asylum seekers' claims evolved into climate of fear and resulted in more restrictive legislation); Stephen Moss, *Mind Your Language: The Semantics of Asylum*, GUARDIAN, May 22, 2001 (remarking that biased, inaccurate, and misleading reports of asylum seekers' motivations and achievements in UK are particularly damaging when asylum seekers are dispersed across UK, to areas that have little direct experience or knowledge of asylum seekers and refugees). See also Home Office, *Radical Reform Unveiled for More Robust Asylum System*, Oct. 29, 2001, available at <http://194.203.40.90/news.asp?NewsId=102&SectionId=1> [hereinafter *Radical Reform Unveiled*] (introducing plans to phase out dispersal procedure and issue identification cards as alternative method of combating fraud in asylum system).

Departments by a voucher scheme.<sup>300</sup>

Experts contend that the "designated accommodation" provision of the 1999 Act permits asylum seekers to become "sitting targets for racist violence" and a voucher-system enhances the stigmatization of asylum seekers and the growth of xenophobia.<sup>301</sup> Commentators refer to families and friends being arbitrarily split up and sent to towns in different parts of the country, as well as families dispersed to estates of known and likely racial abuse, hostility, and attacks.<sup>302</sup> The Home Secretary conceded that the procedures under the Act are inadequate and that the system is slow, vulnerable to fraud, and unfair to both asylum

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300. See *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 11-12 (alleging that asylum seekers receive vouchers that are worth around 70% of current Income Support levels and are exchangeable for essential goods in limited number of shops participating in scheme). As of January 2001 the amounts of weekly voucher support (£10 of which is redeemable for cash per person) were: a person aged 18-24 (£28.95); a person aged over 25 (£36.54); a couple (£57.37); a single parent (£36.54); a child under 16 (£30.95); a child of 16 or 17 (£31.75). *Id.* The value of vouchers is further reduced because shops cannot give change. *Id.* The Government admits that the cost to taxpayers of running a voucher scheme is greater than allowing asylum seekers ordinary Income Support. *Id.* See also Refugee Council, *Voucher System to be Scrapped this April*, Feb. 27, 2002 (asserting that starting April 8, 2002, asylum seekers will receive vouchers which are exchangeable for cash, rather than goods); *Radical Reform Unveiled*, *supra* note 299 (explaining that vouchers may be phased out of system by fall 2002).

301. See Institute of Race Relations, *Lessons from Europe*, available at <http://www.homebeats.co.uk/resources/lessons.htm> (drawing on case studies from European countries where governments had instituted similar measures). By denying social provisions to rejected asylum seekers, the government is institutionalizing social exclusion and creating Victorian-style conditions of poverty. *Id.* Structures of exclusion are erected very quickly and are extremely difficult to remove. *Id.* See also Oxfam, *Token Gestures—The Effects of the Voucher Scheme on Asylum Seekers and Organisations in the UK*, available at <http://www.oxfam.org.uk/policy/papers/vouchers/intro.htm> (presenting results of survey of views on voucher scheme by over fifty organizations working with asylum seekers across UK). Since the introduction of the voucher scheme, all study participants observed an increase in the number of asylum seekers experiencing problems. *Id.* Thirty-five organizations noted that asylum seekers experienced hunger; forty-one organizations mentioned that asylum seekers could not buy enough food; and forty-nine organizations remarked that asylum seekers were unable to buy other essential items. *Id.*; *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 11-12 (documenting responses to voucher scheme by number of organizations).

302. See Grania Langdon-Down, *Unsettled Issue—The Government's Dispersal Programme for Asylum Seekers is Concerning Many Solicitors, who Believe that Refugees are Being Denied Their Legal Rights*, 98 L. SOCIETY'S GAZETTE 24 (2001) (discussing chaotic nature of government dispersal policy); Oxfam, *supra* note 301 (commenting on racist attacks on asylum seekers); *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 8-12 (critiquing dispersal and voucher schemes and presenting list of recommendations for better approach).

seekers and local communities.<sup>303</sup>

Further, commentators note that the current Immigration Rules significantly curtail asylum seekers' appeal rights.<sup>304</sup> Under the Rules, the appellate authority no longer informs asylum applicants directly of its decision, but instead, notifies the Home Office.<sup>305</sup> This procedure enables the Immigration Service to present the applicant with a negative appeal decision and remove her immediately, or detain her for a short period before removal.<sup>306</sup>

## 2. Grounds for Relief

In addition to the optimal grant of asylum, an asylee may be granted "exceptional leave to remain" ("ELR") as an alternative status.<sup>307</sup> ELR is considered a humanitarian favor rather than a right, conferring fewer entitlements.<sup>308</sup> A recognized refugee receives family reunion; access to tertiary education, social, housing and security services, and employment; and can settle after four years; whereas a person with ELR faces, in practice, indefinite separation from his family, inferior educational prospects,

303. See *Radical Reform Unveiled*, *supra* note 299 (quoting Home Secretary's statements to House of Commons). The Home Secretary stated that the current system is too slow, vulnerable to fraud, and unfair. *Id.* He proposed a list of changes to take place in the coming months. *Id.* See also *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 1 (claiming that there are many people who are working illegally, while claiming support, or sub-letting their accommodations). There have been social tensions in neighborhoods across the country, and considerable pressure on local education and social and government services. *Id.*

304. See Immigration Rules 2000, *supra* note 282. See also *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 54-56 (discussing that Immigration Rules 2000 severely circumscribe asylum seekers' rights to appeal).

305. See Immigration Rules 2000, *supra* note 282, § V. See also *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 55 (discussing how asylum seekers do not receive direct communication regarding outcomes of their appeals).

306. See Immigration Rules 2000, *supra* note 282. See also *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 10 (expressing concern that new law would deprive asylum seekers of opportunity to seek legal advice or explore available legal avenues). It cannot be right that asylum seekers are the last to know that their asylum applications have been rejected. *Id.*

307. See MACDONALD & BLAKE, *supra* note 4, at 417-18 (discussing grant of "exceptional leave to remain" ("ELR") status); Home Office, *Asylum Applications—A Brief Guide to Procedures in the UK*, available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=87> [hereinafter *Asylum Applications*] (discussing grant of ELR as alternative status).

308. See MACDONALD & BLAKE, *supra* note 4, at 418 (stating that grant of ELR is discretionary); *Asylum Applications*, *supra* note 307 (showing that ELR may be granted on humanitarian grounds).



and a more uncertain future in the UK.<sup>309</sup>

Under the "safe third country" doctrine, asylum seekers in the UK may be returned to the first country they entered, where they might have sought protection.<sup>310</sup> The doctrine has come under severe criticism because it does not ensure that asylum seekers will have access to the necessary procedures or find basic respect for human rights in the third State.<sup>311</sup> Critics claim that the concept underlying the doctrine is of a morally questionable nature,<sup>312</sup> eroding international asylum norms to the "lowest common level."<sup>313</sup>

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309. See MACDONALD & BLAKE, *supra* note 4, at 401-02, 418 (stating that someone granted asylum should be accorded most favorable treatment possible). By contrast, someone with ELR receives no guarantees. *Id.* at 418; STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 162 (remarking that ELR grants limited protections, as compared to formal refugee status); *Asylum Applications*, *supra* note 307 (discussing limited entitlements under ELR status).

310. See Harvey, *supra* note 284, at 223 (stating that Immigration Act 1999 Section 11 applies to asylum seekers transferred to Member State under Dublin Convention's standing EU arrangements). The Dublin Convention determines which State is responsible for examining an application filed in one of the EC Member States. *Id.* The Dublin Convention was signed in 1990 and came into force on September 1, 1997. *Id.* Immigration Act 1999 Section 12 applies a similar procedure where an asylum seeker is transferred to a safe third country other than under Section 11. See Immigration Act 1999, *supra* note 297, § 12. Under Section 11, if the Secretary of State certifies that an asylum seeker is not a national of the receiving State, and the receiving State accepts the responsibility for considering the asylum claim, nothing prevents the removal of the asylum seeker. See *id.* § 11. Under Section 12, the Secretary of State must certify that the asylum seeker is not a national of the receiving State; his life or liberty would not be threatened on Refugee Convention grounds in that State; and that State would not send him to another country in violation of the Refugee Convention. See *id.* § 12. An asylum seeker may not be removed under Sections 11 or 12 if there is an outstanding appeal, claiming that her transfer would breach the HRA. See *id.* §§ 11, 12.

311. See Harvey, *supra* note 284, at 224 (claiming that under doctrine, as applied today, asylum seeker may be *refouled* in violation of UK obligations under international human rights law); see also Blake, *supra* note 293, at 235 (asserting that lack of common asylum criteria among EU States implies potential *refoulement*); STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 162 (discussing that "safe third country" doctrine may often lead to *refoulement*); Fitzpatrick, *supra* note 146, at 33 (remarking that "safe third country" doctrine, in line with other measures adopted in Western Europe in response to increased asylum flows, undermines Refugee Convention guarantees).

312. See Harvey, *supra* note 284, at 225 (stating that morally questionable nature of concept should not be ignored); STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 161 (describing "safe third country" doctrine as clearly contrary to basic protection principles); Hailbronner, *supra* note 294, at 31 (critiquing rationales underlying "safe third countries" policy).

313. See Richard Dunstan, *A Case of Ministers Behaving Badly: The Asylum and Immigration Act 1996*, in CURRENT ISSUES OF UK ASYLUM LAW AND POLICY 52, 66 (Frances Nicholson & Patrick Twomey eds., 1998) (explaining that as result of European harmonization process, standards of refugee protection are eroded to lowest common level);

Further, the doctrine relies, in part, on the “safe countries of origin” concept or belief that there are countries, which are “objectively and verifiably” safe for the purposes of assessing asylum applications.<sup>314</sup> To be designated as “safe,” a country must have no serious risk of persecution and generate a large number of asylum claims in the UK, a high proportion of which prove unfounded.<sup>315</sup> Critics of this determination point out that it does not mention assessment of the human rights situation or the extent of refugee agencies’ involvement in the designation process.<sup>316</sup> In addition, the doctrine categorizes an individual by virtue of the country from which she came, not her application on its own merits.<sup>317</sup>

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STATE OF THE WORLD’S REFUGEES, *supra* note 171, at 164 (claiming that “safe third countries” policy results in erosion of refugee protection to lowest common denominator). See also Rachel Trost & Peter Billings, *The Designation of Safe Countries and Individual Assessment of Asylum Claims*, in *CURRENT ISSUES OF UK ASYLUM LAW AND POLICY* 85 (Frances Nicholson & Patrick Twomey eds., 1998) (asserting that objectivity and openness of “safe third country” certification process; reliability of information used; and ability of officials to use information consistently are vital concerns in reinforcement of Refugee Convention and ECHR Article 3 guarantees).

314. See Harvey, *supra* note 284, at 226 (asserting that while relatively novel in UK, “safe countries of origin” concept has been part of law and practice of EU Member States for some time). See also Trost & Billings, *supra* note 313, at 75-76 (explaining that doctrine is based on “white list” mechanism, created in secret EU Resolution); Craig Young, *Political Representations of Geography and Place in the Introduction of the UK Asylum and Immigration Act 1996*, in *CURRENT ISSUES OF UK ASYLUM LAW AND POLICY* 34, 47-50 (Frances Nicholson & Patrick Twomey eds., 1998) (challenging proposition that countries designated as “safe” fit that definition).

315. See Harvey, *supra* note 284, at 226 (discussing criteria for designation of country as “safe”); Trost & Billings, *supra* note 313, at 87-89 (asserting that asylum seekers arriving from “safe” countries must overcome double burden of proof and presumption that their claims are not well founded). These asylum seekers’ claims receive “short procedure” treatment, which undercuts time for consultation with a lawyer, social workers, or doctors as well as increases risk of detention. *Id.*; Fitzpatrick, *supra* note 146, at 39-40 (asserting that designation of specific countries as *prima facie* safe is problematic).

316. See Trost & Billings, *supra* note 313, at 80-83 (stating that involvement of UNHCR in process would make determination procedure more objective); Young, *supra* note 314, at 48 (citing greater involvement by NGOs as possible solution); Fitzpatrick, *supra* note 146, at 39 (claiming that presumption of persecution is theoretically rebuttable). Adjudicators in the current climate are likely to take the designation of a country as “safe” very seriously, however, and use low rates of approval as evidence of fraud and lack of persecution. *Id.*

317. See Harvey, *supra* note 284, at 227 (arguing that commitment to case-by-case assessment of asylum claims is dubious under this procedure); Trost & Billings, *supra* note 313, at 86-90 (describing additional hurdles asylum seekers from “safe countries of origin” must overcome to prove their individual claims); STATE OF THE WORLD’S REFU-

### 3. The Asylum Determination Procedure

The UK has a three-tier asylum determination procedure.<sup>318</sup> After an individual makes an asylum application, the application is subject to review by the Home Office.<sup>319</sup> The Home Office's determination is subject to an independent facts and merits review and a second-stage appeal before the Immigration Appeal Tribunal to identify errors of law and interpretation.<sup>320</sup>

#### a. Application process

An individual may apply for asylum on arrival or at any time after entry.<sup>321</sup> Unless an application is rejected for non-compliance or there is enough information on file for immediate refugee status determination, an applicant undergoes a series of interviews.<sup>322</sup> A preliminary interview with an Immigration Officer ("IO") at the port establishes very basic personal details.<sup>323</sup> The 1999 Act also requires fingerprinting at this stage.<sup>324</sup>

An asylum seeker then receives a "self-completion political asylum questionnaire" ("PAQ"), and undergoes the PAQ inter-

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GEES, *supra* note 171, at 161 (commenting on indiscriminately prejudicial treatment of all refugees and asylum seekers).

318. See Owers & Garlick, *supra* note 18, at 207 (describing three steps of system); J.M. EVANS, *IMMIGRATION LAW*, 110-58 (2d ed. 1983) (discussing regulation of immigration flow in UK). See also Sharon Persaud, *Unaccompanied Refugee Children*, 143 *NEW L.J.* 83 (1993) (claiming that although, under Refugee Convention, UK owes asylum seekers duty of protection, it is ironic that Home Office, enforcement department of police, prisons and deportation, considers asylum claims in first instance).

319. See Owers & Garlick, *supra* note 18, at 207 (stating that Home Secretary makes initial determination); MACDONALD & BLAKE, *supra* note 4, at 403-08 (discussing application process).

320. See Owers & Garlick, *supra* note 18, at 207 (stating that appeals are third step of three-tier system); JUSS, *supra* note 280, at 130-31 (discussing function of immigration appeals bodies).

321. See Immigration Act 1999, *supra* note 297, § 69, available at <http://www.legislation.hmso.gov.uk/acts/acts1999/90033—d.htm#69> (discussing application procedures). See also *Asylum Applications*, *supra* note 307 (outlining steps of asylum application process).

322. See MACDONALD & BLAKE, *supra* note 4, at 403-07 (discussing interviewing procedures); *Asylum Applications*, *supra* note 307 (noting that asylum applicant must undergo series of interviews).

323. See MACDONALD & BLAKE, *supra* note 4, at 404 (describing initial interview with IO); *Asylum Applications*, *supra* note 307 (outlining initial interviewing procedures); Persaud, *supra* note 318, at 83 (summarizing interviewing procedure and noting that interrogation can be unrecognized source of trauma).

324. See Immigration Act 1999, *supra* note 297, § 141, available at <http://www.legislation.hmso.gov.uk/acts/acts1999/90033—g.htm#141>.

view.<sup>325</sup> The case is referred for determination by the Secretary of State, who is solely authorized to rule on asylum applications in compliance with UK obligations under the Refugee Convention.<sup>326</sup> In accordance with its commitment to deliver a faster and firmer asylum system, the UK government declared that it aims to institute a process where claims and subsequent appeals are dealt with in approximately four weeks.<sup>327</sup>

An asylum applicant need not depart from the UK until the Secretary of State's determination or a certificate is passed back to the port.<sup>328</sup> If the Secretary of State refuses asylum, an IO resumes his examination to determine whether to grant leave to enter under any other provision of the Immigration Rules.<sup>329</sup> If the asylum seeker is refused entry following the refusal of an asylum application, she receives a notice informing her of the decision, the reasons for refusal, and any rights and means of appeal.<sup>330</sup>

While an asylum seeker's application remains under review, an IO may grant her temporary admission ("TA").<sup>331</sup> Applicants

325. See Persaud, *supra* note 318, at 83 (describing interview steps); MACDONALD & BLAKE, *supra* note 4, at 403-07 (summarizing interviewing procedures).

326. See Persaud, *supra* note 318, at 83 (discussing exclusive power of Secretary of State to decide on asylum applications); MACDONALD & BLAKE, *supra* note 4, at 404 (commenting on Secretary of State's singular authority to decide asylum claims). See also Stevens, *supra* note 18, at 21 (claiming that Secretary of State's discretionary power is too broad).

327. See Maria Fernandez, *Firm, but Hardly Fair or Fast—Serious Questions of Efficiency and Fairness Hang over the Government's Latest Proposals for Reformed Immigration Legislation*, 96 L. SOCIETY'S GAZETTE, 16 (1999) (questioning government's ability to strike right balance between efficiency and fairness); Stevens, *supra* note 18, at 30 (claiming that asylum system is seen by many as mechanical exercise in reducing numbers, not genuine attempt to help asylum seekers); Young, *supra* note 314, at 38 (discussing that government sees asylum seekers as problem and all apparent attempts to assist them is empty rhetoric).

328. See MACDONALD & BLAKE, *supra* note 4, at 403-07 (describing sequence of procedures); Persaud, *supra* note 318, at 83 (detailing events at each step of process).

329. See MACDONALD & BLAKE, *supra* note 4, at 403-07 (explaining IO's duties in such circumstances); Persaud, *supra* note 318, at 83 (stating that Immigration Officer ("IO") should consider all available remedies).

330. See Persaud, *supra* note 318, at 83 (noting that IO must inform asylum seeker of his appeal rights); Home Office, Immigration Rules 331-33, available at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=1013> (providing that asylum seeker will not be removed from UK while his appeal is pending).

331. See MACDONALD & BLAKE, *supra* note 4, at 404 (describing meaning of Temporary Admission ("TA") status); *Asylum Applications*, *supra* note 307 (discussing TA status and what it means for asylum seeker); Fitzpatrick, *supra* note 146, at 16 (critiquing all forms of temporary protection adopted under regionalized regime in Fortress Europe).

with TA are "landed" or permitted entry and they are lawfully present in the UK, provided that they adhere to specific conditions.<sup>332</sup> These conditions include staying at a specific address or mandatory reporting to an IO or the police at specified intervals.<sup>333</sup>

The Immigration Service makes a decision to detain an asylum applicant when there is no alternative and there are grounds to believe that the person will not keep in touch voluntarily.<sup>334</sup> The relevant factors in imposing detention include the existence of a sponsor; satisfactory evidence of identification; past immigration history; and availability of detention accommodation.<sup>335</sup> Asylum applicants may also be detained when they are identified as illegal entrants; directions have been set to remove them; their leave has been curtailed; or applications are filed following the commencement of a deportation action.<sup>336</sup>

#### b. Critique of the System

Critics of the UK asylum system emphasize that it sees its role as the prevention of abuse, not provision of protection to

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332. See MACDONALD & BLAKE, *supra* note 4, at 404 (describing conditions that asylum seekers typically adhere to); *Asylum Applications*, *supra* note 307 (providing examples of conditions which asylum seekers may need to adhere to when they receive TA status).

333. See MACDONALD & BLAKE, *supra* note 4, at 404 (providing examples of conditions asylum seekers with TA typically adhere to); *Asylum Applications*, *supra* note 307 (noting common conditions imposed on asylum seekers with TA status).

334. See Immigration Act 1999, *supra* note 297, § 140, available at <http://www.legislation.hms.gov.uk/acts/acts1999/90033—g.htm#140>; see also MACDONALD & BLAKE, *supra* note 4, at 538-47 (discussing power to detain and challenges to it); *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 16-17 (remarking that although detention should be used only in exceptional circumstances, in reality power to detain is often subject to abuse).

335. See MACDONALD & BLAKE, *supra* note 4, at 544-46 (discussing limits to power to detain); Asylum Aid, *Detention*, available at <http://asylumaid.org.uk/AA%20pages/detention.htm> (discussing abuse of detention procedure); DAS, *Outrageous Detention*, 143 New L.J. 838 (1993) (describing detention in UK as harsh). See generally Amnesty International, *Cell Culture: Asylum Seekers in the UK* (1996) [hereinafter *Cell Culture*], available at [http://www.amnesty.org.uk/journal\\_sept/uk.html](http://www.amnesty.org.uk/journal_sept/uk.html) (contending that detention of asylum seekers in UK is often arbitrary).

336. See MACDONALD & BLAKE, *supra* note 4, at 538-39 (discussing classes of people subject to detention); Asylum Aid, *supra* note 335 (contrasting theoretical power to detain with actual abuse of this power in asylum proceedings); *Cell Culture*, *supra* note 335 (discussing guidelines regarding detention proceedings and commenting that these rules are often broken).

those who really need it.<sup>337</sup> The system's focus on speed and cost-cutting at the initial stage of decision-making paradoxically increases length and expense because poorly reasoned decisions are almost automatically challenged.<sup>338</sup> While appellants in many cases are underrepresented or poorly represented, the adjudicators are under great pressure and their decisions are inconsistent.<sup>339</sup> Furthermore, the piecemeal and partial attempts to reform the system mean grafting on new layers of process without adequate resources or coordination, restricting time scales, or removing appeals or reviews.<sup>340</sup> Experts agree that the system operates as a series of processes to review other people's often inconsistent and uninformed decisions.<sup>341</sup>

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337. See Stevens, *supra* note 18, at 30 (claiming that asylum system is seen by many as exercise in reducing numbers of applications, not genuine attempt to help claimants). The law is unable to differentiate between genuine refugees and bogus claimants and therefore tacitly accepts that some refugees will not be granted asylum. *Id.*; Young, *supra* note 314, at 38 (referring to government's rhetoric which sees asylum seeking itself as problem); Dunstan, *supra* note 313, at 67 (describing how government deliberately links number of asylum seekers and misuse of system to create impression of system abuse).

338. See Alison Harvey, *Researching "The Risks of Getting it Wrong"*, in CURRENT ISSUES OF UK ASYLUM LAW AND POLICY 176-98 (Frances Nicholson & Patrick Twomey eds., 1998) (analyzing length of asylum determination procedure and backlog of cases); Owers & Garlick, *supra* note 18, at 207 (describing that it takes average of two years to resolve case). The system carries a backlog of approximately 70,000 cases, which undermines its efficacy in dealing with the current caseload. *Id.* It produces a 75% rate of refusal of any form of protection and fuels procedures and attitudes known under the rubric of "culture of disbelief." *Id.* See also Asylum Aid, *Still No Reason at All: Home Office Decisions on Asylum Claims*, May 1999, available at <http://www.asylumaid.org.uk/Publications/Still%20No%20Reason%20At%20All.PDF> [hereinafter *Still No Reason at All*] (describing system's pitfalls and problems).

339. See Owers & Garlick, *supra* note 18, at 207 (determining that system is uncoordinated). The "culture of disbelief" instigates fundamental absence of trust between adjudicators and lawyers: many decision-makers see lawyers and the existence of appellate structures as a problem; most asylum lawyers believe that decision-makers challenge asylum seekers' claims. *Id.*; *Still No Reason at All*, *supra* note 338 (describing backlog of asylum applications and inconsistent decision-making); Willman, *supra* note 299, at 26 (describing significant backlog of asylum claims in UK).

340. See Owers & Garlick, *supra* note 18, at 207-08 (remarking that system is not effective mechanism for making decisions); Blake, *supra* note 293, at 235 (describing inconsistencies in UK asylum procedure); Harvey, *supra* note 284, at 224 (remarking on inconsistency and inefficiency of asylum system).

341. See Owers & Garlick, *supra* note 18, at 207-08 (remarking that UK asylum system involves piling layers on layers of process); STATE OF THE WORLD'S REFUGEES, *supra* note 171, at 161 (remarking that piecemeal, restrictive measures unilaterally adopted cannot suffice for effective asylum management); *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 4 (questioning whether inefficiency is deliberate policy of making life of asylum seekers in UK more difficult).

The significant changes to the appeal right ushered in by the Asylum and Immigration Appeals Act 1993 created a tendency to characterize asylum claims as not credible even though they emanate from notorious human rights violator States.<sup>342</sup> This "culture of disbelief" has been extensively critiqued for its reliance on statistics of low recognition rates to demonstrate that most asylum claims are, indeed, unfounded.<sup>343</sup> Critics assert that while recognition rates have declined, a considerably higher number of applicants obtained ELR, many of whom should have received refugee status.<sup>344</sup> Others only failed to get refugee status because of the Refugee Convention's narrow definition of a "refugee," but were irremovable under other instruments of international law.<sup>345</sup>

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342. See MACDONALD & BLAKE, *supra* note 4, at 11-13 (reviewing history of appeal right). The Immigration Act 1999 grants the right to appeal a refused application or a grant of an ELR (rather than refugee) status before a special adjudicator, the Immigration Appeal Tribunal, and the Court of Appeal. *Id.* Appeal rights were abolished under the 1996 Act and their reinstatement under the Immigration Act 1999 is a welcome sign as they are an important source of protection. *Id.* Theoretically at least, once decision-makers know that their decisions are subject to scrutiny, they are more careful in adhering to substantive and procedural rules, which, in turn, leads to more rational and consistent decision-making. *Id.* See also Dunstan, *supra* note 313, at 63 (analyzing appeal rights in context of "safe third country" cases). The "culture of disbelief" functions across and coexists with the rhetoric of "bogus" asylum seekers, undermining the decision-makers' objective review of asylum applications and placing them in violation of UK's obligations under the Refugee Convention. *Id.*; *Shattered Homelands, Scattered Dreams*, *supra* note 164, at 5 (asserting that term "asylum seeker" is so routinely associated with epithet "bogus" that it has become tainted with connotations of fraudulence).

343. See Blake, *supra* note 293, at 236-37 (stating that it is meaningless to equate unsuccessful applicants for refugee status with bogus claimants); Owers & Garlick, *supra* note 18, at 207-11 (analyzing fallacies which guide "culture of disbelief"); Fitzpatrick, *supra* note 146, at 39 (discussing that low rates of approval serve as evidence of high rates of fraud and lack of persecution, without adjudicators being sensitive to solipsism inherent in these assessments).

344. See Adan and Nooh v. Sec'y of State for the Home Dep't, [1997] Imm. A.R. 251 (suggesting that many ELR cases of Somali asylum seekers should be reclassified as refugee cases); Blake, *supra* note 293, at 237 (claiming that many who received ELR should have been granted refugee status).

345. See, e.g., Chahal v. UK, 23 Eur. H.R. Rep. 413 (1987) (showing that domestic interpretation of term "refugee" is narrow); Blake, *supra* note 293, at 237 (demonstrating that narrow interpretation of term "refugee" is one reason for low asylum acceptance rates). Moreover, statistics of success on appeal can be misleading because competent legal representation plays a decisive role in winning asylum requests. *Id.* at 238; *Destination UK*, *supra* note 24 (showing that stringent procedural requirements combined with dispersal of asylum seekers to distant areas thwart competent legal representation). The Home Office is increasing the rate of refusals, permitting only ten days to file an appeal. *Id.* Any "non-asylum" grounds of appeal, e.g., on the basis of marriage,

As for detention, experts describe the UK approach as the worst in Europe.<sup>346</sup> Numerous critics emphasize the absence of a time limit and the fact that asylum seekers do not receive written reasons for detainment.<sup>347</sup> Other critics point to the lack of judicial review or presumption in favor of liberty.<sup>348</sup> Although many detainees suffer from anxiety, insomnia, and depression, there is no evidence that psychiatric or psychological services are

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health, or other factors, also have to be identified within ten days. *Id.* Appeals are then listed for a hearing so quickly that it is very difficult to collect the required documents in time (fourteen days in advance), or to prepare the case properly; and appeal adjudicators will not grant adjournments unless the client has only just approached the legal representatives. *Id.* See also Dunstan, *supra* note 313, at 68 (citing another statistic showing that unsuccessful applicants do not equate with bogus claimants). The percentage of applicants refused protection, whose appeals are dismissed and who are actually removed is very small. *Id.* For instance, in 1999, the Home Office ruled on fewer than 17,000 cases, fifty-four percent of which were given permission to stay in the country. *Id.* Another statistic shows that between 1992 and 1996, the Home Office refused a total of 90,350 asylum seekers and dismissed approximately eighty percent of all subsequent appeals. *Id.* Of the 72,000 applicants who reached the end of the asylum process and became liable for removal, only 10,880 rejected asylum seekers were actually removed. *Id.* at 69.

346. See DAS, *supra* note 335, at 838 (describing detention in UK as harsh); *Cell Culture*, *supra* note 335 (contending that detention of asylum seekers in UK is often arbitrary). See also National Civil Rights Movement, *Campaign to Close Campsfield*, available at <http://www.ncrm.org.uk/caravan> (relating that there is big outcry against detention across England). On September 15-17, 2000, representatives from refugee organizations, campaigners, and expert speakers from twenty-five countries attended a conference against immigration detention at Ruskin College, Oxford. *Id.* Participants described the intensifying racist crackdown on asylum seekers and other migrants by European governments and the spread of detention centers across Europe. *Id.* Workshops covered specific issues: racism in the media; the ECHR; the trauma of detention; asylum from rape; organizing bail for detainees; direct actions at airports to stop deportations and at detention centers to call for their closure; and the introduction of penal regimes inside detention centers. *Id.* The conference ended with a list of resolutions, with the basic goal of participating in a Europe-wide network of anti-detention and anti-deportation campaigns. *Id.*

347. See Lisa Mitchell, *Detention Centres Troubled By Unrest*, BBC NEWS ONLINE, Feb. 15, 2002, available at [http://news.bbc.co.uk/1/hi/english/uk/england/newsid\\_1822000/1822480.stm](http://news.bbc.co.uk/1/hi/english/uk/england/newsid_1822000/1822480.stm) (describing how recent fire in Yarl's Wood detention center brought renewed attention to inhumane and outdated detention center conditions); *Cell Culture*, *supra* note 335 (showing that although Home Office stated that it only detains in special circumstances, Amnesty International found that 86% of 150 detainees were continuously detained without receiving adequate explanation of what their "special circumstances" were); *Destination UK*, *supra* note 24 (showing that detention is unjust).

348. See *Cell Culture*, *supra* note 335 (discussing inadequate due process guarantees in UK detention); National Civil Rights Movement, *supra* note 346 (asserting that due process violations, in combination with other human rights abuses, make UK detention practices unacceptable); National Civil Rights Movement, *supra* note 346 (discussing procedural shortcomings of detention in UK).



provided in detention.<sup>349</sup>

#### 4. The UK Anti-Terrorism Act

On December 13, 2001, in an effort to enhance international security in the aftermath of the September 11th attacks on the United States, the UK adopted new anti-terrorism legislation.<sup>350</sup> The Anti-Terrorism, Crime and Security Bill was published on November 12, 2001, allotting only one month for parliamentary and public scrutiny.<sup>351</sup> Although this legislation was greeted with less public outcry than was the USA PATRIOT Act, recent months witnessed increasing privacy concerns, especially with regard to government's ability to scrutinize records of any person's online activity.<sup>352</sup>

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349. See e.g. WORLD HEALTH ORGANIZATION, *Rapid Assessment of Mental Health Needs of Refugees, Displaced and Other Populations Affected by Conflict and Post-Conflict Situations*, Sept. 11, 2001, available at <http://www.who.int/disasters/tg.cfm?doctypeID=21> (discussing traumas refugees experience and mental disorders common among refugees); *Health: Psychiatric Disorders Plague Refugees*, BBC NEWS ONLINE, Aug. 3, 1999 (describing high rates of psychiatric disorders among refugees). Moreover, medical care is inadequate. *Id.* Doctors often think detainees are pretending to be sick, resulting in delayed treatment and the continued detention of those who eventually prove too sick to be detained. See *Destination UK*, *supra* note 24.

350. See Anti-Terrorism Act 2001, *supra* note 7. See also Explanatory Notes, available at [http://www.hmso.gov.uk/cgi-bin/htm\\_hl3?URL=http://www.hmso.gov.uk/acts/en/2001en24.htm&STEMMER=en&WORDS=anti™error©rime§ securïll+&COLOUR=red&STYLE=s#muscat\\_highlighter\\_first\\_match](http://www.hmso.gov.uk/cgi-bin/htm_hl3?URL=http://www.hmso.gov.uk/acts/en/2001en24.htm&STEMMER=en&WORDS=anti™error©rime§ securïll+&COLOUR=red&STYLE=s#muscat_highlighter_first_match).

351. See Home Office, *Anti-Terrorism, Crime and Security Bill, Passage Through Parliament*, available at [http://www.homeoffice.gov.uk/oicd/antiterrorism/bill\\_through\\_parliament.htm](http://www.homeoffice.gov.uk/oicd/antiterrorism/bill_through_parliament.htm) (showing Bill's progress before implementation).

352. See *Anti-Terror Laws Raise Net Privacy Fears*, BBC NEWS ONLINE, Nov. 11, 2001, available at [http://news.bbc.co.uk/hi/english/sci/tech/newsid\\_1647000/1647309.stm](http://news.bbc.co.uk/hi/english/sci/tech/newsid_1647000/1647309.stm) (referencing emergency measure announced by Home Secretary David Blunkett, enabling net service providers to keep records of what their customers are doing on-line for longer than they do now). In response to Blunkett's statements, civil liberties campaigners prepare to challenge the new legislation in court. *Id.*; *Terror Bill is "Snoopers' Charter"*, BBC NEWS ONLINE, Nov. 28, 2001 available at [http://news.bbc.co.uk/hi/english/uk\\_politics/newsid\\_1681000/1681131.stm](http://news.bbc.co.uk/hi/english/uk_politics/newsid_1681000/1681131.stm) (criticizing anti-terrorism legislation as "snoopers' charter," which permits prosecutors to gain access to information retained by public authorities on non-citizens as well as citizens); S.A. Mathieson, *The Net's Eyes are Watching: The New Anti-Terrorism Bill May Force Internet Firms to Spy on Us*, GUARDIAN, Nov. 15, 2001, at 1 (showing that new legislation will dramatically increase amount of information internet service providers can keep on their customers); Martin Thomas, *An Assault on Freedom: The Anti-Terrorism Bill Undermines both the Human Rights Convention and the Rule of Law*, GUARDIAN, Nov. 26, 2001, at 15 (claiming that Anti-Terrorism Act 2001 undermines essential freedoms).

## a. Derogation

In enacting the Anti-Terrorism Act, the UK became the only EU government to derogate from its international human rights treaty obligations.<sup>353</sup> The Order designating derogation stated: “there exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism.”<sup>354</sup> After the Secretary of State laid the Order before Parliament, human rights activists argued that the Secretary’s statement did not provide evidence of serious and immediate threats to the life of the nation or the community required for effective derogation.<sup>355</sup>

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353. See Anti-Terrorism Act 2001, *supra* note 7, § 30. See also Home Office, *Anti-Terrorism Crime and Security Act 2001 (ch. 24)*, available at <http://www.hmsso.gov.uk/acts/en/01en24-a.htm> [hereinafter Home Office, *Anti-Terrorism*] (summarizing sections of Anti-Terrorism Act 2001). See generally Amnesty International, *Creating a Shadow Criminal Justice System in the Name of “Fighting International Terrorism,”* Sept. 16, 2001, available at <http://web.amnesty.org/802568F7005C4453/0/EA5378E29D289D2D80256B060038D3AC?Open> [hereinafter *Shadow Justice System*] (explaining that Section 30 of Anti-Terrorism Act 2001 requires UK to derogate from ECHR, invoking Article 15 to officially derogate from Article 5). Article 15 permits derogation in time of war or other public emergency threatening the life of the nation, but such measures must be time-limited and restricted to the extent strictly required. *Id.* The UK also derogated from the ICCPR, invoking Article 4 to derogate officially from the provisions of Article 9. *Id.*

354. See *Shadow Justice System*, *supra* note 353 (quoting text of Order); Guardian, *Anti-Terrorism Crime and Security Bill: Summary*, available at [http://image.guardian.co.uk/sys-files/Politics/documents/2001/11/20/Antiterrorism\\_bill.pdf](http://image.guardian.co.uk/sys-files/Politics/documents/2001/11/20/Antiterrorism_bill.pdf) (asserting that Anti-Terrorism Act 2001 is not at odds with ECHR). The government’s choice to derogate from ECHR, moreover, is legitimate as is its aim of protecting liberties. *Cf.* Charter 88, *Anti-Terrorism Crime and Security Bill*, available at <http://www.charter88.org.uk/pubs/brief/0111terror.html> (claiming that no derogation grounds exist). Human rights activists pointed to the fact that when the Secretary of State announced the proposals for emergency legislation on October 15, 2001 he stated that there was no immediate intelligence of a specific threat to the UK. *Id.*

355. See *Shadow Justice System*, *supra* note 353 (discussing circumstances when derogation is justified); ILPA, *ILPA Submission on Forthcoming Emergency Anti-Terrorism Legislation*, available at <http://www.ilpa.org.uk/submissions/terrorism.htm> (arguing against derogation from ECHR, particularly with regard to ECHR Article 5 detention provision); Liberty, *Anti-Terrorism, Crime and Security Bill 2001*, Nov. 2001, available at <http://www.liberty-human-rights.org.uk/mparl8.html> [hereinafter Liberty, *Anti-Terrorism*] (analyzing provisions of new law); Human Rights Watch, *UK: New Anti-Terror Bill Rolls Back Rights*, Dec. 14, 2001, available at <http://www.hrw.org/press/2001/12/UKbill1214.htm> [hereinafter *Anti-Terror Bill Rolls Back Rights*] (discussing foreboding human rights violations under new law).

### b. A Suspected International Terrorist

Section 21 of the Act tasks the Home Secretary with certifying a suspected international terrorist if he believes the person's presence in the UK is a risk to national security, and he suspects that the person is an international terrorist.<sup>356</sup> Section 23 permits indefinite detention of foreign nationals suspected of terrorism-related activities, who cannot be returned to another country because of practical problems such as lack of documentation or because they might be subject to ECHR Article 3 violations.<sup>357</sup> Under the UK's current immigration laws, detention can only be used when there is an on-going removal proceeding in progress and only for a "reasonable" amount of time.<sup>358</sup>

### c. Appeal

Under Section 25(1) of the Anti-Terrorism Act 2001, a suspected international terrorist may appeal to the Special Immigration Appeals Commission ("SIAC") against his certification within three months of its issue.<sup>359</sup> SIAC has the powers to grant bail to suspected national security risks and to review the certifications at six-monthly intervals.<sup>360</sup> It is permitted to receive secret evidence, and to conduct proceedings without the detainee

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356. See Anti-Terrorism Act 2001, *supra* note 7, §§ 21(2), 21(3)(a). Under Section 21(2), an "international terrorist" is a person who "is or has been concerned in commission, preparation or instigation of acts of international terrorism, is a member of or belongs to an international terrorist group, or has links with a person who is a member of or belongs to an international terrorist group." *Id.* Under section 21(3)(a), an "international terrorist group" is a group, which "is subject to the control or influence of persons outside United Kingdom." *Id.* "Terrorism" is defined as the "use or threat of action . . . designed to influence government or to intimidate the public or section of the public, and use or threat is made for the purpose of advancing political, religious or ideological cause." *Id.*

357. See Anti-Terrorism Act 2001, *supra* note 7, § 23. See also ECHR, *supra* note 45, art. 3 (prohibiting ill-treatment absolutely in expulsion cases).

358. See Immigration Act 1999, *supra* note 297, § 140.

359. See Anti-Terrorism Act 2001, *supra* note 7, § 25(1). See also Home Office, *Anti-Terrorism*, *supra* note 353 (summarizing Special Immigration Appeals Commission's ("SIAC") role); *Shadow Justice System*, *supra* note 353 (explaining that SIAC was set up in response to judgment of European Court in case of *Chahal* in 1997 to hear appeals where Home Secretary made decision to deport on national security grounds). The SIAC's decision is binding on the Secretary of State although either party may appeal on a point of law to the Court of Appeal. *Id.*; *Anti-Terror Bill Rolls Back Rights*, *supra* note 355 (discussing SIAC's role in proceedings under Anti-Terrorism Act 2001).

360. See Anti-Terrorism Act 2001, *supra* note 7, § 25(1); see also *Shadow Justice System*, *supra* note 353 (critiquing Anti-Terrorism Act 2001 Section 25(1)).

or their counsel.<sup>361</sup> Additionally, appeal of a SIAC decision must be to the Court of Appeal, and is limited to points of law.<sup>362</sup> However, experts contend that UK courts have already substantially limited the authority of the SIAC to overrule Home Secretary decisions in terrorist cases.<sup>363</sup>

#### d. Right to Seek Asylum

Sections 33 and 34 of the Anti-Terrorism Act 2001 empower the Home Secretary to make a determination that an individual does not have the right to substantive consideration of her asylum application if Articles 1(F) or 33(2) of the Refugee Convention apply.<sup>364</sup> The Refugee Convention Article 1(F) contains the so-called “exclusion clauses” and ensures that perpetrators of gross human rights violations are excluded from refugee status.<sup>365</sup> The Refugee Convention Article 33(2) states that a refugee who can reasonably be regarded as dangerous to a country’s

361. See Anti-Terrorism Act 2001, *supra* note 7, § 25(1); see also *Shadow Justice System*, *supra* note 353 (commenting on SIAC’s ability to hear secret evidence and to conduct proceedings in secret).

362. See Anti-Terrorism Act 2001, *supra* note 7, §25(1); see also *Shadow Justice System*, *supra* note 353 (analyzing limited nature of appeal of SIAC’s decision).

363. See *Shadow Justice System*, *supra* note 353 (discussing that in May 2000, Court of Appeal rejected decision by SIAC in case of Shafiq Ur Rehman, Pakistani national subject to deportation for involvement with alleged Islamic terrorist organization). The SIAC ruled that the Home Secretary did not prove that Rehman’s actions were directed against the UK or its citizens. *Id.* The Court of Appeal overturned the SIAC’s decision, holding that in any national security case, the Home Secretary was entitled to make the decision to deport not only on the basis that the person had in fact endangered national security, but that he presented a danger to national security, regardless of the degree of probability. *Id.* In October 2001, the House of Lords upheld the Court of Appeal decision. *Id.*; Patrick Wintour, *Labor Revolt on Terror Bill*, *GUARDIAN*, NOV. 22, 2001, available at <http://politics.guardian.co.uk/attacks/story/0,1320,603486,00.html> (outlining claim that rules of evidence and representation before SIAC fall short of full judicial review). See also ILPA, *ILPA Briefing on Anti-Terrorism, Crime and Security Bill*, available at <http://www.ilpa.org.uk/submissions/antiterrorism.html> (contending that appeal to SIAC is meaningless provision of Anti-Terrorism Act 2001); Liberty, *Detentions Under Anti-Terror Act “Utterly Unjust”—Liberty to Coordinate Legal Challenge*, available at <http://www.liberty-human-rights.org.uk/mpress80.html> (asserting that SIAC is not designed to deal with indefinite detention appeals). See also *Memorandum submitted by the United Nations High Commission for Refugees (UNHCR)*, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/351/351ap19.htm> (urging for implementation of procedural guarantees in SIAC’s decision-making process).

364. See Anti-Terrorism Act 2001, *supra* note 7, §§ 33-34.

365. See Refugee Convention, *supra* note 12, art. 1(F) (citing crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside country of refuge, or acts contrary to purposes and principles of U.N.).

security may not seek protection against *refoulement* from that country.<sup>366</sup>

Human rights organizations allege that Article 1(F) requires commission of crimes by an individual and does not refer to any perceived future threat as sufficient grounds for exclusion.<sup>367</sup> Section 33(1), on the other hand, empowers the Home Secretary to exclude a person from refugee status or to detain her for association with a terrorist organization or for being a future national security threat.<sup>368</sup> In effect, critics claim, the Act reverses the Convention's "inclusion before exclusion" mandate and empowers the Home Secretary to deny protection as a matter of first course.<sup>369</sup>

Human rights activists also argue that the Article 33(2) prohibition against *refoulement* does not apply to a past political crime that does not endanger the UK's current security.<sup>370</sup> Sections 33 and 34 of the Anti-Terrorism Act 2001, on the other hand, deny full determination of refugee status in favor of *refoulement*, preventing the SIAC from balancing an individual's fear of persecution upon *refoulement* against the government's

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366. See *id.* art. 33(2).

367. See *Shadow Justice System*, *supra* note 353 (stating that definition of "suspected international terrorist" is vague and over-inclusive). "Link" with member of terrorist group is too tenuous to signify that the person has been involved in the commission of terrorist activities. *Id.* Broad, undefined terms such as "links" could result in findings of guilt by association for persons sharing the same political ideology, nationality, ethnicity, social grouping, or even family, with persons who commit acts of terrorism. *Id.*; Liberty, *Anti-Terrorism*, *supra* note 355 (stating that terminology of Anti-Terrorism Act 2001 is over-inclusive and ambiguous); Charter 88, *supra* note 354 (critiquing vague and over-inclusive terms of anti-terrorism laws).

368. See *Shadow Justice System*, *supra* note 353 (critiquing Secretary of State's broad detention powers); Liberty, *Anti-Terrorism*, *supra* note 355 (making similar criticisms); *After the Terror*, *supra* note 17, at 7 (remarking on increasing abuse of asylum seekers' and refugees' rights world-wide); *Justice Not Revenge*, *supra* note 27 (claiming that events of September 11th are resulting in massive abuses of human rights around world); *Amnesty International's Concerns*, *supra* note 27 (expressing concern about increased detention of asylum seekers).

369. See Refugee Convention, *supra* note 12, art. 33; *Shadow Justice System*, *supra* note 353 (arguing that fundamental principle guiding Refugee Convention's protection mandate is presumption of inclusion on basis of full and fair review). This approach is consistent with UNHCR guidelines on the application of the exclusion clauses. *Id.* See generally UNHCR, *Note on the Exclusion Clauses*, (EC/47/SC/CRP.29) (discussing exclusion clauses and their rationale).

370. See *Shadow Justice System*, *supra* note 353 (claiming that past crime does not fall under purview of Refugee Convention); Liberty, *Anti-Terrorism*, *supra* note 355 (asserting that Refugee Convention does not account for past crimes); Charter 88, *supra* note 354 (claiming that Refugee Convention does not encompass past crimes).

perceived threat to national security.<sup>371</sup> The SIAC does not have the power to address asylum questions, thereby suspending Refugee Convention guarantees.<sup>372</sup> Moreover, human rights activists assert that the system of indefinite detention of refugees establishes a shadow justice system without the safeguards or guarantees of rights required in the formal system.<sup>373</sup> In effect, asylum seekers can be deemed threats to national security and “suspected international terrorists” and imprisoned indefinitely on the basis of information, which is considered inadmissible in a trial, and on a significantly lower standard of proof.<sup>374</sup>

### III. A COMPREHENSIVE MULTILATERAL APPROACH IS NECESSARY TO SAFEGUARD ASYLUM SEEKERS' RIGHTS IN THE POST-SEPTEMBER 11TH WORLD

From the time the United States and the UK signed onto the major international human rights documents promising spe-

371. See Anti-Terrorism Act 2001, *supra* note 7, §§ 33-34.

372. See *Shadow Justice System*, *supra* note 353 (arguing that exclusion before inclusion risks criminalizing refugees). Exclusion is exceptional and it is not appropriate to consider exception first. *Id.* Further, Section 33(8) of the Anti-Terrorism Act 2001 restricts the right of appeal to a higher court for persons certified as threats to national security when SIAC upholds that certification. *Id.* Appeal in such cases can only touch on points of law, requiring the SIAC to accept the facts as presented by the Home Secretary. *Id.* Moreover, the recent European Court decision in *Chahal* established that certain Refugee Convention Article 32(2) procedural guarantees should also apply to those potentially subject to *refoulement* under Article 33(2). See *Chahal v. UK*, 23 Eur. H.R. Rep. 413.

373. See *Shadow Justice System*, *supra* note 353 (coining term “shadow justice system”); John Wadham, *Acting out for Human Rights—A Look at the Anti-Terrorism Act and Whether Parliament Would Allow the Sun to Set on Areas of the Statute that Breach Human Rights*, 99 L. SOCIETY GAZETTE 16 (2002) (arguing that powers UK government retains under Anti-Terrorism Act 2001 run obviously contrary to fundamental human rights law); Charter 88, *supra* note 354 (discussing unfairness of asylum proceedings under Anti-Terrorism Act 2001).

374. See *Shadow Justice System*, *supra* note 353 (critiquing detention provisions under Anti-Terrorism Act 2001); Liberty, *Anti-Terrorism*, *supra* note 355 (echoing concerns that innocent people may be detained); *Anti-Terror Act at-a-Glance*, BBC NEWS ONLINE, Dec. 14, 2001, available at [http://news.bbc.co.uk/hi/english/uk\\_politics/newsid\\_1710000/1710435.stm](http://news.bbc.co.uk/hi/english/uk_politics/newsid_1710000/1710435.stm) (discussing main measures under Anti-Terrorism Act 2001, including detention without trial); Liberty, *European Torture Watchdog in Secret Visit to UK Detention Without Charge or Trial Under New Anti-Terrorism Powers Prompts Alarm*, available at <http://www.liberty-human-rights.org.uk/mpress96.html> (discussing secret investigation by European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) into detention conditions under Anti-Terrorism Act 2001).

cific rights to asylum seekers,<sup>375</sup> both countries struggled to balance compliance with these international obligations with domestic policy and security concerns.<sup>376</sup> Because international law lacks effective enforcement mechanisms<sup>377</sup> and States are free to adopt caveats to the international obligations they do undertake,<sup>378</sup> the United States and the UK managed to compromise their obligations to asylum seekers in distinct ways.<sup>379</sup> The post-September 11th anti-terrorism legislation enacted by the two countries skews the balance toward a unilateral approach that further undermines these asylum obligations.<sup>380</sup> Only a comprehensive multilateral approach will safeguard asylum seekers' rights in the post-September 11th world.

#### A. U.S. and UK Non-Compliance with International Law

The U.S. and the UK asylum systems underwent similar cyclical changes, with both countries opening their doors to asylum seekers from the Second World War<sup>381</sup> until the 1980s,<sup>382</sup> and tightening their immigration controls since then.<sup>383</sup> The major

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375. See *supra* notes 11-16 and accompanying text (listing first international human rights documents and summarizing U.S. and UK obligations under these instruments). See also *supra* notes 46-63 and accompanying text (describing U.S. and UK obligations under International Bill of Human Rights); notes 64-73 and accompanying text (defining basic U.S. and UK obligations under Refugee Convention and Refugee Protocol); notes 74-80 and accompanying text (outlining U.S. and UK basic obligations under Torture Convention).

376. See *supra* notes 171-216 and accompanying text (summarizing evolution of U.S. asylum system from Second World War until today); notes 284-306 and accompanying text (outlining evolution of UK asylum procedures during same time period).

377. See, e.g., *supra* note 55 and accompanying text (describing lack of enforcement for breach of ICCPR); notes 61-63 and accompanying text (noting lack of enforcement for breach of ICESCR). See also *supra* notes 163-65 and accompanying text (discussing lack of enforcement of asylum seekers' rights under international law).

378. See *supra* notes 112-16 and accompanying text (describing steps States may undertake to opt out of international human rights obligations).

379. See *supra* notes 246-56 and accompanying text (illustrating some criticisms of U.S. treatment of asylum seekers); notes 337-49 and accompanying text (detailing some criticisms of UK treatment of asylum seekers).

380. See *supra* notes 25-28 and accompanying text (remarking on criticisms aimed at U.S. and UK anti-terrorism legislation and its effect on asylum seekers' rights).

381. See *supra* note 20 and accompanying text (reflecting on welcoming attitude of United States and UK in immediate post-war years).

382. See *supra* note 18 and accompanying text (remarking on common trend in U.S. and UK asylum developments during 1980s); notes 180-200 and accompanying text (describing 1980s developments in U.S. asylum system); notes 288-96 and accompanying text (outlining forces affecting UK asylum developments in 1980s).

383. See *supra* notes 20-24 and accompanying text (commenting on trend in U.S.

international human rights documents played specific roles in the development of domestic asylum law and policy in the United States and the UK.<sup>384</sup> The Refugee Convention had key significance in both countries because it provided the basic definitions of the terms “refugee” and “*nonrefoulement*.”<sup>385</sup> The U.S. legislation expanded this “refugee” definition to include future persecution, while adding absolute bars to refugee status.<sup>386</sup> The UK legislation left the Refugee Convention terminology unaltered.<sup>387</sup>

While other international documents played a minor role in the UK asylum litigation,<sup>388</sup> in the United States, the Torture Convention provided an independent ground of asylum relief and expanded the *nonrefoulement* principle to include threat of torture.<sup>389</sup> As far as the regional treaties are concerned, the American Convention played a nominal role in the U.S. asylum litigation.<sup>390</sup> By contrast, the regional ECHR, as incorporated into the UK domestic law by the HRA, became the document of paramount importance.<sup>391</sup> Besides being one of the few human rights documents widely known in the UK, the ECHR became the only human rights document providing UK citizens with an

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and UK developments since 1980s and reasons for these trends); notes 201-16 and accompanying text (detailing U.S. asylum developments since 1980s); notes 292-306 and accompanying text (explaining regional and domestic developments affecting UK asylum law and policy since 1980s).

384. See *supra* notes 117-25 and accompanying text (outlining application of international human rights law in U.S. courts generally); notes 126-40 and accompanying text (discussing specific U.S. obligations to asylum seekers under international law). Cf. *supra* notes 141-46 and accompanying text (commenting on application of international human rights law in UK courts generally); notes 147-62 and accompanying text (reporting specific UK obligations to asylum seekers under international law).

385. See *supra* notes 64-73 and accompanying text (introducing and explaining these Refugee Convention provisions).

386. See *supra* notes 131, 131-34 and accompanying text (describing alterations of Refugee Convention definitions under U.S. domestic law).

387. See *supra* note 149 and accompanying text (attesting to unaltered definitions of terms “refugee” and “*nonrefoulement*” under UK domestic law).

388. See *supra* note 153 and accompanying text (remarking that terms of most international human rights treaties are not reflected in UK legislation or in court).

389. See *supra* notes 135-37, 227-31 and accompanying text (discussing role of Torture Convention in U.S. asylum legislation).

390. See *supra* note 140 and accompanying text (remarking on insignificant effect of American Convention on U.S. domestic asylum laws).

391. See *supra* notes 152-59 and accompanying text (discussing central role ECHR plays in UK asylum litigation).



individual right of petition.<sup>392</sup>

The specific mechanisms the United States and the UK developed to address asylum movements were unique.<sup>393</sup> The hallmark of the U.S. domestic asylum scheme is expedited removal and mandatory detention procedures under IIRIRA.<sup>394</sup> Under this process, asylum seekers are thrown in detention centers or prisons, where they await adjudication of their claims.<sup>395</sup> The human rights violations that occur in detention centers are well documented.<sup>396</sup> Because detained asylum seekers rarely receive attorney representation and unrepresented asylum seekers rarely win their cases, a large number of these individuals are *refouled* in violation of international guarantees.<sup>397</sup>

Under the UK 1999 Immigration Act, asylum seekers may enter the UK, but only to be dispersed, on a no-choice basis, into far-flung ends of the country, where they often become victims of racism and xenophobia.<sup>398</sup> Asylum seekers in the UK are subject to additional prejudice due to the government-distributed food coupons.<sup>399</sup> A few asylum seekers end up in detention<sup>400</sup> and the UK detention sites are subject to criticisms comparable to those targeting the U.S. detention practices.<sup>401</sup> The UK system, at its worst, becomes an endless series of reviews of other people's inconsistent decisions.<sup>402</sup>

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392. *See id.*

393. *See supra* notes 217-45 and accompanying text (discussing grounds for relief asylum seekers may claim and procedures they undergo under U.S. domestic law). *Cf. supra* notes 307-36 and accompanying text (discussing procedures asylum seekers in UK undergo and outlining grounds for relief they may claim under UK domestic law).

394. *See supra* notes 212-16, 232-45 and accompanying text (introducing basic IIRIRA provisions, including expedited removal and mandatory detention).

395. *See supra* notes 232-56 and accompanying text (discussing U.S. interviewing and detention procedures and presenting critiques of system).

396. *See supra* notes 249-56 and accompanying text (pinpointing specific human rights violations occurring in detention centers).

397. *See supra* note 256 and accompanying text (discussing asylum seekers' difficulty obtaining legal representation).

398. *See supra* notes 297-306 and accompanying text (discussing Immigration Act 1999 provisions and criticisms of dispersal program under this law).

399. *See supra* note 301 and accompanying text (showing that voucher scheme serves to stigmatize asylum seekers).

400. *See supra* notes 334-36 and accompanying text (analyzing contributing factors in decision to detain asylum seekers).

401. *See supra* notes 337-49 and accompanying text (presenting critiques of UK detention system and procedures).

402. *See supra* notes 337-41 and accompanying text (discussing UK system's tendency to ignore its inconsistencies and graft on layers of process).

The U.S. and the UK asylum systems operate in different contexts.<sup>403</sup> Where the U.S. domestic legislation only responds to international norms, which it tends to ignore as needed, the UK is subject to the regional EU norms.<sup>404</sup> The ongoing Europeanization of UK asylum law and policy operates to both, promote and hinder the rights of asylum seekers in ways not present in the United States' largely unilateral approach.<sup>405</sup>

The recent anti-terrorism measures bring the disparate U.S. and UK asylum laws closer together.<sup>406</sup> The USA PATRIOT Act and the UK Anti-Terrorism Act threaten to undermine asylum seekers' rights in fundamental ways,<sup>407</sup> reinvigorating the debate regarding the legality of indefinite detention,<sup>408</sup> but more importantly, the propriety of a strong unilateral response to an international problem, which will not soon disappear.<sup>409</sup> The U.S. legislation is perhaps more extreme. Although there is controversy surrounding UK's derogation from its regional obligations,<sup>410</sup> there is less controversy regarding the extent to which the UK legislation endangers personal liberties of regular citizens.<sup>411</sup> In the United States, on the other hand, the USA PATRIOT Act put a number of civil rights activists up in arms, claiming numerous violations of constitutional guarantees.<sup>412</sup>

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403. *See supra* note 140 and accompanying text (attesting to minor role regional system plays in U.S. domestic approach). *Cf. supra* notes 152-55 and accompanying text (recognizing important role regional developments play in UK asylum litigation).

404. *See id.*

405. *See id.*

406. *See supra* notes 26-28 and accompanying text (demonstrating common concerns raised by USA PATRIOT Act and Anti-Terrorism Act).

407. *See id.*

408. *See supra* notes 272-76, 357-58, 368 and accompanying text (detailing detention powers under USA PATRIOT Act and Anti-Terrorism Act, respectively).

409. *See supra* notes 26-28 and accompanying text (questioning whether USA PATRIOT Act and Anti-Terrorism Act furnish appropriate responses to terrorism-related concerns).

410. *See supra* notes 353-55 and accompanying text (discussing UK derogation from international human rights treaties and human rights activists' reaction to this move).

411. *See supra* note 28 and accompanying text (outlining concerns regarding regular citizens' rights under USA PATRIOT Act). *Cf. supra* note 352 and accompanying text (expressing privacy concerns Anti-Terrorism Act 2001 raises in UK).

412. *See supra* notes 28, 259 and accompanying text (discussing civil rights activists' objections to USA PATRIOT Act).

### B. Suggested Improvements

Commentators contend that the international human rights documents the Western nations drafted in the aftermath of the Second World War reflected idealist values and humanitarian principles of justice and peace.<sup>413</sup> Experts remark, however, that the law, which developed out of these early beginnings is weak.<sup>414</sup> After the events of September 11th, the capacity of the international legal system to provide an effective framework for protection of human, and specifically asylum seekers' rights, is further undermined.<sup>415</sup> The bottom line question becomes: Is the concerted effort for universal cooperation regarding asylum seekers' rights pointless given the ease with which States evade or ignore their international obligations? The answer must be no.

The integration of domestic refugee law into the global system of refugee protection and care is one of the greatest achievements of the past several decades.<sup>416</sup> It expresses the lesson gleaned from two world wars and the human experience before then.<sup>417</sup> These lessons should not be unilaterally abandoned by two States, which risk making clumsy decisions guided by fear and the instinct of self-preservation.<sup>418</sup> Additionally, asylum seekers are among the most vulnerable segments of the world population—they should not again become scapegoats through hasty decision-making.<sup>419</sup>

What States do within their borders is a matter of international concern because the effects can bleed into neighboring States—today it is physically, economically, and politically impos-

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413. See *supra* notes 8-10 and accompanying text (describing idealist climate that accompanied drafting of international human rights documents).

414. See *supra* notes 163-64 and accompanying text (discussing incapacity of international law to effectively enforce asylum seekers' rights).

415. See *supra* notes 26-28 and accompanying text (discussing concerns regarding asylum seekers' rights raised by new anti-terrorism legislation).

416. See *supra* notes 8-10 and accompanying text (summarizing this accomplishment and highlighting its importance and effect on asylum systems throughout world).

417. See *id.*

418. See *supra* notes 258-60 and accompanying text (showing hasty enactment of USA PATRIOT Act by U.S. Congress); notes 350-51 and accompanying text (demonstrating that only one month passed between issuance of Anti-Terrorism Bill and enactment of Anti-Terrorism Act in UK).

419. See *supra* notes 20-22 and accompanying text (showing that with advances in technology, communications and travel, asylum seekers increasingly became scapegoats for domestic problems).

sible for any part of the world to shut itself off.<sup>420</sup> Moreover, a unilateral approach to the asylum issue would harm, rather than benefit a nation with closed doors. Violations of asylum seekers' rights are only a small step away from violations of rights of regular citizens.<sup>421</sup>

The United States and the UK must focus on developing a program aimed at addressing terrorism concerns, while allowing the Office of the UNHCR to continue bridging the gap between domestic asylum systems. The current laws dealing with asylum seekers, including the anti-terrorism legislation, arrest asylum seekers in their tracks either by not letting them into the country, locking them in detention, or dispersing them into areas of prejudice and abuse.<sup>422</sup> The new program must focus on long-term anti-terrorism and asylum-friendly objectives and not become a clumsy fix of today's problems alone.

The United States and the UK should bring their anti-terrorism legislation into compliance with the Refugee Convention by most immediately, narrowing the scope of the terms "terrorist," "terrorist organization," and "terrorist activity."<sup>423</sup> The new definitions should lead the two countries to reexamine the new limitations on the right to seek asylum, as well as the extensive detention powers granted to the U.S. Secretary of State and the UK Home Secretary.<sup>424</sup> One way to implement this idea is by developing a body of terrorism-related definitions and principles under international law. The new international system would face the old enforcement problems and should set up enforcement mechanisms that actually work and on which the United States and the UK can rely.

Another solution may involve developing stronger regional systems. Closer cooperation among neighboring countries may

420. *See id.*

421. *See supra* note 28 and accompanying text (expressing concerns that anti-terrorism measures are becoming pretext for rights violations of regular citizens).

422. *See supra* notes 23-24 and accompanying text (discussing generally deterrent effect of current asylum law and policy in United States and UK); notes 218-34 and accompanying text (reflecting on U.S. asylum determination procedure and grounds for relief); notes 307-20 and accompanying text (outlining UK asylum determination process and relief possibilities).

423. *See supra* notes 261-67, 356-58 and accompanying text (presenting definitions of these terms under USA PATRIOT Act and Anti-Terrorism Act, respectively).

424. *See supra* notes 272-76, 357-58, 368 and accompanying text (outlining these powers under USA PATRIOT Act and Anti-Terrorism Act, respectively).

incite a better understanding of common security concerns, while reducing the threat of a terrorist organization using a neighboring country as base for its operations. To that end, the existing European regime should aim to maintain a better balance between regional safety concerns and borders that are open to genuine asylum seekers. The Inter-American system should strive toward the same goal, with an emphasis on the clearly enunciated right to seek asylum under the American Convention.<sup>425</sup>

### CONCLUSION

A multilateral policy is the only solution that can ensure that the U.S. and the UK domestic considerations do not topple the global structure of refugee protection. U.S. Attorney General John D. Ashcroft highlighted the dubious role the law can play in the asylum context.<sup>426</sup> "Some will ask," he said at a recent conference, "whether a civilized nation, a nation of laws and not of men, can use the law to defend itself from barbarians and remain civilized."<sup>427</sup> In crafting their civilized response, both the United States and the UK must not lose perspective of the context within which their domestic laws operate. International guarantees to asylum seekers must remain binding rules of law, which civilized nations respect.

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425. See *supra* note 87 and accompanying text (quoting definition of right to seek asylum under American Convention).

426. See *supra* notes 1-2 and accompanying text (quoting Ashcroft's speech at U.S. Conference of Mayors on October 25, 2001).

427. See *id.*

