

Alien Crewmen: The United States Asylum Policy

Robert M. Rader

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Rader, Robert M. (1971) "Alien Crewmen: The United States Asylum Policy," *Cornell International Law Journal*: Vol. 4: Iss. 2, Article 4.
Available at: <http://scholarship.law.cornell.edu/cilj/vol4/iss2/4>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Alien Crewmen: The United States Asylum Policy

Robert M. Rader

I. INTRODUCTION

The American public and much of the free world were shocked during the fall of 1970 to learn of the refusal of a United States Coast Guard cutter to grant asylum to a would-be Lithuanian defector named Simas Kudirka, a crewman aboard a Soviet fishing trawler in United States territorial waters. The incident attracted enormous, perhaps disproportionate, attention from the State Department, Congress, and the President himself. While a request for asylum aboard a U.S. Coast Guard cutter is not unique,¹ most requests for asylum by alien crewmen are made ashore, after the ship has docked in an American port. The request is then handled by immigration officials through a standing procedure wholly outside State Department jurisdiction. Had Kudirka been channeled through this procedure, it is likely that his escape would have proved equally futile but certainly not so notorious.

Aside from the unfortunate foreign policy implications, the facts in both the Kudirka incident and the many more obscure incidents of a refusal to grant asylum ashore point to a breach of the 1951 Geneva Convention Relating to the Status of Refugees.² The United States became a signatory to this treaty by the 1967 Protocol,³ which incorporates the earlier provisions by reference.⁴ The treaty commits signatories to granting at least temporary asylum when the life of the escapee is endangered.⁵ The traditional United States policy toward alien crewmen

1. The Coast Guard has assisted Cuban refugees once they enter the Florida straits; but during congressional investigation of the Kudirka incident, the Commandant could recall only one instance of a request for aid when the escape was opposed by a Cuban vessel in the near presence of a Coast Guard Cutter. A lifeboat carrying four Cuban defectors was rammed by the Cuban ship off the Virginia coast; but the Coast Guard, under orders from the State Department, did not interfere because the lifeboat was outside U.S. territorial waters. *Hearings on the Attempted Defection by Lithuanian Seaman Simas Kudirka Before the Subcomm. on State Department Organization and Foreign Operations of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 61, 78 (1970) [hereinafter cited as *Defection Hearings*].

2. Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 150 (1954) [hereinafter cited as *Convention Relating to the Status of Refugees*].

3. Protocol Relating to the Status of Refugees, done Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter cited as *Protocol Relating to the Status of Refugees*].

4. *Id.* Art. I, para. 1.

5. *Supra* note 2, Art. 33.

deserting Soviet bloc vessels has been anything but generous and, regarding Kudirka, borders dangerously close to a violation of the Convention.

The Kudirka incident is thus instructive for purposes of applying U.S. law and analyzing whether U.S. action conforms to obligations under the 1951 Convention. It reveals the treatment which other Soviet bloc crewmen might receive after desertion, upon being returned to their ship by U.S. immigration officials.

A. THE DEFECTION

On November 23, 1970, the Russian fishing trawler *Sovetskaya Litva* moored alongside the U.S. Coast Guard cutter *Vigilant* so that Soviet and U.S. civilian representatives could discuss fishing rights off the New England coast. The ships were within U.S. territorial waters just off Martha's Vineyard, Massachusetts. While the U.S. delegation was aboard the Soviet vessel late that morning, a Soviet crewman, Simas Kudirka, told *Vigilant* crewmen of his intent to desert ship during the negotiations. The *Vigilant* wired the Coast Guard district office in Boston for instructions. There were no standing orders regarding defectors applicable to the Coast Guard of the Boston District.⁶ The Boston station in turn contacted the Chief of the U.S. Coast Guard Intelligence Staff in Washington. The Chief was directed by the officer on duty at the Soviet Union Affairs desk of the State Department to keep the State Department informed and to do nothing to provoke a defection. The officer said, however, that once Kudirka had jumped into the ocean "he could be treated as a mariner in distress and rescued in accordance with the long-standing traditions of the sea and the Coast Guard statutory responsibility as a search and rescue agency."⁷ This message was then relayed back to the Boston station.

While these communications were in progress, the Acting Commander of the Boston station called his commanding officer, Rear Admiral William Ellis, to brief him on the possible defection. The Admiral suggested that if the defector jumped overboard the Russians should be allowed to pick him out of the sea. If the Russians did not go to his aid, the

6. *Defection Hearings* 20, 58, 61; U.S. DEP'T OF STATE, ATTEMPTED DEFECTION BY A CREW MEMBER OF THE SOVETSKAYA LITVA, Dec. 6, 1970 (memorandum prepared for the President) [hereinafter cited as DEP'T OF STATE MEMORANDUM]. (Also cited in *Defection Hearings* 234.)

7. DEP'T OF STATE MEMORANDUM 3. During subsequent congressional investigation, the Coast Guard Commandant was reluctant to concede that the Coast Guard might assist or rescue persons outside the traditional mariner in distress situation. *Defection Hearings* 79. The State Department later took the position that Kudirka should have been treated as a mariner in distress. *Id.* at 23.

Vigilant could rescue but should then return the defector.⁸ In large part because of indecisive instructions from the State Department, this advice finally hardened into an order.

In mid-afternoon, Simas Kudirka leaped from his ship onto the deck of the *Vigilant*. Once aboard, Kudirka told Commander Eustis that he would rather jump overboard and risk drowning than return voluntarily to his ship.⁹ Several civilians of the fishing industry on board for negotiations pleaded with Commander Eustis to grant Kudirka asylum. Two such men, purportedly having special knowledge of Russian defection policy, warned that Kudirka's life or freedom was gravely endangered by his request for asylum.¹⁰ Eustis's initial order to return Kudirka was nonetheless confirmed by Boston headquarters. At that point the Soviet captain filed a written request for the return of Kudirka, charging him with the theft of 3,000 rubles in ship's funds. Meanwhile, Kudirka was hiding on the *Vigilant*, explaining the reasons for his defection. Kudirka said that he had been asked by the Russians years ago to spy on fellow Lithuanians and that he had refused and suffered discrimination and ill-treatment ever since. He had been denied a passport and mariner's certificate, both standard issues to Soviet vessel crewmen. Also, he said, he had been relegated to menial jobs and denied civil rights.¹¹ Arguments by both the American and Russian commanders did not convince Kudirka to return voluntarily. Faced with irrevocable orders to return Kudirka and wishing to avoid the ignominy of ordering American sailors to capture and surrender a defector, Commander Eustis permitted several crewmen from the *Sovetskaya* to board the cutter and retake Kudirka. These sailors seized Kudirka and, as onlookers would later recall, inflicted a vicious beating. The defector and Russians were lowered into an American launch, escorted by a few American sailors. Upon their return to the *Vigilant*, the American sailors reported that Kudirka was either unconscious or dead.

8. SUBCOMM. ON STATE DEPARTMENT ORGANIZATION AND FOREIGN OPERATIONS, HOUSE COMM. ON FOREIGN AFFAIRS, 91st Cong., 2d Sess., REPORT ON THE ATTEMPTED DEFECTION BY LITHUANIAN SEAMAN SIMAS KUDIRKA 3 (Comm. Print 1971) [hereinafter cited as DEFECTION REPORT].

9. *Defection Hearings* 153.

10. *Defection Hearings* 32, 153. Since the advice of a private citizen cannot be used as a fair yardstick for measuring obligations under international law or for determining the proper course of action in discharging duties according to U.S. foreign policy, Captain Eustis was alerted to the need to check directly with State Department officials. As it was, the State Department had been prematurely informed of Kudirka's return hours before it occurred. DEP'T OF STATE MEMORANDUM 4-5. See also N.Y. Times, Nov. 29, 1970, at 84, col. 1.

11. *Defection Hearings* 154.

B. THE AFTERMATH

The American public vehemently protested the official handling of Kudirka's thwarted escape. Demonstrators lined the streets of numerous large cities.¹² In reply to an official Coast Guard explanation that it had not wanted to interrupt the "delicate international discussions" underway by granting asylum to Kudirka, the protesters complained that American authorities were more interested in flounder than people.¹³

None were more incredulous than the State Department, Congress, and the President himself. The State Department declared the incident to be without precedent.¹⁴ Although the Department could argue with some strength that it had been left outside the decision making in the incident because of misleading and infrequent communication with the Coast Guard, it did not disclaim a violation of the 1951 Geneva Convention.¹⁵ Pending a complete review of American policy regarding asylum, the State Department issued interim regulations to be used by all agencies not currently operating under standing procedure.¹⁶ The State Department explicitly recognized the Convention rules as the compelling force within the interim regulations. These provided that any person seeking asylum due to alleged persecution or fear of persecution was to be interrogated immediately by the appropriate U.S. official to determine his status as a bona fide refugee. With a special nod to the Kudirka incident, the regulations flatly stated that

[u]nder no circumstances should the person seeking asylum be arbitrarily or summarily returned to foreign jurisdiction or control pending determination of his status. Moreover, to the extent circumstances permit, persons seeking asylum should be afforded every possible care and protection.¹⁷

Finally, State Department spokesmen emphasized that the incident occurred as a result of bureaucratic bungling and not because of a change in American policy regarding asylum.¹⁸

Congress was angered by the absence of standing instructions regarding asylum aboard Coast Guard cutters and was understandably even more

12. N.Y. Times, Nov. 29, 1970, at 1, col. 2.

13. N.Y. Times, Nov. 29, 1970, at 84, col. 1.

14. N.Y. Times, Dec. 3, 1970, at 2, col. 4. The State Department spokesman qualified his statement by saying that a person with "clear grounds" for asylum had never been denied sanctuary. *Id.* Earlier a spokesman had said that it was U.S. policy to grant asylum to Communist-bloc refugees "who manage to make it into our hands." N.Y. Times, No. 29, 1970, at 84, col. 4. The State Department maintained this position throughout the congressional investigation. *Defection Hearings* 8.

15. N.Y. Times, Nov. 29, 1970, at 84, col. 1.

16. DEP'T OF STATE MEMORANDUM, ANNEX NO. 11.

17. *Id.* at 4.

18. See note 14 *supra*.

disturbed that the void had been filled, as it would learn later, by Admiral Ellis, an officer "unencumbered by a knowledge or understanding of U.S. foreign policy on defection."¹⁹ Nor could Congress understand why the State Department had failed to instruct the Coast Guard to afford Kudirka temporary refuge until it had decided what final action to take.²⁰ Several congressmen were equally displeased to hear that Russian officers had assumed a degree of command over the *Vigilant* while Kudirka was being routed from hiding and captured.²¹

President Nixon called the incident "outrageous" and expressed deep concern that foreign nations, particularly Iron Curtain countries, would interpret the abortive defection to mean that the United States had either abandoned its traditionally liberal policy of granting asylum or had simply lost its moral fiber and resolve.²² The President ordered a steady stream of reports broadcast over Voice of America assuring Eastern Europe that America was still a haven for Iron Curtain escapees.²³ One report referred to an "open door" policy for refugees and stated that policy to mean accommodation but not encouragement of defectors.²⁴ The President also insisted that the White House be immediately informed of all future requests for asylum.²⁵

The Coast Guard, reacting to criticism of its role in the incident, responded that it had acted in the best interests of the fishing rights negotiations.²⁶ The Coast Guard also argued that in the absence of more express authority empowering it to rescue aliens, its officers were correct in staying within the Coast Guard tradition of rescuing only mariners in distress.²⁷ Thus, if Kudirka had jumped into the water rather than aboard the cutter, his chances for gaining asylum would have improved. Additionally, the Coast Guard argued that Kudirka was properly returned because he had been charged by his ship's captain of the theft of 3,000 rubles.²⁸ Whatever the merit of the Soviet claim, it is certain that neither the Constitution nor statutory law authorizes a Coast Guard officer to execute the extradition laws of the United States.

19. DEFECTION REPORT 2.

20. *Defection Hearings* 21.

21. *Defection Hearings* 43.

22. N.Y. Times, Dec. 3, 1970, at 2, col. 4.

23. See *Defection Hearings* 121-50. Editorial broadcasts emphasized the traditional liberality of the U.S. asylum policy; blame for the surrender of Kudirka was laid at the feet of bungling bureaucrats. *Id.* at 106.

24. See *Defection Hearings* 142-43.

25. N.Y. Times, Dec. 4, 1970, at 12, col. 1.

26. See note 13 *supra*.

27. *Defection Hearings* 78-79, 85-86.

28. N.Y. Times, Dec. 1, 1970, at 1, col. 3; *Defection Hearings* 244.

II. INTERNATIONAL RIGHTS AND DUTIES IN GRANTING TERRITORIAL ASYLUM

A. THE RIGHT AND PROPRIETY UNDER CONVENTIONAL INTERNATIONAL LAW

The principle of "territorial supremacy" means that each nation is competent to accept aliens within its borders. Each state offers, therefore, at least a provisional asylum for entering refugees.²⁹ Asylum itself is a politically neutral condition and entails merely the grant of an indefinite stay in a foreign country and active protection by the state of asylum.³⁰ But the moral connotation, through usage and discussion, has grown so strong that there is immediately implied a refuge from persecution or fear of persecution on the basis of political opinion or activity, religion, race, or for other manifestly unjust reasons.³¹

Just as territorial supremacy gives the right to accept refugees, so does it contain the right to reject them. In the absence of treaty, states have traditionally recognized both rights as equally absolute,³² though, from time to time, a number of countries have chosen to enact a constitutional right of asylum.³³ These provisions, affirmatively reacting to individual persecution, inevitably conflict with national immigration laws, which negatively react to mass persecution.³⁴

29. I L. OPPENHEIM, *INTERNATIONAL LAW* 675-77 (8th ed. H. Lauterpacht).

30. A. PAVITHRAN, *SUBSTANCE OF INTERNATIONAL LAW: WESTERN & EASTERN* 252 (1965);

J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 309 (6th ed. 1967).

31. One authority defines asylum as a granting of admission because a person is being persecuted for political or scientific activity or support of a national liberation movement. A. PAVITHRAN, *supra* note 30, at 252. More frequently, the reasons for which asylum should or must be granted are stated in the context of provisions in resolutions or conventions which prohibit rejection or expulsion of a refugee if doing so would endanger his life. Article 33 of the *Convention Relating to the Status of Refugees* is typical. It limits relief to persecution because of race, religion, nationality, membership in a particular social group, or political opinion.

32. L. OPPENHEIM, *supra* note 29, at 677.

33. At least Italy, West Germany, France, Yugoslavia, the Soviet Union, and Communist China have, chiefly in the post-World War II era, enacted such provisions. See L. OPPENHEIM, *supra* note 29, at 677; C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 182 (P. Corbett transl. 1957); W. TUNG, *INTERNATIONAL LAW IN AN ORGANIZING WORLD* 215 (1968).

34. See Kirchheimer, *Asylum*, 53 AM. POL. SCI. REV. 985, 989-990 (1959); C. DE VISSCHER, *supra* note 33, at 183. Even the World War II European refugee experience has not spurred that continent into agreeing upon a mass exodus asylum policy of mutual cooperation. The European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 did not deal with either individual or mass asylum problems. Other multilateral treaties have also failed to face this problem squarely. The International Refugee Organization, a postwar organ of the United Nations, was able, however, to resettle from western Europe to overseas countries 1.4 million persons, most of whom were refugees from communist nations and who were unwilling to be repatriated. 50 U.S. DEP'T OF STATE BULL. 678 (1964). Nevertheless, the prewar experience shows that nations bordering upon "cataclysmic social and political upheavals" will not, generally speaking, grant even

In earlier days, asylum was an important reform in putting an end to extradition for political crimes;³⁵ the pursuing government had an interest in recovering the political criminal because his opposition and the ideas which he physically embodied were a threat to the state. The Cold War refugee, however, is no longer political but social; and the pursuing state may regret his escape only for its momentary, dramatized propaganda value. Therefore, the earlier moral commitment to provide asylum required narrowing if it were not to shed hope so diffusely that the freer states offering asylum would be overwhelmed by numbers and then be unable or unwilling to help any at all.³⁶

B. NARROWING THE SCOPE AND DEFINING THE OBLIGATION TO GRANT ASYLUM

Large masses of refugees present such tremendous problems of surveillance, police protection, care and welfare, and national assimilation that no nation has been willing to state in advance by convention a determination to meet any burden a war or natural catastrophe might bring. These problems necessarily fall upon international organizations, such as the International Refugee Organization, to which the wealthier countries make voluntary contributions. A supplemental route is emergency national legislation, in which the United States has been a postwar leader, designed to ease the crowding in overseas refugee camps by admitting a fair proportion into the foreign state either as immigrants or as non-immigrants given temporary refuge.

A great deal of international legislation has been devoted to the status and rights of the refugee once granted asylum. Foremost among these efforts has been the challenge of protecting enemies of the state of origin from the persecution they would encounter if repatriated in-

temporary asylum to large numbers of refugees. Kirchheimer, *supra*, at 994. The Swiss did, however, admit French and German refugees during the prewar and war years if they were in imminent personal danger. *Id.* at 989 n. 7.

35. V. MAHAJAN, *INTERNATIONAL LAW* 295 (4th ed. 1963).

36. See C. DE VISSCHER, *supra* note 33, at 182. But see L. OPPENHEIM, *supra* note 29, at 678, where the author argues that in the absence of an international law which binds nations to respect the human rights of their own nationals, the right of refugees to be granted asylum should be recognized and "the sanctity of human life should prevail over the inconvenience — economic and other — resulting from the obligatory administration of large numbers of persecuted refugees." *Id.* Aside from the problem of defining a political refugee during times when political revolution often precipitates, accompanies, or causes economic disaster (or vice-versa), Lauterpacht's ambitious proposal imposes an enormous logistical challenge, even with considerable international cooperation. The State Department estimated there were 11 million bona fide political or religious refugees as of 1966. It is anticipated that this number will increase as nationalist struggles for self-determination, religious wars, and the steady exodus from communist nations continues. 55 U.S. DEP'T OF STATE BULL. 751 (1966).

voluntarily. Historically, the policy may be traced to the refuge granted Russian and Armenian refugees by European countries following World War I under the direction of the League of Nations High Commissioner for Refugees. The participating nations reached a non-binding accord for mutual cooperation which provided in part that properly admitted refugees should not be expelled if they were unable "to enter a neighboring country in a regular manner."³⁷ The recommendation was motivated by a regard for the security of refuge rather than by fear of possible persecution elsewhere.

Similarly, the 1933 Convention Relating to the International Status of Refugees³⁸ bound signatories against expulsion or non-admittance at the frontier (commonly called "refoulment") of refugees authorized to reside within the state, except for reasons of national security or public order. But the 1933 Convention went further than the earlier accord since it also imposed an absolute duty upon signatories to accept refugees at the border of their nations of origin.³⁹ This provision, like the old accord, primarily assured the refugee a nation of refuge, surely his first concern; but it also guaranteed protection for persons who had fallen out of favor with the regime. Subsequently, the 1938 Convention Concerning the Status of Refugees coming from Germany⁴⁰ also offered asylum to German refugees not having "in law or fact"⁴¹ the protection of the German government and forbade refoulment of refugee residents except for reasons of national security or public order.

In recent years efforts have been made to codify and regularize the international rules regarding the admittance or rejection of refugees. In 1950, l'Institut de Droit International, meeting in Bath, produced certain Resolutions Relating to Asylum in Public International Law.⁴² The territorial asylum provisions are relevant chiefly to large refugee masses, and the articles on territorial asylum are very inconclusive on the matter of refoulment. Article 2 applies a uniform rule in anticipating both situations in which the state may be able to expel a refugee and situations in which "expulsion is rendered impossible by the refusal of other states to receive him." This consideration of the non-refoulment principle respects the *primary* function of the principle, security of refuge, but gives only weak support to the *secondary* function of non-refoulment, protec-

37. Arrangement Relating to the Legal Status of Russian and Armenian Refugees, done June 30, 1928, 89 L.N.T.S. 53 (1929).

38. Done Oct. 28, 1933, 159 L.N.T.S. 199 (1936).

39. *Id.* Art. 3.

40. Done Feb. 10, 1938, 192 L.N.T.S. 59 (1938).

41. *Id.* Art. 1 (I) (a).

42. *Institute of International Law, Resolutions Relating to Asylum in Public International Law*, 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 388 (Bath Session 1950) [hereinafter cited as *Resolutions Relating to Asylum*].

tion of the individual from persecution or recrimination by his own government.

As part of its continuing effort to elevate all basic human rights and freedoms to the level of international recognition and enforcement, the United Nations has been instrumental in codifying the international law of asylum. Most of its effort, too, has been directed to the benefit of the mass refugee and not to the isolated political dissenter, even though both are covered by many of the same provisions.⁴³ The landmark achievement under U.N. tutelage has been the 1951 Convention Relating to the Status of Refugees.⁴⁴ The United States did not sign the 1951 Con-

43. The U.N. sponsored International Refugee Organization resettled more than one million Eastern Europeans overseas after World War II. Although the principle of non-refoulement was not explicitly a part of the IRO Constitution, the principle of voluntary return and the definition of refugee to include those fearing persecution gave the rule practical effect. The Annex defines war refugees within its concern as (1) victims of the Axis regimes and regimes assisting them; (2) Spanish Republicans; (3) persons considered refugees before World War II because of persecution on account of race, religion, nationality or political opinion; (4) anyone who fled his country of nationality or former residence as a result of events after war broke out and is unwilling or unable to avail himself of the protection of his former government; (5) persons of Jewish ancestry, foreigners, and stateless persons formerly residing in Austria or Germany who were in those countries at war's end only because of Nazi persecution, if they had not yet firmly resettled therein; and (6) war orphans outside their country of origin. All categories except (5) require that the person be outside the country of nationality or habitual residence. Constitution of the International Refugee Organization, *done* Dec. 15, 1946, Annex I, T.I.A.S. No. 1846, 18 U.N.T.S. 3 (1948).

44. *Done*, July 28, 1951, 189 U.N.T.S. 150 (1954).

45. During Senate hearings on the 1967 Protocol, the State Department assigned this omission to orientation of the Convention to postwar Europe. The State Department claimed that the United States then saw the 1951 Convention as an effort to define rights of the European refugee overflow already in countries of asylum directly after World War II. Since rights stated under the Convention were already provided here by domestic law or practice, and the United States was already committed to a number of postwar emergency relief programs for refugees, failure to accede to the 1951 Convention did not pose any real problems on the human or diplomatic level. But, as the spokesman implied, harmonizing the non-refoulement provisions with latter day deportation law would have been difficult (if not impossible) had each been literally applied. SENATE COMM. ON FOREIGN RELATIONS, PROTOCOL RELATING TO REFUGEES, S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 9 (1968) [hereinafter cited as S. REP. No. 14].

46. Protocol Relating to the Status of Refugees, *supra* note 3.

47. The chief purpose of the 1967 Protocol was to redefine "refugee" to include refugees other than those displaced by World War II and the subsequent Communist takeover of eastern Europe. Signatories to the Protocol presently recognize "refugee" to include (1) persons recognized as refugees by earlier agreements for the protection of refugees which were sponsored by the League of Nations, or (2) persons outside the country of their nationality and unable or unwilling to rely upon the protection of their government, owing to well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion, or (3) stateless persons outside the country of their last habitual residence who fear similar persecution and are unwilling or unable to return. *E.g.*, Convention Relating to the Status of Refugees. A person may forfeit his status as a refugee if he (1) avails himself of the protection of the country of his nationality; (2) voluntarily reacquires lost nationality; (3) acquires new nationality from a different nation whose protection he

tion⁴⁵ but did accede to the 1967 Protocol,⁴⁶ which incorporates, with a few amendments, the 1951 provisions in their entirety.⁴⁷ The Convention imposes no duty to accept refugees.⁴⁸ However, Article 33 limits the right of a signatory to expel or return a refugee, whether the refugee entered the country lawfully⁴⁹ or unlawfully⁵⁰ and prohibits refoulment to the frontiers of the territory in which his life or freedom would be threatened.⁵¹

Although the signatories to the 1951 Convention have been slow in

enjoys; (4) voluntarily emigrates to the country he left out of fear of persecution; (5) can no longer validly assert a fear of persecution in the country he left. *Id.* Article 1 (c) (1)-(5). Nor does the Convention protect persons whom the asylum state has declared to have rights and obligations attached to nationality, even though the person cannot or has not achieved the status of citizen or national. *Id.* Article 1 (E). Persons strongly suspected of war crimes, crimes against peace, or crimes against humanity, persons committing a serious non-political crime outside the asylum state prior to admission, and persons committing acts contrary to the purposes and principles of the United Nations are likewise denied coverage. *Id.* Article 1 (F).

48. The State Department assured the Senate that "there is nothing in [the] protocol which implies [a duty] or puts any pressure on any contracting state to accept additional refugees as immigrants." S. REP. NO. 14, at 10, 19 (emphasis added).

49. Article 32 governs the treatment of lawful entries. It provides for the expulsion of refugees only upon traditional grounds of national security or public order. Significantly, summary expulsion is forbidden except in compelling instances of national security. Otherwise, the state of asylum must follow some administrative or judicial procedure consistent with due process. If he loses, the refugee must still be allowed a reasonable period to seek legal admission to another country.

50. Article 31 governs the treatment of unlawful entries. If a refugee enters or is present in a country illegally, state authorities may not impose a penalty for such illegality if the refugee can satisfy local officials that he came directly from a territory in which his life or freedom was threatened. Article 31, unlike Article 32, contains no procedural safeguards, although the entrant must show good cause for the illegal entry or presence, which implies that he be given at the very least a hearing at which he may present evidence of his hardship. If the entrant fails to convince the authorities on any point, he must be granted a reasonable period and all necessary help in obtaining admission elsewhere prior to deportation.

51. The State Department, without elaboration, strongly hinted that the United States immigration law was consistent on its face with the Protocol but that U.S. practice in granting a stay or suspension of deportation would require change. During Senate hearings a spokesman commented:

[W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

S. REP. NO. 14, at 6.

The spokesman added that the language of § 243 (h) of the 1952 Immigration and Nationality Act, 66 Stat. 214, was in conflict with Article 33. That section authorized the Attorney General to grant a stay of deportation of any alien to any country "in which in his opinion the alien would be subjected to physical persecution." That language was amended by § 11 (f) of the 1965 Immigration and Nationality Act, 79 Stat. 918, so that the new test for persecution is "persecution on account of race, religion, or political opinion." 8 U.S.C. §1253 (Supp. V 1969).

ratifying the Protocol,⁵² wide acceptance of the non-refoulement rules has been noted in practice, to the extent that national self-restraint may allow the non-refoulement principle to become a customary rule of international law, at least among non-totalitarian states.⁵³ One source argues that short of a yet unrecognized duty to grant asylum, there is room for recognizing a "temporary, provisional claim to short-term asylum" until permanent residence is established elsewhere.⁵⁴

The 1954 Convention Relating to the Status of Stateless Persons⁵⁵ also lends some support to the recognition of non-refoulement as conventional international law. The Convention contains no equivalent of Article 33. The Final Act of the Convention explains the omission as an opinion of the Conference that Article 33 is an expression of "the generally accepted principle" of non-refoulement, so that the Conference found it unnecessary to include its equivalent in the 1954 Convention.⁵⁶ However, it is doubtful that the expression is even binding on the signatories, since it is contained in the Final Act instead of the body of the Convention.⁵⁷

Two resolutions of the United Nations General Assembly bear heavily on the status of the non-refoulement rule as conventional international law. While resolutions of the General Assembly are in no sense legally binding upon any nation, they surely may be observed voluntarily. And they do show underlying sympathy and moral support for principles which the voting members presumably hope to develop into binding conventional law at a later, more propitious date.

The first of these resolutions passed was the Universal Declaration of

52. At the time the Protocol was submitted to the Senate for approval, only 18 of the 53 signatories to the 1951 Convention had ratified the Protocol and no non-signatory had ratified it. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL RELATING TO THE STATUS OF REFUGEES, 90th Cong., 2d Sess. 25 (Star Print 1968).

53. Kirchheimer, *supra* note 34, at 1000; Weis, *Human Rights and Refugees*, 45 INTERPRETER RELEASES 75 (1968). The 1951 Convention Relating to the Status of Refugees may, on the other hand, be regarded as a codification of what states regard as their preexisting obligations and rights under conventional international law. *Id.* at 79-80.

54. J. STARKE, *supra* note 30, at 310-11.

55. *Done*, Sept. 28, 1954, 360 U.N.T.S. 117 (1960).

56. See N. ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION 123-24 (1955).

57. *Id.* at 124. *Accord*, Grahl-Madsen, *The European Tradition of Asylum and the Development of Refugee Law*, 1966 J. OF PEACE RESEARCH 284 n. 47. Another part of the Final Act implicitly recognizes the non-refoulement principle. If a nation finds the reasons for which a person has voluntarily renounced the protection of the state of which he was a national are valid, the nation is to consider sympathetically the possibility of treating such person as a stateless person under the Convention. This finding presumably carries with it a decision not to return the person to his former homeland.

58. G. A. Res. 217, U.N. Doc. No. A/789 at 70 (1948).

Human Rights,⁵⁸ enacted at the end of the 1948 session. Article 14 states that everyone "has the right to seek and to enjoy in other countries asylum from persecution," except persons sought regarding prosecutions "genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."⁵⁹ It also provides that the persecuting state may not use its extradition procedures to thwart an attempt at asylum⁶⁰ or otherwise resort to retributive sanctions in an attempt to penalize or frustrate an attempt to gain asylum, whether before, during, or after asylum is sought. In conjunction with this premise, Article 13 provides in part for freedom to leave any country, including one's homeland, and to return to one's homeland.⁶¹ However, to tell a tyrant in one breath that he must not persecute on account of politics or religion and tell him in the next that if he does, he must allow the tormented to escape, is ludicrous and shallow.⁶² The incongruity would be easier to accept, and some nobility might be restored, if the Article 14 obligation were bilateral so as to include some measure of responsibility on the part of the asylum state in helping the refugee seek and enjoy his asylum.

Later, the Human Rights Commission, resolving to amplify the right declared by Article 14, produced a resolution on a Declaration of Territorial Asylum.⁶³ Article 1 limits the scope of the Declaration to persons entitled to seek and enjoy asylum according to Article 14 of the Universal Declaration of Human Rights. Article 1 also leaves that determination and other decisions regarding the grounds for granting asylum with the discretion of the asylum state. While Article 3 (1) states the Declaration's non-refoulment principle, Article 3 (2) permits exceptions to the non-refoulment rule for reasons of national security or safeguarding the population, as in instances of mass immigration. The Declaration at

59. This was the language of Article 14 as submitted to the General Assembly by the Third Committee. The text which the Third Committee considered was drafted a year earlier by the Commission of Human Rights, a unit of the Economic and Social Council. U.N. GAOR, Third Comm., Annexes at 128, U.N. Doc. A/C.3/400/Rev. 1 (1948). The earlier draft of Article 14 was much more liberal. It guaranteed the right to seek and *be granted* asylum from persecution. 7 U.N. ECOSOC, Supp. 2, at 8, U.N. Doc. E/CN.4/95 (1948). The British delegate to the Third Committee thought that the wording of Article 14 as submitted interfered with national immigration laws. An amendment was offered and adopted, with strong United States encouragement, to restrict the right to enjoyment of asylum once granted. U.N. GAOR, Third Comm., Annexes at 24, U.N. Doc. A/C.3/285/Rev. 1 (1948).

60. See 3 U.N. GAOR, Third Comm. 329-31 (1948).

61. A Soviet proposal to limit the right in accordance with the procedure laid down by municipal law failed. See 3 U.N. GAOR, Third Comm., Annexes 23, U.N. Doc. A/C.3/284/Rev. 1 (1948).

62. Professor Lauterpacht has been quoted as calling Article 14 "artificial to the point of flippancy." See Weis, *supra* note 53, at 72.

63. G.A. Res. 2312, 22 U.N. GAOR Supp. 16, at 81, U.N. Doc. A/6716 (1967). See Weis, *supra* note 53, at 73.

tempts to compensate for this concession to national sovereignty in two ways. Article 2 (2) suggests that nations should consider the propriety of joint or individual efforts in lightening the immigration load of an overburdened state of asylum. Also, Article 3 (3) directs the asylum state to consider the possibility of offering provisional asylum and exit to a nonhostile country in the event the asylum state should choose not to follow the non-refoulement rule of Article 3 (1).

The Declaration and 1951 Convention added together retreat from earlier, stricter frontier non-refoulement rules. Article 3 of the 1933 Convention Relating to the International Status of Refugees,⁶⁴ for example, absolutely prohibited refoulement at the frontier of the refugee's country of origin.

C. THE NON-REFOULMENT PRINCIPLE AND DESERTING ALIEN SEAMEN

None of the non-refoulement rules stated in the United Nations resolutions or conventions deal specifically with those who desert their ships. However, a number of resolutions of l'Institut de Droit International discuss asylum aboard warships extraterritorially. These may be analytically compared to the policy of granting territorial asylum because the resolutions refer to issues of persecution and political activity equally relevant to territorial asylum.

The earliest of these was the adoption during the Hague session of 1898 of certain Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports.⁶⁵ Article 19 puts all ship deserters in the same class as criminal military deserters and refugees; ship commanders were forbidden to grant asylum to all three groups. The Regulations apparently did not foresee a situation in which desertion from a merchant marine vessel might itself be a political act or arise from political activity, because they lay down no guidelines for determining the status of political refugees and only enjoin the ship to maintain strict impartiality regarding the political dispute. If the ship commander wrongly received a refugee, however, Article 21 provided that force could not be used for his recapture and resort had to be made to extradition procedures.

In 1928 l'Institut de Droit International maintained this lack of distinction between political refugees and other ship deserters. Article 21 of the Regulations Governing Ships and Their Crews in Foreign Ports

64. *Done*, Oct. 28, 1933, 159 L.N.T.S. 199 (1936).

65. Institute of International Law, *Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports*, 17 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 273 (1898), cited in DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 144 (J. Scott, ed. and transl. 1916).

in Peacetime⁶⁶ also prohibited a ship commander in a foreign port from granting asylum to ship deserters. Similarly, the commander was ordered to maintain strict neutrality, but this time the regulations added that the refugee must clearly establish the political nature of his refugee status.⁶⁷ Again, no standards were laid down.

The Resolutions Relating to Asylum in Public International Law,⁶⁸ enacted by the Bath Session of the l'Institut de Droit International in 1950, offer some help. Articles 3 and 4 recognize a right to receive refugees aboard ships in foreign ports in circumstances of civil strife or in other instances in which local authority cannot guarantee the protection of the persons seeking asylum. While these resolutions deal with the scope of the extraterritorial asylum right rather than the non-refoulment duty, the same practical consequences follow. In either instance the refugee has committed himself and, having shown his hand, he is at the mercy of his government upon his return.

At least one bilateral treaty has in fact envisioned ship desertion as an expression of political dissent brought on by unjust persecution or a realistic fear of such persecution. The Consular Convention Between the United Kingdom and Norway⁶⁹ provides that the signatories have a duty in aiding the apprehension of ship deserters but that there is no duty to surrender the seamen if there is reasonable ground for believing his life or liberty would be endangered by reason of racial, religious, national, or political persecution⁷⁰ in any country where the vessel is likely to go.

D. THE CONCEPTUAL INADEQUACY OF STANDARDS GOVERNING A GRANT OF ASYLUM

The earlier rules regarding a grant of extraterritorial asylum are conceptually inadequate for measuring the non-refoulment duty in the age of the Cold War. Even the later Conventions themselves seem tied to the concept of shifting population masses, usually ethnically or nationally homogeneous, which move abruptly following natural catastrophe, war, or the threat of war. They seem apart from the incident involving Simas Kudirka, who strikes one more as a defector than a refugee. "Defector" seems the best way to describe any person whose flight from the control of his government or from a foreign power controlling his government unlawfully is a political dissent from the government; how-

66. Institute of International Law, *Regulations Governing Ships and Their Crews in Foreign Ports in Peacetime*, 34 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 736 (1928).

67. *Id.* at 743.

68. *Resolutions Relating to Asylum*, *supra* note 42.

69. Done Feb. 22, 1951, 326 U.N.T.S. 209 (1959).

70. *Id.* Art. 26 (5) (a), (b) (ii).

ever, no significant extrinsic circumstance sets the escaping person apart from his countrymen. A refugee, on the other hand, is a person who has evoked a "personalized hostile reaction"⁷¹ from his government or a part of the community the government is powerless to control. The lone defector, though, whose hardships under a normalized though wholly unlawful foreign subjugation are indistinct from his compatriots, would not be a refugee so as to fall under the 1951 Convention Relating to the Status of Refugees.⁷² Certainly it could not have been the intention of those who drafted the Convention Relating to the Status of Refugees nor of its signatories to grant immediate, unconditional right of asylum to the entire population of any country unlawfully or tyrannically governed.⁷³ The United States therefore regards the assessment of the status of each escapee under the 1951 Convention as an *ad hoc* judgment.⁷⁴

The Department of State declined to decide the status of Simas Kudirka after the incident had ended; but on the basis of Kudirka's conversation aboard the *Vigilant*, the element of persecution appears missing, although the issue is by no means certain. Kudirka, no doubt under crushing pressures and anxiety about his surrender, was able for the most part to relate in only a vague manner what was later recounted by civilian on-lookers as discrimination and a denial of civil rights. Concretely speaking, Kudirka claimed to have been denied job advancement and certain papers normally issued to Soviet vessel crewmen. This ill-treatment, while perhaps a rung above harassment, is less than the level of persecution the United States has required for refugees to avoid refoolment in the administration of immigration laws.⁷⁵ At least regarding matters extrinsic to his escape, Kudirka would not have qualified as a refugee under the 1951 Convention.

The vicious attack upon Kudirka on board the *Vigilant* presents another difficult question, namely, whether the act of defection may sometimes qualify as a "political opinion" within the meaning of Article I of the 1951 Convention. If so, and the defector can satisfy the asylum state that he would be punished for his defection if returned, it could be reasonably argued that refoolment would result in persecution for

71. See note 34 and accompanying text *supra*.

72. Article I clearly provides that in order to qualify as a refugee the cause for leaving one's country originally must have been persecution or a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. It is not enough that the defector leaves because of a political opinion formed as to unsatisfactory conditions in his country; an element of individualized persecution is required to achieve refugee status.

73. Again referring to the language of Article I, the test is not whether a person owes or feels allegiance to his government, but whether he has its protection.

74. See DEP'T OF STATE MEMORANDUM, Annex 12 at 3.

75. See note 51 *supra*.

political opinion and, hence, would be prohibited by Article 33.⁷⁶ True, the argument is sheer bootstrap logic, but that does not change political realities; severe recriminations *will* probably occur if the defector is surrendered, as they did so clearly in the Kudirka incident.

Here an important distinction must be made between humanitarian policy and liability under the Convention. The definition of refugee in Article 1 implicitly rejects the notion that the mere defection or escape itself should provide a basis for pleading the non-refoulement rule. It states that refugees are persons *outside* the country⁷⁷ of their nationality.⁷⁸ Clearly, the parties wished to restrict coverage to individuals whose fear of persecution was based upon something aside from their mere escape or absence from their homeland. Hopefully, nations would give sympathetic consideration to defectors lacking refugee status by making a realistic estimate of political conditions in the defector's homeland, even though not required by the 1951 Convention to do so.

In any event, the determination of refugee status involves "complex factual and legal considerations."⁷⁹ The State Department reached the conclusion in its study of the Kudirka incident that Article 33 must be interpreted to mean that provisional asylum will be granted during the period of official assessment; and accordingly it reported that for breach of this implied duty the United States may have violated Article 33.⁸⁰

The State Department did not mention the possibility that Article 33 prohibits only refoulement in the nature of expulsion and does not re-

76. Speaking in a slightly different context on the right to offer asylum, one authority says:

Accomplishing a duty of humanity, the State in whose territory the refugees are cannot be bound to impose repatriation when, fully informed on the real situation in their homeland and being neither war criminals nor traitors to their country, they persistently refuse to return. To hand them over to governments which have nothing against them but their want of attachment to the regime would be to betray the principles of tolerance that are the foundations of political asylum.

C. DE VISSCHER, *supra* note 33, at 183.

77. "Country" in the Article 1 sense should be interpreted as dependent upon jurisdiction and control rather than legal fictions sometimes recognized by international law. In the Kudirka incident, for example, U.S. Coast Guard and civilian officials learned of the crewman's desire to defect while they were on board the Soviet trawler during negotiations. *Defection Hearings* 53. It is unclear what status a publicly owned trawler enjoys in foreign waters. Possibly it is not regarded as part of the territory. See L. OPPENHEIM, *supra* note 29, at 856; C. FENWICK, *INTERNATIONAL LAW* 320 (3d rev. ed. 1948).

78. The 1951 Convention added another qualification: the person must be outside the country as a result of events occurring before January 1, 1951, the purpose being to limit the Convention to persons displaced by the turmoil of World War and the subsequent Communist takeover in Eastern Europe. The 1967 Protocol removed the time limitation but left intact the requirement that the person be outside the country of origin.

79. DEP'T OF STATE MEMORANDUM Annex 11 at 3.

80. *Id.* Annex 12 at 3.

quire admittance under any circumstances.⁸¹ Article 33 itself forbids only that states "expel or return" a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." Against this literalism, however, there is the argument that non-refoulement is a principle historically understood to include a limited right of admission, as seen in the 1933 Convention Regarding the International Status of Refugees.⁸² Further, it may be presumed that in most cases, as in the Kudirka incident, the fleeing refugee will enter a territory illegally and will then come under Article 31, dealing with refugees illegally within the country, and, incidentally, Article 33. It is illogical from the viewpoint of the purpose of Article 33 in preventing persecution to distinguish persons who have reached the border from those who gained illegal entry. In each instance, the asylum state has the power to make the determination of refugee status, as defined under Article 1, as well as the Article 33 determination of whether his life or freedom would be imperiled. A grant of provisional asylum to all who request it, whether within or without the country, whether finally determined a refugee or not, would satisfy the humanitarian duty unstated by the 1951 Convention and would implement the right of persons to seek asylum under Article 14 of the Universal Declaration of Human Rights.

There is an additional ground for imposing liability for Iron Curtain defectors under Article 33 that lies outside the Convention. Following the Kudirka incident, the United States embarked on a massive effort to inform Iron Curtain countries by means of Voice of America that its traditionally liberal asylum policy would be honored in the future.⁸³ The President himself promised against recurrence of the Kudirka tragedy.⁸⁴ The broadcasts said in effect that the United States would not decline asylum to any Iron Curtain escapee. Rarely was the promise qualified even to the extent of commenting that the United States did not encourage defections but that aid would be offered if asylum were sought.⁸⁵ Under such circumstances, even lacking adverse reliance, it may

81. *But see* testimony of State Department spokesman before congressional hearings, *supra* note 48. The spokesman said that there was no duty to accept immigrants; but that apparently still leaves room under U.S. immigration law for acceptance of refugees given non-immigrant status.

82. *Done* Oct. 28, 1933, Article 3, 159 L.N.T.S. 199 (1936).

83. *See* notes 23 and 24 *supra*. A complete record of the relevant overseas broadcasts by Voice of America may be found in *Defection Hearings* 121-50.

84. The President remarked:

I was, as an American, outraged and shocked that this could happen. I can assure you it will never happen again. The United States of America for 190 years has had a proud tradition of providing opportunities for refugees, and guaranteeing their safety. And we are going to *meet* that tradition. (emphasis in original). Voice of America, Taped Radio Broadcast (Dec. 13, 1970), *cited in Defection Hearings* 149.

85. *See* Voice of America, U.S. Information Agency, Radio Broadcast (Dec. 1, 1970) *cited in Defection Hearings* 143.

be that the United States would be estopped from denying Iron Curtain defectors refugee status.⁸⁶ The estoppel principle acts as a stabilizing force within international law and prevents inequities in circumstances as this in which reliance is notorious.⁸⁷

The last and most nettlesome problem posed by the non-refoulement rule in international law is enforcement. Traditionally, injury suffered by an individual by a breach of international treaty law is a grievance that must be taken up by the sovereign; the national has no standing before an international tribunal.⁸⁸ Article 33, the non-refoulement rule of the 1951 Convention, introduces an obvious obstacle in the normal procedure for bringing international claims: the rule anticipates that the sovereign will not protect but will in fact persecute the injured national. Even if by some remarkable quirk the sovereign did bring an action before the International Court of Justice,⁸⁹ the national would thereby

86. The principle achieved at least passing recognition during the early 1950's when our program for assisting Iron Curtain escapees was undergoing evaluation. The President's Commission on Immigration and Naturalization concluded that the United States had a "special responsibility" and "special interest" in these people:

At least some of them have come because our propaganda lured them. If sacrifice earns the right to liberty, they have earned it. We cannot turn them away and expect those still behind the Iron Curtain to believe us ever again.

U.S. PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION: WHOM WE SHALL WELCOME 59 (1953). One federal court has conceded that deportation under U.S. immigration law may be barred under the principle of estoppel, if there is reliance upon a misleading statement or position of the government. *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

87. See Note, *The Effect of Unilateral State Acts in International Law*, 2 N.Y.U.J. INT'L L. & POL. 333. (1969).

88. See *Nottebohm Case*, [1955] I.C.J. 8. There is a crucial difference between the individual's power to sue and his rights and duties created by international treaty, custom, or convention. Lauterpacht has noted the very crucial distinction between procedural capacity before an international tribunal and status of a subject of international law: "The two questions are not synonymous. The existence of a right and the power to assert it by judicial process are not identical." H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950). The Nuremberg trials, the Universal Declaration of Human Rights, and the European Convention on Human Rights and Fundamental Freedoms are examples of the latter. For further discussion, see Udochi, *The Individual as a Subject of International Rights and Duties*, 2 COLUM. J. TRANSNAT'L L. 14 (1963); C. NORGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 82-98 (1962).

89. Article 38 of the Convention Relating to the Status of Refugees provides for judicial settlement:

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

The 1967 Protocol has a similar provision. This is an acceptance of compulsory jurisdiction under Article 36(1) of the Charter of the International Court of Justice, and would not be in any way restricted by the Connally Amendment, by which the United States reserves the right to refuse to submit to the jurisdiction of the court if the matter lies within the domestic jurisdiction of the United States. (This determination is to be made by the United States, and not the I.C.J.) See S. EXEC. REP. No. 14, at 11-12, 18.

automatically forfeit status as a refugee under the 1951 Convention for having solicited the protection of his government.⁹⁰ To allow the individual injured to bring an action would be no solution since by hypothesis he has effectively lost his freedom upon return to his homeland.

To the extent that unlawful refolement detracts from the purpose of the 1951 Convention and possibly may impose a future duty of care upon another contracting party, nonviolating parties to the 1951 Convention would seem to have a justiciable interest in the protection of the asylum rights of the refoled national. Otherwise, it would be hard to imagine how a "dispute" over the interpretation and application of the Convention would occur with respect to rules prohibiting refolement. Alternatively, it might be suggested that the United Nations, clearly an international personality,⁹¹ having sponsored the 1951 Convention and recommended its accession by resolution,⁹² has the right to litigate and defend the unprotected asylum rights of world refugees. An additional protocol might also be desirable to insure possible participation by the United Nations in such disputes. Whatever the remedy, the enormous effort on behalf of refugees has produced substantial rights which should not lapse because of procedural deficiencies within the international system of justice.

III. AMERICAN POLICY IN GRANTING ASYLUM

A. GRANTING ASYLUM EXTRATERRITORIALLY

Although the United States has been cautious in offering extraterritorial asylum, there is overwhelming support in our diplomatic history for such a grant when the life of a refugee or escapee is arbitrarily threatened, whether by his own government, a political faction, or uncontrolled mob violence. Whether the limits of the American policy are self-imposed or are restraints set by conventional international law,⁹³ the United States practice of granting asylum extraterritorially when personal danger threatens the requesting refugee has been a minimal standard for many nations throughout the years and, as such, has be-

90. Convention Relating to the Status of Refugees, Art. 1 (c) (1).

91. The United Nations "is a subject of international law and capable of possessing international rights and duties, and . . . has capacity to maintain its rights by bringing international claims." Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174, 179.

92. Res. 538 (VI) (A), 6 U.N. GAOR Supp. 20 at 35, U.N. Doc. A/2119 (1951-52).

93. The State Department maintains that diplomatic asylum, for instance, is possible only because of the inviolability of such premises and not because of any conventional

come integrated into numerous conventions defining the rights and obligations of nations in accepting or rejecting refugees territorially. The American history of extraterritorial asylum thus guides one toward an understanding of our obligations under the 1951 Geneva Convention.

1. *Diplomatic Asylum*

The privilege of granting asylum within a foreign embassy or consulate as a colorable right grew out of the early fiction that diplomatic legations are outside the domestic jurisdiction of the host nation. Local administrative authority was deemed barred from these premises, at least as far as was necessary to protect the inviolability of the persons and state papers of the legation.⁹⁴ Gradually, the privilege expanded until it became practical by usage and mutually desirable to afford protection to political figures out of favor with the present regime. In later instances this privilege came to bless less prominent men,⁹⁵ so that in critical periods of internal revolt, legations have given protection to large masses of ordinary citizenry hardly distinguished by political zeal but still without adequate protection from their own government.⁹⁶

Sometimes called "humanitarian intervention" by diplomacy because of its extraterritorial nature,⁹⁷ the authorities have commented favorably upon the United States policy of granting diplomatic asylum in dire circumstances. According to Hackworth, the United States policy is that

such refuge should never be granted, or if granted be continued, in opposition to the demands of an existing local government that is able and willing to guarantee to the refugee the customary safeguards of its legal institutions. It is

international law regarding asylum. If diplomatic premises are "inviolable", though, it is difficult to justify restraint in granting asylum extraterritorially as based on a respect for foreign sovereignty rather than a sense of international comity. In one correspondence Secretary of State Hughes likewise refused in defending the *ipso facto* quality of United States diplomatic asylum to take shelter in international custom. The grant of temporary asylum, he said, "is based on the theory that disorderly conditions productive of mob violence, for example, have so impaired the power of disposition of local authorities to administer justice as to render inapplicable for the time being the (territorial sovereignty) principle." Telegram from the Sec'y of State to the Ambassador in Chile [1925], 1 FOREIGN REL. U.S. 4854 (1925).

94. See L. OPPENHEIM, *supra* note 29, at 795-96.

95. See Kirchheimer, *supra* note 34, at 1003.

96. During the Spanish Civil War, for example, well over ten thousand refugees poured into various diplomatic premises in Madrid. W. TUNG, *supra* note 33, at 217 n. 86.

97. L. OPPENHEIM, *supra* note 29, at 304. Lauterpacht elsewhere declares the right of humanitarian intervention—which he offers only as an analogy to diplomatic asylum—to exist only "when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind." *Id.* at 312. He finds support for this theory within the Charter of the United Nations despite the Charter rule against intervention in matters of domestic jurisdiction. *Id.* at 313.

only when the local government has become unable to assure the safety of the refugee and his life is consequently endangered through mob violence or other lawlessness that protection may be granted.⁹⁸

This usage proceeds out of a humanitarian sense rather than observance of the international law of extraterritorial asylum, which the United States does not recognize.⁹⁹ Even in South American nations, which frequently accord the privilege among themselves, the principle of diplomatic asylum evolved more from humanitarian impulse and expediency than from a respect for law.¹⁰⁰ Moreover, there is cause to believe that there are "practical variations" in the United States policy, so that a more lenient attitude toward asylum exists in those American legations established in countries which themselves have a tolerant policy toward diplomatic asylum.¹⁰¹

Instances of diplomatic asylum in United States legations are by no means isolated,¹⁰² but mention of a few will adequately demonstrate the perimeters of American policy. In 1925 a junta rebellion occurred in Chile, which left several of the old regime in fear of losing their lives by mob violence. The Secretary of State advised the American embassy that temporary asylum might be offered if the threat of mob violence became so intense that local authority would be powerless or indisposed to administer justice. Further refuge could be granted if the persons were sought for political offenses that were not crimes under local law or if there were reason to believe that the criminally accused would be denied due process of law.¹⁰³

It is strict American policy, however, that foreign legations should not become embroiled in political quarrels or civil war within the host nation.¹⁰⁴ Where there is an outbreak of military or paramilitary action,

98. 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 622 (1941). Asylum must cease, of course, after the emergency has ended. *Id.* Asylum also should not be granted to thwart the legitimate efforts of local police in arresting criminals. *See, e.g.,* L. OPPENHEIM, *supra* note 29, and Kirchheimer, *supra* note 34, at 1004.

99. W. TUNG, *supra* note 33, at 218. The United States has declined to sign the Convention on Diplomatic Asylum even though the Convention limited protection to persons escaping mob violence or official persecution. *See* C. RONNING, *DIPLOMATIC ASYLUM* 155, 156 (1965); 30 U.S. DEP'T OF STATE BULL. 635 (1954).

100. C. DE VISSCHER, *supra* note 33, at 184. *See generally* C. RONNING, *supra* note 99.

101. *See* H. JACOBINI, *INTERNATIONAL LAW: A TEXT* 230-31 (rev. ed. 1968).

102. One writer counts about fifty instances of diplomatic asylum in the century dating from the mid-1800's. Morgenstern, *'Extraterritorial' Asylum*, 25 *BRIT. YEARBOOK OF INT'L L.* 241 (1948).

103. Telegram from the Sec'y of State to Ambassador in Chile, *supra* note 93, at 584-85.

104. Local political sensitivity is a minimal factor, however, when innocent non-nationals are threatened by force. There was no question of the propriety of diplomatic asylum afforded French and British diplomatic officers by the American consulate in Moscow during the Russian Revolution. *See* Telegrams from the Consul in Russia to the Sec'y of State, 1 *FOREIGN REL. U.S.* 667, 671 (Russia 1918).

humanitarian ideals must be all but completely suppressed in favor of neutrality. Often it is very difficult to distinguish between an insurgent force still battling for power and political dissenters or outcasts from the old regime. The distinction in granting asylum is crucial. Thus, when the U.S. legation to Haiti extended asylum to a rebel general and a handful of men during an 1875 uprising, a severe reprimand followed from the Secretary of State for meddling in Haitian internal affairs. The Secretary advised that mere sympathy for the rebel's plight was insufficient cause to offer refuge, since by doing so the legation gave comfort and material advantage to the rebel forces.¹⁰⁵

A growing respect for national sovereignty, relative political stability in the Western Hemisphere, and the desire wrought in part by the Cold War to avoid charges of overseas interference in domestic affairs have perhaps combined to bring a decline in the practical importance of diplomatic asylum. The 1961 Vienna Convention on Diplomatic Relations,¹⁰⁶ for example, does not consider the matter.¹⁰⁷ However, as shown by the grant of indefinite asylum to Cardinal Mindszenty by the United States embassy in Budapest following the 1956 Hungarian revolt,¹⁰⁸ the underlying moral commitment to the protection of lives denied adequate or fair police protection or denied safeguards of the local system of justice remains. The policy of temporary sanctuary obtains, it should be noted, even to the possible prejudice of diplomatic good will,¹⁰⁹ even though the underpinning theory of international law invoked — suspension of sovereignty sheerly out of a unilateral humanitarian concern — is certainly tenuous and subject to abuse.

2. *Asylum Aboard Warships*

In judging whether asylum should be granted aboard an American warship in foreign waters, the delicate balancing of international feelings

105. Telegrams from the Sec'y of State to the American Legation in Haiti [1875], 2 FOREIGN REL. U.S. 701 (1875). The Secretary added, curiously, that having accepted the refugees the legation should not expel them unless a guarantee was given for their trial and safe passage out of their country if convicted. *Id.*

106. *Done* April 18, 1961, 500 U.N.T.S. 95 (1964).

107. Compare the Institute of International Law *Resolutions*, *supra* note 42, which grant broad discretion to diplomats in granting asylum when mob violence or official persecution threatens an individual. In armed civil strife, the threat to personal safety must be politically inspired; and diplomats are cautioned not to allow their missions to become bases of operations. *Id.* Arts. 3, 4.

108. See W. TUNG, *supra* note 33, at 218; H. JACOBINI, *supra* note 101, at 231. One authority cites the Mindszenty case as a departure from traditional political non-involvement and suggests that the Hungarian lack of protest was a political tactic and not an implicit recognition of the legitimacy of the American action. Kirchheimer, *supra* note 34, at 1004 n. 2.

109. See Morgenstern, *supra* note 102, at 259-60.

probably weighs as heavily in the decision as in questions of diplomatic asylum.¹¹⁰ The theoretical justification, on the other hand, has more to commend itself to those granting asylum. A respectable body of authority maintains that customary international law has elevated warships to the level of "floating islands" of their sovereign.¹¹¹ Accordingly, acts occurring on board the vessel are immune from local jurisdiction; and the right to grant asylum, even to criminals, would seem absolute.¹¹² Other authority, however, holds that immunity follows only from an implied waiver of territorial sovereignty.¹¹³ Throughout its diplomatic history, the United States has observed the latter theory¹¹⁴ and has thereby applied the same standard in offering asylum aboard warships as in legations.¹¹⁵ This uniformity probably owes more to State Department circumspection regarding the judgment of naval officers in assessing sensitive political issues than to a conscious deliberation over international law. Nonetheless, like the policy of restraint in granting diplomatic asylum, humanitarian considerations must give way to extrinsic factors, as a practical matter.

B. POST-WAR IMMIGRATION LAW AS ESTABLISHING DOMESTIC ASYLUM POLICY

The present policy regarding asylum is peculiar to the Cold War years, an era in which the refugee is likely to be a political criminal in the land he left by virtue of his defection alone and an unknowing propaganda asset in the land in which he seeks refuge. In years past, national quotas

110. *See, e.g.*, Telegrams from Acting Sec'y of State to Sec'y of Navy [1912], FOREIGN REL. U.S. 860-61 (1912); Letter from Sec'y of State to Sec'y of Navy [1913], FOREIGN REL. U.S. 854-55 (1913).

111. *See, e.g.*, L. OPPENHEIM, *supra* note 29, at 853. A similar conceptual variant is the idea that warships and naval auxiliaries are "immediately identified with the personality of the state." C. FENWICK, *supra* note 77, at 319. Interestingly enough, a number of congressmen were quite firm in insisting during the defection hearings that the deck of the Coast Guard vessel was American soil. *Defection Hearings* 3, 61. (Since the defection occurred in U.S. territorial waters, the point was made only in passing.)

112. There is a split of authority whether a ship must surrender a fleeing person to local authorities. Some maintain that diplomatic protest for failure to give up the fugitive is the only recourse. *See* V. MAHAJAN, *supra* note 35, at 302. J. STARKE, *supra* note 30, at 230-31.

113. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *Chung Chi Cheung v. King*, [1939] A.C. 160; A. PAVITHRAN, *supra* note 30; J. WESTLAKE, 1 INTERNATIONAL LAW 168 (2d ed. 1910).

114. *See generally* 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 845-55 (1906). Asylum has therefore been extended only at times deemed essential to the protection of life or freedom. C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 238-240 (4th rev. ed. 1959).

115. Morgenstern, *supra* note 102, at 254-55. Other authority agrees with the propriety of this uniform standard. A. PAVITHRAN, *supra* note 30, at 255. Even an early critic denying the propriety of diplomatic asylum as unfounded in custom conceded the usage aboard naval vessels. A. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 271 (1912).

under American immigration law were strictly maintained no matter how great the imminent threat of danger. Immediate entry during emergencies was sometimes available on a visitor's visa, but this in turn made admission turn upon the applicant's social and financial status.¹¹⁶

Modern non-refoulement policy in U.S. immigration law parallels the approach of modern international law. The earlier deportation practice had been to allow voluntary departure to a different country if an alien feared religious or political persecution in his homeland, but even this policy suffered occasional abuse when the alien's politics were not to the liking of U.S. authorities.¹¹⁷ But this practice later bowed to non-refoulement policy akin to Article 33 of the 1951 Convention Relating to the Status of Refugees as a result of a still unsettled mixture of pure humanitarianism, democratic ideology, anti-communism, and a steady decrease in nationalist, racist sentiment.¹¹⁸ The change, of course, did not take place overnight.

United States relief for those fleeing Nazi persecution actually preceded the war years themselves. From the advent of Hitler in 1933 to mid-1942, overseas consular offices issued almost 550,000 visas to nationals whose countries would be Axis-dominated in 1943.¹¹⁹ Many more were authorized for the war years in Europe, but the prospective issuants were unable to emigrate. Of the number issued during the war years, practically all arrived in the United States and remained.¹²⁰ Immigration during World War II, however, was extremely slack; only small percentages of each year's quota were consumed. Most of the war refugees were natives of the Balkan states and eastern and central Europe. The immigration quota set for this area plus Germany was only 39,000, of which two-thirds was allocated for Germany.¹²¹ There was a token ef-

116. Kirchheimer, *supra* note 34, at 992. A discussion of early immigration laws regarding asylum may be found in Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW 204, 207-11 (1969).

117. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMM'N), REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE U.S. 120-23 (1931). A noted deviation from the voluntary departure policy came with the deportation of a well-known Italian Communist, Guido Servio, who was not allowed to depart for Russia but was instead deported to fascist Italy and certain death. *Id.*

118. One comment on the asylum policy, while made with reference to little more than the mechanics of the *Immigration and Nationality Act of 1952*, still has vitality:

United States asylum policy is both dogmatic and pragmatic. Foreign policy objectives, interest group pressures and counter-pressures, and the traditional imagery of a haven for the oppressed and humiliated, intertwine and clash in a jungle of contradictory practices, which the lucky winner extols and the losers vilipend.

Kirchheimer, *supra* note 34, at 993.

119. 8 U.S. DEP'T OF STATE BULL. 201, 203 (1943).

120. *Id.*

121. Truman, *Immigration to the United States of Certain Displaced Persons and Refugees in Europe*, 13 U.S. DEP'T OF STATE BULL. 981 (1945). Unless specially provided, unused quotas do not cumulate under U.S. immigration law.

fort of asylum for war refugees during the war,¹²² and President Truman made an honest attempt to reactivate the prewar visa issuance program for eligible immigrants. But this could hardly cope with the problem of an estimated one million Eastern European refugees in the German western zones, Austria, and Italy, who were unable to return home because of political opinion and fear of persecution.¹²³ President Truman, arguing that these vehement anti-communists had good cause to fear returning, urged Congress to enact special legislation which would lift the quota limit on eastern European countries.¹²⁴

Congress responded with the Displaced Persons Act of 1948¹²⁵ which authorized the issuance of 202,000 immigration visas to eligible persons¹²⁶ over a two-year period but according to a system commonly called "mortgaging." The number of immigrant visas issued to the nationals of any given country were deducted in advance in amounts up to one-half of that country's normal quota for future years.¹²⁷ The cutoff date for determining refugee status so as to qualify for emigration to the United States was December 1945, which principally benefited bona fide war refugees¹²⁸ in Austria, Italy, and the western zones of Germany who had entered those countries *during* World War II and still remained by 1948.¹²⁹

On its face, the Act was an evenhanded method of draining off a small but measurable portion of Europe's overflow refugee migration. But President Truman severely criticized the Act as "flagrantly discriminatory," particularly towards anti-communist Catholics who had fled incipient Soviet domination *after* the end of World War II and were hence

122. In June 1944 President Roosevelt had ordered the immediate entry of 1000 refugees to be chosen among those who had taken temporary refuge in southern Italy. The President directed that the numbers selected represent the various nationalities present. See 10 U.S. DEP'T OF STATE BULL. 532 (1944). Since this group was for the most part qualified for admission as immigrants, President Truman later ordered that they be granted immigrant status rather than go through the formality of deportation and readmission. See Truman, *supra* note 121.

123. 17 U.S. DEP'T OF STATE BULL. 137 (1947).

124. *Id.* at 138.

125. Ch. 647, 62 Stat. 1009.

126. *Id.* § 3 (a), 62 Stat. 1010.

127. *Id.* § 3 (b).

128. Bona fide war refugees are defined as those persons under the care and concern of the International Refugee Organization. *Id.* § 2 (b), 62 Stat. 1009.

129. Displaced Persons Act of 1948, ch. 647, § 2 (c), 62 Stat. 1009, *as amended*, Act of June 16, 1950, ch. 262, § 1, 64 Stat. 219. Also included were Czechs who had fled communist persecution since the beginning of 1948. *Id.* § 2 (d), 62 Stat. 1010. The Act listed three preference groups. The first two preferences were employment oriented, while the third was aimed at relieving separated families. *Id.* § 6, 62 Stat. 1012. A priority was given to those who had fought against the Axis powers and were unable or unwilling to return home because of persecution or fear of persecution on account of race, religion, or political opinion. *Id.* § 7.

ineligible displaced persons.¹³⁰ The President would have doubled the number of immigrants and substituted for December 1945, a new date, April 27, 1947, at which time the camps for displaced persons refused further admissions, as the deadline for determining refugee emigration rights to the United States.¹³¹ A new Congress met and in some instances exceeded the President's original recommendations. The 1950 amendment¹³² to the Displaced Persons Act of 1948 extended the right of emigration deadline to January 1, 1949,¹³³ and provided for the inclusion of all those who had fled into refugee zones from persecution because of race, religion, or political opinion within the group of eligible refugees.¹³⁴ The amendment extended the operation of the program for one year and increased the number of issuable immigration visas to a total of 341,000.¹³⁵ Thus the United States began a straightforward policy of refuge for escapees from behind the Iron Curtain.¹³⁶

Any notion that the Displaced Persons program could keep pace with eastern European defection was quickly shattered. East Germans were crossing over into the Western zone at a rate up to 20,000 a month. The refugee flow from communist countries to the south and east of East Germany averaged about 1,000 monthly. The visa pool was virtually exhausted within the authorized time limit for emigration.¹³⁷ In 1952, President Truman proposed new legislation to admit 300,000 additional

130. 19 U.S. DEP'T OF STATE BULL. 21-22 (1948).

131. *Id.* at 152.

132. Act of June 16, 1950, ch. 262, 64 Stat. 219.

133. Displaced Persons Act of 1948, ch. 647, § 2 (c), 62 Stat. 1009.

134. *Id.* § 2 (d), as amended, Act of June 16, 1950, ch. 262, § 2, 64 Stat. 219.

135. *Id.* § 3 (a), as amended, Act of June 16, 1950, ch. 262, § 4, 64 Stat. 221. Indefinite mortgaging of future quotas was continued but curtailed. Quotas before 1954 could only be mortgaged 25%; those after could be mortgaged 50% as before the 1948 Displaced Persons Act. *Id.* § 3 (c), as amended, Act of June 16, 1950, ch. 262, § 4, 64 Stat. 223.

136. Other relief granted to Iron Curtain escapees is stated in Section 12 of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1013, as amended, Act of June 16, 1950, ch. 262, § 10, 64 Stat. 226. The original provision authorized consulate operations in Austria and Germany to be resumed, and directed that up to 50% of available visas be issued to persons of German origin formerly residents in certain Iron Curtain countries. The amendment lengthened the list of qualifying Iron Curtain countries and authorized 54,744 immigrant visas to be issued to these fleeing refugees. The visas were obtained first from a pooling of German and Austrian visas unused under the terms of the 1948 Displaced Persons Act and then from the quotas of the country of nationality. *Id.* § 12 (b), as amended, Act of June 16, 1950, ch. 262, § 10, 64 Stat. 226.

Other evidence of anti-communist influences in the amending Act appears in the prohibition of visa issuance to any person advocating or following "the principles of any political or economic system or philosophy directed toward the destruction of free competitive enterprise and the revolutionary overthrow of representative governments, or to any person who is or has been a member of any organization which has been designated by the Attorney General of the United States as a Communist organization." *Id.* § 13, as amended, Act of June 16, 1950, ch. 262, § 11, 64 Stat. 227.

137. Truman, *Legislation Requested to Handle Overpopulation Problem in Western Europe*, 26 U.S. DEP'T OF STATE BULL. 551, 552 (1952).

European immigrants over a three-year period. The proposal was made as part of the overall U.S. contribution to the resettlement of European overpopulation¹³⁸ and was equally intended as humane action in the face of communist tyranny overseas.¹³⁹ However, the Immigration and Nationality Act of 1952,¹⁴⁰ which contained no specialized vehicle for continued aid to European refugees fearing or suffering persecution soon followed. By resorting to the old national quota system of earlier legislation, the Act eliminated all but nominal immigration from southern and eastern Europe.¹⁴¹

Only months later President Truman appointed a commission to study the impact of the new legislation.¹⁴² The President's Commission on Immigration and Naturalization reported that the antagonistic policy toward eastern Europeans was sorely at odds with foreign policy objectives in combatting world communism.¹⁴³ The Commission reiterated President Truman's plan for admission of 300,000 escapees and displaced persons over a three-year period.¹⁴⁴ Unlike the President's scheme, however, the Commission plan worked within annual quota limits and simply accorded those seeking asylum a statutory priority.¹⁴⁵ Under President Eisenhower, the program was in good part adopted with the enactment of the Refugee Relief Act of 1953,¹⁴⁶ which implemented the Truman plan for non-quota immigration visas. Thus, the Refugee Re-

138. Section 101 (a) of the Mutual Security Act of 1951, ch. 479, 65 Stat. 373, empowered the President to authorize an expenditure up to \$100,000,000 for a U.S. Escapee Program upon his determination that such assistance to other countries would benefit preservation of peace in the North Atlantic area as well as the security of the United States.

The President so determined in March 1952 and thus initiated the U.S. Escapee Program to improve the reception and treatment of Iron Curtain defectors and to provide for their resettlement. 26 U.S. DEP'T OF STATE BULL. 602 (1952).

139. *Id.* at 551-52. Seven per cent of the visas were reserved for political and religious refugees from eastern Europe. German refugees would receive 39% of the visas.

140. Ch. 477, 66 Stat. 163.

141. See 27 U.S. DEP'T OF STATE BULL. 78, 79-80 (1952). The President's veto was not strong enough to overcome congressional forces favoring the Act. After passage the President noted that the quota for Rumania, Poland, and the Baltic states was less than 1/25 the number of exiled refugees from those countries. *Id.* at 80. The President sharply criticized the Act as requiring continuing emergency legislation for displaced Europeans fleeing communist control. *Id.* at 78.

142. Exec. Order No. 10,392, 3 C.F.R. 896 (1949-1953).

143. U.S. PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, *supra* note 86, at 60-61, 70.

144. *Id.* at 264.

145. Within the context of 1952 immigration law, a priority within the annual quota would have been practically meaningless for eastern and central European displaced persons and escapees since the quota for those countries was pitifully low. The Commission, on the other hand, would have abolished the national origins quota system outright and created a unified quota pool. Immigration would be permitted on the basis of five priorities, of which the right of asylum would have headed the list for the first three years. *Id.* at 263-64.

146. Ch. 336, 67 Stat. 400.

Relief Act was not an amendment of the Immigration and Nationality Act of 1952 but was the first piece of emergency refugee legislation to avoid the insidious mortgaging process of earlier legislation that robbed future generations of part of their already small immigration quotas.¹⁴⁷ The Act authorized 205,000 visas to be distributed to refugees,¹⁴⁸ escapees,¹⁴⁹ and German expellees.¹⁵⁰ These visas were to be issued almost exclusively to Europeans; over 18,000 would go unclaimed.¹⁵¹ President Eisenhower attributed the incomplete issuance to increased European prosperity and technicalities within the 1953 Act and was worried that the surplus would be wasted.¹⁵² He suggested, for example, that since escapees rarely carried documents, the United States should waive passport requirements and the matter of security should be left to security officers overseas. The President also advanced additional proposals, all of which to some extent would have benefited Iron Curtain escapees.¹⁵³ Congress rejected most of these and the earlier proposals of the President but did eliminate the quota mortgages completely¹⁵⁴ and rejuvenated the unused quota of over 18,000 under the expired Refugee Relief Act.¹⁵⁵ This constituted the only trace of emergency legislation for

147. The administration was most adamant on this issue. See 29 U.S. DEP'T OF STATE BULL. 859 (1953).

148. A "refugee" entitled to a visa was defined as:

. . . any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.

Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, § 2 (a).

149. An "escapee" is any refugee who fled and cannot return to Russia, East Germany, or Iron Curtain countries because of persecution or fear of persecution on account of race, religion, or political opinion. *Id.* § 2 (b).

150. A refugee qualifies as a "German expellee" if he is of German ethnic origin, resides in West Germany or Austria, and was forced to leave an Iron Curtain country or Russia (but not East Germany) in which he was born. *Id.* § 2 (c). Note that both escapee and German expellee incorporate the requirement of refugee status, the most important of which is being without settled residence.

151. See Act of September 11, 1957, Pub. L. No. 85-316, § 15, 71 Stat. 643.

152. 32 U.S. DEP'T OF STATE BULL. 951 (1955).

153. *Id.* These proposals included: (1) an increase by 5,000 of the immigration quota without regard to national origin; (2) basing the immigration quota for all nations on the 1950 rather than the 1920 census; (3) pooling unused quotas to be given to over-subscribed preferences elsewhere; and (4) elimination of mortgages created by the 1948 Displaced Persons Act and the 1950 amendment. *Id.* at 952.

154. Act of September 11, 1957, Pub. L. No. 85-316, § 10, 71 Stat. 639.

155. *Id.* § 15. These visas were to be distributed to Middle East as well as anti-communist refugee-escapees. *Id.* § 15 (a)(3), (c) (1) (A), (B). The requirement of persecution or a fear of persecution was uniform, but the law made no geographic distinction regarding anti-communist escapees. A number of refugee-escapees from mainland China were able to benefit from this omission. See 39 U.S. DEP'T OF STATE BULL. 507 (1958).

escapees left on the books, and the visas authorized were virtually exhausted after a year and a half.¹⁵⁶

While the Immigration and Nationality Act of 1952 gave refugee-escapees only a thin slice of the immigration quota, it contained another feature of inestimable value to an extent unimagined by its drafters. Section 212(d) (5) authorizes the Attorney General to allow aliens to enter the United States under emergency conditions or when such action is in the strict public interest until the emergency ceases, at which time the alien is returned.¹⁵⁷ The entry, known as "parole," does not constitute "admission" into the United States¹⁵⁸ but only temporary asylum. Further, the language leaves the questions of entry and length of stay wholly within the discretion of the Attorney General.¹⁵⁹

Following the Hungarian revolt of 1956, President Eisenhower invoked section 212(d) (5) to order the parole of 15,000 Hungarians.¹⁶⁰ The Hungarian immigration quota of 6,500 was clearly insufficient if the United States was to be in a position to grant asylum to revolutionary escapees.¹⁶¹ Convinced by the experience that the temporary asylum privilege for Communist country escapees should be more explicitly set out in the law, President Eisenhower then proposed that the President be empowered to authorize the Attorney General to parole into the United States escapees from communist tyranny selected by the Secretary of State. The Attorney General would then be given discretion to adjust the status of these parolees to lawful residents eligible for citizenship.¹⁶² The President later suggested setting the annual parole at 10,000, which was thought to represent a fair moral commitment to the world refugee problem.¹⁶³ The President put forward this and other unenacted proposals in an effort to overhaul the entire immigration system in 1960.¹⁶⁴

While the effort to *reform* the quota system failed, Congress did respond to the call for world refugee aid with the Fair Share Act of 1960.¹⁶⁵

156. See 40 U.S. DEP'T OF STATE BULL. 437-438 (1959).

157. Immigration and Nationality Act of 1952, ch. 477, § 212(d) (5), 66 Stat. 188.

158. *Id.*

159. *Id.*

160. 35 U.S. DEP'T OF STATE BULL. 913 (1956).

161. 36 U.S. DEP'T OF STATE BULL. 247 (1957).

162. *Id.* This number was not to exceed in one year the average number of aliens who had entered during the last eight years under the authority of emergency legislation.

163. 41 U.S. DEP'T OF STATE BULL. 215 (1959).

164. See 42 U.S. DEP'T OF STATE BULL. 659 (1960).

165. Pub. L. No. 86-648, 74 Stat. 504. Though scheduled to terminate in two years, the termination date was cancelled by § 6 of the Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121. The decision to continue paroling was made because of the continued passage of refugees into western Europe.

The Act created a matching program whereby the Attorney General was authorized to use his parole power on behalf of up to 25 per cent of the number of refugee-escapees resettled in foreign nations.¹⁶⁶ Because the Act was meant as the United States contribution to the World Refugee Year sponsored by the United Nations to close down European war refugee camps,¹⁶⁷ the Act was politically neutral. No mention was made of persecution or defection. The only politically tinged feature was the requirement that refugee-escapees must apply for parole within countries not controlled, dominated, or occupied by Communists.¹⁶⁸ Parolees resident in the United States for two years could apply for adjustment of status in order to become citizens.¹⁶⁹ The Fair Share Act, having accomplished its purpose, is now effectively embodied in section 203 (a) (7), of the Immigration and Nationality Act¹⁷⁰ which lumps refugees of natural disasters and persons fleeing persecution into one category.¹⁷¹ Persons paroled into the United States under section 203 (a) (7) are labeled "conditional entrants" and are like parolees in most respects except that conditional entrants have a built-in proviso for adjustment of status.¹⁷²

Because section 203 (a) (7) has a statutory limitation of 10,200 annually,¹⁷³ section 212 (d) (5) remains the critical provision for immediate, effective asylum during world crises. That much has been clear since the late 1950's when it enabled refugees fleeing Castro's Cuba found refuge in Florida. Under section 212 (d) (5), over 356,000 had exited to the mainland by 1970;¹⁷⁴ and a voluntary airlift program¹⁷⁵ continues

By 1964, over 16,000 refugees had benefited by parole. 52 U.S. DEP'T OF STATE BULL. 471 (1965).

166. "Refugee-escapee" under the Fair Share Act was defined the same as under Sec. 15 (c) (1) of the Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 639.

167. See 52 U.S. DEP'T OF STATE BULL. 471 (1965).

168. Pub. L. No. 86-648, § 1, 74 Stat. 504.

169. *Id.* § 3.

170. Immigration and Nationality Act of 1952, ch. 477, § 203 (a) (7), 66 Stat. 163, as amended Immigration and Nationality Act of 1965, § 3, 79 Stat. 912.

171. *Id.* The State Department preferred an alternative amendment of Sec. 203 (a) (7), which would have dealt with the two groups separately. The fear was expressed that a major natural catastrophe would seriously hinder the emigration of eastern European refugees. *Hearings on the Operation of the Immigration and Nationality Act Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 15 (1968).

172. *Id.*

173. The Administration originally fought for a limit of 17,000 annually. It believed that this was a large enough number to guarantee "[f]lexibility in the authority of the President to admit groups of refugees without delay . . . [so] important to our foreign policy interests." *Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., pt. 1, at 174 (1965).

174. See 47 INTERPRETER RELEASES 193 (1970). The total is undoubtedly greater, since the number cited represents only those Cubans registering with American authorities. Non-registrants were presumably paroled.

175. See 45 U.S. DEP'T OF STATE BULL. 238 (1961).

to bring 40,000 Cuban refugees annually.¹⁷⁶ Nor has relief been limited to this hemisphere. President Kennedy authorized the use of section 212 (d) (5) to bring over 10,000 mainland China refugees to this country in 1962 and years following.¹⁷⁷

While the numerous emergency programs for immigration and the broad use of the Attorney General's parole power could be justified alone on humanitarian motives, an important impetus throughout the postwar years has been the thrust of anti-communist foreign policy. One need only trace the history of the parole power to see that the moral commitment to defections inspired by anti-communism has far outweighed the wavering regard to personal circumstance, which itself has run the gamut from persecution to inconvenience. The requirement of "persecution" is humanely overlooked or loosely evaluated so that mere escape is evidence of a political opinion for which the escapee would be persecuted if returned.

The asylum state, too, is rewarded by its generosity. Its liberal acceptance of persons to whom it owes only the barest moral obligation is a honor it proudly wears¹⁷⁸ in contrast to the repression of the refugee's homeland, which only increases its disgrace if it attempts to cut off the refugee flow outward. Indeed, as shown by the Kudirka incident, the propaganda effect of even a single well-publicized escape can be enormously valuable — or costly.

C. ALIEN CREWMAN AND UNITED STATES NON-REFOULMENT POLICY

1. *Ship Desertion as a Political Crime*

Imprisonment for desertion of a public vessel is certainly not so uncommon or unjust that it must, without further investigation, be labeled barbaric. In socialist nations which rely almost entirely on public vessels to carry on world trade, ship desertion may well be an offense as much an injury to the national welfare as desertion from a peacetime army. In fact, desertion from the United States Merchant Marine was punishable by up to three months imprisonment before the law was amended in

176. Letter from Frank L. Kellogg, Special Assistant to the Secretary for Refugee and Migration Affairs, U.S. Dep't of State, to *Cornell International Law Journal*, Feb. 23, 1971.

177. See 50 U.S. DEP'T OF STATE BULL. 679 (1964); 52 U.S. DEP'T OF STATE BULL. 471 (1965).

178. Testifying before a congressional committee, a State Department spokesman emphasized the importance of granting "forceful, immediate, and adequate" asylum to Cuban refugees in order to maintain a good image throughout South America and Latin America. 45 U.S. DEP'T OF STATE BULL. 257, 259 (1961).

1915.¹⁷⁹ Even a law with minimal imprisonment, on the other hand, might be unjust if politically motivated or if applied unevenly to punish crewmen for their political acts or beliefs. Crewmen from Iron Curtain countries, who desert ship in United States ports, have argued with varying success that asylum should be granted them because of pre-existing political or religious persecution which they escaped or because their defection is so infused with political opinion that any punishment meted out by homeland officials would necessarily constitute political persecution. Considering the number of crewmen defecting annually from Iron Curtain ships,¹⁸⁰ the question of deportation has a fair degree of practical importance.

Alien crewmen serving a bona fide function aboard a ship docking at an American port, who intend to come ashore temporarily and solely in pursuit of their calling and to leave with their ship,¹⁸¹ may be issued conditional landing permits by immigration officials.¹⁸² The permit gives the crewman 29 days of valid shore leave;¹⁸³ if the alien willfully overstays, he is guilty of a misdemeanor.¹⁸⁴ Congress has taken a very dim view of alien crewmen using the conditional landing permit fraudulently to enter the United States and desert ship.¹⁸⁵ Actually, alien

179. Rev. Stat. 4596 (1875), as amended, Act of March 4, 1915, § 7, 46 U.S.C. § 701 (1964). A deserting merchant marine seaman now forfeits his personal belongings and earned wages. *Id.*

180. During the five year period from 1965 to 1969, the issue of conditional permits averaged close to 2,037,000 annually. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT (1965-1969). Many of these permits, of course, were issued to the same seamen at different times. Roughly 4850 issuants have deserted on the average each year. *Id.* Complete statistical analysis for Iron Curtain crewmen is impossible because INS figures do not give a breakdown for all nationalities. During the five-year period examined, at least 323 deserting crewmen came from Soviet-bloc countries, with the majority from Yugoslavia. Judging from INS data, it appears that roughly two-thirds of all Iron Curtain crewmen sailed on Soviet-bloc ships. *Id.*

181. Immigration and Nationality Act of 1952, § 101(a)(15)(D), 8 U.S.C. § 1101(a)(15)(D) (1964).

182. *Id.* § 252(a), 8 U.S.C. § 1282(a) (1964).

183. *Id.*

184. *Id.* § 252, 8 U.S.C. § 1282(c) (1964).

185. If an immigration officer determines that an alien is not a bona fide crewman or that he intends to desert the ship, he may revoke the conditional landing permit, take the crewman into custody, and require his detention aboard ship until it departs. *Id.* § 252(b), 8 U.S.C. § 1282(b) (1964). By making a request for asylum, the alien crewman automatically loses his status as a bona fide crewman if he admits that he formed the intent to jump ship before he received his conditional landing permit. Even without an outright admission, the immigration officer will infer such intent in the absence of convincing rebutting evidence, a finding which the courts have rarely if ever disturbed. See *United States ex rel. Feretic v. Shaughnessy*, 221 F.2d 262 (2d Cir. 1955), cert. denied, 350 U.S. 822 (1955); *United States ex rel. Trujillo-Gonzalez v. Esperdy*, 186 F. Supp. 909 (S.D.N.Y. 1960). This technicality is particularly vexing to aliens unfamiliar with immigration law and who are doing their best to

deserters who come into the United States by conditional landing permits have not "entered" in the technical sense of the word; and immigration officials are empowered to return a deserting crewman to his ship by authority of summary deportation methods set out in the statute, apart from the normal deportation procedure.¹⁸⁶ These procedural shortcuts have been justified as involving exclusion, not deportation.¹⁸⁷

Neither the statutory law nor the Immigration and Naturalization Service (INS) regulations took up the issue of persecution that might be encountered if the alien were sent back to his ship until *United States ex rel. Szlajmer v. Esperdy*,¹⁸⁸ which held that an alien crewman facing summary deportation had a right to a hearing on a plea of possible persecution. The INS responded by enacting a regulation which would allow the alien crewman to obtain parole under section 212 (d) (5) if he could demonstrate the possibility of persecution a claimant would show under normal deportation procedure.¹⁸⁹ The Supreme Court approved this regulation in *Immigration and Naturalization Service v. Stanisic*,¹⁹⁰ despite the dissent's argument that the hearing granted claimants under the new regulation lacks due process safeguards other deportees are guaranteed.¹⁹¹ The new regulation thus incorporates the standards of normal deportation proceedings.

cooperate honestly with immigration authorities. See *Hearings Before the President's Comm'n on Immigration and Naturalization*, 82d Cong., 2d Sess. 267 (1952). Immigration officials have the power to suspend deportation and adjust the status of the deportee to lawful resident in limited circumstances. Immigration and Nationality Act of 1952, § 244, 8 U.S.C. § 1254 (1964). But this is denied to alien crewman who entered the United States after June 30, 1964. *Id.* § 244 (f), as amended, Immigration and Nationality Act of 1965, § 12 (b), 8 U.S.C. § 1254 (f) (Supp. V 1969). Elsewhere Congress has provided that the ship's owner or commanding officer has a duty to report all crewmen who land illegally or desert before departure. *Id.* § 251 (b), (c), 8 U.S.C. § 1281 (b), (c). It is a violation punishable by \$5,000 fine for anyone knowingly to assist an alien in entering the United States by conditional landing permit when the alien intends to violate the terms of the permit. *Id.* § 257, 8 U.S.C. § 1287 (1964).

186. Standard deportation proceedings are held before a special inquiry officer and are conducted with a number of procedural safeguards. Among them are notice of the nature of the charges against the deportee, the privilege of counsel representation (presumably now including the right to appointed counsel), the right to cross-examine witnesses and present evidence, and a presumption of non-deportability. Immigration and Nationality Act of 1952, § 242 (b), 8 U.S.C. § 1252 (b) (1964). Summary deportation of alien crewmen, following revocation of the conditional landing permit, is authorized by § 252 (b), 8 U.S.C. § 1282 (b) (1964).

187. *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967); *Glavic v. Beechie*, 225 F. Supp. 24 (S.D. Tex. 1963), *aff'd*, 340 F.2d 91 (5th Cir. 1964). *Contra*, *United States ex rel. Szlajmer v. Esperdy*, 188 F. Supp. 491 (S.D.N.Y. 1960).

188. 188 F. Supp. 491 (S.D.N.Y. 1960).

189. 8 C.F.R. § 253.1 (f) (1970). The regulation, however, only benefits those who can show a fear of communist persecution.

190. 395 U.S. 62 (1969).

191. *Id.* at 80-82.

A stay of deportation may normally be obtained under section 243 (h) of the 1952 Immigration and Nationality Act, which 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 subjected to persecution on account of race, religion, or political opinion.¹⁹²

A good deal of the case law regarding alien crewmen claims under section 243 (h) has revolved around the status, yet uncertain if the existing case law is any indication, of the punishment meted out under foreign law for ship desertion. In the early cases, before a clear administrative determination had been made and promulgated, the courts struggled with a concept of an international minimum standard in assessing the political quality of foreign law punishing desertion. Generally, the courts agreed with the INS that desertion was not so infused with political expression as to put the crewman in danger of persecution if returned.¹⁹³

Most of the early cases involved deserting Yugoslav seamen, and these early judicial decisions as well as the rulings of the Immigration Board of Appeals on section 243 (h) claims may be explained by a heavy reliance upon an initial determination of Yugoslav politics in 1958. In

192. 8 U.S.C. § 1253 (h) (Supp. 1969). Relief is available even though an organized government is not the persecutor, but "sporadic harassment" of one group by another will not suffice. *Matter of Tan*, 12 I. & N. Dec. 564 (1967). The persecutor, as well as the persecution, must be existing and not speculative. An argument that Hong Kong might fall from the British to the communists was dismissed as too conjectural for relief under Sec. 243 (h). *Cheng Kai Fu v. Immigration and Naturalization Serv.*, 386 F.2d 752 (2d Cir. 1967). The current language was enacted in the 1965 Immigration and Nationality Act. The 1952 Act had specified relief only in instances of "physical persecution." Immigration and Nationality Act of 1952, § 243 (h), 8 U.S.C. § 1253 (h) (1964). The change was in part prompted by the effort of liberal spokesmen to convince Congress that the INS too narrowly interpreted the provision and that its decisions were not critically reviewed by the courts. *Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Judiciary Comm.* 89th Cong., 1st Sess., pt. 2, at 887 (1965); *Hearings on H.R. 7700 Before Subcomm. No. 1, House Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. 3, at 860-61 (1964).

193. In *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961), the court determined that imprisonment for ship desertion was a "criminal sanction that is reconcilable with generally recognized concepts of justice." *Id.* at 511. *Accord*, *Diminich v. Esperdy*, 299 F.2d 244 (2d Cir. 1961), *cert. denied*, 369 U.S. 844 (1962). *See also* *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Cir. 1962). The court in *Zupicich v. Esperdy* 319 F.2d 773 (2d Cir. 1963), *cert. denied*, 376 U.S. 933, *rehearing denied*, 377 U.S. 913 (1964) reached the same conclusion. Another court ruled that punishment for ship desertion was still a non-political crime even when the crewman feared being turned over to Yugoslav authorities for failure to participate in the ship's Communist Party meetings. *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962). (The court also ruled that loss of employment as a seaman would not amount to persecution.) Further resort to an international minimum standard may be seen in *Sovich v. Esperdy* 319 F.2d 21 (2d Cir. 1963) in which the court rejected as the test whether the offense was a crime under a "recognized judicial system." *Id.* at 28. The court noted that unlawful departure is a crime not traditionally found in western societies and therefore may be persecution for political opinion. *Id.*

*Matter of Kale*¹⁹⁴ the INS reported that while Yugoslavia was communist-controlled, there was religious freedom and the country had provided asylum for Hungarian freedom fighters. Thus, fear of imprisonment would not qualify a deserting crewman for relief under section 243 (h) since such punishment is "cognizable . . . under generally recognized civilized judicial systems."¹⁹⁵ In a subsequent case the court all but rendered the *Kale* precedent conclusive upon the issue of the persecution in Yugoslavia, in the absence of some special circumstances.¹⁹⁶

More recently, there has been somewhat of a trend away from a formula for determining persecution based upon an international minimal standard. Instead of inquiring into the nature of the punishment, the new approach is to characterize the penalty. In *Kovac v. Immigration and Naturalization Service*,¹⁹⁷ section 243 (h), said the court, was intended not for the benefit of common criminals but for those who would be criminally punished for violating a political motivated prohibition against defection from a police state.¹⁹⁸ Under this decision the INS would seem hard pressed to prove that any given Iron Curtain desertion law was *not* politically motivated or that any given desertion would *not* be interpreted by the home regime as a politically inspired defection.

The court in *Kovac* relied in part upon the Immigration Board of Appeals decision in *Matter of Janus and Janek*,¹⁹⁹ to date the most extensive exploration of the defection-political crime problem, in which the Board observed that a law forbidding defection "normally has political, rather than criminal, connotations."²⁰⁰ The test is whether the law has "travel control" as its "prime concern."²⁰¹ Applied in isolation, persons leaving Iron Curtain countries could successfully bootstrap themselves under this test into a legitimate claim under section 243 (h) by simply pointing to their national law penalizing overstay of an authorized leave abroad. Therefore, the Immigration Board of Appeals in *Matter of Janus and Janek* added another condition for relief under section 243 (h): the alien must show a previous involvement in political dissent

194. Adm. Dec. A9 555 532, cited in *Dombrovskis v. Esperdy*, 195 F. Supp. 488, 492 (S.D.N.Y. 1961).

195. *Id.*

196. *Dombrovskis v. Esperdy*, 321 F.2d 463 (2d Cir. 1963). The court ruled that the single Latvian plaintiff had presented no evidence distinguishing his situation from the Yugoslav seamen and that the court would therefore assume *Kale* to apply to his circumstances as well. *Id.* at 467. That conclusion may be difficult to reconcile with the fact that Latvia is a Soviet-occupied territory, unlike Yugoslavia, which is Communist-controlled.

197. 407 F.2d 102 (9th Cir. 1969).

198. *Id.* at 104.

199. 12 I. & N. Dec. 866 (1968).

200. *Id.* at 873.

201. *Id.*

before entering the United States; or at the very least, he must show that his departure was motivated by genuine political dissent.²⁰²

As an attempt to reconcile the "floodgate theory," Cold War pragmatism, the legislative intent of section 243 (h), and simple humanitarianism, the *Janus and Janek* test reaches heroic proportions. Only the relationship between the alien and his homeland is considered relevant. Other legal and foreign policy considerations are excluded. Nonetheless, to the extent that section 243 (h) expresses enmity toward undemocratic regimes, it may be improper to ignore the quasi-extradition function often inherent in the deportation of Iron Curtain defectors.²⁰³

2. Extradition Law as a Harmonizing Influence Under Section 243(h)

Surrender of fugitives was historically induced by the sheer power of the demanding sovereign from whom they had fled. That sharp retribution would be exacted by the sovereign in the form of summary, arbitrary punishment was no doubt a central factor in the growth of political asylum. But as the system of extradition became more refined, another principle intervened. States with liberal constitutional governments or democratic traditions could not honestly regard revolt against a tyrannical state, however brutal, as uncategorically immoral. The feeling that the fate of the rebel should not stand or fall with the success or failure of the revolution took on widespread appeal.²⁰⁴ The principle by which nations refused extradition on the ground that the alleged wrong was

202. The Board said:

A person whose departure from an Iron Curtain country is devoid of political motivation or whose decisions not to return is unrelated to the politics of that country (e.g., the person who finds better economic opportunity here, or enters into a marital relationship with a resident alien or United States citizen) is not entitled to a section 243 (h) stay solely on the basis that he may face criminal prosecution for overstay. Nor is a person who has not expressed opposition to the political regime before departure automatically excluded from relief, if he can show that his departure was politically motivated and that any consequences he faces on return are political in nature.

Id. at 876.

203. See generally Evans, *Acquisition of Custody Over the International Fugitive — Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. YEARBOOK OF INT'L L. 77 (1964). Quasi-extradition in its many variants has sometimes been referred to as disguised, irregular, or illegal extradition. *Id.* at 78 n.2. However, these terms imply a degree of conscious cooperation. Informal extradition may have some justification when cooperation is intended and circumstances render formal extradition procedures useless or inconvenient. *Id.* at 93-98. However, this is scarcely relevant where the extraditing state openly opposes the foreign prosecution. See also Kirchheimer, *supra* note 34, at 997-1000.

204. C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1019-20 (2d rev. ed. 1945); Hudson, *The Factor Case and Double Criminality in Extradition*, 28 AM. J. OF INT'L L. 274, 284-85 (1934); V. MAHAJAN, *supra* note 35, at 297-98.

not a wrong within the internal law of the extraditing state became known as "double criminality." Double criminality is a term in almost every United States extradition treaty, either by direct provision or by listing extraditable crimes exhaustively.²⁰⁵

One concomitant of the principle of double criminality is that a person who is extradited may not be tried for crimes other than those for which he was extradited or at least for crimes not listed in the extradition treaty.²⁰⁶ Therefore, the United States has refused to extradite persons charged with offenses seemingly common law crimes on their face if the offense for which prosecution would result was sufficiently politically related.²⁰⁷

Two notable examples with Communist countries are worth consideration. On March 30, 1950, the American Embassy in Praha received two notes from the Czech Ministry of Foreign Affairs with reference to the landing of three hijacked Czech planes carrying 85 passengers on an airfield in the American zone of West Germany. The eight leaders were charged by Czech authorities with kidnapping and endangering the lives of innocent passengers. The Czechs requested extradition for criminal trial.²⁰⁸ The American Embassy could have relied alone upon the principle of nonextradition without treaty right. But the United States went further and rejected the request for extradition on the broader ground that the hijacking was obviously motivated by a desire to escape and that criminal elements of the escape plot were irrelevant to that purpose; extradition would in effect subject political offenders to criminal prosecution.²⁰⁹ Similarly, when Castro gained power in Cuba, requests for mass

205. See generally C. HYDE, *supra* note 204, at 1018. See also *Wright v. Henekel*, 190 U.S. 40, 58 (1903); *Collins v. Loisel*, 259 U.S. 309, 311 (1922). In *Factor v. Laubenthal*, 290 U.S. 276 (1933), the Supreme Court declined to adopt the principle of double criminality in an extradition proceeding, either generally as implicitly incorporated into the extradition treaty by international law or as a matter of treaty interpretation. Significantly, the court rationalized that surrender of a fugitive charged with a "nonpolitical offense . . . generally recognized as criminal by the laws in force within its own territories" involves no impairment of legitimate technical restrictions upon extradition. *Id.* at 299.

206. See G. HACKWORTH, *supra* note 98, at 232-39; C. HYDE, *supra* note 204, at 1032-34. Limited exception may be made for waiver of the defendant's right, or loss of the right if the accused lingers in the country too long after his first trial. *Id.* at 1033. See also *United States v. Rauscher*, 119 U.S. 407, 419-21 (1886).

207. For the most part, American courts have been guided by an early English precedent laying down a standard for extradition for "political" crimes. In *Re Castioni*, [1891] 1 Q.B. 149, involved the extradition of a Swiss wanted for a murder committed during an armed uprising in a Swiss district. The court had no hesitation in deciding that the crime was political in nature since it was "incidental to and formed a part of political disturbances." *Id.* at 166. According to this formula, a political act must occur as part of a conflict between two groups battling for governmental control.

208. 22 U.S. DEP'T OF STATE BULL. 595 (1950).

209. *Id.*

extradition of Cuban defectors were made to the United States, perhaps more for their propaganda value than anything else. Replying to communist charges laid before the United Nations that the United States was sheltering Cuban war criminals, the United States answered that the Castro government had simply taken the expedient route of labeling all escaping political dissenters war criminals and that under the existing extradition treaty between the two countries the United States had cooperated to the extent "consistent with its traditional legal safeguards."²¹⁰

While American precedents on the point are few, they are amply supported by foreign case law. Thus, in 1955, Great Britain refused to extradite mutinous Polish seamen, though its treaty with Poland covered mutinous acts, because a pre-existing fear of political persecution on the part of the seamen colored the mutiny to make it a political offense excluded by the treaty.²¹¹ At about the same time, Switzerland recognized the political nature of escape, even in the absence of a pre-existing fear of political persecution, when the country seeking extradition precludes domestic opposition by means of political oppression.²¹² West Germany has also refused extradition for a political offense when the accused was able to prove that the prosecution was politically motivated.²¹³

In *Matter of Tejada*²¹⁴ the Board of Immigration Appeals frankly admitted the similarity of deportation and extradition when dealing with political refugees. Like the Secretary of State, the INS must decide whether the state to which the accused will return has a prima facie case against the accused. To send a person to a state in which he must face baseless criminal charges would be to subject him to persecution.²¹⁵ However, when deportation and extradition proceedings conflict, the

210. 43 U.S. DEP'T OF STATE BULL. 690, 695 (1960).

211. *Ex parte* Kolczynski, [1955] 2 Q.B. 540.

212. Judgment of Apr. 30, 1952, 78 BGE 39. This involved a reversal of the traditional stance of the Swiss that criminal acts could assume a political character only when they were intended to bring about an internal political change. See *In Re Castioni*, *supra* note 207.

213. Judgment of Jan. 21, 1953, 3 BGHSt. 392.

214. 10 I. & N. Dec. 435 (1964).

215. The respondent in *Tejada* seeking relief under section 243 (h) was the former chief of a military intelligence unit serving under the Trujillo regime in the Dominican Republic. The unit was more responsible for repression than intelligence, as fifty to sixty executions took place during the respondent's tenure. The Board ruled that persecution excluded:

. . . any governmental action taken in an orderly, judicial manner to determine respondent's responsibility for the former activities of [the intelligence unit he commanded], and to prescribe punishment only for acts so performed that, regardless of possible political motivation, they would constitute ordinary crimes under any civilized juridicial system.

Id. at 437.

deportation proceedings must cease upon a ruling of the Secretary of State granting extradition.²¹⁶ While the Secretary might voluntarily defer to a claim upheld under section 243 (h), the extradition order has priority.²¹⁷

Even where repressive brutality has occurred in foreign lands, the United States has been reluctant to allow extradition to be invoked against the oppressors. Strict political neutrality must be observed in order "to prevent our legal processes from being used by a foreign regime as instruments of reprisal against its domestic political opponents."²¹⁸ The willingness of the State Department to find barely cognizable traces of political expression is especially true for incidents involving the non-extradition of refugees from an Iron Curtain country.²¹⁹ The sympathetic implementation of the non-extradition principle by the State Department in avoiding what amounts to forcible repatriation of those seeking asylum from Communist persecution is a policy which might well enlighten the courts and the INS in the discharge of their respective duties under section 243 (h).

3. Political Questions and the Burden of Proof Under Section 243(h)

An alien who applies for a stay of deportation under section 243 (h) has the burden of proving probable persecution.²²⁰ One must sympathize with the less than well-informed alien who must prove foreign law, its application under near-totalitarian regimes, and the rather subjective elements of his fear of persecution.²²¹ Worse yet, the alien who has carried his burden of proof is not guaranteed relief under section

216. *Matter of Jiminez*, 10 I. & N. Dec. 309, at 312-13 (1963).

217. *Id.*

218. *In Re Gonzalez*, 217 F. Supp. 717, 722 (S.D.N.Y. 1963).

219. *Cf.* 34 U.S. DEP'T OF STATE BULL. 939 (1956); S. REP. NO. 14, at 6. These sources relate efforts of Communist nations to secure the return, either voluntary or with United States cooperation, of political escapees.

220. 8 C.F.R. § 242.17 (c) (1970).

221. A Yugoslav seaman seeking a stay of deportation in *Muskardin v. Immigration and Naturalization Serv.*, 415 F.2d 865 (2d Cir. 1969) lost his case in part because his expert witness had left Yugoslavia in 1940, was unfamiliar with the current administration of the law there, and could not cite cases of convictions for ship desertion. The crewman himself had never been in trouble with Yugoslav authorities and could only plead his hatred of communism as a Catholic. *See also Antolos v. Immigration and Naturalization Serv.*, 402 F.2d 463 (9th Cir. 1968). In *Matter of Sihalale*, 11 I. & N. Dec. 531 (1966), the Board said that a person seeking a stay of deportation under Sec. 243 (h) has available:

no better method for ascertaining current political conditions abroad than does the average person. Hence, practically speaking, [his] testimony may be the best — in fact the only — evidence. . . . It must, therefore, be accorded the most careful and objective evaluation possible, in the light of acceptable official knowledge.

Id. at 532-33.

243 (h), which authorizes, but does not require, the Attorney General or his agent to grant a stay of deportation.

The picture on the other side of the court room is wholly different. The INS is fully armed with information gathered by the State Department relating to the political atmosphere and governmental structure within foreign countries. This data is supplied confidentially to the INS, which may refuse to disclose its contents on the ground that such disclosure would be prejudicial to the interests of the United States.²²² This privilege is invariably invoked regarding Iron Curtain cases; and the information therefore does not become a part of the record. Should an appeal be taken, factual review is all but hopeless.²²³ Besides this classified information, the INS may rely on its own experts²²⁴ or the willingness of the hearing officer or Immigration Board of Appeals to take administrative notice of conditions abroad.²²⁵

Only a few courts have been bold enough to challenge the determinations of the INS. Other courts have seized upon two tactics in upholding administrative decisions. The 1950 National Security Act directed the Attorney General in mandatory terms not to deport any person to any country in which he finds that the person would suffer physical persecution.²²⁶ Section 243 (h) changed the mandate to an authorization to withhold deportation and referred to the "opinion" of the Attorney General rather than a "finding." Despite the paucity of legislative history,²²⁷ many courts have had no difficulty in distinguishing an opinion from a finding²²⁸ and characterizing the former as somehow less judicially reviewable, possibly because it is based on facts outside the record.²²⁹

222. 8 C.F.R. § 242.17 (c) (1970).

223. Arguments that this practice is irregular on the ground that the alien deportee has no opportunity to cross-examine the replying State Department writer or discredit his expertise have failed. *Hosseinmardi v. Immigration and Naturalization Serv.*, 405 F.2d 25 (9th Cir. 1968).

224. *E.g.*, *Cheng Fu Sheng v. Immigration and Naturalization Serv.*, 400 F.2d 679 (9th Cir. 1968), *cert. denied*, 393 U.S. 1054 (1969).

225. *Matter of Tejada*, 10 I. & N. Dec. 435 (1964) (due process within the Dominican Republic); *Matter of Vardjan*, 10 I. & N. Dec. 567 (1964) (penalty in Yugoslavia for willful overstay of visitor's visa); *Matter of Bukowska*, 10 I. & N. Dec. 49 (1962) (status of non-members of Polish Communist Party).

226. "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 1010, *amending* Immigration Act of 1917, ch. 29, § 20, 39 Stat. 890.

227. H.R. REP. No. 5678, 82d Cong., 2d Sess. (1952) states as to Sec. 243 (h): "The bill contains the provision in existing law to the effect that no alien shall be deported to any country in which the Attorney General finds that he would be subjected to physical persecution."

228. *E.g.*, *Vardjan v. Esperdy*, 197 F. Supp. 931 (S.D.N.Y. 1961), *aff'd* 303 F.2d 279 (2d Cir. 1962); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953). *See also* *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963), at 31-33 (dissent).

229. *See* *Sovich v. Esperdy*, 319 F.2d 21, 33 (2d Cir. 1963) (dissent); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

This results in confusing factual review (review of *opinion* of the Attorney General regarding likelihood of persecution) with review of the administrative standards in granting relief (review of the exercise of *discretion* of the Attorney General). The two must be kept clearly distinct. Whether a crewman will suffer imprisonment if deported is a factually reviewable matter, technically, although no doubt the greatest respect is owed an administrative determination having the benefit of classified information. But whether imprisonment constitutes valid grounds for a stay of deportation is a matter of law likewise reviewable, and the courts owe no great deference in this area to outside determinations. Nowhere in the 1952 Nationality and Immigration Act or regulations thereunder is persecution defined; and if the definition is to be established through administrative and judicial appellate procedure, surely the courts have a rightful place in setting the boundaries for discretion.²³⁰

The other judicial escape hatch has been the political question shibboleth. Relying upon *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,²³¹ some courts have said that factual review, even if the courts could compel full disclosure, would be excluded because an assessment of political conditions abroad is a matter impinging on foreign affairs and therefore a political question.²³² However, as that phrase is understood in the context of foreign affairs problems, the bare determination of a factual issue — will the deportee be persecuted? — in no way involves an administrative political *decision*, as with sovereign immunity or state recognition problems.²³³ The decision to grant, or refuse a stay of deportation because of expected persecution may in some indirect way insult a foreign nation — if that were ever a congressional concern²³⁴ — and only in this very broad sense might questions arising under section 243 (h) become matters so sensitive to the conduct of foreign affairs that they must be withdrawn from the judicial arena. The exercise of judicial review regarding persecution in cases coming within parole provisions,

230. "Administrative discretion should not be used as a cloak for a process which exposes one to the risk of oppression without judicial review." *Chi Sheng Liu v. Holton*, 297 F.2d 740, 742 (9th Cir. 1961).

231. 333 U.S. 103 (1948). "But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial." *Id.* at 111 (dictum).

232. See note 228 *supra*.

233. See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 567-73 (1966) which discusses the "access to information" rationale of the political question doctrine solely in terms of decision-making.

234. One court found "no indication that the broadening of the Attorney General's powers in these matters was predicated upon any political considerations, or that the courts' review of these questions unduly obstructed the conduct of the nation's foreign affairs." *Chi Sheng Liu v. Holton*, 297 F.2d 740, 742 (9th Cir. 1961).

however, apparently has not prompted complaints that the Executive is being embarrassed. Nor, if the strong presidential and congressional outburst over the Kudirka incident is any indication, is anyone ever likely to complain when a court declares that an alien is entitled to a temporary asylum. As a self-imposed restraint against wandering into an area of immigration law in which courts supposedly are forbidden, the political question doctrine has been called upon more to excuse a lack of confidence than competence.

Finally, the political question doctrine calls for absolute judicial subservience to the will of a political branch, a policy that would be sorely tested by a fact situation evoking an overwhelming humanitarian impulse.²³⁵

IV. CONCLUSION

Asylum problems in the United State are being handled by two competing jurisdictional units within the executive branch: the State Department and the INS. While the two rarely if ever compete in any real sense, the function each performs and the obligations each must meet conflict to some extent. The State Department, with its job of defining and applying foreign policy, is more sensitive to the consequences of giving or refusing asylum. It is more likely to see the alien seeking asylum as an object of concern and sympathy. The INS, however, regulating immigration according to a tightly knit, technically profuse statutory body of law, does not approach asylum problems sympathetically. Virtually every alien crewman before the INS is in the first instance a law violator and another bad mark on its record.

Because of the complexities of immigration law, it would be unwise to transfer all asylum problems *in toto* to the State Department, but certain changes might be made to accommodate the valid foreign policy considerations, humanitarian and political, which pervade asylum. These considerations suggest that the State Department should, either by law or regulation, be informed of all pleas made for a stay of deportation on the ground of expected persecution. Arrangement might also be made by law or regulation of a certification process, by which the INS would be bound to accept a State Department determination of either

235. See *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960). The court rejected a plea of an extraditee convicted abroad *in absentia* that judicial procedures awaiting him at home were unjust. The court held this matter a political question but added that, under some circumstances, the extraditee "would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle . . ." *Id.* at 79.

political conditions abroad or the probability of persecution in individual cases or both. This would also give the State Department an opportunity to interpret cases in light of United States obligations under the 1951 Geneva Convention. The present language of section 243 (h) conforms to that treaty, except possibly as to burden of proof; but the administration of the provision by the INS shows that international obligations might be compromised. To date, in fact, the INS does not appear to have considered such treaty problems.²³⁶

It may well be that the asylum problem is not well suited to the adjudicative process.²³⁷ But in the absence of a more aggressive stance by the State Department in demanding participation in asylum cases, the judiciary will have to take up the slack in protecting rights guaranteed under international and domestic law. Finally, there have been a few glimmers of hope that the INS itself will grow a scant more attuned to international politics in reaching its decisions. Whatever the means of reform, it is clear that in an era of international political gamesmanship all too often suspect for its deceit and hypocrisy, the United States cannot afford to speak with more than one clearly understood voice.

236. Research reveals the 1951 Geneva Convention being mentioned in only one case, and there, only in passing. The court in *Muskardin v. Immigration and Naturalization Serv.*, 415 F.2d 865 (2d Cir. 1969), held that the immigration hearing officer had a right to consider the treaty; but he was not bound to do so. The court took the treaty to have evidentiary value only insofar as it pointed to a liberalized congressional attitude on asylum, *Id.* at 867. The court's inferential conclusion that the treaty is not self-executing is doubtful. The convention contains frequent mandatory language which requires no implementing legislation. Further, the State Department took the position that the treaty would be immediately operative. *See* S. REP. No. 14, at 8.

237. *See* *Matter of Diaz*, 10 I. & N. Dec. 199 (1963). Respondent feared returning to the Dominican Republic after the ouster of Trujillo. The political facts as stated in the record were openly ignored. The Board commented that considering the steady shifting of events, the execution of sec. 243 (h) was more amendable to "purely administrative action." *Id.* at 204. Courts have made similar deference to the State Department regarding the political content of extradition and the fairness of judicial procedure at trial. *In re Gonzalez*, 217 F. Supp. 717, 722 (S.D.N.Y. 1963); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960).

Let's Look at the Record!

—•—

Shepard's Citations has been an
Indispensable Service for 98 Years

—•—

There is something compelling in such a record of stability.

Whether you consider the long years that Shepard's has been serving the American Bench and Bar or simply the last few...the remarkably accurate, efficient and comprehensive service which Shepard's gives to each subscriber has been recognized in every city and town in the United States.

The primary aim of Shepard's Citations has ever been to provide lawyers with maximum protection in the least possible space and at the lowest possible cost. This sound objective has been attained by exercising the greatest care in compiling and tracing the history and interpretation of every case and statute, both state and federal, by incessant and intelligent attention to detail and by conservative and economical management.

SHEPARD'S CITATIONS

McGRAW-HILL, Inc.

COLORADO SPRINGS

COLORADO 80901

SERVING THE LEGAL PROFESSION FOR 98 YEARS