IMMIGRATION LAW AND THE REFUGEE—A RECOMMENDATION TO HARMONIZE THE STATUTES WITH THE TREATIES

> I would not read the law narrowly to make it the duty of our officials to send [an alien] . . . to what may be persecution or death. Technicalities need not enmesh us. The spirit of the law provides the true guide. It makes plain, I think, that . . . the Attorney General is authorized to save a human being from persecution in a Communist land.[1]
>
> William O. Douglas, 1958

With these words, Justice Douglas in a dissenting opinion protested the forced return of an alien to Communist China. In 1970, another alien was bound, gagged, beaten into unconsciousness and forcibly returned to a Soviet ship after requesting asylum aboard an American Coast Guard Vessel.[2] The common denominator in the cases of these aliens is that neither received a hearing on the merits of his asylum request.[3] Only since 1972 has it been the stated policy of the United States to grant such a hearing for each asylum request.[4] This policy is consistent with the terms of

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1. Leng May Ma v. Barber, 357 U.S. 185, 192 (1958) (Douglas, J. dissenting).
2. N.Y. Times, Nov. 29, 1970, at 1, col. 2.
3. *See generally id.*; Leng May Ma v. Barber, 357 U.S. 185 (1958).
4. Significant portions of United States asylum policy follow:

Policy. Both within the United States and abroad, foreign nationals who request asylum of the U.S. Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by U.S. personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

. . .

U.S. Objectives. A basic objective of the United States is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

Background. A primary consideration in U.S. asylum policy is the "Protocol Relating to the Status of Refugees," to which the United States is a party. . . . As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

the Protocol Relating to the Status of Refugees,[5] to which the United States acceded in 1968.[6]

The effect of accession to the Protocol was to make applicable to the United States[7] articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees.[8] The Protocol and Convention each define the term "refugee",[9] and guarantee certain rights to the refugee while within the borders of one of the contracting nations.[10]

Several sections of the Immigration and Nationality Act[11] correspond to the provisions of the Protocol and Convention. For example, section 203(a)(7) allots conditional entries to aliens who are fleeing persecution.[12] Section 243(h) permits the Attorney General to withhold deportation of an alien to a country where he would be subject to persecution.[13] Finally, section 212(d)(5) of the Act[14] has been used to "parole" refugees into the United States who were unable to enter under section 203(a)(7).[15]

Dep't of State Policy Statement, Public Notice 351, 37 Fed. Reg. 3447 (1972) [hereinafter cited as Policy Statement].

5. Protocol Relating to the Status of Refugees, October 15, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter cited as Protocol]; *see* Policy Statement, note 4, *supra.*

6. *See* President Johnson's statement proclaiming the Protocol Relating to the Status of Refugees at 19 U.S.T. 6257.

7. Protocol, *supra* note 5, at 6224.

8. Convention Relating to the Status of Refugees, October 15, 1968, 19 U.S.T. 6260, T.I.A.S. No. 6577 [hereinafter cited as Convention].

9. *Id.*, art. I, paras. 2, 3; Convention, *supra* note 8, art. I at 6261.

10. *See* Convention, *supra* note 8, arts. 2-34; Letter of Submittal from Secretary of State Rusk to President Johnson, July 25, 1968, S. EXEC. K, 90th Cong., 2d Sess. VI (1968) [hereinafter cited as Letter to President Johnson].

11. Immigration and Nationality Act, ch. 477, 66 Stat. 166 (1952), 8 U.S.C. (1970) [hereinafter cited as Act].

12. *Id.*, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1970).

13. *Id.*, § 243(h), 8 U.S.C. § 1253(h) (1970).

14. *Id.*, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

15. § 212(d)(5) provides:

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

Since the enactment of this law, nearly one million refugees have entered the United States under its provisions. Following the Hungarian revolution in 1956, approximately 32,000 refugees who fled that country were paroled into the United

Despite United States asylum policy, it appears that immigration law fails to conform to the requirement that all asylum requests be considered on their merits. The purpose of this comment is to focus upon this apparent shortcoming and to recommend a solution through application of the terms of the Protocol and Convention.

In treating this problem, several recent cases will be examined which indicate judicial attitudes toward the Protocol and Convention. Next, section 203(a)(7) of the Act will be compared with the Protocol definition of "refugee" to determine where these enactments materially vary. This will be followed by treatment of the problem's most critical area: a comparison between the terms of the Act and Convention which deal with forcible return of refugees. To present these subjects in the proper context, it is first necessary to examine the background and history leading to adherence to the Protocol by the United States.

States. Remarks by Mr. H.L. Hardin, Assistant Commissioner, Inspections, Immigration & Naturalization Service, at the Conference of the Association of Immigration and Nationality Lawyers, New Orleans, La., May 25, 1972, 49 INTERPRETER RELEASES 247 (1972) [hereinafter cited as Remarks]. In 1962, President Kennedy indicated that several thousand refugees from mainland China who were temporarily located in Hong Kong would be paroled into the United States. 46 DEP'T STATE BULL. 993 (1962). Ultimately, approximately 15,000 Chinese entered. U.S. NEWS AND WORLD REP'T, May 5, 1975, at 22 [hereinafter cited as U.S. NEWS].

The most extensive use of section 212(d)(5) was in connection with Cuban refugees fleeing Castro's regime. Fragomen, *The Refugee: A Problem of Definition*, 3 CASE W. RES. J. INT'L L. 45 (1970) [hereinafter cited as Fragomen]. 675,000 Cubans utilized this section to find a haven in this country. In addition, approximately 20,000 refugees from Eastern European countries and about 1300 Ugandans of Asian origin were admitted to the United States under this section. On April 22, 1975, Attorney General Edward Levi issued an order authorizing the parole of up to 132,000 South Vietnamese and Cambodian refugees into the United States. U.S. NEWS, *supra*, at 22-23. By June 15, 1975, more than 131,000 Vietnamese and Cambodians had reached reception centers in the Western Pacific and on the mainland. L.A. Times, June 24, 1975, at 1, col. 5.

Parole is also frequently used in the case of a person seeking to immigrate. Pending final determination of the immigrant's right to enter, he can be paroled into the United States. 8 C.F.R. § 212.5 (1975). This process spares the immigrant from detention pending the determination of his case, and spares the government the cost of such detention. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958).

The status of the parolee is unchanged despite the parole since the parolee is still technically and legally in custody at the boundary line of the United States awaiting the determination and order of the immigration officials. Kaplan v. Tod, 267 U.S. 228 (1925); Dong Wing Ott v. Shaughnessy, 247 F.2d 769 (2d Cir. 1957). *Cf.* Siu Fung Luk v. Rosenberg, 409 F.2d 555 (9th Cir.), *cert. dismissed*, 396 U.S. 801 (1969).

I. BACKGROUND AND HISTORY

The Convention, to which the United States was not a party,[16] was adopted as an instrument to consolidate previous multilateral refugee enactments.[17] It was especially designed to provide for the post-World War II refugee situation with particular emphasis upon the problems in Europe.[18] The earlier enactments had defined refugees as those individuals who fell within specific categories,[19] such as "refugees coming from Germany."[20] Adoption of the Convention was significant because it was the first international instrument which classified individuals as refugees on the basis of a legal definition of "refugee".[21] Also, the Convention goes further than the earlier enactments by setting forth certain fundamental principles and by guaranteeing specific rights.[22]

The Convention's definition of "refugee" included a "dateline" of January 1, 1951. Only persons who became refugees as a result of occurrences prior to this date were to receive the Convention's protection.[23] After 1951, it became increasingly diffi-

16. Weis, *The Convention Relating to the Status of Refugees*, 42 INTERPRETER RELEASES 1 (1965) [hereinafter cited as *Convention on Refugees*]. For a list of nations which are parties to the Convention, see S. EXEC. K, 90th Cong., 2d Sess. 25 (1968).

17. Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 BRIT. YEARBOOK OF INT'L L. 39 (1967) [hereinafter cited as *Protocol on Refugees*]; *see* Convention, *supra* note 8, art. IA(1) at 6261.

18. The Senate Committee on Foreign Relations during its hearings on the Protocol received the following testimony:

> When the Convention Relating to the Status of Refugees was developed under UN auspices in 1951, its framers had very much in mind the large problem at that time in Western Europe of hundreds of thousands of refugees who had fled or been displaced from East European Communist countries during and after World War II. The asylum countries of Western Europe were beset with a multitude of grave economic and other problems in the aftermath of World War II. The framers of the Convention recognized the need to secure for these refugees, within asylum countries and third countries to which they might be resettled, a number of specific rights designed to improve their legal, political, economic, and social status. Even more important, they sought to protect refugees from involuntary repatriation.
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> The Convention [was] thus to a degree European-oriented. . . .

Statement of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State, S. EXEC. REPT. No. 14, 90th Cong., 2d Sess. 6 (1968) [hereinafter cited as Statement of Laurence A. Dawson].

19. *See Convention on Refugees, supra* note 16, at 2.

20. Convention Concerning the Status of Refugees Coming from Germany, *done at Geneva*, February 10, 1938, 192 L.N.T.S. 59.

21. *Convention on Refugees, supra* note 16, at 2.

22. *Id.*

23. Convention, *supra* note 8, art. IA(2), IB at 6261-6262.

cult to link situations which produced refugees to events which occurred prior to 1951.[24] Accordingly, the Protocol was drafted to grant equal status to all refugees who fall within the Convention definition, without regard to the dateline.[25]

The Protocol actually serves a dual purpose. Among the nations which are parties to the Convention, it is an agreement to update the terms of the Convention, while between states which are not parties to the Convention, it is an independent multilateral treaty.[26] The Protocol's general approach, with respect to refugees' rights while within the borders of a contracting party, is to assure that refugees are granted due process of law.[27]

In transmitting the Protocol to the Senate for its advice and consent, President Johnson stressed that the Protocol was a comprehensive Bill of Rights for refugees which would permit them to become self-supporting members of free societies, living under dignified conditions.[28] In urging the Senate to approve the Proto-

24. Statement of Laurence A. Dawson, *supra* note 18, at 6.

25. Protocol, *supra* note 5, at 6224.

26. *Protocol on Refugees, supra* note 17, at 63.

27. Letter to President Johnson, *supra* note 10, at VI.

28. Significant portions of the President's message follow:

> The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties. . . . Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion of return of refugees to any country in which they would face persecution. . . . [R]efugees are to be accorded rights which . . . would enable them to cease being refugees, and instead to become self-supporting members of free societies, living under conditions of dignity and self-respect.
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> It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. . . . [A]ccession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere. This impetus would be enhanced by the fact that most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries. Thus, United States accession should help advance acceptance of the Protocol and observance of its humane standards by States in which . . . guarantees and practices relating to protection and other rights for refugees are less liberal than in our own country. . . .
>
> United States accession to the Protocol would thus constitute a significant and symbolic element in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations; and to secure and preserve peace in the world.

Letter of Transmittal from President Johnson to the Senate, August 1, 1968, S. EXEC. K, 90th Cong., 2d Sess. III (1968) [hereinafter cited as Letter from President Johnson].

In describing the Protocol to the Senate Foreign Relations Committee, one of the witnesses stated:

> The protocol is a human rights document. The human rights which

col, he stated that it was clearly in the interests of the United States to promote the "United Nations effort to broaden the extension of asylum and status for those fleeing persecution."[29] In the President's words, accession would amount to both "a significant and symbolic element" in furthering individual as well as national dignity and freedoms.[30]

II. RECENT IMPLICATIONS

To date, no court has determined the impact of the Protocol and Convention upon sections 203(a)(7), 212(d)(5) and 243(h) of the Immigration and Nationality Act.[31] However, in several cases involving the Protocol, the implications which arise are unmistakable. Two of these cases, *Kan Kam Lin v. Rinaldi*[32] and *Chim Ming v. Marks*,[33] dealt directly with claims for protection under the terms of the Protocol and Convention.

Both cases rested on similar facts and involved the same issues. Most, if not all, of the plaintiffs were persons born in China, who had fled to Hong Kong or Taiwan during or after the Communist takeover. *Kan Kam Lin* consolidated seven actions by Chinese who, as alien seamen, had violated the Act either by entering the United States illegally, or by overstaying the period

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> it covers for the refugees involved are of the most crucial and the most important type. They are literally the difference between life and death for many of them. They are in all cases the difference between the opportunity to live in dignity as a decent, self-supporting, self-respecting human being, or else in the absence of such opportunity, to languish in camps or otherwise in a state of dependency.

Statement of Laurence A. Dawson, *supra* note 18, at 4.

The Protocol and Convention have also been referred to as the Refugee Magna Charta. Address by Frank L. Kellogg, Special Assistant to the Secretary of State for Refugee and Migration Affairs at Cambridge, England, on February 25, 1975, 72 DEP'T STATE BULL. 373 (1975).

29. Letter from President Johnson, note 28, *supra*.

30. *Id.*

31. *See* Matter of Dunar, Int. Dec. No. 2192, Apr. 17, 1973. *Cf.* Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 184 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974); Chim Ming v. Marks, 367 F. Supp. 673, 679 (S.D.N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974). Several cases have tangentially mentioned the Protocol. *See, e.g.*, Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865 (2d Cir. 1969); Immigration & Naturalization Serv. v. Stanisic, 395 U.S. 62, 79 n.22 (1969).

32. 361 F. Supp. 177 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974).

33. 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974).

designated on their conditional entry permits.[34] The *Chim Ming* case consolidated two claims by Chinese alien seamen who had overstayed the authorized period.[35] Following deportation hearings and denials of asylum requests, the actions were commenced to prevent deportation, relying upon the Protocol and Convention.

The issues in the *Chim Ming* case, also applicable to *Kan Kam Lin*, were twofold: first, whether the plaintiffs were in fact refugees within the meaning of the Protocol, and second, if they were refugees, whether they were entitled to protection under the Convention. The courts assumed, expressly in *Chim Ming* and impliedly in *Kan Kam Lin*, that the plaintiffs were refugees, but held that none were entitled to relief. The courts in both cases cited a statement by the Convention's drafters which indicated that protection would be denied to "a refugee who . . . overstayed the period for which he was . . . authorized to stay . . . ."[36] The courts were undoubtedly correct in applying this statement to the aliens who had overstayed the periods of their entry permits.

However, neither court expressly stated why the illegal entrants were not to receive the benefits of the Convention. In this context, both courts simply made conclusary statements that since no plaintiffs were lawfully within the United States, as the Convention requires, its protection could not be invoked.[37] In-

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34. Section 241(a)(2) of the Act applies to the plaintiffs in the first category. 8 U.S.C. § 1251(a)(2) (1970). Section 252, 8 U.S.C. § 1282 (1970), authorizes immigration officers to issue crewmen conditional landing permits. These permits cover the period of time which the crewman's vessel remains in port, but with a limit of 29 days.

35. Additionally, in footnote 1 of the *Chim Ming* opinion the court said that the case was legally and factually representative of 130 separate but similar actions which were pending. Counsel stipulated they would be bound in each of the other cases by the court's decision in the instant case.

36. Report of the *Ad Hoc* Committee on Refugees and Stateless Persons, U.N. Doc. E/1618 at 47 (1951) [hereinafter cited as Report on Refugees and Stateless Persons].

37. Presumably, the courts could have held that these plaintiffs had failed to follow the requirements for regularizing their illegal status under article 31 of the Convention. However, the courts did not do so. Article 31 provides:

> *Refugees Unlawfully in the Country of Refuge*
> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

In affirming *Chim Ming*, the Second Circuit stated:

> We need only add that [the district court's] interpretation of Article 32 by no means makes the treaty a nullity and without benefit to refu-

deed, both courts seemed too preoccupied in relating the histories of the Protocol and Convention, and the executive and legislative history of United States accession to give clear and concise reasons why their applications for relief were denied. In reviewing the history of United States accession to the Protocol, the court in *Chim Ming* indicated that all:

> [T]he individuals and institutions involved in [the accession] process had a continuing belief that the Convention would not alter or enlarge the effect of existing immigration laws, chiefly because it was felt that our immigration laws already embodied the principles of the Convention.[38]

In light of this history, the issues presented in *Chim Ming* and *Kan Kam Lin* become insignificant and a more pointed question arises: what purpose does the Protocol serve in the United States against the backdrop of the Act? A reading of these cases seems to answer this question. By implication, *Chim Ming* and *Kam Lin* state that accession to the Protocol does not broaden the extension of asylum and other rights for refugees within the United States. These cases echo President Johnson's message to the Senate implying that in every nation which adopts the Protocol except the United States, refugees' rights would be extended. The President's apparent position was that in the United States, accession would be merely a symbolic event.[39]

> gees. There is the protection under Subsection 2 of Article 31 insofar as it provides that "Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

Chim Ming v. Marks, 505 F.2d 1170, 1172 (2d Cir. 1974).

38. Chim Ming v. Marks, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170, (2d Cir. 1974). Secretary Rusk stated, "United States accession to the Protocol would not impinge adversely upon the laws of this country." Letter to President Johnson, *supra* note 10, at VII. President Johnson's conclusion was couched in similar terms: "Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Letter from President Johnson, *supra* note 28, at III. During the committee hearings, the following dialog occurred:

> Senator Sparkman. Is there anything in here that conflicts with our existing immigration laws?
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> Mr. Dawson. . . . I would say that Article 32 . . . would pose certain questions in connection with Section 241 of our Immigration and Nationality Act. . . . But I do not believe it would be in conflict. . . .

Statement of Laurence A. Dawson, *supra* note 18, at 8. Finally, the Committee in reporting favorably on the Protocol stated: "It is understood that the protocol would not impinge adversely upon the Federal and State laws of this country." S. EXEC. REPT. No. 14, 90th Cong., 2d Sess. 2 (1968).

39. *See* Letter from President Johnson, note 28, *supra*.

Under United States treaty law, there is no doubt that the construction of a treaty by the executive or legislative branch carries some weight. This construction, however, is by no means conclusive upon the courts.[40] A court when interpreting the Protocol and Convention will have to construe them fairly, according to their express provisions. Even if the President and Senate do not construe their provisions literally, a court may not deviate from their terms.[41]

When comparing the significant provisions of the Protocol and Convention with their counterparts under the Act, the conclusion that the effect of the Act is neither altered nor enlarged by these treaties must be seriously challenged. The remainder of this comment is devoted to this question.

III. "REFUGEE" DEFINED: THE PROTOCOL AND SECTION 203(a)(7) OF THE ACT

The Immigration and Nationality Act does not define the word "refugee" nor provide for asylum in the United States.[42] Section 203(a)(7) merely authorizes the Attorney General to grant conditional entries to aliens who can satisfy an immigration officer that:

> (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion or political opinion . . . .[43]

The courts and the Immigration and Naturalization Service strictly construe this section by requiring that several factors be present before agreeing to an alien's eligibility. First, the alien

40. Factor v. Laubenheimer, 290 U.S. 276 (1933). *See* Kolovrat v. Oregon, 366 U.S. 187 (1961); Newington v. United States, 354 F. Supp. 1012 (E.D. Va. 1973).

41. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

42. Matter of Dunar, Int. Dec. No. 2192, Apr. 17, 1973.

43. Act, *supra* note 11, § 1153(a)(7) (1970). This section was not made a part of the Act until its addition by Pub. L. No. 89-236, 79 Stat. 913 (1965). Prior to its inclusion, refugees had been admitted under laws passed to deal with each group of refugees as it arose. 111 CONG. REC. 24225 (1965) (statement by Senator Edward Kennedy). For a brief treatment of these various refugee enactments, see 4 INT'L LAWYER 709 (1970).

must actually flee the country.[44] Second, the flight must be the result of actual or anticipated persecution based on race, religion or political opinion.[45] Third, only an alien fleeing from Communist, Communist-dominated or Middle East countries can enter under this section.[46] Fourth, the alien must be unable or unwilling to return to the country from which he fled because of race, religion, or political opinion.[47] A final requirement, not stated in the section but added by judicial interpretation, is that the alien, after fleeing, may not have "firmly resettled" in any other country before seeking admission to the United States.[48]

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44. *See* Shubash v. District Director Immigration & Naturalization Serv., 450 F.2d 345 (9th Cir. 1971) (Jordanian resident of Jerusalem left city for personal reasons; city was subsequently occupied by Israel in aftermath of 1967 war; Service denied alien's application under section 203(a)(7)).

45. Matter of Shirinian, 12 I.&N. Dec. 392 (1967) (alien feared criminal penalties as opposed to persecution on account of race, religion, or political opinion; application denied).

46. Min Chin Wu v. Fullilove, 282 F. Supp. 63 (N.D. Cal. 1968). Accordingly, no refugees can be admitted from the Western Hemisphere, from those areas of Africa outside the Middle East, or from the Indo-Pakistani subcontinent. Western Hemisphere aliens are covered under section 101(a)(27) of the Act, 8 U.S.C. § 1101(a)(27) (1970), and section 201(a), 8 U.S.C. § 1151(a) (1970).

47. Shubash v. District Director Immigration & Naturalization Serv., 450 F.2d 345 (9th Cir. 1971). The court stated, "statutory conditions (i) and (ii) . . . both must be met."

48. Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971). The alien fled Communist China in 1953, arriving in Hong Kong where he remained until 1960. His application under section 203(a)(7) was denied by the Service on the grounds that he had been firmly resettled in Hong Kong. The District Court found he had not been firmly resettled, and the Ninth Circuit affirmed, concluding that the alien's resettlement was not relevant. In holding that the resettlement concept was relevant, the Court, in a 5-4 decision, indicated that Congress had not intended to open the United States to refugees who had found a haven in a third country and who had begun to build new lives. The Court spelled out the resettlement concept by stating:

> The District Director applied the correct legal standard when he determined that Section 203(a)(7) requires that "physical presence in the United States [be] a consequence of an alien's flight in search of refuge," and further that "the physical presence must be one which is reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge."

402 U.S. at 56-57 (footnote omitted).

Following this statement the Court said:

> The legal standard employed by the District Director and approved here today does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages. Certainly many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way. Such stops do not necessarily mean that the refugee's aim to reach these shores has in any sense been abandoned.

An alien who desires to apply for a conditional entry into the United States will find the procedural requirements to be rather restrictive. For example, there are only eight countries in the world where an application for conditional entry will be accepted by American authorities.[49] Such an application may not be made within the United States, but must be made while the alien is physically present within one of the specified countries.[50] Further, an alien must not be a national of the country in which he applies for conditional entry.[51] Barring special executive or legislative action, the combined effect of the interpretation of section 203(a)(7) and its administration is undoubtedly to exclude most recognized

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402 U.S. at 57 n.6.

Justice Stewart, speaking for the minority, emphasized that the words "firmly resettled" had been omitted from section 203(a)(7), although they had appeared in that section's predecessors prior to 1957, and even though the State Department had expressly requested that they be inserted. He concluded that section 203(a)(7) is unambiguous in not requiring firm resettlement.

Justice Stewart also called attention to a statement made by Senator Edward Kennedy defining refugees:

> Refugees are those persons displaced from Communist dominated countries or areas, or from any country in the defined area of the Middle East because of persecution, or fear of persecution, on account of race, religion, or political opinion. *They must be currently settled in countries other than their homelands.*

111 CONG. REC. 24227 (1965) (emphasis added).

For factors determinative of the resettlement concept, see Chi-Wai Lui v. Pilliod, 358 F. Supp. 542 (N.D. Ill. 1973) (aliens after fleeing Communist China resided in Hong Kong six and fourteen years, respectively; request denied); Min Chin Wu v. Fullilove, 282 F. Supp. 63 (N.D. Cal. 1968) (ailens lived in Dominican Republic nine and fourteen years, respectively, after fleeing China; request denied); Chow Lung Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970) (alien lived in Taiwan for nine years; request denied); Matter of Chai, 12 I.&N. Dec. 81 (1967) (alien lived in Hong Kong for five years but was not accorded any rights inconsistent with refugee status; request granted); Matter of Hung, 12 I.&N. Dec. 178 (1967) (alien lived six to seven years in Hong Kong, but was admitted to United States as a student while still a minor, and whose family had been paroled into United States as refugees; request granted).

Arguably, the very fact that the refugee seeks admission to the United States shows he is not "firmly resettled".

49. Application for conditional entry into the United States may be made only in Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon. *See* 8 C.F.R. § 235.9(a) (1974).

50. Chan Hing v. Esperdy, 262 F. Supp. 973 (S.D.N.Y. 1966); 8 C.F.R. § 235.9(a) (1974). In Tai Mui v. Esperdy, 371 F.2d 772 (2d Cir. 1966), the court held that section 203(a)(7) was not invalid for failing to list the United States as one of the locations where a refugee could apply for a conditional entry. *Accord*, Cheng Ho Mui v. Rinaldi, 408 F.2d 28 (3d Cir.), *cert. denied*, 395 U.S. 963 (1969).

51. Min Chin Wu v. Fullilove, 282 F. Supp. 63 (N.D. Cal. 1968).

refugee groups from entry into the United States.[52]

The Protocol definition of "refugee" is much broader than the class described by section 203(a)(7),[53] both in terms of the circumstances in which the alien finds himself, and in terms of his national origin. For the purpose of the Protocol, a "refugee" is any person who:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.[54]

It can be seen that, unlike the requirements of the Act, a refugee under the Protocol need not have fled the country. He must merely be outside it for the reasons stated.[55] This may occur through the refugee's flight for the reasons stated, or as a result of happenings subsequent to his departure which make him fearful of returning.[56] However, it must be noted that unlike section 203(a)(7), the Protocol and Convention do not provide for entry into the territory of a contracting nation.[57]

The refugee's absence must be a result of a "well-founded fear" of persecution. "Well-founded" means that the refugee must actually have been a victim of persecution, or he must be able to show good reasons why he fears persecution.[58] Because

52. Fragomen, *supra* note 15, at 63. For examples of special executive action see note 15, *supra*. For an example of special legislative action, see 121 CONG. REC. H3326 (daily ed. Apr. 24, 1975), which refers to H.R. 6381.

53. Remarks, *supra* note 15, at 248. It was further commented that, "the convention covers persecutees from the entire world; Section 203(a)(7), only Eastern Hemisphere refugees." Since the date of this talk, the Attorney General has provided for refugees from Communist China by the addition of Hong Kong as one of the countries within which a refugee can apply for entry under section 203(a)(7). *See* 8 C.F.R. § 235.9(a) (1974).

54. Protocol, *supra* note 5, at 6224. The Protocol by incorporating the Convention also specifies persons who are not entitled to relief under the definition. *See* Convention, *supra* note 8, art. I(C)-(F) at 6262-6264.

55. Weis, *The Concept of the Refugee in International Law*, 87 JOURNAL DU DROIT INTERNATIONAL 928, 972 (1960) [hereinafter cited as *Concept of the Refugee*].

56. *Id.*

57. *See* Statement of Laurence A. Dawson, *supra* note 18, at 10. *See generally* Convention, *supra* note 8, arts. 2-34.

58. Report on Refugees and Stateless Persons, *supra* note 36, at 39.

of the words "well-founded," the refugee's fear must contain an objective element in addition to the usual subjective concept of fear.[59]

The Protocol definition adds nationality and membership in a particular social class to the race, religion and political opinion requirements which the refugee may plead under the Act. The Protocol makes no limitation upon the type of government, or the part of the world from which the refugee is escaping. Finally, the concept of "firmly resettled" plays no part in the interpretation of the Protocol's provisions.

IV. AN UNFAVORABLE COMPARISON: ARTICLE 33 OF THE CONVENTION AND SECTION 243(h) OF THE ACT

"Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country in which they would face persecution . . . ."[60] This right and the recognized exceptions to it are set forth in article 33:

> *Prohibition of Expulsion or Return*
>
> 1. No Contracting State shall expel or return 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.
>
> 2. The benefit of the present 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.[61]

By its wording, article 33 grants a substantive right to which a refugee is entitled if the appropriate criteria are met.[62] The refugee has the right not to be expelled from the asylum country. The absolute quality of that right, within the scope required by the article, is couched in the strongest of terms by the use of the

59. *Concept of the Refugee, supra* note 55, at 970.

60. Letter from President Johnson, *supra* note 28, at III.

61. Convention, *supra* note 8, at 6276.

62. If the Protocol is the refugee's Bill of Rights, then the articles of the Convention made applicable to the United States are substantive rights. *See* text accompanying note 28, *supra.*

words, "in any manner whatsoever." Only where the refugee's presence can reasonably be said to be a threat to national security, or where, as a result of a conviction of a serious crime, he is considered to be a danger to the community, can he be returned to the country from which he fled.

Section 243(h) of the Act is the counterpart to article 33,[63] and provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or personal opinion. . . .[64]

Under section 243(h) an alien has no right comparable to that granted under article 33. This section merely "authorizes" but does not require consideration of persecution claims.[65] The determination whether an alien will be expelled from the United States rests with the discretion of the Attorney General. The alien has no enforceable right, but must hope for the favorable exercise of the Attorney General's discretion.[66] In this respect, courts have held that under section 243(h), relief is not a matter of right, but a matter of grace.[67]

Under article 33, the claimant's entitlement to protection from expulsion relates back to the Protocol definition of refugee, and in particular to his "well-founded fear" of persecution. If the claimant can show the objective as well as subjective elements of his fear, and that his fear is for the specified reasons, he is entitled to relief from expulsion.[68] Under section 243(h), however, an alien must demonstrate a "clear probability of persecution" before the Attorney General can act favorably upon his request for withholding of deportation.[69] The question then arises whether the terms "well-founded fear" of persecution and "clear probabil-

63. Letter to President Johnson, *supra* note 10, at VIII.

64. Act, *supra* note 11, 8 U.S.C. § 1253(h) (1970).

65. Immigration & Naturalization Serv. v. Stanisic, 395 U.S. 62, 71 n.10 (1969).

66. *Id.*

67. Jay v. Boyd, 351 U.S. 345 (1956); Chao-Ling Wang v. Pilliod, 285 F.2d 517 (7th Cir. 1960); Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963).

68. *See Concept of the Refugee, supra* note 55, at 970-72.

69. Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. Immigration & Naturalization Serv., 379 F.2d 536 (7th Cir. 1967); Rosa v. Immigration & Naturalization Serv., 440 F.2d 100 (1st Cir. 1971); *cf.* Hamad v. Immigration & Naturalization Serv., 420 F.2d 645 (D.C. Cir. 1969).

ity of persecution" mean essentially the same thing. If they do not, then the respective scopes of the article 33 and section 243(h) requirements are not co-extensive, and it must be determined which enactment prevails.

A. The Dunar Case

The Supreme Court has not ignored inconsistencies between the terms of article 33 and those of section 243(h).[70] But to date, the only case which has dealt with the question whether article 33 supersedes section 243(h) is *Matter of Dunar.*[71] In this case, the Board of Immigration Appeals concluded that article 33 had effected no substantial change in the application of section 243(h). In reaching this conclusion, the Board considered three areas of possible conflict between the enactments: burden of proof, coverage, and manner of arriving at decisions.

On the burden of proof issue, counsel for the claimant argued that since under article 33 all an alien need show is a "well-founded fear" of persecution, the alien should be relieved of showing a "clear probability of persecution" as required by section 243(h). Under this argument, the primary test is whether this fear exists in the alien's own mind. The Board, in rejecting counsel's argument, stated that "if all [the claimant] can show is that there is a mere conjectural possibility of persecution, his fear can hardly be characterized as 'well-founded'."[72] To support its conclusion that the "well-founded" concept does not supersede section 243(h) of the Act, the Board reviewed the legislative history

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70. Kan Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974). This court was referring to the following statement made in *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 79 n.22 (1969):

> [I]t is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968.

71. Int. Dec. No. 2192, Apr. 17, 1973. Dunar was a native of Hungary who was admitted to the United States as a nonimmigrant visitor and who remained longer than permitted. The supercession issue was the second of two issues raised on Dunar's behalf. His first contention was that he was immune from deportation because of article 32 of the Convention. The Board of Immigration Appeals held to the contrary.

Decisions of the Board of Immigration Appeals are binding only upon officers and employees of the Immigration Service. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 1.10b (rev. ed. 1975).

72. Int. Dec. No. 2192, Apr. 17, 1973, at 16.

which expresses the general feeling that existing immigration laws already provide for the reforms in the Convention and Protocol. In further support of its conclusion, the Board surmised that by its amendment in 1965, section 243(h) had been brought into harmony with article 33.[73]

There is no doubt that under either article 33 or section 243(h), the burden of proof is upon the claimant to show that he is entitled to relief.[74] In *Dunar*, the Board seemed to require that the alien produce a significant amount of evidence in support of his persecution claim.[75] But in the case of a refugee, such a re-

73. Prior to 1965, section 243(h) had read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to *physical persecution*. . . .

Immigration and Nationality Act, ch. 477, § 243(h), 66 Stat. 214 (1952) (emphasis added). "Physical persecution" was held to mean confinement, torture, or death inflicted on account of race, religion or political viewpoint. Blazina v. Bouchard, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961). *Blazina* involved an alien crewman who had jumped ship and who alleged persecution because of his desertion. The court stated that punishment under such circumstances was a criminal sanction reconcilable with generally recognized concepts of justice. *Accord*, Zupicich v. Esperdy, 207 F. Supp. 574 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir. 1963), *cert. denied*, 376 U.S. 933 (1964). *But see* Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963).

Following its amendment in 1965 by Pub. L. No. 89-236, section 243(h) was given a more liberal treatment by the courts. In *Kovac v. Immigration & Naturalization Serv.*, 407 F.2d 102 (9th Cir. 1969), under facts similar to *Blazina*, the court recognized that the act of seeking asylum could be grounds for persectuion. The court suggested that the Board of Immigration Appeals had equated the seaman's fear of punishment for desertion with fear of punishment for having sought asylum. It pointed out that Congress had not intended to make the United States a refuge for common criminals, but it did intend to grant asylum to those who, if returned, would be punished criminally for violating a politically motivated prohibition against defection from a police state. The court also recognized that deliberate imposition of substantial economic disadvantage could bring the claimant within the scope of section 243(h).

74. *See Concept of the Refugee, supra* note 55, at 986; 8 C.F.R. § 242.17(c) (1974). In hearings conducted pursuant to section 243(h), the government normally offers no proof. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.16b(e) (rev. ed. 1975).

75. Under section 243(h), the claimant must show a "clear probability of persecution." *See* text accompanying note 69, *supra*. "Probability" has been defined variously as, "[t]he likelihood of a proposition or hypothesis being true, from its conformity to reason or experience *or from superior evidence or arguments adduced in its favor*;" or, "[a] condition or state created when there is *more evidence in favor of the existence of a given proposition than there is against it*." BLACK'S LAW DICTIONARY 1364 (4th ed. 1951) (emphasis added). Addition of the word "clear" to the phrase above seems to place an even greater burden upon the proponent of the evidence.

Dunar's persecution claim was based on an assertion coupled with evidentiary

quirement may result in an unjust outcome.[76] Because of his flight, a refugee may have no documentation or witnesses to relate the facts of his particular case. As a result, he may be unable to introduce evidence which sufficiently supports his position.[77] In such a situation, the real issue becomes the claimant's credibility.[78] Therefore, as a matter of reality, the concept "well-founded fear" of persecution should require a lesser burden of proof than that of "clear probability of persecution."

The Board compared the mandatory terms of article 33 to the discretionary nature of the Attorney General's authority to decide whether article 33 compelled a change in the Attorney General's determination process. No conflict was found. The Board implied that the Attorney General's broad discretionary powers provide sufficient protection for a claimant.[79] This position was supported by a statement that the Board was aware of no cases in which the Attorney General's discretionary relief had been denied where the alien showed a "clear probability of persecution."[80]

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support that he would face criminal prosecution in Hungary for having departed illegally. He also claimed that his long stay in Western Europe and then in the United States would lead Hungarian authorities to consider him a possible proselytizer of capitalism.

The immigration judge and Board concluded that imposition of a penalty for illegal departure would not be so severe as to be considered persecution. For differing views as to whether penalties for illegal departures from Communist territory or vessels can be considered persecution, *compare* Blazina v. Bouchard, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961) *with* Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963), *and* Kovac v. Immigration & Naturalization Serv., 407 F.2d 102 (9th Cir. 1969).

76. *See Concept of the Refugee, supra* note 55, at 986.

77. *Id.*

78. *Id.*

79. Examination of section 243(h)'s predecessor reveals a statute which can be more closely associated with the meaning of article 33 than the present one. Under section 20(a) of the Immigration and Nationality Act of 1917, as amended by section 23 of the Internal Security Act of 1950, 64 Stat. 987, 8 U.S.C. § 156 (a) (1946, Supp. IV), the courts held that when an alien alleged persecution in the country to which he was to be deported, the Attorney General had to find as a fact that he would not be subject to physical persecution before he could be sent there. United States *ex rel.* Harisiades v. Shaughnessy, 187 F.2d 137 (2d Cir. 1951), *aff'd*, 342 U.S. 580 (1952); Sang Ryup Park v. Barber, 107 F. Supp. 603 (N.D. Cal. 1952); United States *ex rel.* Chen Ping Zee v. Shaughnessy, 107 F. Supp. 607 (S.D.N.Y. 1952). It would seem that with enactment of section 243(h) in 1952, a dramatic shift in policy occurred.

80. The Service's appellate trial attorney made this statement in his brief:

> In actual practice there has been no case under Section 243(h) in which it has been held that the Attorney General's discretion dictated the deportation of an alien to a country where there was a well-founded reason to believe that he would be persecuted. If such a contingency

This reasoning clearly misses the point. Under article 33 the claimant has been granted a *substantive* right. Under section 243(h) the claimant has no substantive rights, only *procedural* ones.[81] To state that the Attorney General's discretion has not

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were to arise, it is inconceivable that it could arise in anything other than the context permitted under paragraph 2 of Article 33, namely, national security or danger to the community.

Matter of Dunar, Int. Dec. No. 2192, Apr. 17, 1973, at 20 n.20. The Service's Assistant Commissioner for Inspections made a similar comment on a separate occasion:

> In actual practice, there has been no case under Section 243(h) in which it has been held that the Attorney General's discretion dictated the deportation of an alien to a country where there was a well-founded reason to believe that he would be persecuted.
>
> The plain fact is that, as long as Section 243(h) has been in the statute, an alien who established such a well-founded fear has been accorded the benefits of Section 243(h).

Remarks, *supra* note 15, at 250. *But see* Radic v. Fullilove, 198 F. Supp. 162 (N.D. Cal. 1961) (alien seaman introduced extensive evidence showing persecution to himself and his family if forced to return to Yugoslavia, but Service denied relief on basis of a file, contents of which were not revealed to him); Sovich v. Esperdy 319 F.2d 21 (2d Cir. 1963) (appellant escaped from Yugoslavia after several unsuccessful attempts and eventually entered United States as alien seaman; after being ordered deported, relief under section 243(h) was denied by Service despite evidence showing religious and political opposition to communism, anti-regime statements, warnings by Yugoslavian officials, and escape to Italy); Kovac v. Immigration & Naturalization Serv., 407 F.2d 102 (9th Cir. 1969) (Service denied relief to appellant who alleged persecution at hands of Yugoslavian officials because of his Hungarian extraction and refusal to inform on Hungarians in Yugoslavia following 1956 Hungarian revolution).

The Assistant Commissioner followed his statement above by stating:

> Indeed, interpretations of Section 243(h) have gone much further than would appear to be authorized by an interpretation of the definition in Article 1 and the language in Article 33 of the Convention. For example, it has been held that economic deprivation could permit characterization of the alien's possible treatment as "persecution", whereas Article 33 refers in specific language to a threat to "life and freedom" only.

Remarks, *supra* note 15, at 250. It should be noted, however, that this interpretation was mandated by the courts, not the Service. *See, e.g.*, Kovac, *supra* this note.

81. Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963). The court stated:

> [T]he applicant under Section 243(h) is not without rights. . . . The applicant is entitled to procedural due process. . . . He has a right to have his application considered, . . . and this consideration must be given in conformity with the pertinent regulations promulgated by the Attorney General himself.

Id. at 24. Procedural due process is not violated where the Attorney General denies the applicant's request on the basis of confidential information, unavailable to either the court or the applicant, the disclosure of which would be prejudicial to the public interest or national security. Jay v. Boyd, 351 U.S. 345 (1956); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953); Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963). However, without a contention by the government

yet been improperly exercised is tantamount to denying the existence of the right under article 33. Alternatively, it is an implication that a public official's discretion is a satisfactory substitute for an individual's enforceable substantive right. Further, the reviewability of the Attorney General's discretionary decisions leaves little hope for a refugee who has been denied relief. The courts will generally decline to review the merits of the alien's case and will confine themselves to determining whether the Attorney General has abused his discretion.[82]

In all fairness to the Board and the Immigration Service, the conservative attitudes and narrow interpretations in such cases undoubtedly result from abuses of the asylum procedure.[83] These abuses occur when aliens make frivolous claims for asylum in order to gain additional time in the United States pending the determination of their cases.[84] However, to do justice to the spirit of the Protocol and Convention, article 33 should be liberally construed in a humanitarian manner.[85]

B. Applicability of Section 243(h) and Article 33

Section 243(h) has been severely criticized because of its narrow scope and its technical construction by the courts. It has

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that the document's disclosure would harm national security, due process is violated. Radic v. Fullilove, 198 F. Supp. 162 (N.D. Cal. 1961).

82. Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865 (2d Cir. 1969). Discretion would be abused if a determination:

> [W]ere made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group. . . .

Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1961). In United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 394-95 (2d Cir. 1953), the court stated:

> [T]he withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and "opinion" of the Attorney General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien.

However, in cases where the court disagrees with the Attorney General's finding for reasons other than denying the alien a chance to present his evidence, the court will state that the Attorney General erroneously construed the standards to be employed in exercising his discretion. *See, e.g.*, Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Kovac v. Immigration & Naturalization Serv., 407 F.2d 102 (9th Cir. 1969).

83. *See*, Remarks, *supra* note 15, at 252.

84. *Id.*

85. *Concept of the Refugee, supra* note 55, at 986-88.

been characterized as "badly needing reform,"[86] and as affording "only a tenuous grip on political asylum."[87] A study of cases which arose as a result of section 243(h) led one writer to conclude that success in persuading the Attorney General to withhold deportation is not easily achieved.[88]

Only those aliens who are "within the United States"[89] may invoke the protection of section 243(h).[90] To determine whether an alien is "within the United States" it is necessary to determine his classification under the Act. Immigration laws have consistently distinguished between aliens who are merely seeking admission, and aliens who have entered the country, legally or illegally.[91] In the terms of the Act, aliens in the first category who are being deported are subjected to *exclusion* proceedings, while those in the other category are subjected to *expulsion* proceedings.[92]

The difference between the two types of proceedings is significant since aliens involved in *expulsion* proceedings are granted rights and privileges which are not extended to those in the *excludable* alien classification.[93] Where deportation is being contested by an alien, courts distinguish *expulsion* from *exclusion* and apply the rule that an *excluded* alien is not eligible for section 243(h) protection.[94]

When a refugee enters the United States pursuant to section 203(a)(7), and subsequently becomes inadmissible for per-

86. Fragomen, *supra* note 15 at 64 n.60.

87. Evans, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571 (1972).

88. Evans, *Political Refugees and the United States Immigration Laws*, 62 AM. J. INT'L L. 921 (1968).

89. Act, *supra* note 11, § 243(h), 8 U.S.C. § 1253(h) (1970).

90. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958).

91. *Id.*

92. *Id.* at 187. The Court pointed out that the word "deportation" may be used generically to refer to either type of proceeding. However, as a word of art, "deportation" refers only to *expulsion* proceedings.

93. *Id.* For an excellent discussion of this distinction see Wenzell & Kolodny, *Waiver of Deportation: An Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CALIF. W. INT'L L.J. 271 (1974).

94. The Supreme Court in *Leng May Ma v. Barber*, 357 U.S. 185 (1958), stated:

> Section 243(h), . . . was inserted by the Congress *not* among Chapter 4's "Provisions Relating to Entry and Exclusion," but squarely within Chapter 5—a strikingly inappropriate place if, . . . it was intended to apply to excluded aliens.

Id. at 190 (emphasis in original).

manent residence, he may be subjected to exclusion hearings.[95] If found to be excludable and deportation is ordered, the refugee seemingly cannot avail himself of the benefits of section 243(h).[96]

A refugee who has been paroled into the United States under section 212(d)(5) is in virtually the same position. If it is determined that neither emergency nor public interest justifies his continued presence, the refugee is subjected to exclusion proceedings.[97] He is not "within the United States" for the purposes of section 243(h), and therefore, may not invoke its protection.[98]

It can be seen that a paroled refugee or a section 203(a)(7) refugee who is physically present within the United States is prohibited from invoking section 243(h) because of his excludable alien classification. The practical effect of this prohibition is to deny an alien, who is physically but not technically present, a hearing on his asylum request.

Under article 33, there is no counterpart to the excludable alien classification. This article specifies only two grounds for denial of relief to a refugee who is physically within the country: national security and conviction of a particularly serious crime.[99] Therefore, article 33 has a much broader application than section 243(h), since it embraces all refugees in the country, not merely those who are both physically *and* technically present.

V. SUGGESTED APPROACH

The preceding sections have contrasted the broad scope of the Protocol and Convention with their restrictive counterparts in the Act. Because the Protocol defines "refugee" in much broader

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95. 8 C.F.R. § 235.9(f) (1975).

96. No cases have been found in which a conditional entrant has been denied a section 243(h) hearing. However, in Wing Wa Lee v. Immigration & Naturalization Serv., 375 F.2d 723, 724 n.1 (9th Cir. 1967), the court stated:

> Apparently the difference between an immigrant visa and a conditional entry is that if the alien is found undesirable he can be "excluded" under a conditional entry but must be "deported" under an immigrant visa.

Furthermore, 8 C.F.R. § 235.9(f) (1974) explicitly subjects conditional entrants to exclusion proceedings when determining their deportability. Therefore, they would not be entitled to section 243(h) relief. *See* note 93, *supra.*

97. 8 C.F.R. § 212.5(a) (1975).

98. Leng May Ma v. Barber, 357 U.S. 185 (1958); Siu Fung Luk v. Rosenberg, 409 F.2d 555 (9th Cir.), *cert. dismissed*, 396 U.S. 801 (1969). *See also*, Ahrens v. Rojas, 292 F.2d 406 (5th Cir. 1961); United States *ex rel.* Stellas v. Esperdy, 366 F.2d 266 (1966).

99. Convention, *supra* note 8, art. 33(2).

terms than the class described under section 203(a)(7), it might seem that this section should be superseded. However, when a statute and a later treaty cover the same matter and are, to a degree reconcilable, a court must give effect to them both.[100] Such would appear to be the case in this situation. The entire thrust of section 203(a)(7) is to grant certain refugees entry into the United States.[101] The Protocol deals with the rights of refugees *after* entry.[102] Although both enactments describe who may gain asylum, since the Protocol in no way relates to entry, section 203(a)(7) would not be superseded.

In adopting section 203(a)(7), Congress envisioned two classes of refugees: those abroad who are seeking to enter the United States, and those who have already entered under this section and who have been within the United States at least two years.[103] The conditional entry procedure was adopted for refugees in the first class.[104] Refugees in the second class may apply for adjustment of status to be eligible for permanent residence.[105] A third class consists of refugees admitted under section 203(a)(7)[106] who have not been able to adjust their status because the two year requirement has not been fulfilled or other conditions have not been satisfied. These refugees, as excludable aliens, have substantially fewer rights than those who have been able to adjust their status.[107] An alien whose status has been adjusted is granted the complete protection of the Constitution when he is involved in expulsion proceedings.[108] Therefore, in reference to

100. Whitney v. Robertson, 124 U.S. 190 (1888); United States v. Lee Yen Tai, 185 U.S. 213 (1902); John T. Bill Co. v. United States, 104 F.2d 67 (C.C.P.A. 1939).

101. Wong Pak Yan v. Rinaldi, 429 F.2d 151 (3d Cir. 1970); *see* Wing Wa Lee v. Immigration & Naturalization Serv., 375 F.2d 723 (9th Cir.), *cert. denied*, 389 U.S. 856 (1967); Tai Mui v. Esperdy, 371 F.2d 772 (2d Cir. 1966).

102. *See Concept of the Refugee, supra* note 55, at 940.

103. Tai Mui v. Esperdy 371 F.2d 772 (2d Cir. 1966).

104. *Id.*

105. Act, *supra* note 11, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1970).

106. *See* Cheng Ho Mui v. Rinaldi, 408 F.2d 28 (3d Cir.), *cert. denied*, 395 U.S. 963 (1969); Tai Mui v. Esperdy, 371 F.2d 772 (2d Cir. 1966).

107. For coverage of rights not afforded to aliens under exclusion proceedings, see note 108, *infra*.

108. Compare the rights of aliens in each type of proceeding below:
Exclusion proceedings

The hearing is normally closed except by request of the alien; the immigration judge must inform the alien of the nature and purpose of the hearing, that he has the right to counsel, an opportunity to present evidence, examine and object to evidence, and to cross examine witnesses. 8 C.F.R. § 236.2(a) (1975).

expulsion, a refugee whose status has been adjusted has no need for the protection of the Protocol and Convention. However, by giving effect to both the Protocol and section 203(a)(7), refugees in the third class would receive more right than they now possess.

If any section of the Act is ripe for supercession, it is section 243(h).[109] A court in determining whether that section is superseded will, quite naturally, proceed with caution because of contrary statements made during the Protocol's accession process. But a court should not hesitate to construe the treaty obligations liberally.[110] Since a treaty is the law of the land, the court must interpret it according to its terms.[111] Repeal by implication, which would be required in this case, is not favored by the courts, and requires a "positive repugnancy" between the terms of the statute and treaty.[112] But where the enactments cov-

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Expulsion proceedings

The alien may apply for voluntary departure. 8 C.F.R. § 242.5 (1975). In case of respondent's mental incapacity, a guardian, near relative or friend may appear in his behalf. 8 C.F.R. § 242.11 (1975). No finding of deportability is valid unless clear, unequivocal and convincing evidence is presented to show the facts alleged as grounds for deportability are true. 8 C.F.R. § 242.14(a) (1975). The immigration judge must advise respondent of his right to counsel, to examine and object to evidence, present evidence, and cross-examine witnesses. The hearing is generally open to the public. 8 C.F.R. § 242.16 (1975).

The immigration judge must inform the respondent he has the right to apply for suspension of deportation under section 244(a) of the Act, for adjustment of status under section 245, or for creation of a record of lawful admission for permanent residence under section 214(d) or section 249. 8 C.F.R. § 242.17(a) (1974). The respondent may designate the country of deportation and an alternate. He must be informed he can apply for withholding of deportation under section 243(h). 8 C.F.R. § 242.17(c) (1975).

109. *See* text accompanying notes 60-99, *supra.*

110. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Eck v. Arab Airlines, 241 F. Supp. 804 (S.D.N.Y. 1965).

111. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

112. In *Wood v. United States*, 41 U.S. (16 Pet.) 341, 362 (1842), the Court in attempting to determine whether an act of Congress had been repealed by a subsequent act stated:

> The question then arises, whether [the act in question] has been repealed, or whether it remains in full force. . . . [T]he question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say, by necessary implication; for it is not sufficient to establish, that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy.

This principle was applied in *United States v. Lee Yen Tai*, 185 U.S. 213 (1902), where the Court resolved the question of whether a treaty had, by implication, repealed an earlier act of Congress.

er the same area, and it is not possible to give effect to both, a later enactment must prevail if it is self-executing.[113] This is particularly true where that enactment is broad and its terms are clear and explicit so that it can be seen to cover the entire area.[114]

The terms of article 33 meet the supercession requirements. First, both it and section 243(h) cover the same area: the prevention of expulsion of a refugee to a country where he will be subjected to persecution. Second, the requisite "positive repugnancy" exists between the concepts "well-founded" fear of perecution, and "clear probability of persecution." Because the "well founded" concept should require a lesser burden of proof, the requirements of article 33 should be less stringent than those of section 243(h). Third, it does not appear possible to give effect to both enactments without radically altering the interpretation of section 243(h) or watering down article 33. Finally, the United States adhered to the Protocol, a self-executing treaty, after Congress enacted section 243(h).[115]

For these reasons, when this issue is raised, a court should hold that article 33 supersedes section 243(h). Because immigration law is basically a product of the legislative branch of government, a court might be inclined to hedge on the subject of supersession and hold that article 33 does not prevail. In this eventuality, the court should at least urge Congress to bring section 243(h) into agreement with article 33.

It seems paradoxical, once having determined that an alien is a refugee under the Act, to deny the protection of section 234(h) on the basis of a classification of excludable alien. This

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The Court in *Johnson v. Brown*, 205 U.S. 309, 321 (1907), stated:

> [A] later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.

See also United States v. Borden Co., 308 U.S. 188 (1939); Gardner v. The Danzler, 281 F.2d 719 (4th Cir. 1960).

113. *See* Whitney v. Robertson, 124 U.S. 190 (1888); United States v. Lee Yen Tai, 185 U.S. 213 (1902); United States v. Rathjen Bros., 137 F.2d 103 (C.C.P.A. 1943); Farbenfabriken Bayer v. Sterling Drug, 148 F. Supp. 733 (D.N.J. 1957).

114. Frost v. Wenie, 157 U.S. 46 (1895); Minerva Automobiles v. United States, 96 F.2d 836 (C.C.P.A. 1938). *See* United States v. Lee Yen Tai, 185 U.S. 213 (1902); John T. Bill Co. v. United States, 104 F.2d 67 (C.C.P.A. 1939).

115. Congress originally passed section 243(h) in 1952 and most recently amended it in 1965. *See* note 73, *supra*. The United States adhered to the Protocol in 1968. *See* note 6, *supra*. For the self-executing aspect of the Protocol, see *Matter of Dunar*, Int. Dec. No. 2192, Apr. 17, 1973, at 6.

classification when applied to refugees who are physically, but not technically present in the United States contravenes the spirit and plain words of article 33. Additionally, it fails to meet the requirements of United States asylum policy.

An attempt to tighten loopholes which allow *mala fide* claims for asylum seems to be behind the restrictive interpretations and nature of section 243(h).[116] Such an attempt is commendable due to the undesirability of the success of these claims. But even more undesirable than the success of a *mala fide* claim for asylum is the failure of a *bona fide* claim. Adoption of article 33 in lieu of section 243(h) would be a step in the proper direction foreclosing the possibility of failure of a *bona fide* claim for asylum.

VI. CONCLUSION

The most urgent need of the refugee is to gain asylum.[117] Once he is within the territory of the contracting nation and meets the other basic requirements of the Protocol and Convention, he is guaranteed such asylum. The United States has an international treaty obligation to implement the Protocol within areas subject to its jurisdiction,[118] and United States asylum policy requires that aliens who request asylum be given a complete opportunity to have their requests considered on their merits.[119] However, the present state of immigration law denies paroled refugees and section 203(a)(7) refugees an opportunity to have their requests considered under section 243(h). Continuation of such a practice by invoking the exclusion-expulsion technicality and ignoring article 33 of the Convention makes accession to the Protocol a virtually meaningless gesture. If accession is to be truly meaningful, humanitarian concepts dictate that technicalities not be used as a means to deny asylum.

Donal M. Hill

116. *See generally* 96 CONG. REC. 5451 (1950) (remarks of Senator McCarran).

117. *Convention on Refugees, supra* note 16, at 3.

118. Policy Statement, note 4, *supra*.

119. *Id.*