

Rejected Cambodian Refugees: Prior Persecutors or Victims of an Illegal Screening Process

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NOTES

REJECTED CAMBODIAN REFUGEES: PRIOR PERSECUTORS OR VICTIMS OF AN ILLEGAL SCREENING PROCESS?

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I. INTRODUCTION

The Immigration and Naturalization Service's recent processing of Cambodian refugees for resettlement in the United States raises serious doubts about the accuracy of its "prior persecutor" determinations. Refugee law of both the United States and the international community prohibits the granting of asylum or resettlement to any person previously involved in the persecution of others. Legislators throughout the world share the view that such persons do not deserve international protection.¹ Few question the legitimacy of such a

1. A number of U.S. statutes and international treaties specifically exclude "prior persecutors" from their protection. The emergence of Nazi war criminals after World War II triggered worldwide concern over the treatment of "prior persecutors." For U.S. Statutes responding to this problem, see, e.g., Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (repealed 1952); The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (current version codified at 8 U.S.C. §§ 1101, 1151-1153, 1157-1159, 1181, 1182, 1251, 1253, 1255 n., 1521-1525; 22 U.S.C. § 2601 (1982)).

In the international arena, crimes, against peace, war crimes, and crimes against humanity were defined in Article 6 of the London Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, art. 6, 82 U.N.T.S. 279. Article 6(c) of the Charter defines crimes against humanity as follows:

[N]amely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

1 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 272-74 (1966) (citing the London Charter).

The Statute of the Office of the United Nations High Commissioner for Refugees contains, in paragraph 7(d), the provision that the High Commissioner's competence shall not

policy.

Evidence strongly suggests, however, that the screening process of the United States improperly excluded thousands of innocent Cambodians because they allegedly persecuted others under the oppressive Khmer Rouge regime.² These refugees' hopes of permanently resettling in a safe environment to enjoy basic human rights rest entirely at the discretion of the resettlement countries. Because of the potentially disastrous consequences, it is imperative that the Immigration and Naturalization Service's screening process be consistent with domestic and international law.

This Note concedes that the current screening process, which has denied refugee status to thousands of Cambodians, does not technically violate the Constitution or U.S. immigration law. The process does, however, contravene several fundamental principles of administrative law and congressional intent for the Refugee Act of 1980. Moreover, the screening process violates the international legal obligations of the United States. This Note will first review U.S. domestic law and then examine the international legal obligations of the United States regarding refugee rights.

II. BACKGROUND

The status and rights of refugees are covered in a number of sources. The Immigration and Naturalization Service (INS) must comply with the Constitution, congressional statutes, and its own regulations and rules.³ In addition to these domestic legal constraints, the INS must adhere to international agreements ratified by the United States.⁴

These sources of law consistently deny refugees who are deemed "prior persecutors" the protection and resettlement opportunities otherwise available to them.⁵ Such refugee protections include the following: the opportunity to meet the U.S. statutory definition of "refugee," thereby establishing eligibility for resettlement in the United

extend to any person for whom there are serious reasons for considering that he has committed a crime mentioned in Article VI of the London Charter. *Id.* at 272. Finally, the 1951 Convention Relating to the Status of Refugees states, in Article 1(f), that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed . . . a crime against humanity." United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 1(f), 189 U.N.T.S. 137 [hereinafter 1951 Convention] (The United States became a party to the Convention in 1967).

2. See *infra* text accompanying notes 143-57.

3. 2 P. MUTHARIKA, *THE ALIEN UNDER AMERICAN LAW* 272 (1984).

4. *Id.*; see also *infra* note 104 (citing Vienna Convention on the Law of Treaties, concluded May 23, 1969, 23 U.N. Doc. A/Conf. 39/27 (1969)) and accompanying text.

5. For a definition of "prior persecutor," see *infra* notes 16, 57 and accompanying text.

States; the right to *non-refoulement*;⁶ the right to certain procedural protections in the asylum process; and the protection of fundamental human rights. A review of these sources of law establishes the legal framework within which immigration officers make "prior persecutor" determinations.

A. UNITED STATES LAW ON IMMIGRATION AND REFUGEES

1. *An Overview of Immigration Law*

The Immigration and Nationality Act of 1952 (INA), comprises the basic immigration law in the United States today.⁷ With the enactment of the INA, Congress created the Immigration and Naturalization Service (INS) that, as a branch of the Department of Justice, administers and enforces the laws relating to the admission, exclusion, deportation and naturalization of aliens.⁸ Under the INA, the INS exercises both legislative and adjudicative powers.⁹ The Department of State, to a lesser degree, is also involved in the immigration process. Its role is principally one of issuing advisory opinions to the INS on asylum petitions;¹⁰ in addition, the Department's Refugee Bureau works closely with the INS in processing overseas applicants for refugee status.¹¹

Congress' enormous power over immigration and naturalization matters is clearly evident in two Supreme Court decisions. In *Boutlier v. INS*,¹² the Supreme Court stated: "It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."¹³ Almost ten years later, in *Mathews v. Diaz*,¹⁴ the Court recognized congressional power to discriminate against and

6. The right of non-refoulement refers to the right of an alien not to be "expel[led] or return[ed] . . . in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. XXX, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

7. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1982) [hereinafter INA].

8. A. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY § 9.01 (1983).

9. See generally K. DAVIS, ADMINISTRATIVE LAW TEXT 26-52, 139-56, 194-214 (3d ed. 1972) (outlining administrative law principles regarding delegation of rule making and adjudicative powers to administrative agencies).

10. Avery, *Refugee Status Decision Making: The Systems of Ten Countries*, 19 STAN. J. INT'L L. 235, 333-41 (1983).

11. STAFF REPORT OF SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 2D SESS., UNITED STATES PROCESSING OF KHMER REFUGEES I (Comm. Print 1984) [hereinafter STAFF REPORT].

12. 387 U.S. 118 (1967) (homosexual petitioner denied review of deportation order because excludable as psychopathic personality as provided in statute).

13. *Id.* at 123.

14. 426 U.S. 67 (1976).

among aliens on grounds considered unconstitutional if applied to American citizens.¹⁵

Congress' authority also includes the power to determine whom to admit. Currently, Congress employs a system of priorities that excludes, among others, persons who have participated in the persecution of any other person on account of race, religion, or membership in a particular social group.¹⁶

2. *The Refugee Act of 1980*

The Refugee Act of 1980,¹⁷ amending the Immigration and Nationality Act, provided the first comprehensive program for refugee admissions and resettlement in the United States.¹⁸ The Refugee Act adopted a new definition of refugee that eliminated the previous ideological and geographic restrictions;¹⁹ it also established the statutory basis for excluding "prior persecutors" from the United States.²⁰

The Act adopted the definition of refugee found in the 1967 United Nations Protocol Relating to the Status of Refugees.²¹ The legislative history of the Act indicates the intent of Congress to bring "United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees . . . and the United Nations Convention Relating to the Status of Refugees, which is incorporated by reference into United States law through the Protocol."²² Section 201 of the Refugee Act defines "refugees" as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion,

15. *Id.* at 79-80; *see also* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recent decision confirming *Diaz*).

16. Refugee Act of 1980, *supra* note 1, § 201(a), 8 U.S.C. § 1101(a)(42) (1982). Other persons considered excludable are those with undesirable political beliefs or moral character, and mental or physical disability. 8 U.S.C. § 1182(a) (1982).

17. Refugee Act of 1980, *supra* note 1.

18. 2 P. MUTHARIKA, *supra* note 3, at 138.

19. Until the Refugee Act of 1980 the Immigration and Nationality Act basically defined "refugees" as "persons fleeing persecution in communist countries or countries in the Middle East." A. LEIBOWITZ, *supra* note 8, § 1.01, at 1-15 (citing INA, *supra* note 7). The Refugee Act of 1980 changed a great deal of U.S. immigration law. Earlier legislation had dealt only with problems of specific categories of refugees. *See, e.g.*, Displaced Persons Act of 1948, *supra* note 1; Refugee Relief Act of 1953, Pub. L. No. 83-243 ch. 336, 67 Stat. 400 (1953).

20. Refugee Act of 1980, *supra* note 1, at § 201(a), 8 U.S.C. § 1101(a)(42) (1982).

21. A. HELTON, *MANUAL ON REPRESENTING ASYLUM APPLICANTS* (1984).

22. *See* S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979).

nationality, membership in a particular social group, or political opinion.²³

The Refugee Act of 1980 requires applicants for refugee admission to establish three facts: they must meet the definition of refugee; they must not have firmly resettled in any foreign country; and, except for certain waived requirements of Section 212(a) of the INA, they must be admissible as immigrants.²⁴ The definition of refugee automatically excludes a "prior persecutor."

Furthermore, the Refugee Act of 1980 protects a refugee's right to *non-refoulement*. The right of *non-refoulement* prohibits a nation from returning a refugee to a country where the refugee fears persecution.²⁵ Such protection, however, does not extend to an alien who has persecuted others.²⁶

3. Limits to INS Power

a. Administrative Law

Immigration officials enjoy relatively broad powers of discretion in executing their duties.²⁷ To properly limit this discretion, the Administrative Procedures Act (APA) provides for judicial review of agency adjudications.²⁸

The Board of Immigration Appeals (BIA), an appeals tribunal independent of and distinct from the INS, and partially independent of the judiciary, maintains a system of review at the administrative level.²⁹ Judicial review is also available for exclusion and deportation orders.³⁰ Courts may directly review procedural unfairness and errors

23. The Refugee Act of 1980, *supra* note 1, at § 201(a), 8 U.S.C. § 1101(a)(42) (1982).

24. *Id.* §§ 201(a), 207(c)(1), 8 U.S.C. §§ 1101(a)(42), 1157(c).

25. *Id.* § 203(e), 8 U.S.C. § 1253(h)(1),(2).

26. The Refugee Act of 1980 authorizes the Attorney General, in his discretion, to grant asylum to an alien who is determined to be a refugee. Refugee Act of 1980, *supra* note 1, at § 208(a), 8 U.S.C. § 1158(a). Because a "prior persecutor" is not afforded refugee status, he is ineligible for asylum. Similarly, section 203(e) of the Refugee Act, amending section 243(h) of the INA, states that the Attorney General shall not deport an alien if the "alien's life or freedom would be threatened in such country . . ." *Id.* § 203(e), 8 U.S.C. § 1253(h)(2)(A) (1982). But this clause prohibiting deportation "shall not apply to any alien if the Attorney General determines that the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; INA, *supra* note 7, at § 243(h)(2), 8 U.S.C. § 1251; *see also* 8 C.F.R. § 208.8(f)(1)(iii) (1986).

27. Federal courts have consistently upheld the use of such discretion by INS officers. For a more thorough discussion, see Ludd, *Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review?*, 8 T. MARSHALL L.J. 65, 68 (1982).

28. 5 U.S.C. § 702 (1982).

29. NATIONAL LAWYERS GUILD, IMMIGRATION DEFENSE MANUAL § 6.1 (1977) [hereinafter IMMIGRATION DEFENSE]; *see also* 8 C.F.R. §§ 3.1-3.8 (1976). This five member tribunal has the power to review certain kinds of decisions.

30. A. HELTON, *supra* note 21, at 176.

of law, including potential statutory or constitutional violations.³¹ In addition, courts are empowered to examine possible abuses of administrative discretion.³² To determine whether an abuse of discretion has occurred, courts typically apply a "rational basis" test.³³ Simply stated, this test precludes a finding of abusive discretion if an administrative officer had a *sufficient* or *rational* basis for the decision.³⁴ The courts will overturn arbitrary, capricious, or otherwise illegal decisions.³⁵

Overseas refugees seeking asylum in the United States, however, do not enjoy the procedural safeguard of review.³⁶ Refugees cannot appeal a denial of asylum.³⁷ Asylum is not a right, but rather a privilege granted at the discretion of the INS district director.³⁸ In 1950, the Supreme Court declared: "Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides."³⁹

b. United States Constitution

The constitutional limitations on INS decision-making and the rights of aliens are developing areas of law. Traditionally, overseas applicants have possessed virtually no "rights" under U.S. law.⁴⁰ In

31. *Id.*

32. *Id.*

33. Ludd, *supra* note 27, at 69.

34. *Id.*

35. IMMIGRATION DEFENSE, *supra* note 29, § 7.4(d)(1977); *see also* Foti v. INS, 375 U.S. 217, 228 (1963) (judicial review of denials of discretionary relief from deportation is limited to whether there has been any abuse of discretion); Yiu Sing Chun v. Sava, 550 F.Supp. 90 (E.D.N.Y. 1982), *rev'd on other grounds*, 708 F.2d 869 (2d Cir. 1983).

36. The application process for refugee status and asylum in the United States is easily summarized. An applicant must first meet the definition of refugee under § 201(a) of the Refugee Act of 1980, and not be excluded as a "prior persecutor." *See supra* notes 1, 23, and 24, and accompanying text. An applicant then fills out Form I-591 and, along with supporting documents, submits it to an overseas officer responsible for the area in which the applicant is located. A. HELTON, *supra* note 21, at 33. The individual, if over the age of fourteen, is then interviewed personally, under oath, by an immigration officer. 8 C.F.R. § 207.2(b) (1986). An applicant must have a sponsor, either an individual or an organization. A. HELTON, *supra* note 21, at 33. Denial of refugee status cannot be appealed. 8 C.F.R. § 207.4.

37. 8 C.F.R. § 207.4 (1986).

38. *Id.* at §§ 208.1-8(a); *see also* *In re* Paktorovics, 156 F. Supp. 813, 816 (E.D.N.Y. 1957) (admission into U.S. a privilege, not a right, for alien outside of territory), *rev'd on other grounds*, 260 F.2d 610 (2d Cir. 1958).

39. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (upholding power of Attorney General to bar entry into U.S. without hearing of alien war bride).

40. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (alien vested constitutional rights after lawfully entering and residing in the United States); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (alien on threshold of initial entry only owed due process provided by authorized Congressional procedure).

contrast, applicants on United States territory have enjoyed the constitutional safeguards of due process and equal protection.⁴¹

The Supreme Court stated in *Landon v. Plasencia*⁴² that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."⁴³ This is an entirely rational and necessary position. The entire world cannot claim the protection of the United States Constitution and Congress must maintain power over immigration and control of the U.S. border.⁴⁴

Recently, however, the courts conceded that Congress has conferred certain entitlements to asylum applicants presently in the United States. These entitlements, in turn, trigger due process protection. The courts have noted two protectable interests for asylum applicants.

First, the United States recognizes a liberty interest, the right of *non-refoulement*.⁴⁵ The 1967 United Nations Protocol,⁴⁶ to which the United States became a signatory in 1968, incorporated the 1951 Convention⁴⁷ regarding the status of refugees. The 1951 Convention declares that a contracting state cannot expel or return a refugee to territories where his life or freedom would be threatened on account of race, religion, nationality, or political beliefs.⁴⁸ Congress codified this international treaty obligation in the Refugee Act of 1980.⁴⁹ In *Yiu Sing Chun v. Sava*,⁵⁰ the Second Circuit recognized this liberty interest, concluding that a refugee who has a "well-founded fear of persecution" in his homeland has a protectable interest created by both treaty and statute.⁵¹ In such cases, the asylum applicant threatened with *refoulement* may receive some due process protection not available to

41. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (alien illegally discriminated against in violation of his 14th Amendment rights).

42. 459 U.S. 21 (1982).

43. *Id.* at 32; see also *Knauff*, 338 U.S. at 542 (aliens seeking admission into the United States have no rights; the United States may grant privileges upon terms that it prescribes); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1891) (an accepted maxim of international law is that every sovereign nation has the inherent power to forbid entrance of foreigners and admit those under prescribed conditions).

44. Note, *Due Process Rights of Asylum Applicants Expanded to Include Stowaways*, 50 BROOKLYN L. REV. 751, 771 (1984).

45. 8 U.S.C. § 1253(h)(1). Section 1253 states: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality or membership in a particular social group or political opinion." *Id.*

46. 1967 Protocol, *supra* note 6.

47. 1951 Convention, *supra* note 1.

48. *Id.* art. 33(1).

49. Refugee Act of 1980, *supra* note 1.

50. 708 F.2d 869 (2d Cir. 1983).

51. *Id.* at 877.

an alien claiming only admission.⁵² The severity of harm to an erroneously excluded asylee outweighs the administrative burden of providing a hearing.⁵³

Second, the courts also found a protectable property interest. This interest is based on the right to petition for asylum and the right to be heard on that petition.⁵⁴ Once Congress has granted these liberty and property interests, the INS cannot deny them without the constitutional protection of due process.

Governmental agencies such as the INS face two additional restrictions. First, an agency must abide by its own promulgated regulations and procedures.⁵⁵ Second, an agency must operate under adequate standards or guidelines and risk a violation of due process.

4. *Scope of Statutory Exclusion for "Prior Persecutors"*

a. Definition of "Prior Persecutors"

The broad language of the Refugee Act of 1980 provides little insight as to the type of conduct that triggers a denial of refugee status.⁵⁶ The Act's language describing prior persecutors as "any person who ordered, incited, or otherwise participated in the persecution . . . [of others]" is ambiguous. Adjudications and various governmental publications provide little assistance.

Although no universally accepted definition of persecution exists, the INS's *Worldwide Guidelines for Overseas Refugee Processing*⁵⁷ offers a definition:

52. *Id.*

53. *Id.*

54. *Id.* at 877 n.25. 8 U.S.C. § 1158(a) directs the Attorney General to establish asylum procedures. Based on this provision, courts have concluded that a property right exists. *See, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982). In *Haitian Refugee Center*, the Fifth Circuit stated:

Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum. Specifically, we find in the federal regulations establishing an asylum procedure . . . a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum.

Id.

55. 2 P. MUTHARIKA, *supra* note 3, at 272; *see, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *see also Morton v. Ruiz*, 415 U.S. 199 (1974) (Bureau of Indian Affairs failed to comply with own internal procedures by not publishing eligibility requirements for benefits available to public).

56. STAFF REPORT, *supra* note 11, at 29.

57. IMMIGRATION AND NATURALIZATION SERVICE, *WORLDWIDE GUIDELINES FOR OVERSEAS REFUGEE PROCESSING* (Aug. 1983) [hereinafter *WORLDWIDE GUIDELINES*]. These guidelines were an outgrowth of a review of refugee policy and Indochinese processing. They superseded earlier guidelines of February 22, 1982, that provided inadequate guidance for processing in particular Khmer applicants. *See infra* text accompanying notes 140-45. For discussion of the binding nature of the guidelines, *see infra* text accompanying notes 205-07.

It can be inferred, however, by reference to Article 33 of the [1951] Convention [Relating to the Status of Refugees] and section 243(h) of the INA, that persecution includes *a threat to life or freedom*. In context, *a threat to life* clearly relates to the prospect of loss of life or serious physical injury. The *threat to freedom* is less clearly defined. It certainly includes risk of prolonged detention or incarceration, significant restriction on freedom of movement.⁵⁸

A joint report by the State Department and the INS attempts to interpret the scope of exclusion as to those persons considered prior persecutors.⁵⁹ The Joint Report states that the denial of refugee status contemplated by the "second sentence" (i.e., the "prior persecutor" exclusion clause in Section 201(a)) of the Refugee Act intended to include not only those persons who directly committed or perpetrated acts of persecution, but also those whose acts were less direct, so long as they "ordered, incited, assisted, or otherwise participated in the persecution of others."⁶⁰

In addition, at least two cases, one before the Board of Immigration Appeals and one before the First Circuit Court of Appeals, have established that the Refugee Act contemplated persecution by individuals or non-governmental organizations as well as persecution by organized governments.⁶¹

b. Evidentiary Standard

A number of cases have explored the evidentiary standard used by the INS and reviewing courts in determining whether an individual is a "prior persecutor." In *Fedorenko v. United States*,⁶² the Supreme Court upheld the government's denaturalization of an individual who had concealed on his visa application his service as an armed guard at a Nazi concentration camp. Because of the seriousness of the government's action, however, the Court required of the government a burden of "clear, unequivocal and convincing evidence."⁶³

Similarly, the Ninth Circuit, in *Laienieks v. INS*,⁶⁴ held the INS to the same high evidentiary standard when the INS sought to prove that an individual involved with the Latvian Political Police had persecuted others. The court interpreted Section 1251(a)(19) of the INA to

58. WORLDWIDE GUIDELINES, *supra* note 57, at 9.

59. JOINT REPORT OF THE BUREAU FOR REFUGEE PROGRAMS (Dep't of State) AND THE IMMIGRATION AND NATURALIZATION SERVICE (Dep't of Justice), THE PROCESSING OF CAMBODIAN REFUGEES: SECOND SENTENCE ASPECTS (March 1985) [hereinafter JOINT REPORT].

60. *Id.*

61. See *McMullen v. INS*, 658 F.2d 1312, 1318 (9th Cir. 1981) (persecution by the Provisional Irish Republican Army, a clandestine, non-governmental terrorist organization); *Rosa v. INS*, 440 F.2d 100, 101 (1st Cir. 1971) (fear of persecution by a mob is sufficient grounds for staying deportation).

62. 499 U.S. 490 (1981).

63. *Id.*

64. 750 F.2d 1427 (9th Cir. 1985).

allow deportation of aliens if they "ordered, incited, assisted or otherwise participated in the persecution of any person. . . ."⁶⁵ The court limited deportation to circumstances where the evidence established that the individual in question *personally* ordered, incited, assisted, or otherwise participated; that is, the court deemed mere acquiescence or membership in an organization insufficient.⁶⁶ The seriousness of depriving an individual of refugee status justifies this high evidentiary burden.

B. INTERNATIONAL LAW PERTAINING TO REFUGEES AND HUMAN RIGHTS

The United Nations Charter and a number of international treaties and declarations address the issues of refugee rights and the obligations of nation states towards refugees.⁶⁷ The 1951 Convention⁶⁸ and the 1967 Protocol Relating to the Status of Refugees⁶⁹ established the international legal principle of *non-refoulement*, which prohibits nation states from returning refugees to territories where they would be threatened with persecution.⁷⁰

These instruments exclude from their protection, however, refugees that are deemed prior persecutors.⁷¹ The United Nations High Commissioner for Refugees (UNHCR),⁷² one of several international organizations that protect and provide assistance to refugees, has published the *Handbook on Procedures and Criteria for Determining Refu-*

65. *Id.* at 143.

66. *Id.*

67. Those which will be discussed below are the 1951 Convention, *supra* note 1; 1967 Protocol, *supra* note 6; Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967); Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration]; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec., OEA/Ser. L/VII.23, doc. 21 rev. (1968) [hereinafter American Convention]; American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec., OEA/Ser.L/VII.23, doc. 21 rev. (1980) [hereinafter American Declaration]; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6361 (1976) [hereinafter Covenant on Economic, Social and Cultural Rights]; International Covenant on Civil and Political Rights, Dec. 16, 1966 G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Civil and Political Rights].

68. 1951 Convention, *supra* note 1, art. 33.

69. 1967 Protocol, *supra* note 6, art. I.

70. The 1951 Convention related only to persons affected by events in Europe occurring prior to January 1, 1951. The 1967 Protocol extended the protection of the 1951 Convention by eliminating the geographic and date limitations.

71. 1951 Convention, *supra* note 1, art. 1(f); 1967 Protocol, *supra* note 6, art. I(2).

72. The Statute of the Office of the United Nations High Commissioner for Refugees was adopted by the General Assembly on December 14, 1950 as an annex to G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950). The functions of the UNHCR are to provide international protection to refugees and supervise the application of international conventions. 1 GRAHL-MADSEN, *supra* note 1, at 18.

gee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.⁷³ Authorities recognize this *Handbook* as an authoritative interpretation of the refugee standard and view it as a valuable aid in analyzing asylum claims.⁷⁴ The *Handbook* lays down a number of procedural protections designed to prevent refugees from being haphazardly denied asylum.⁷⁵ Finally, several human rights instruments delineate a number of refugee entitlements.⁷⁶

1. *The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*

The United States is a party to the 1967 Protocol Relating to the Status of Refugees, and to those provisions of the 1951 Convention that the 1967 Protocol incorporates.⁷⁷ Over ninety nations are party to the Convention, the Protocol, or both. The Convention and the 1967 Protocol established the principle of *non-refoulement*, which prohibits contracting states from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."⁷⁸ This internationally accepted principle arguably constitutes the most fundamental obligation of nation-states in the treatment of refugees.⁷⁹ Neither the Convention nor the Protocol guarantees a refugee the right of entry to a country.⁸⁰ Nevertheless, *non-refoulement*, at the very least, restricts the otherwise well recognized right of a sovereign state to admit or exclude noncitizens as it sees fit.⁸¹

The protections and rights offered by these two treaties do not extend to those guilty of persecuting others. Article 1(f) of the Convention, adopted by the Protocol, states: "The provisions of this con-

73. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (Geneva 1979) [hereinafter HANDBOOK].

74. See A. HELTON, *supra* note 21, at 2-3. For decisions that cite the HANDBOOK, see *Zavala-Bonella v. INS*, 730 F.2d 562, 569 n.7 (9th Cir. 1984); *In re Frentescu*, 18 I. & N. Dec. 244, 246 (1982); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 468 (1980).

75. See HANDBOOK, *supra* note 73, at 45-51.

76. See sources cited *supra* note 67.

77. The U.S. Senate ratified the 1967 Protocol on October 4, 1968, with two reservations (one relating to taxation of refugees, the other to benefits available to refugees under the Social Security Act). See 1967 Protocol, *supra* note 6.

78. 1951 Convention, *supra* note 1, art. 33; 1967 Protocol, *supra* note 6, art. I(1).

79. Teitlebaum, *Immigration, Refugees, and Foreign Policy*, 38 INT'L ORG. 429, 437 (1984).

80. Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees*, 1982 MICH. Y.B. INT'L LEGAL STUD. 291, 300.

81. Teitlebaum, *supra* note 79, at 437.

vention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a crime against peace, a war crime, or a crime against humanity. . . .”⁸² Similarly, Article 33(2) of the 1951 Convention provides that the benefits of *non-refoulement* (Art. 33(1)) “may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁸³

2. UNHCR Handbook on Procedures and Criteria

Because nation-states can legally deny important protections, the procedure by which a nation excludes them becomes extremely important. The UNHCR *Handbook* provides an authoritative interpretation of procedural safeguards under the 1951 Convention and the 1967 Protocol that a nation-state must follow before an individual is excluded as a “prior persecutor.”⁸⁴ Because the United States is bound by these treaties, it must adhere to the *Handbook*’s safeguards. The *Handbook* explains the Convention’s and Protocol’s definition of the term “refugee.” Its publishers intended the explanations to guide government officials of contracting states in their determination of refugee status.⁸⁵ Chapter four of the *Handbook* discusses clauses of the Convention that exclude from refugee status persons otherwise having the characteristics of refugees.⁸⁶

In Part II, the *Handbook* discusses procedures for determining refugee status. The *Handbook* requires each contracting state to devise its own procedure consistent with that state’s particular constitutional and administrative requirements.⁸⁷ The *Handbook* further recommends certain procedural requirements designed to ensure a minimum level of protection for each applicant.⁸⁸ The requirements include competent interpreters, necessary procedural guidance for the

82. 1951 Convention, *supra* note 1, art. 1(f).

83. *Id.* art. 33(2).

84. See HANDBOOK, *supra* note 73, at 45-51; see also *supra* note 74 and accompanying text.

85. HANDBOOK, *supra* note 73, at 2.

86. Basically, three categories of persons otherwise having the characteristics of refugees are excluded from refugee status. The first category consists of those persons already receiving U.N. protection or assistance. *Id.* at 33-34. The second category is made up of those persons not considered to be in need of international protection. *Id.* at 34. The third category is persons not considered to be deserving of international protection. *Id.* at 35.

87. *Id.* at 45.

88. These requirements were recommended by the Executive Committee of the High Commissioner’s Programme, at its twenty-eighth session in October 1977. The Committee realized that the states bound by the Convention and the Protocol would establish different procedures. It therefore sought to guarantee a few procedural safeguards. *Id.* at 45-46.

applicant, and reasonable time to appeal a decision denying refugee status.⁸⁹

The *Handbook*, in discussing fact finding methods, states that the burden of proving refugee status rests with the applicants.⁹⁰ However, because of the difficulty of proof in these situations, the *Handbook* provides that "if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."⁹¹

3. *Human Rights Guaranteed to Refugees*

Some international instruments provide refugees seeking asylum greater protection than does the 1951 Convention or the 1967 Protocol. The Declaration of Territorial Asylum requires that a nation-state admit an individual fleeing persecution in a neighboring state.⁹² The American Convention on Human Rights⁹³ and the American Declaration of the Rights and Duties of Man⁹⁴ similarly require that a nation-state grant asylum to a refugee in accordance with its laws and international agreements.

The Universal Declaration of Human Rights creates a number of rights and freedoms to which everyone, including a refugee, is entitled.⁹⁵ Among these are "the right to life, liberty and security of person" (Article 3);⁹⁶ the right to not be "subjected to . . . cruel, inhuman or degrading treatment" (Article 5);⁹⁷ "the right to seek and to enjoy

89. *Id.* at 46.

90. *Id.* at 47.

91. *Id.* at 47-48.

92. See Declaration on Territorial Asylum, *supra* note 67, art. 3, par. 1. It states that "no person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection of the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution." *Id.*

93. American Convention, *supra* note 67, art. 2(7), states: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." *Id.* The United States is a signatory to this convention, and therefore legally bound. See U.S. CONST. art. VI.

94. American Declaration, *supra* note 67, art. 27, states: "Every person has the right, in cases of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country, and with international agreements." *Id.* The United States is a member of the Organization of American States and therefore bound to respect the rights enumerated in the American Declaration. Young-Anawaty, *International Human Rights Forum: A Means of Recourse for Refugees*, 1982 MICH. Y.B. INT'L LEGAL STUD. 451, 459 n.94.

95. Universal Declaration, *supra* note 67.

96. *Id.* art. 3.

97. *Id.* art. 5. A similar provision can be found in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222.

in other countries asylum from persecution" (Article 14);⁹⁸ and the "right to a nationality" (Article 15).⁹⁹ In addition, the two International Covenants on Human Rights provide civil, political, economic, social and cultural rights to all people.¹⁰⁰

Finally, the provisions of the United Nations Charter arguably impose obligations on nation-states to assist in refugee resettlement. Refugees often suffer near total deprivation of human rights and consequently pose serious economic and humanitarian problems for the international community. Article 1 of the Charter lists as one of its purposes the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and [the promotion] and [encouragement of] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁰¹ Similarly, Article 55 states that "the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all"¹⁰² In Article 56, "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."¹⁰³

4. *United States Bound by International Law*

International law binds the United States in two ways. First, the United States is bound by any international instrument that it has signed and ratified.¹⁰⁴ Article VI of the Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."¹⁰⁵ Second, customary international law binds the United States. For example, in *The Paquete Habana*,¹⁰⁶ the Supreme Court held that the capture of two

98. Universal Declaration, *supra* note 67, art. 14.

99. *Id.* art. 15. For a discussion on the binding nature of the Universal Declaration, see Young-Anawaty, *supra* note 94, at 459.

100. See Covenant on Economic, Social, and Cultural Rights, *supra* note 67; Covenant on Civil and Political Rights, *supra* note 67. Refugees suffer serious deprivations of most of these rights. They are frequently in high risk of danger, subjected to inhuman living conditions, and without home or nationality. Cambodian refugees serve as a good example of these problems. For a description of the tragic living conditions in the Cambodian refugee camp of Khao-I-Dang, see *infra* note 234.

101. U.N. CHARTER art. 1.

102. *Id.* art. 55.

103. *Id.* art. 56.

104. A nation is bound to act in conformity with the provisions of any legally binding international document it signs. Vienna Convention on the Law of Treaties, May 22, 1969, U.N. Doc. A.Conf./39/27, at 289, *reprinted in* 8 I.L.M. 579 (1969).

105. U.S. CONST. art. VI.

106. 175 U.S. 677 (1900). Justice Grey declared that "International Law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.

Spanish fishing boats by the United States during the war with Spain violated customary international law.¹⁰⁷

Moreover, U.S. courts increasingly acknowledge the obligations of the United States under its treaties and customary international law. In a series of cases involving Haitian refugees illegally in the United States, a district court found that the activities of the INS violated petitioners' rights under the Protocol and the Convention.¹⁰⁸ In *Fernandez v. Wilkinson*,¹⁰⁹ the court found the INS bound by customary international law. The court declared that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law."¹¹⁰ In sum, both the positive law of treaties as well as customary international law define recognizable legal rights.¹¹¹

III. THE DILEMMA OF CAMBODIAN REFUGEES

The oppressive Khmer Rouge regime and Vietnam's subsequent invasion of Cambodia forced hundreds of thousands of Cambodians to seek refuge in Thailand.¹¹² Keeping its promise to help Thailand resettle the refugees, the United States established a screening process to determine those persons eligible for resettlement in the United States, and to reject those deemed "prior persecutors."¹¹³ A close look at this screening process reveals many problems.¹¹⁴ Such findings compel an analysis of the consistency of this screening process with United States and international law.

A. BACKGROUND OF CAMBODIAN REFUGEE MOVEMENTS

Gross deprivations of civil, political, and economic rights fre-

107. *Id.*

108. See *Bertrand v. Sava*, 535 F. Supp. 1020 (S.D.N.Y. 1982); *Vigile v. Sava*, 535 F. Supp. 1002 (S.D.N.Y. 1982). The U.S. District Court for the Southern District of New York cited Article 31 (prevention of penalties due to illegal entry and prevention of unnecessary restrictions on movements) and Article 3 (forbidding discrimination in applying the treaty) of the Convention and the Protocol. Anker, *Haitians Win NY Custody Battle*, 5 IMMIGR. J. 12 (Mar. 1982).

109. 505 F. Supp. 787 (D.Kan. 1980). The question under review was whether the INS had acted arbitrarily in indeterminately detaining an excluded alien, who had neither been convicted of a crime in the United States nor found to be a security risk.

110. *Id.* at 798. The court cited a number of international instruments that, together with other sources, provided a consensus of international law on arbitrary detention. See Note, *Fernandez v. Wilkinson: Making the United States Accountable Under Customary International Law*, 10 J. INT'L L. & POL. 360 (1981).

111. Schneebaum, *Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy*, 1982 MICH. Y.B. INT'L LEGAL STUD. 373, 379.

112. See *infra* notes 115-20 and accompanying text.

113. See *infra* notes 122-28, 130-36 and accompanying text.

114. See *infra* text accompanying notes 143-57.

quently cause refugee movements.¹¹⁵ The story of Cambodian refugees is no different. Since 1970, the Cambodian people have endured foreign invasion, civil wars, massive aerial bombardment, widespread famine, and foreign occupation. In 1975, the Khmer Rouge, Cambodia's communist movement led by Pol Pot, won control of the nation. The Khmer Rouge's ensuing mass murder of their fellow countrymen during their three-year rule "remains one of the most profound tragedies of recent history."¹¹⁶ Over a million of that nation's total population of seven million died during this brief period.¹¹⁷ Subsequently, on Christmas Day 1978, the Vietnamese army invaded Cambodia. Within weeks, the Khmer Rouge regime disintegrated, and Vietnam replaced it with a government friendly to Vietnam, the People's Republic of Kampuchea (PRK).¹¹⁸

Because of Vietnam's full-fledged invasion and continued efforts to stamp out resistance, tens of thousands of Cambodians fled the country.¹¹⁹ The majority of these refugees crossed the border into Thailand,¹²⁰ while many tragically died from Vietnamese military attacks and land mines.¹²¹ The United States and other nations subsequently assured the Thais that they would find refugees permanent homes outside of Thailand if Thailand would grant the refugees first asylum.¹²²

B. THE ROLE OF THE UNITED STATES

1. *Resettlement In the United States*

The United States established a refugee program in Thailand, which operated out of its embassy and attempted to identify refugees eligible for entry into the United States.¹²³ From 1975 to 1983, the United States admitted 120,000 Cambodian refugees.¹²⁴ In mid-1983,

115. LAWYERS COMMITTEE FOR HUMAN RIGHTS, KAMPUCHEA: AFTER THE WORST 1 (1985).

116. *Id.*

117. *Id.* at 3.

118. *Id.* at 17.

119. Only a very few refugees were able to escape Cambodia during Pol Pot's rule because of well-sealed borders. Devecchi, *Politics and Policies of "First Asylum" in Thailand*, INT'L RESCUE COMMITTEE (date unknown).

120. These waves of refugees included Khmer Rouge political and military figures, fleeing the Vietnamese occupation forces, as well as starving peasants and urban, educated people. U.S. COMMITTEE FOR REFUGEES, CAMBODIAN REFUGEES IN THAILAND: THE LIMITS OF ASYLUM 4 (1982) [hereinafter LIMITS OF ASYLUM].

121. In June 1979, 42,000 Khmer were forced to return to Cambodia at Preat Vihear. See JOINT REPORT, *supra* note 59, at 15; see also STAFF REPORT, *supra* note 11, at IX.

122. STAFF REPORT, *supra* note 11, at 1.

123. This program was comprised of State Department officials, INS officials, and contract employees of the Joint Voluntary Agency. In Washington, the Department of State's Refugee Bureau is primarily responsible for developing U.S. refugee policy. *Id.*

124. N.Y. Times, May 22, 1985, at 1, col. 4.

however, the rejection rate of the 40,000 Khmer seeking resettlement rose significantly.¹²⁵ In the early months of 1985, State Department officials declared that the United States would soon stop processing Cambodian refugees in Thailand.¹²⁶ The officials stated that the remaining Cambodians in Thailand were ineligible for admission.¹²⁷ Out of the 25,000 refugees in the remaining Khmer camp of Khao-I-Dang, the United States screening program disqualified 14,500 applicants as either security risks or non-refugees (i.e., not satisfying the definition of "refugee" in the Refugee Act of 1980).¹²⁸

2. *The Need to Screen for "Prior Persecutors"*

The Cambodian refugee flows into Thailand after the 1978 Vietnam invasion included both victims of the Khmer Rouge's persecutions and the persecutors themselves.¹²⁹ Yet knowledgeable sources maintain that "most of the Khmer Rouge soldiers and cadre and their families returned either to Pric or Nong Pru on the Thai-Cambodian border during the June 1980 'repatriation' . . ."¹³⁰ Because a small number of Khmer Rouge stayed behind, the United States instituted a program necessary to screen those Cambodian refugees seeking resettlement in the United States. Since this screening program dramatically influences the futures of thousands of people, it is imperative that the program conform with domestic and international law.

C. UNITED STATES SCREENING PROCESS

1. *Mechanics of the Screening Process*

The screening process currently requires three steps, with each step involving a separate agency.¹³¹ The Joint Voluntary Agency

125. STAFF REPORT, *supra* note 11, at IX.

126. See N.Y. Times, *supra* note 124, at 1, col. 4.

127. *Id.* Officials refer here to the approximately 25,000 refugees in the main camp at Khao-I-Dang. In addition to these individuals, there are approximately 230,000 "displaced" Cambodians living in camps, just inside the Thai border; who were driven there by recent Vietnamese military activities. These persons have not been registered as refugees by the United Nations, nor regarded as such by the Thais or principal resettlement countries (United States, Canada and Australia). Thailand intends to induce them to return to Cambodia when the situation permits. Although there is discussion of the United States screening these displaced persons, at this point they have been categorized as non-refugees and ineligible for resettlement. The handling of these "displaced" persons is not at issue in this Note. See Washington Post, Jun. 17, 1985, at 27 (weekly ed.); N.Y. Times, May 22, 1985, at 4, col 3.

128. N.Y. Times, May 22, 1985, at 4, col. 3. As for the remaining 10,000 of the camp population, 2,000 have yet to be interviewed, 4,300 have been allowed to remain by the Thai government even without official refugee status, and 4,000 are believed to have been accepted by other countries. N.Y. Times, May 23, 1985, at 7, col. 1.

129. STAFF REPORT, *supra* note 11, at 36.

130. *Id.*

131. *Id.*

(JVA), an arm of the International Rescue Committee, identifies, interviews and arranges sponsorship for refugees.¹³² Personnel from the JVA initially screen the applicants.¹³³ Those applicants it suspects of having persecuted others under the Khmer Rouge are directed to Ethnic Affairs Officers (EAO) of the Department of State Refugee Bureau.¹³⁴ The EAO then subjects the applicant to a more in-depth examination.¹³⁵ Lastly, an INS official interviews the applicant, along with his or her family. Based on information and determinations supplied by the EAO, the INS makes the final decision on the applicant's eligibility for resettlement in the United States.¹³⁶

Sensitive to the humanitarian concerns of Cambodian resettlement, Congress and the Reagan administration issued a series of measures intended to ease the burden of proof for Cambodian refugee applicants.¹³⁷ These measures included a series of directives to the INS known as the Kamput Cables,¹³⁸ National Security Decision Directive Number 93,¹³⁹ and the INS *Worldwide Guidelines on Overseas Refugee Processing of August 1983*.¹⁴⁰

President Reagan's directive instructed the Attorney General to "determine whether there are categories of persons who . . . share common characteristics that identify them as targets of persecution in a particular country. . . . Applicants for refugee status who fall into any such categories of fact . . . and who allege persecution will not

132. *Id.* at 16.

133. *Id.* at 36.

134. *Id.*

135. The Ethnic Affairs Offices are privately contracted and review cases for civil or military service verification and communist affiliation. Unidentified Report from the Joint Volunteer Agency in Thailand, *U.S. Refugee Program in Thailand*, at 22 [on file at *Cornell International Law Journal*].

136. Specifically, the INS determines whether the applicant qualifies as a refugee as defined by the Refugee Act of 1980, and as incorporated by the Immigration and Nationality Act. The service additionally ensures that the refugee is not otherwise excludable from U.S. admission. The INS interviews for the Khao-I-Dang applicants are conducted in a processing center at Ban Thai Smart near Aranyaprathet. The INS in Thailand is headed by an Officer-in-Charge and three permanent immigration officers. The individuals, plus an additional six to eight officers on temporary assignment, report to the Ambassador in Thailand and to the INS District Director in Hong Kong. STAFF REPORT, *supra* note 11, at 21-22.

137. American Council for Nationalities Service, *Computer Survey of Denied Cambodian Cases Raises Questions About Review Process*, 6 REFUGEE REP. No. 11 (Nov. 8, 1985) [hereinafter *Cambodian Cases*].

138. Kamput Cables, regarding Reference Processing of Cambodian Refugee Applicants at Camp Kamput (10/29/82 to 7/14/83) [hereinafter Kamput Cables. On file at *Cornell International Law Journal*].

139. Presidential National Security Decision Directive No. 93, May 13, 1983, *discussed in* WORLDWIDE GUIDELINES, *supra* note 57, at 24-25 [hereinafter Presidential Directive]. The Presidential Directive "was intended to ensure proper and effective processing consistent with United States law and policy objectives, including steps to improve control guidance." WORLDWIDE GUIDELINES, *supra* note 57, at 24.

140. WORLDWIDE GUIDELINES, *supra* note 57.

have to present independent evidence regarding persecution."¹⁴¹ The Attorney General subsequently assigned the development of these categories to the INS. The INS responded by releasing guidelines that delineated eight categories of persons.¹⁴²

2. Results of the Screening Process

Since the release of the guidelines, the "INS has performed admirably in Thailand, approving about 35,000 of the approximately 53,000 Cambodian applicants at [Khao-I-Dang]."¹⁴³ Nevertheless, "many people closely connected with the Khmer review process feel the spirit of these measures [—even the letter of the *Worldwide Guidelines*—] is not being followed."¹⁴⁴ There is concern that "too rigorous a standard is being applied to the Khmer and that many of the 14,500 rejectees remaining at [Khao-I-Dang] were denied for reasons which should not be considered damning in view of the guidelines."¹⁴⁵

The U.S. Ambassador to Thailand ordered a computer survey of 1,898 denied cases; the results of the survey indicate an extremely serious problem in the screening process.¹⁴⁶ The following is a representative sampling, not a complete presentation, of the survey's results. Approximately forty cases (180 people) "appear to have been denied solely on the basis of being 'old people' or 'base people'."¹⁴⁷ These

141. J. Mitchell, Report on Impressions Following a Week in Bangkok, Thailand, April 13-21, Reviewing Khmer Refugee Policy and Practice 7 (1985) (unpublished manuscript).

142. Presently the categories in *WORLDWIDE GUIDELINES* apply only to applicants from Vietnam, Laos, and Kampuchea. The categories for Kampuchea are as follows:

- A) Former officials of the government prior to 1975 takeover.
- B) Former members of the military prior to 1975 takeover.
- C) Persons formerly or presently employed by U.S. or Western institutions; persons educated in the West and persons who have worked in refugee programs.
- D) Ethnic Chinese.
- E) Buddhist monks.
- F) Persons who left Kampuchea between 1975 and 1980 and who experienced imprisonment, forced relocation, forced labor and forced family separation; or persons with family members who had experienced such treatment or who had been killed or had disappeared.
- G) Persons with close relatives in the United States.
- H) Members of households of persons falling into any of the preceding categories.

WORLDWIDE GUIDELINES, *supra* note 57, at 32-35.

143. Bangkok Joint Voluntary Agency, Observations on the Khmer Review Process 2 (Sept. 23, 1985) (unpublished report detailing a computer survey conducted by the American Embassy in Bangkok) [hereinafter *Observations*]. The computer survey is reprinted in 6 *REFUGEE REPORTS*, *supra* note 137.

144. *Observations*, *supra* note 143, at 2.

145. *Id.*

146. Based on a recommendation by the Joint Voluntary Agency, Ambassador Brown in the Bangkok embassy ordered a computer survey of the denied cases. See *Cambodian Cases supra* note 137, at 3. A "case" may involve more than one person. For example, a family applying together would be processed as one case.

147. *Id.* at 4.

terms refer to people who resided in areas that the Khmer Rouge took over *before* April 1975, and who remained there despite the invasion.¹⁴⁸ It does not follow, however, that these individuals were Khmer Rouge sympathizers or supporters simply because they did not flee from their homes. It is even more unlikely that these individuals committed acts of persecution.¹⁴⁹

The screening committee denied admission to other applicants because they had engaged in one or more "normal" activities—i.e., they were favored by the Khmer Rouge, and consequently escaped persecution.¹⁵⁰ Examples of such normal activities include growing vegetables; tending livestock; traveling by ox cart, bus or train; and being treated by a doctor.¹⁵¹ In addition, if an applicant had even a distant familial relationship with a person alleged to have had a Khmer Rouge connection, the screening committee often presumed guilt by association.¹⁵² The committee denied asylum to 258 people, for one of these two reasons.¹⁵³

Finally, a number of cases were denied because of "lack of credibility."¹⁵⁴ For example, inconsistent stories given during the various interviews with JVA, EAO and INS officials led to the denial of seventy cases or 270 persons.¹⁵⁵ For those applicants with no indication of Khmer Rouge involvement, denial of refugee status for this reason is troubling.¹⁵⁶ Although it undertook review processes in February 1985 and November 1985, the INS reexamined less than twenty-five percent of the rejected cases and overturned only three percent of the prior denials.¹⁵⁷

IV. ANALYSIS

The INS screening process may not violate U.S. domestic law (i.e., the Constitution, statutes, and case law), but it does violate the legal obligation of the United States under international law. Although compelling arguments exist for vesting the Cambodian refu-

148. STAFF REPORT, *supra* note 11, at 39.

149. *Id.*

150. Observations, *supra* note 143, at 4; *see also Cambodian Cases supra* note 137, at 4.

151. Observations, *supra* note 143, at 4.

152. *Id.* at 5.

153. *Id.*

154. *Id.*

155. *Id.*

156. According to the STAFF REPORT, *supra* note 11, at 30, virtually all Cambodian refugees lie at some point during their interviews. Many refugees believe rumors about what answers the Americans want to hear, and accordingly they fabricate stories. Unfortunately, since members of the Khmer Rouge must lie about their past, any unexplained deceit is looked upon by an interviewer as highly suspicious.

157. S. GOLUB, LOOKING FOR PHANTOMS: FLAWS IN THE KHMER ROUGE SCREENING PROCESS (United States Committee for Refugees Issue Brief 28 (1986)).

gees with constitutional due process rights,¹⁵⁸ most authority suggests that overseas aliens do not possess such rights.¹⁵⁹ Consequently, the INS screening process, which failed to incorporate standards or criteria for evaluating Khmer Rouge affiliation, may not violate due process. However, the lack of an automatic system of review for denied refugee status eliminates the possibility of reversing arbitrary and capricious decisions.¹⁶⁰ Finally, the screening committee has ignored the few guidelines and directives that the government has provided for Khmer refugee processing.¹⁶¹

Yet, by overlooking a number of international procedural protections for potentially excludable "refugees," the screening process violates several principles of international law.¹⁶² In addition, the United States, by rejecting qualified applicants, permits continued deprivation of these refugees' basic human rights. Such conduct is clearly contrary to a number of international instruments.¹⁶³

A. KHMER REFUGEE SCREENING: TECHNICALLY NOT A VIOLATION OF U.S. LAW

1. *The Rights of Overseas Refugees*

Congress possesses the unquestionable power to refuse "prior persecutors" admission into the United States.¹⁶⁴ Furthermore, the fact that Congress has statutorily excluded such persons in the Refugee Act of 1980 is consistent with U.S. statutes and a series of international agreements emerging after World War II.¹⁶⁵ Excluding "prior persecutors" from benefits such as the right to *non-refoulement* and the opportunity to seek haven in the United States is a commendable policy.¹⁶⁶

Uncertainty arises, not in the notion of screening refugees to exclude "prior persecutors," but in the screening process itself. To what extent do overseas refugees possess the right to procedural due process? United States courts have uniformly refused to find any constitutional rights vested in overseas aliens seeking admission.¹⁶⁷ How-

158. See *supra* notes 53-54, and *infra* notes 168-75 and accompanying text.

159. See *supra* notes 40-44, and *infra* note 167 and accompanying text.

160. See *supra* notes 35-37, and *infra* note 186 and accompanying text.

161. See *infra* notes 198-204 and accompanying text.

162. See *infra* notes 208-26 and accompanying text.

163. See *infra* notes 224-37 and accompanying text.

164. See, e.g., *Boutillier v. INS*, 387 U.S. 118 (1967).

165. See *supra* note 1 and accompanying text.

166. The concept of the United States containing sovereign power to exclude from its borders whomsoever it chooses has been legally upheld by the Supreme Court on numerous occasions. See *supra* note 16 and accompanying text; see, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathew v. Diaz*, 426 U.S. 67, 79-80 (1976).

167. See *supra* notes 40-44 and accompanying text.

ever, Congress enacted the Refugee Act of 1980 with the following objective: "To provide a permanent and *systematic procedure* for the admission to this country of refugees of special humanitarian concern to the United States" (emphasis added).¹⁶⁸ The legislative history discussing the emergency admission provisions of the Act shows Congress' intent to handle the screening of refugees in a manner consistent with the Attorney General's prescribed regulations and procedures:¹⁶⁹

The Attorney General may admit [emergency situation refugees] as conditional entrants or as permanent resident aliens, according to regulations and procedures he may prescribe for dealing with emergency refugee situations. If adequate screening is impossible under the circumstances, he may admit refugees conditionally; if he is satisfied that time and circumstances permit adequate screening, he should admit refugees as permanent resident aliens.¹⁷⁰

These passages indicate a desire for systematic admission of refugees through adequate screening. The screening program used for Cambodian refugees fails to satisfy this desire.¹⁷¹

Recent Supreme Court holdings¹⁷² tentatively support the argument that when the United States government confers important benefits, it cannot constitutionally deprive an individual of such benefits without due process of law. The establishment of an official screening process in Thailand, and the lessening of the burden of proof under the presidential directive, would most likely qualify as important benefits.¹⁷³

Moreover, in *Landon v. Plasencia*¹⁷⁴ the Court provided a "cost benefit" analysis of procedural safeguards that supports this argument:

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.¹⁷⁵

Admittedly, establishing procedural safeguards would substantially increase administrative processing costs. Time consuming appeals by rejected refugees, increased training of field officers, improved resources (e.g., maps, history books), and increased manpower would

168. Refugee Act of 1980, *supra* note 1, § 101(b).

169. See S. REP. NO. 256, *supra* note 22, at 10.

170. *Id.*

171. See *supra* notes 143-57 and accompanying text for results of computer survey of rejected Cambodian refugees.

172. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Goldberg v. Kelly*, 397 U.S. 254 (1978); see also *supra* notes 45-54 and accompanying text for a discussion of alien entitlements.

173. For discussion of the United States undertaking screening program, see *supra* notes 129-36 and accompanying text. For discussion of the Presidential Directive, see *supra* notes 137-42 and accompanying text.

174. 459 U.S. 21 (1982).

175. *Id.* at 34.

add substantial expense and delay to the screening process. Yet the humanitarian principles that are inherent in President Reagan's National Security Decision Directive Number 93,¹⁷⁶ the INS *Worldwide Guidelines*,¹⁷⁷ and the Refugee Act of 1980¹⁷⁸ do not admit to a monetary value.

The INS screening process should incorporate additional safeguards for two reasons: (1) the interests at stake for Cambodian applicants are enormously high, and (2) the procedures used in the screening process produce erroneous results. Although an overseas alien may arguably have no constitutional due process rights, the United Nations Protocol,¹⁷⁹ which binds the United States,¹⁸⁰ guarantees such rights.

2. *A Screening Process Without Standards*

United States refugee law does not explicitly mention the Khmer Rouge, or delineate any criteria for the determination of Khmer Rouge affiliation.¹⁸¹ The INS and the State Department have failed to provide meaningful criteria for (1) classifying people as Khmer Rouge; (2) defining "culpability" as a persecutor; or (3) what constitutes "meaningful participation" or "otherwise participated" in the persecution of others.¹⁸² Consequently, immigration officials in Thailand have made subjective and arbitrary recommendations that have varied significantly based on the individual officer's personal standards.¹⁸³ As mentioned above, Congress enacted the Refugee Act of 1980 to provide a systematic procedure for admitting refugees of special humanitarian concern.¹⁸⁴ It can hardly be supposed that Congress intended a standardless screening process whereby overworked and underguided field agents make critical humanitarian determinations.¹⁸⁵

176. Presidential Directive, *supra* note 139.

177. *WORLDWIDE GUIDELINES*, *supra* note 57.

178. Refugee Act of 1980, *supra* note 1, § 101(a).

179. 1967 Protocol, *supra* note 6.

180. See 2 P. MUTHARIKA, *supra* note 3, at 272.

181. STAFF REPORT, *supra* note 11, at 29.

182. *Id.*

183. *Id.* The author, Carl Ford, states:

Some [officers] consistently apply stringent criteria, while others consistently err on the side of leniency. . . . All deplore the situation they find themselves in—having to interpret the law the best they can—and are upset that the lawmakers and those who set policy within the Executive Branch have not given them sufficient support and guidance.

Id.

184. Refugee Act of 1980, *supra* note 1, § 101(b).

185. See S. REP. NO. 256, *supra* note 22, at 10.

3. *Limits to Agency Discretion Surpassed*

A reviewing court may overturn an agency decision made in an arbitrary, capricious or otherwise illegal manner.¹⁸⁶ There is no appeal, however, for a denial of refugee status.¹⁸⁷ Consequently, no reviewing body exists to check for abuse of discretion and sufficiency of evidence. If a review process were available to rejected Cambodian refugees, it would arguably reveal an abuse of discretionary power.

An administrative officer abuses his discretion only when there is no *sufficient* or *rational* basis for his decision.¹⁸⁸ Many of the reasons for which the INS denied an applicant's admission would undoubtedly qualify as *insufficient* or *irrational*. Many of the reasons for rejecting an applicant (e.g., engaging in "normal" activities, "nervousness during the interview," and darker skin indicating peasant status and possible Pol Pot sympathy)¹⁸⁹ illustrate far-reaching administrative discretion. Middle-level officials involved in the processing of Khmer refugees have privately expressed serious doubts about the screening process, and have indicated their fears that many of the rejected cases are "based on the flimsiest of evidence."¹⁹⁰

In *Laipenieks v. INS*,¹⁹¹ the court called for "clear, convincing and unequivocal evidence" that an alien persecuted others in order to deport him.¹⁹² Optimally, government officials should apply this same standard to overseas applicants. A number of human rights concerns as well as foreign policy arguments militate against haphazardly labeling individuals "prior persecutors." Rejection for resettlement pro-

186. See IMMIGRATION DEFENSE, *supra* note 29; see also *Yiu Sing Chun v. Sava*, 550 F. Supp. 90 (E.D.N.Y. 1982), *rev'd on other grounds*, 208 F.2d 869 (2d Cir. 1983).

187. See *supra* notes 36-37 and accompanying text.

188. See Ludd, *supra* note 27.

189. STAFF REPORT, *supra* note 11, at 37; see also Observations, *supra* note 143, at 4. The fact that many refugees rejected by the United States as Khmer Rouge are accepted by Canada or Australia, two countries that also exclude "prior persecutors," is evidence of the irrationality of the indices used by United States officials to determine refugee status. J. Mitchell, *supra* note 141, at 8.

190. STAFF REPORT, *supra* note 11, at 27. The EAOs and INS officers interviewing the refugees recognize the imprecise nature of the system and are critical of having to implement the screening process with such poor guidelines. *Id.* These same officials "also express doubts that the system poses an effective barrier to any real KR [Khmer Rouge] bent on entering the United States." *Id.* Examples exist of culpable KR members who would have slipped through the system had it not been for additional information from eyewitnesses. *Id.* at 31.

191. 750 F.2d 1427 (9th Cir. 1985).

192. *Laipenieks* involved the issue of deporting an alien already in the U.S. based on the persecutor exclusion clause of the Refugee Act of 1980. However, deporting an individual already in the United States is not a more serious matter than preventing an overseas refugee, in a high risk of being returned to the place of persecution, from entering the United States. Consequently, the evidentiary standard for excluding such individuals should be comparable, if not identical. See *id.*

foundly affects an alien's future.¹⁹³ If the courts applied the *Laipenieks* standard to overseas applicants, the current indices for evaluating "prior persecutors" would undoubtedly violate the standard.¹⁹⁴

Another arguably arbitrary and capricious exercise of discretion in this screening process occurs when a refugee requests a review of his rejected application. Although there is no appeal for a denial of refugee status,¹⁹⁵ rejection letters received by applicants state that decisions will be reconsidered upon the presentation of "new evidence."¹⁹⁶ Local INS officers, however, have made a sweeping decision that affidavits from friends, neighbors, or relatives submitted after a rejection are "self-serving" and do not constitute new evidence.¹⁹⁷ Given the finality and seriousness of these refugee determinations, such arbitrary conclusions seem intolerable.

4. *Violations of Kamput Cables, NSDD, and Worldwide Guidelines*

The authors of the Kamput Cables,¹⁹⁸ President Reagan's National Security Decision Directive 93,¹⁹⁹ and the resulting INS *Worldwide Guidelines* designed these documents to ease the burden of proof on Indochinese refugees by granting a greater benefit of the doubt.²⁰⁰ If an applicant proved that he fit into one of the INS's "persecuted person" categories,²⁰¹ then he established that he was a likely target of persecution.²⁰²

In spite of these directives, the INS has denied refugee status to thousands of refugees who fit into the established categories. The INS based many of its denials on reasons other than security (i.e., lack of credibility or inconsistent stories) even when the INS could have easily verified the refugee's category status.²⁰³ According to the embassy report, "[i]t seems totally consistent with the *Worldwide Guidelines* to assume that, in the absence of some compelling reason to the contrary,

193. For a discussion of the probable significance of denied resettlement to Cambodian refugees, see *infra* notes 225-26 and accompanying text.

194. Sample indices used in the screening process included a person's residence in Cambodia before 1975, inconsistencies in the person's story, and whether or not the individual fought or helped to fight against the Vietnamese invasion. See STAFF REPORT, *supra* note 11, at 37.

195. 8 C.F.R. § 207.4 (1986).

196. J. Mitchell, *supra* note 141, at 9.

197. *Id.*

198. Kamput Cables, *supra* note 138.

199. Presidential Directive, *supra* note 139.

200. It was the aim of Congress and the administration to reduce the impact of the overwhelming hardships that befell Cambodians after 1975. See Observations, *supra* note 143, at 2.

201. See *supra* note 142.

202. WORLDWIDE GUIDELINES, *supra* note 57, at 26.

203. J. Mitchell, *supra* note 141, at 2.

such as some *strong* indication of Khmer Rouge involvement, *all* of the above-mentioned cases are refugees".²⁰⁴ Simply stated, the agency violated the *Worldwide Guidelines* by denying status to those refugees who otherwise satisfied the statutory definition.

The INS has ignored these directives and violated its own guidelines. A number of U.S. courts have held that guidelines are not regulations and, therefore, not vested with the force of law.²⁰⁵ However, one scholar writes: "Yet it may be more accurate to say that for those courts which have not totally refused to consider review of the INS, the operation instructions are viewed as quasi-standards of expected agency behavior."²⁰⁶ One court recently held that "while the [Operations Instructions do] not have the force of law, [they do] provide a yardstick for judging the reasonableness of [agency decision making]."²⁰⁷

B. KHMER REFUGEE SCREENING: INCONSISTENT WITH INTERNATIONAL LAW

The U.S. screening process in Thailand violates international law in three ways. First, the screening process denies rejected applicants the procedural due process provided by the 1951 Convention and 1967 Protocol, which the UNHCR *Handbook* enumerates.²⁰⁸ Second, the process creates a population of unfairly rejected refugees who are *not* prior persecutors, and who risk forcible return to Cambodia in violation of their right to *non-refoulement*.²⁰⁹ Third, the process deprives of many basic human rights those refugees indiscriminately rejected as "prior persecutors".²¹⁰

1. Violation of International Procedural Protections

INS officials have rejected a large number of Cambodian refugees. In doing so, INS officials have applied an exclusion standard that violates the standard mandated by the 1951 Convention and the 1967 Protocol. The UNHCR *Handbook*, recognized as an authoritative interpretation of these instruments and cited in several U.S. cases,²¹¹

204. Observations, *supra* note 143, at 4 (emphasis added).

205. *Dong Sik Kwon v. INS*, 646 F.2d 909 (5th Cir. 1981); *Zacharakis v. Howerton*, 517 F. Supp. 1026 (S.D. Fla. 1981).

206. Ludd, *supra* note 27, at 77.

207. *Galvez v. Howerton*, 503 F. Supp. 35, 39 (C.D. Calif. 1980) (INS delay in processing visa applications deemed "unreasonable" based on time frame provided by agency's own Operations Instructions).

208. See *infra* text accompanying notes 211-12.

209. See *infra* text accompanying notes 223-26.

210. See *infra* text accompanying notes 227-38.

211. See A. HELTON, *supra* note 21, at 2-3; see also *Zavala-Bonella v. INS*, 730 F.2d 562, 569 n.7 (9th Cir. 1984); *In re Frentescu*, 18 I. & N. Dec. 465, 468 (1980).

calls for a restrictive interpretation of the exclusion clauses because of the serious consequences of exclusion.²¹² The 1951 Convention states that the provisions of the Convention do not apply to an individual if there are "serious reasons" for believing that, among other things, he or she has committed a crime against humanity.²¹³ Many of the reasons for which INS officials labeled Cambodians as persecutors, such as growing vegetables or being a "base" person, hardly qualify as serious reasons.²¹⁴

The *Handbook* also discusses the burdens of proof involved in the screening process. It declares that the examiner must assess the validity and credibility of the applicant.²¹⁵ While the *Handbook* maintains that the burden of proof rests with the applicant, documents are often missing, and statements are not susceptible to proof. The *Handbook* states: "In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."²¹⁶ The computer survey of rejected applicants at Khao-I-Dang and a Congressional Staff Report indicate, however, that INS officials did not accord such a "benefit of the doubt."²¹⁷

The *Handbook* also recognizes that "an applicant for refugee status is normally in a particularly vulnerable situation."²¹⁸ Subsequently, the *Handbook* requires qualified personnel, specially established procedures, and competent interpreters.²¹⁹ At one point or another during the processing of Khmer refugees, INS officials violated all three of these requirements. For example, inadequately trained INS officials performed the difficult task of screening applicants.²²⁰ In some cases, it was discovered that incompetent interpreters caused the refugee to give inconsistent answers during the interviews.²²¹ But the most fundamental failing of the screening process is its lack of clear guidelines or procedures to accurately determine prior persecutors.²²²

212. HANDBOOK, *supra* note 73, at 35.

213. See 1951 Convention, *supra* note 1, art. 1(f)(a).

214. See *supra* text accompanying notes 146-51. The computer survey, Observations, *supra* note 143, examined many of these reasons.

215. HANDBOOK, *supra* note 73, at 47.

216. *Id.*

217. See *supra* text accompanying notes 144-57, 189-90.

218. HANDBOOK, *supra* note 73, at 45.

219. *Id.* at 46.

220. None of the interviewers received special training, and virtually none had any direct experience with Cambodia, or any Khmer language skills. The interviewers lacked the depth of knowledge about Cambodia necessary for the screening process. STAFF REPORT, *supra* note 11, at 30.

221. For an example of such an occurrence, see *id.* at 30 n.1.

222. See *supra* text accompanying notes 181-85.

2. *Violation of the Principle of Non-refoulement*

Numerous international instruments guarantee a refugee the right of *non-refoulement*, a fundamental principle of refugee law.²²³ Evidence supports the argument that *non-refoulement* is a principle of customary law, binding on all states, independent of specific assent.²²⁴ The ramifications of denying refugee status to the Cambodians remaining in Khao-I-Dang are extremely serious. Thailand originally intended to send the remaining refugees back to Cambodia upon the completion of the screening process.²²⁵ While the Thais have said that they will not forcibly return refugees, it is "likely that they will withdraw non-essential services from Khao-I-Dang in order to encourage voluntary relocation or close Khao-I-Dang as a refugee facility altogether."²²⁶

The consequences are alarming for those refugees the INS has incorrectly labeled "prior persecutors." These individuals likely will face possible forced labor, imprisonment, or even death upon their return to Cambodia. The United States will thus have been at least partially responsible for their threatened safety.

3. *Violation of Rejected Refugees' Human Rights*

International human rights instruments accord refugees certain rights, yet refugees unfairly rejected as "prior persecutors" will never realize these rights. These instruments are necessary because the legal mechanisms that provide for stateless persons and refugees are inadequate. Refugees are cut off from the tie of nationality, which normally protects them under international law. Neither the 1951 Convention nor the 1967 Protocol provide for automatic refuge or permanent resettlement. Human rights instruments merely oblige governments to treat individuals a particular way, regardless of race, creed, sex, national origin, social class or political persuasion.²²⁷ The American Convention on Human Rights,²²⁸ which legally binds the United States, and the American Declaration of the Rights and Duties of Man,²²⁹ grant, however, the right of asylum in accordance with the legislation of the state.²³⁰

223. See *supra* notes 6, 25, 70 and accompanying text.

224. Goodwin-Gill, *supra* note 80, at 304.

225. STAFF REPORT, *supra* note 11, at 4.

226. D. GALLAGHER & S. FORBES, *REFUGEES IN SOUTHEAST ASIA: TOWARD A MORE COMPREHENSIVE STRATEGY* 10 (1985).

227. Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, 1982 MICH. Y.B. INT'L LEGAL STUD. 339, 351.

228. American Convention, *supra* note 67, art. 22.

229. American Declaration, *supra* note 67, art. 27.

230. See Young-Anawaty, *supra* note 94, at 459.

The screening process violates a number of the international legal obligations of the United States. The INS, as discussed above, violated its obligations under the UN Protocol to provide due process.²³¹ In addition, the INS violated the spirit of the Refugee Act of 1980, the presidential directive, and the letter of the *Worldwide Guidelines* by using a standardless screening process that erroneously rejected deserving applicants.²³² The United States has, therefore, violated its obligations under Article 22 of the above-mentioned American Convention and Article 27 of the American Declaration. The American Declaration and the Universal Declaration on Human Rights are arguably evidence of customary international law, and consequently bind the United States.²³³

The Universal Declaration of Human Rights protects basic human rights unobtainable for Cambodians struggling in Khao-I-Dang. The conditions of life in refugee camps are deplorable.²³⁴ Refugees, for their own security, must remain in the camps until they can find a safe home elsewhere. They face degrading living conditions, and have no nationality. Moreover, a strong possibility exists that Thailand will return these rejected applicants to Cambodia, where they would face likely extermination because of their opposition to the current regime.²³⁵ Fundamental rights such as the "right to life, liberty and security of person"²³⁶ are in unquestionable danger. The "luxuries" of civil, political and economic rights described in the International Covenants on Human Rights will never be a reality for these rejected Cambodians.

Although the United States is not deliberately violating any of these refugees' rights, the arbitrary determinations of who is a "prior persecutor" and therefore disqualified as a "refugee" effectively deprive innocent people of the chance to enjoy certain human rights. This action contravenes the principles of the United Nations Charter to provide and encourage respect for human rights and fundamental freedoms for all.²³⁷ It also contravenes the Refugee Act of 1980 to give "statutory meaning to [the United States'] national commitment

231. See *supra* text accompanying notes 84-91, 208-11.

232. See *supra* text accompanying notes 144-51, 181-85.

233. Young-Anawaty, *supra* note 94, at 459.

234. Khao-I-Dang is filled with either illegal inhabitants (those who arrived after Thailand closed its doors to new refugees), or desperate residents that have either never been processed, or rejected for resettlement. The facts that illegal entrants are not entitled to food and longer term residents receive money from relatives in the West, combined with poor security, resulted in almost nightly robberies, beatings and killings. J. Mitchell, *supra* note 141, at 5-6.

235. *Id.* at 7.

236. Universal Declaration, *supra* note 67, art. 3.

237. See *supra* text accompanying notes 95-96, 101-03.

to human rights and humanitarian concerns. . . ."²³⁸

V. POLITICAL IMPORTANCE OF FAIR SCREENING PROCESS

The INS has failed to recognize the political advantages of maintaining a fair and legal screening process. Moreover, an unfair and illegal screening process may ultimately lead to political harm. The greatest harm lies in the rejection of thousands of innocent refugees for resettlement. The United States prides itself on its humanitarian reputation, but this reputation could suffer as a result of the abnormally high rejection numbers. Furthermore, the remaining refugees generate tension between the United States and Thailand. The United States must maintain good relations with Thailand, and instill confidence in the Thai government about the U.S. commitment to the resettlement of refugees. The United States assured Thailand in 1979 that it would uphold its obligation to resettle refugees if Thailand continued to act as a country of first asylum. United States actions now may dramatically influence future refugee crises. The Thai government may refuse to admit refugees if it fears that they will permanently settle in Thailand.²³⁹

VI. RECOMMENDATIONS

Officials responsible for developing U.S. refugee policy need to provide detailed guidance to field officers in Thailand on how to interpret Section 100(a)(42) of the Immigration and Nationality Act.²⁴⁰ These officials should construct guidelines similar to the 1983 *Worldwide Guidelines for Overseas Refugee Processing* to delineate what types of activities and affiliations constituted Khmer Rouge persecution. The officials must also indicate which activities demonstrate meaningful and voluntary participation in Khmer Rouge acts of persecution.²⁴¹

Before an officer labels an individual a "prior persecutor," there should be specific and reliable allegations made either by intelligence sources or other Cambodians to substantiate the decision. Unfortunately, field officers are currently operating without a clear definition of prohibited conduct. Consequently, officers use personal guidelines

238. SENATE COMMITTEE ON THE JUDICIARY, 96TH CONG., 2D SESS., REVIEW OF UNITED STATES REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 80 (Comm. Print 1980) (comment by Sen. Kennedy, the original sponsor of the Refugee Act of 1980, noted in the "Conference Report and Analysis of the Refugee Act of 1980" transmitted to the President).

239. LIMITS OF ASYLUM, *supra* note 120, at 13-14.

240. See STAFF REPORT, *supra* note 11, at 6.

241. See S. GOLUB, *supra* note 157, at 32.

resulting in inconsistent and erroneous determinations. Congress should adopt legislative guidelines considered by some of its members for defining Khmer Rouge affiliation. Such recommendations would state:

With regard to Cambodian refugees who were not members of the Khmer Rouge leadership or political, administrative, and military cadre, specific acts of inhumanity or persecution of others would have to be alleged in order to satisfy the purpose of the Immigration and Nationality Act. It is the intent of Congress that criteria of a general nature, such as residence in Pol Pot controlled areas before 1957 would not be considered in themselves as grounds for exclusion.²⁴²

One report recommends that several of the following categories could provide more objective criteria for the identification of previous Khmer Rouge members: members of the Communist Party of Kampuchea, security system personnel at all levels, members of village militia, and governing or administrative committee members at all levels.²⁴³

In order to determine which individuals belonged to the Khmer Rouge, field officers need access to more information. Experts in Cambodian history, personnel from INS and the State Department, and intelligence analysts have the expertise to compile an historical data base. Access to such a data base would result in more informed decision making. Officials should also consult scholars, relief workers, UNHCR officials and others to obtain their rough estimates of how many Khmer Rouge are in Khao-I-Dang.²⁴⁴ Most experts conclude that many of the Khmer Rouge left Khao-I-Dang and returned to the border;²⁴⁵ consequently, the INS screening process should reflect this fact. In addition, better supplies (e.g., maps), better working and living conditions for personnel at the processing center, and improved training programs for newly assigned officers would improve the accuracy of the process.²⁴⁶

Finally, the United States should cease all processing of Khmer refugees until proper guidance and procedural improvements are forthcoming. The United States must make a "good faith effort to keep the residual of KID [Khao-I-Dang] as small as humanly possible"²⁴⁷ to avoid a confrontation with Thailand.

242. See STAFF REPORT, *supra* note 11, at 6.

243. *Id.* at 40.

244. S. GOLUB, *supra* note 157, at 32.

245. *Id.* at 6.

246. See STAFF REPORT, *supra* note 11, at 8.

247. *Id.* at 6.

VII. CONCLUSION

The United States' desire to shut its doors to "prior persecutors" is consistent with commonly held notions of fairness and justice. No justification exists for the true "prior persecutor's" conduct. Therefore, the goal to screen out persons responsible for human rights abuses is admirable; the process, however, is flawed and most likely illegal. The screening violates the due process safeguards of the 1967 Protocol Relating to the Status of Refugees, and possibly continues to deprive refugees of basic human rights. The current screening process additionally ignores a presidential directive, INS guidelines, and Congress' intent that the Refugee Act of 1980 provide systematic procedures for refugee admission. The application of well-defined guidelines and standards should set a precedent for future refugee resettlement. This is particularly important given the increased number of refugees world-wide and the bleak future erroneously denied refugees can expect in their home territories. The INS must accept the task of devising and implementing a well-conceived and fair screening procedure that is based on full information.

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