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A CRIMINAL AT THE GATE: A CASE FOR THE HAITIAN REFUGEE

Cheryl Tompkin*

"Give me your tired, your poor, your huddled masses yearning to breathe free; the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door."¹

"Under present law it would be appropriate to add: as long as they come from Northern Europe, are not too tired or too poor or slightly ill, never stole a loaf of bread, never joined any questionable organization and can document their activities for the past two years."²

INTRODUCTION

On September 15, 1963, the first boatload of Haitians claiming persecution in Haiti arrived in the United States. There were twenty-five refugees in this group. After administrative hearings, appeals taken to the Board of Immigration Appeals, judicial review in the United States District Court, and the United States Court of Appeals, the final decisions were unfavorable and all twenty-five were deported.³

The current movement of Haitians to the United States who claim persecution began in 1972 with a boatload of sixty immigrants.⁴ Haitian refugees continue to arrive, although their arrival has not been greeted favorably.

On November 6, this year, some 55 [Haitians] entered from a 45 foot boat after being at sea 33 days; surviving at the end by drinking sea water and eating raw fish. Eleven of them were women, one pregnant. Two of them were boys. The men were immediately incarcerated, they are held on illegal entry charges and the bond is at least \$500. These people are, of course, completely penniless. As far as conducting interviews, to conduct these interviews, for instance, in the past you would have to have gone to Immolalee or some of the distant places. Right now they are, by the Service's own statement in Port Isabel, Tex., some 2,000 miles away from their attorney in Miami . . . I challenge anyone to find any other category of persons facing the issue of life and death who are treated in such a manner as to deprive them of elementary due process rights, as well as the rights that are accorded them under the Protocol Relating to the Status of Refugees.⁵

Throughout its history the United States has been considered a haven for persons fleeing from religious and political persecution. Until 1875, any

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1. E. LAZARUS, *THE NEW COLOSSUS* 1 (1883).

2. J. KENNEDY, *A NATION OF IMMIGRANTS* 77 (1964).

3. *Human Rights in Haiti: Hearing Before the Subcomm. on International Relations of the House Comm. on International Relations*, 94th Cong., 1st Sess. 16-17 (1975) (statement of Leonard F. Chapman, Jr.).

4. *Id.*

5. *Id.* at 36 (statement of Ira Gollobin).

alien who chose, except for African natives, could freely enter the United States. No law was necessary to assure the right of political, religious or other refugees to enter the United States because there were no restrictions on immigration. Such laws became necessary only when controls were placed on immigration.

Since 1948, when the first statute authorizing the admission of displaced persons into the United States was enacted, more than one and a half million refugees have been granted religious or political asylum.⁶ Most refugees have entered as a part of large scale movements under programs assisted by governmental agencies and voluntary service organizations. Others have come individually with advance permission to enter the United States.⁷ However, more recently, Haitian refugees have come to the United States shore without advance permission and without the sponsorship of the government or social agencies. In their movement to this country these refugees tend to follow a uniform pattern. A group of refugees without visas, buy, rent, or steal a boat and set sail for the Florida shore where they come into port or simply land on the beach. Upon arrival these refugees assert that they are subject to persecution by the government in Haiti. They claim political refugee status and seek asylum.⁸

The alien asserting political refugee status does not automatically receive that classification. He must produce evidence sufficient enough to demonstrate that he is within the definition of a political refugee. However, even if the immigrant does fall within the political refugee definition he may still be expelled from the United States. United States immigration laws limit the entry of refugees with previous criminal records. This exclusion is particularly significant for many of the Haitian refugees coming to this country. Many of these immigrants come to the United States with criminal convictions on their records. For a large number of these immigrants the criminal convictions were obtained in proceedings which did not conform to American concepts of due process. Should criminal convictions of this kind form the basis for excluding a refugee? Should there be a distinction made between the types of crimes committed in determining excludability? Should the refugee be excluded if the crimes were committed to further political activity? Does the political refugee status vitiate prior criminal convictions? This article will attempt to answer these questions in relation to the Haitian refugee. It will focus on Haitian refugees with criminal records who seek political refugee status. It will also examine human rights in Haiti and the standard of proof for establishing political refugee status. Additionally, this article will look briefly at United States international obligations to refugees and will explore the status of a Haitian refugee who fits within the definition of a political refugee but who may still be excludable from the United States due to a criminal record at the time of entry.

6. Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (1948).

7. DEPARTMENT OF JUSTICE, LABOR AND STATE, INTERAGENCY TASK FORCE ON IMMIGRATION POLICY: STAFF REPORT 71 (1979).

8. *Hearing on International Relations*, *supra* note 3, at 13.

I. DEFINING THE POLITICAL REFUGEE

A. *Historical Protection of Refugees*

During the eighteenth and nineteenth centuries the existing groups of refugees were small and states more readily permitted their entry and continued presence. This situation began to change after World War I however, and World War II produced vast refugee problems. After World War II refugees became increasingly numerous, and their numbers swelled as a result of internal and/or international disturbances. Severe economic and political oppression in the country of nationality also contributed to the flow of refugees. As a result, the refugee problem has been a continuing source of concern within the international community.

In 1943 the United Nations Relief and Rehabilitation Administration (UNRRA) was formed by forty-four nations to perform the function of giving assistance to the refugees produced by World War II. The year 1946 brought the formation of the International Refugee Organization (IRO). Its purpose was to provide for the care and maintenance as well as the legal and political protection of refugees. The IRO was subsequently abolished in 1951 and replaced by the office of the United Nations High Commissioner for Refugees (UNHCR), which became the international organization for the protection of refugees.

Finally, on July 28, 1951 a major refugee treaty, the Geneva Convention Relating to the State of Refugee (hereinafter the "Convention"), was adopted. Prior to the passage of this legislation the refugee was without legal standing and each state was at liberty to its treatment of refugees. Due to this precarious status the United Nations, the representative of the international community generally, sought to create legal protections for refugees through international agreements. The Convention dealt with the fundamental rights of refugees and additionally established guidelines relating to their freedom of movement and residence. These rights parallel those rights enumerated in the Universal Declaration of Human Rights (hereinafter "Universal Declaration") which attempts to establish a minimum standard of treatment for all individuals.

The Convention contains a general definition of a refugee, although it is not a universal one.⁹ As defined in Article 1, the term applies to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the county of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Thus, the general definition articulated in Article 1 of the Convention is restricted by the provision that the refugee status must be the result of events occurring before 1 January 1951. Also, the Convention maintains the refugee status of persons who have been considered refugees under pre-war ar-

9. Weis, *The Concept of the Refugee in International Law*, 1960 JOURNAL DU DROIT INTERNATIONAL 928, 936.

rangement or instrument, or under the Constitution of the IRO, the predecessor to the UNHCR.

The determination of refugee eligibility is a matter for the authorities of the contracting states.¹⁰ The Convention does not prescribe a specific procedure for determining eligibility. However, eligibility determinations must be in good faith and must be made in accordance with the Convention criteria.¹¹

New refugee groups, particularly certain groups in Africa, emerged during the 1960's. Because off the 1951 dateline these groups were not covered by the Convention. This omission handicapped the High Commissioner, who sought to assist all refugees within his mandate, since the contracting states were not bound as a matter of international law to accord any certain standard of treatment to these new groups.¹² To remedy this situation, the 1967 Protocol Relating to the Status of Refugees (hereinafter "the Protocol") was adopted. The Protocol was an independent instrument which incorporated the substantive provisions of the Convention (Articles 2-34), but removed the 1 January 1951 dateline found in Article 1 of the Convention. Thus, the Protocol made the substantive provisions of the Convention applicable to the new refugee groups. States that were not parties to the Convention could accede to the Protocol, and in so doing they would accede to the 1951 Convention.

The Protocol, which the United States acceded to, was designed to consolidate and reinforce previous international instruments relating to the status of refugees.¹³ In addition, it served to bring about changes in the international protection of refugees by extending the material and personal scope of previous instruments to new refugee groups. Thus, the Convention and the Protocol constitute the basis for the legal framework of international protection of refugees.

B. *The Political Refugee Status*

The political refugee is distinguished from other classes such as ordinary aliens, ordinary migrants, economic refugees, and stateless persons, in that political controversy exists between the refugee and the authorities of his home country, and this controversy, relating to how the country shall be governed and who shall govern it, is so serious as to disrupt the basic relationship between the citizen and his government.¹⁴ The term political used in this description is used in a sense wide enough to include religious, racial, ethnic, and social conditions, as well as political opinion. Furthermore, unlike the ordinary alien or migrant, the political refugee has left his former territory because of political events there, not because of economic condi-

10. L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972 162 (1975).

11. 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 239 (1972).

12. L. HOLBORN, *supra* note 10, at 178.

13. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 606 U.N.T.S. 2681. The Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 150, is incorporated in the Protocol by reference.

14. *See generally* 1 GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 78-81 (1966).

tions or because of the economic attractions of another territory or because of other reasons of a personal nature.

In other words, it is characteristic of the situation of political refugees that the normal mutual bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken (or simply does not exist) in their case, and that they are afraid of returning to that country lest they shall have become victims of political persecution, or at least shall have to make a complete political submission to a government which they consider repugnant and maybe also 'illegal.'¹⁵

The important requirement of "political refugee" is persecution for political reasons. Almost all political offenders fall in the category of political refugees. However, the concept of a political refugee is much wider than that of a political offender. Thus, when categorizing political refugees, the political refugee with the character of a political offender may be distinguished from the political refugee lacking the character of a political offender. A political offender is one who perpetrates an offense against a law aimed at the upholding and protection of the system of government (the constitution) and/or the government (regime) itself.¹⁶ It is generally agreed that the political offender shall be granted asylum, at least in the sense that he shall not be extradited.¹⁷ The non-extradition principle dates from the early part of the nineteenth century. States began refusing to extradite persons for political offenses from the turn of the century and this rapidly became general practice. In addition, many national extradition statutes and treaties provide for the non-extradition of a political offender in mandatory form. The right of the political refugee with the character of a political offender to asylum is clearly established. The scope of this article will, therefore, be limited to the status of the political refugee lacking the character of a political offender, but who has a criminal conviction on his record at the time he seeks entry as a political refugee.

Those who qualify as political refugees may claim the benefit of Article 33, the Protocol's basic asylum provision. It provides that:

No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or 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.

Note that Article 33 establishes a right not to be returned to the country of persecution, rather than an affirmative right to stay in the host country. A contracting state need not grant asylum to a refugee who can be transferred to a third country willing to accept and protect him against return to the country of prosecution. However, when no country will accept the refugee, he effectively enjoys the right to remain for so long as the persecution endures.

The refugee's first and most fundamental need is for asylum, i.e., admission into the territory of a state other than the one from which he is fleeing.¹⁸ Without the right to asylum a refugee cannot enjoy any of the

15. *Id.* at 79.

16. *Id.* at 83.

17. Harvard Research, *In International Law, Extradition*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 86 (1935).

18. L. HOLBORN, *supra* note 10, at 162.

rights that are guaranteed by the 1951 Convention and the 1967 Protocol. At present, the right of asylum is the right of the state to grant asylum.¹⁹ International law as currently interpreted does not confer any right of asylum on individuals.²⁰ Notwithstanding the fact that many states have recognized the right to asylum in their municipal law and as a matter of practice a majority have granted asylum, an individual's right to asylum has not yet been incorporated into customary international law.²¹ "The so-called right of asylum is nothing but the competence of every state, inferred from its territorial supremacy to allow a prosecuted alien to enter, and to remain in its territory under its protection and thereby grant an asylum to him."²²

II. THE HAITIAN IMMIGRANT AS A POLITICAL REFUGEE

A. *Human Rights in Haiti*

1. *The Haitian Constitution*

Under the definition of a political refugee enunciated in the Protocol, political treatment of the refugee in his country of nationality is the key to establishing a basis for his political refugee claim. In assessing political treatment, and thus human rights, in Haiti, two factors must be considered. First, military dictatorships of varying degrees of severity and efficiency ruled during the nineteenth and early twentieth centuries. Second, no matter how democratic a constitution may be, and Haiti's contains many safeguards of citizen's rights, custom and usage are the ultimate arbiters; no more than ten percent of the people participate in government even to the extent of voting, and it is inevitably in the interests of this minority that the lines are drawn and the laws enforced. On the surface, Haiti's constitution gives to the people the right to choose the executive and members of the assembly, but it must be remembered that Haiti, with ninety percent of the people illiterate and exercising no voice in the affairs of government, is not, and never has been a democracy.²³

According to the Haitian Constitution all Haitians are equal before the law without regard to sex, creed, or color, save that women, though permitted to participate in municipal elections and to hold office, are not eligible to vote for national office.²⁴ The Haitian Constitution also enunciates the procedures for effectuating criminal arrests, prosecutions and imprisonment, as well as detailing other human rights guarantees. The chief executive, the president, has the right to dissolve the assembly, name all judges and court tribunals, and choose members of his cabinet.²⁵

Chapter IV, Individual Rights and Guarantees, of Article 17, provides that individual liberty shall be guaranteed. No person may be arrested, prosecuted or detained except in the cases determined by law in the manner prescribed. Article 17 additionally provides that a person can only be arrested or detained if an order has been issued by a legally competent official.

19. 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 646 (7th ed. 1948).

20. L. HOLBORN, *supra* note 18.

21. *Id.*

22. H. LAUTERPACHT, *supra* note 19, at 618.

23. R. ROTBERG, HAITI: THE POLITICS OF SQUALOR 1 (1976).

24. S. RODMAN, HAITI: THE BLACK REPUBLIC, THE STANDARD GUIDE TO HAITI 41 (1973).

25. HAITI CONST. of 1964, tit. IV, ch. III, § I.

The order is to state the reason for arrest and the law that has been violated. Unnecessary force or restraint in the apprehension of a person or in keeping him under arrest is forbidden, as is moral pressure or physical brutality. No one is to be kept under arrest more than forty-eight hours unless he has appeared before a judge and the judge has confirmed the arrest. Petty offenses are to be referred to the justice of the peace for final decision. More serious offenses can be appealed to the presiding judge of the competent civil court, who on the basis of an oral statement by the prosecutor, will rule on the legality of the arrest. If any arrest is judged illegal, the arrested person is released. Any violations of the provisions in Article 17 can be appealed to the competent courts, prosecuting either the authors or the perpetrators of the violations, regardless of their rank.

Article 18 provides that no one can be denied access to the judges, and that a civilian may not be tried in a military court. In criminal trials and trials for political offenses committed through the press or some other means, a jury is to be impaneled.²⁶ And capital punishment may not be imposed for any political offense except for treason.²⁷

Article 19 guarantees Haitian citizens the right to be secure in their homes from unreasonable searches and seizures. Article 22 provides a right of ownership free from expropriation, except for public purpose. Article 26 guarantees freedom of speech, and the right to peaceably assemble to discuss politics and the right of free association are granted in Articles 31 and 32.

The Haitian Constitution enunciates many of the freedoms and guarantees established by the United States Constitution. People are granted the right to freedom of assembly, freedom of speech and the right to be secure in their homes. Upon arrest, a person must be brought before a judge and the validity of his arrest and detention promptly determined. In criminal and political trials a jury is guaranteed. Appeals may be taken from serious offenses (although not from petty offenses). It must be noted, however, that once there has been a determination that the arrest was valid, there is no requirement that the person be quickly brought to trial and sentenced. Nor is there any requirement that the sentencing be reasonable.

While the Haitian Constitution states that the law of the Constitution is always to prevail,²⁸ the executive in Haiti has always reigned supreme. The legislature, the cabinet and the judiciary have been comparatively meaningless. Executives have regularly ignored the provisions of Haiti's carefully drafted Constitution because they reflected aspirations rather than fundamental political realities. Haiti's Constitution is verbally honored, repeatedly cited and promulgated, but seldom enforced.²⁹

2. *Haitian Practice*

Haiti is brutal and rapacious tyranny. It is a country without due process, or any understanding of the meaning of the term, where all trials are show, arrests and imprisonment are whimsical—but brutal—and no ordinary

26. HAITI CONST. of 1964, tit. II, ch. IV, art. 30.

27. HAITI CONST. of 1964, tit. II, ch. IV, art. 25.

28. HAITI CONST. of 1964, tit. II, ch. IV, art. 38.

29. R. ROTBERG, *supra* note 23, at 17.

man wants more than to be left alone.³⁰

Self-preservation has dictated an overwhelmingly apathetic response by the Haitians to the course of Haitian politics. Peasants still have no reason to suppose that anything but harm comes from involving themselves in national politics; at the local level the question hardly arises since there has never been any effective politics in the sense in which the term is usually employed. Colonial-style military rule is the pattern in the rural sections and districts. It may also be said that Haiti's citizens, many of whom lease their land from the State, quickly learn as a means of survival, that they must conserve their resources and avoid the kinds of economic or political behavior which would subject them to functionaries or rivals with licenses to plunder.³¹

Violations of human rights were particularly widespread during the reign of Francois Duvalier, president from 1951 to 1971. His son, "President for Life" Jean-Claude Duvalier, has made some improvement with respect to the rights of the individual, but the system of authoritarian government and the human rights violations continue.³² Arbitrary arrest and imprisonment are practiced extensively and the constitutional guarantee of a prompt determination of the validity of arrest and detention implemented only sporadically.

The Tontons Macoutes is the primary repressive force in Haiti. This organization, which has more than 30,000 members, is known technically as "Volunteers for National Security." These volunteers receive no pay for their services. Their function is to suppress dissent and they are compensated by being permitted to take land and merchandise, and to confiscate the property of working people and the lower middle-class strata without just compensation. The Tontons Macoutes, along with Haitian police, security militia and the President's security corps arrest and imprison arbitrarily.

Arrests are carried out without warrants and often take the form of disappearances or kidnappings. The family may subsequently be unable to find any trace of their missing relative. In other cases the police or the Tontons Macoutes block off an entire neighborhood and proceed to arrest indiscriminately as many as hundreds of citizens. Following severe interrogations, some are released and others are tortured and remain in prison.³³

Prisoners, which include peasant farmers, workers, teachers, students and other intellectuals, are not allowed lawyers. They are not allowed to contact their families after arrest and, with a few exceptions, they are never charged or brought to trial. In certain cases with political overtones, the government has apparently chosen to detain individuals indefinitely, avoiding public trial. Detention of up to twelve years has been reported.³⁴ Furthermore, although sessions of criminal courts open to the public resumed in 1975 and have been held regularly since, the case backlog is large and the system's resources are insufficient to cope with all cases. For this reason, many cases, although initiated, never make their way through the entire le-

30. *Id.* at 3.

31. R. ROTBERG, *supra* note 29.

32. AMNESTY INTERNATIONAL REPORT 66-67 (1979).

33. AMNESTY INTERNATIONAL REPORT 101-02 (1975-1976).

34. *Id.*

gal process and detainees are released after a period without having been brought to trial. The number of cases never tried is thought to be large.³⁵ It is unclear whether release after detention without a trial constitutes a conviction under Haitian practice.

Although a large number of Haitians are released without a judicial determination of guilt, many do go to "trial." Having a trial, however, does not guarantee that there will be due process of law, such as notice, opportunity to be heard and the right to be tried before an impartial tribunal.³⁶ The procedure followed in Haitian courts is set forth in Title II, Chapter IV, Article 17 of the Haitian Constitution. It requires the arrestee to be brought before a judge within forty-eight hours. The judge is to pass on the legality of the arrest and must give reasons for confirming any arrest. There is no provision granting the accused the right to confront witnesses against him or to produce evidence in his own behalf. Indeed, since the arrestee is rarely permitted a lawyer and is not allowed to contact family or friends, it would be virtually impossible for him to produce witnesses. Furthermore, on appeal, the validity of the arrest is determined solely on the basis of an oral statement by the prosecutor. Nor does the accused appear before an impartial tribunal. In accordance with Title IV, Chapter IV, Article 3 the president appoints all judges.³⁷ He also appoints other court officials who are subject to his power of dismissal.³⁸ All these officials are directly indebted to the president for their positions and repeated accusations have been made that the trials are a mockery of justice and merely for show.³⁹

Whether a Haitian is detained without benefit of trial or after going to trial, the prison conditions he is subjected to are identical.

On reading [the code of regulations] one pictured a model house of detention, ruled wisely by grave officials with one eye on the regulations and the other on the welfare of their prisoners. [Then] I went to the prison. The grave officials of fancy were replaced by a dozen truculent vagabonds with cocomacaque clubs. The place was a haunt of disease, blow flies, and vermin, a pestiferous swamp, surrounded by ramshackle walls, inhabited by starving and naked prisoners The code of regulations was for show, the prison for use.⁴⁰

Even though the death of a prisoner is not announced, it is known that the death rate is high due to maltreatment and prison conditions.⁴¹ Torture is practiced in an attempt to identify any sign of political dissent and to discourage active opposition; harsh treatment by the police of detained suspects remains a common substitute for legal prosecution.⁴² "Failure to bring prisoners to trial, and detention incommunicado remain the main human rights issues in Haiti."⁴³

In 1978, Haiti took several initiatives in the field of human rights.

35. AMNESTY INTERNATIONAL REPORT 73-74 (1974-1975).

36. U.S. DEPT. OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 341-47 (1979).

37. See U.S. CONST. amend. XIV; U.S. CONST. amend. V; *Whitfield v. Hanges*, 222 F. 745 (8th Cir. 1915).

38. HAITI CONST. of 1964, tit. IV, ch. IV, art. 108.

39. R. ROTBERG, *supra* note 30.

40. *Id.*

41. AMNESTY INTERNATIONAL REPORT, *supra* note 35.

42. *Id.*

43. AMNESTY INTERNATIONAL REPORT 145-46 (1977).

These initiatives were aimed at reducing arrest without legal safeguards, indefinite detention incommunicado without trial, torture and failure to inform families of the death of imprisoned relatives.⁴⁴ However, the political structure has undergone no change and there has been no reduction in the security militia, the Tontons Macoutes, or the President's security corps, who have been responsible for illegal arrests, ill treatment and other breaches of constitutional guarantees.⁴⁵ Haiti has failed to meet the human rights standards enunciated in its own constitution.

B. *Haiti's International Obligations*

International law is binding on all states, and every state is obliged to give effect to it. The state is responsible to ensure that its government, its constitution, and its laws enable it to carry out its international law.⁴⁶ A number of human rights agreements are in force which together establish a wide network of human rights obligations. Haiti, like most nations of the world, is now a party to the United Nations Charter (hereinafter "Charter"). In becoming signatories, members of the Charter pledged to take joint and separate action in cooperation with the United Nations for the achievement of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁴⁷ "All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment is solely its own business."⁴⁸ A State has the obligation to effect the protection of human rights in its municipal legislation, judiciary, and administration.⁴⁹ The human rights provisions of the Charter, though broadly stated, are widely accepted as prohibiting massive, gross, and persistent government-imposed denials of basic human rights.⁵⁰ Thus, Haiti appears to also be in violation of the Charter.

Another source of human rights law is the Universal Declaration of Human Rights. The Universal Declaration standards, although initially only declaratory and non-binding, have by now, through wide acceptance and recitation by nations as having normative effect, become binding customary international law.⁵¹ The Universal Declaration is often invoked as if it were legally binding, both by nations and by private individuals and groups.⁵² The Universal Declaration, paralleling the provisions found in the

44. AMNESTY INTERNATIONAL REPORT 96-8 (1978).

45. AMNESTY INTERNATIONAL REPORT, *supra* note 32.

46. L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 114 (2d ed. 1980).

47. U.N. CHARTER art. 1 para. 3.

48. *Department of State Bulletin*, vol. LXXVI, no. 1972, April 11, 1977, 332.

49. L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, *supra* note 48, at 114-16.

50. Bilder, *The Status of International Human Rights Law: An Overview*, INTERNATIONAL HUMAN RIGHTS LAW PRACTICE 7 (1978).

51. Article 38(1)(b) of the statute of the International Court refers to "international custom as evidence of a general practice accepted as law." The definition of custom comprises two distinct parts: (1) general practice, and (2) its acceptance as law. To prove customary international law a party must establish the fact that the same act has been repeated for a long time by a number of states, and that it has become a legal conviction of the normative consciousness of states. *Columbia v. Peru*, 1950 I.C.J. 266.

52. Bilder, *supra* note 50, at 8.

Haitian Constitution, states that "No one shall be subjected to arbitrary arrest, detention or exile.⁵³ Everyone is entitled . . . to a fair and public hearing by an independent and impartial tribunal . . . [in connection with] any criminal charge against him.⁵⁴ Everyone charged with a penal offense has the right to be presumed innocent until proven guilty according to law. . . ."⁵⁵

Haiti is also bound to respect human rights under the American Convention of Human Rights⁵⁶ (hereinafter the "American Convention") which it ratified in September of 1977. The American Convention provides that no one is to be subject to arbitrary arrest and imprisonment⁵⁷ and anyone detained is to be informed of the reasons for detention.⁵⁸ Any person deprived of liberty is to be treated with respect and is not to be subjected to torture or cruel, inhuman, or degrading punishment or treatment.⁵⁹ A detainee is to be brought before a judge promptly to determine the validity of the arrest or detention.⁶⁰ He is to be presumed innocent until guilt is proven.⁶¹ The accused is to have a public trial⁶² before an impartial tribunal⁶³ with the right to examine and present witnesses.⁶⁴ The American Convention grants basic human rights to those covered by its provisions; therefore, the violations of human rights cannot be considered a matter solely within the domestic jurisdiction of Haiti, the offending state. Since Haiti is additionally bound by the Universal Declaration and the Charter, Haitians are entitled to the protection of these international agreements against social and political repression.

C. *United States Law and Proof of Political Refugee Status*

United States law originally recognized no right to asylum for persons seeking entry,⁶⁵ but in 1968 the Protocol Relating to the Status of Refugees was accepted as binding on the United States.⁶⁶ In addition to protecting persons who are refugees because of their religious or political opinions, the Protocol protects persons who are refugees because of their nationality or membership in a particular social group. However, as previously noted, the Protocol prescribes no particular procedure for refugee eligibility determina-

53. *Universal Declaration of Human Rights*, G.A. RES. 217, U.N. Doc. A III, at 9 (1948).

54. *Id.*

55. *Id.* at art. 10.

56. *Opened for Signature*, 34 Stat. 2858, 8 BEVANS 653 (Nov. 22, 1969).

57. Footnote to follow.

58. *Id.* art. 7(4).

59. *Id.* art. 5(2).

60. *Id.* art. 7(5).

61. *Id.* art. 8(2).

62. *Id.* art. 8(5).

63. *Id.* art. 8(1).

64. *Id.* art. 8(2)(f)-(g).

65. S. Rep. No. 1137, 82 Cong., 2d Sess. 6 (1952).

66. President Lyndon Johnson, in his letter of transmittal to the Senate recommending the advice and consent of that body to the Protocol, stated:

Foremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to any country in which they would face persecution. . . . It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, . . . accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations.

tion. Therefore, who is to be accorded refugee status is left to the authorities of the contracting States. These determinations are to be made in accordance with Protocol criteria and the provisions of the Protocol are to be applied without discrimination as to race, religion or country of origin.⁶⁷

To be eligible for political refugee status, the Protocol requires the alien to prove that he personally has a "fear of persecution." The term "persecution" or its equivalent has not been defined in the Protocol, or other international instruments, so the concept of persecution has been rather narrowly circumscribed in various municipal laws, in conjunction with Protocol criteria. Under United States law the threshold requirement of asylum is a showing that the alien faces some form of harm if repatriated. Article 3 of the Protocol and section 243(h) of the Immigration and Nationality Act⁶⁸ (as amended by the 1980 Refugee Act),⁶⁹ phrase this harm in terms of a threat to the alien's life or freedom. The original version of section 243(h) required the threat to be one of physical persecution, a term which encompassed death or bodily injury, significant imprisonment,⁷⁰ and economic sanctions severe enough to prevent earning a living.⁷¹ The 1965 Act deleted the word physical, although legislative history suggests that Congress still intended that only substantial harm give rise to the right of asylum.⁷² *Kovac v. Immigration and Naturalization Service*⁷³ was the first examination of the 1965 amended standard. Kovac, a Yugoslav merchant seaman, claimed that his government persecuted him by forcing him to work as an unskilled cook, rather than a highly skilled chef. The Immigration Board applied the old physical persecution standard and concluded that Kovac had not shown the requisite degree of harm. The court of appeals rejected this interpretation, and held that substantial economic disadvantage could be sufficient to meet the amended persecution standard. In reaching its conclusion, the court observed that Congress had removed the physical harm requirement to ease the burden on asylum applicants.⁷⁴

To meet his burden of proof, an alien must demonstrate a "clear probability" that he will be persecuted if returned to his country of nationality.⁷⁵ This is a higher standard than that required by the Protocol which requires only that the refugee justify a well founded fear of persecution. However, in *Matter of Bunar*⁷⁶ the court determined that the clear probability standard demanded under section 243(h) would still be necessary under the Protocol. Since the courts and Immigration and Naturalization Service (hereinafter "INS" or "Service") generally rely on reports of an official nature,⁷⁷ it is difficult for the asylum applicant to meet his burden of

67. See generally, Protocol Relating to the Status of Refugees, *supra* note 13.

68. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, as amended by Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 912, amended by Pub. L. No. 96-212, tit. II, sec. 203(e).

69. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

70. See *Kalatjis v. Rosenberg*, 305 F.2d 249, 252 (9th Cir. 1962); *Sovich v. Esperdy*, 319 F.2d 21, 29 (2d Cir. 1963).

71. *Dunat v. Hurney*, 297 F.2d 744, 746 (3d Cir. 1961).

72. See, e.g., 111 Cong. Rec. 21,804 (1965) (statement of Rep. Poff).

73. 407 F.2d 102 (9th Cir. 1969).

74. *Id.* at 106.

75. See, e.g., *Kashani v. Immigration & Naturalization Serv.*, 547 F. 376 (7th Cir. 1977).

76. 14 I. & N. Dec. 310 (1973).

77. The INS requests for information are channeled to the American Embassy in the state of

proof. Evidence of the requisite weight is seldom available to him.⁷⁸

In *Matter of McMullen*,⁷⁹ the respondent alien sought asylum on the basis that he would be persecuted if returned to Ireland. In support of his persecution claim, respondent submitted documents describing numerous killings and violent incidents relating to the Irish conflict, Amnesty International reports regarding allegations of brutality by the Irish police, the Garda, and other reports regarding allegations of brutality.⁸⁰

The *McMullen* court also considered respondent's claim of persecution by the government since some of the documents submitted by respondent related to alleged mistreatment of detainees and prisoners, and respondent alleged that he would be persecuted by the Garda if returned to Ireland.⁸¹ In denying the government persecution claim the court noted: (1) none of the evidence presented on the actions of the Garda related specifically to the respondent;⁸² (2) the evidence suggested that the government had attempted to curb the abuse of the Garda;⁸³ (3) the Garda had not mistreated respondent when he was picked up for his extradition hearing;⁸⁴ and (4) respondent's allegations that he would be arrested and coerced to talk about the PIRA upon his return were mere speculation.⁸⁵ Concluding that the evidence did not convince them that respondent would be in imminent peril for his life or limb if repatriated, the court denied the asylum claim.

Under the *McMullen* standard, an alien must demonstrate not only that he is subject to persecution, but that in some way his native government is responsible for or is unable to prevent the harm threatened.⁸⁶ In Haiti the slightest sign of opposition is crushed and people are arbitrarily arrested, imprisoned, ill-treated, or tortured for nothing more serious than accidentally bumping into a Tonton Macoute in a crowd,⁸⁷ or for the purpose of simply instilling fright in the minds of the population at large. All of these measures may be rightly classified as forms of political persecution, if they are applied in order to intimidate and suppress certain elements of the population.⁸⁸ In Haiti, these measures of persecution are applied to suppress the peasantry and middle income strata.⁸⁹ They are applied by the Tontons Macoutes, the security militia, the police and the President's corps who are in every basic respect government instrumentalities. While it is true that seizure of property, imprisonment, torture and other breaches of constitu-

proposed destination, whereupon, the Embassy makes inquiries into the status or condition of that country, and about the ethnic, social, or political class or group in which the alien claims membership. The alien, on the other hand, is in a foreign country with little access to evidence or witnesses in his homeland and often has very limited resources. Obtaining corroborating evidence is thus difficult.

78. See *Matter of Joseph*, 13 I. & N. Dec. 310, 319 (1973).

79. U.S. Bd. of Immigration & Naturalization Appeals No. 2831 (1980).

80. *Id.* at 6-7.

81. *Id.* at 8.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Past persecution may, of course, provide the best evidence of the likelihood of future persecution.

87. See text *supra* § II(A)(2).

88. I GRAHL-MADSEN, *supra* note 14, at 82-83.

89. AMNESTY INTERNATIONAL REPORT, *supra* note 33.

tional guarantees are initiated by these organizations without prior directives, invariably their actions are later approved, except when these acts involve other Macoutes, government officials or influential persons.⁹⁰ Despite the political conditions prevailing in Haiti, under the *McMullen* standard only if the Haitian alien can document that government persecution will be directly applied to him if he is returned, can he successfully assert an asylum claim. This standard implies a premise: that people without overt political activity, or minority political opinions, are unlikely to be the victims of political persecution. Haitians often become the focus of government persecution without ever engaging in any traditionally political activity.⁹¹ Haitian political conditions are so specially oppressive that credence should be given a wider range of prosecution claims. Recognition should be taken of the suppression of human rights, the nonexistence of any rule of law and the suspension of the articles of the Constitution guaranteeing individual rights.⁹²

It should be pointed out that the term "political prisoners" has to be interpreted in the widest possible sense in the Haitian context. There may have been no political activity whatsoever, as a large number are imprisoned indiscriminately, due to technical mistakes, as a result of personal grudges, or simply for minor offenses. As in most cases there are no judicial procedures whatsoever and as torture is systematic, these prisoners are well within Amnesty International's area of concern.⁹³

Immigration authorities cannot properly decide a Haitian's fate without taking note of conditions in Haiti.

In *Coriolan v. Immigration and Naturalization Service*⁹⁴ the Fifth Circuit Court of Appeals rejected the notion that persons from a regime that persecutes virtually the entire population, were ineligible for political asylum. The court refused to give credence to the idea that Congress would have refused sanctuary to people whose misfortune it was to be victims of a government which did not require political activity or opinion to trigger its oppression.⁹⁵ While the language of the statute and the Protocol does not sweep as broadly as the *Coriolan* opinion,⁹⁶ *Coriolan* recognizes a need to liberally assess political refugee claims.

Most Haitians fear for their lives if they are repatriated. There has been short term detention, imprisonment and ill-treatment of those returning after leaving illegally.⁹⁷ Such fears, as well as the incidents giving rise to them, should bring the Haitians within the protective parameters of the immigration statutes and the Protocol. Accordingly, no Haitian should be returned to Haiti unless there is a clear showing that there is no basis for fearing

90. Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27, 30 n.11 (1976).

91. AMNESTY INTERNATIONAL REPORTS indicated that arrest, conviction, and imprisonment are arbitrary.

92. See text *supra* § II(A)(2) *United States v. Esperdy*, 234 F. Supp. 611 (S.D.N.Y. 1964).

93. *Coriolan v. Immigration and Naturalization Serv.*, 559 F.2d 993, 1002 (5th Cir. 1977).

94. *Id.*

95. *Id.* at 1004. Case remanded for consideration of Amnesty International Report as additional evidence. If especially oppressive conditions were proven to exist in Haiti a "wider range of persecution claims would have to be given credence."

96. The Protocol refers to persecution "on account of political opinion," not merely victims of politically motivated persecution.

97. AMNESTY INTERNATIONAL REPORT, *supra* note 32.

either the Duvalier government or its local Tontons Macoutes or other security organizations.

III. EFFECT OF CRIMINAL RECORD ON REFUGEE STATUS

A. *United States Law*

The desire to keep criminals out of the United States was one of the earliest motivations for a selective immigration process. In its earliest expression the immigration statute excluded convicts, thereby preventing foreign nations from emptying their jails and shipping their criminals to the United States.⁹⁸ This general exclusion was supplanted by more comprehensive legislation which barred aliens who had been convicted or admitted the commission of any crime involving moral turpitude.⁹⁹ This exclusion has remained substantially unchanged since 1891.

1. *Historical Application of the Criminal Exclusion Provisions*

The first hundred years of the United States' existence was a period of free immigration. New immigrants were encouraged because they were important to the development of the new nation. During this period there was little legislation. The Alien Act of 1798¹⁰⁰ was an early attempt at restriction. It authorized the President to expel from the United States any alien he deemed dangerous. This legislation was very unpopular and was allowed to expire at the end of its two year term.

From the earliest days there were groups counseling restriction on immigration. And as immigration continued to increase states moved to enact legislation imposing local controls. However, these statutes were all declared unconstitutional by the Supreme Court on the basis that they constituted an invasion of the exclusive federal power to regulate foreign commerce.¹⁰¹ Opposition to free immigration continued and became more potent during times of economic depression. The continued demand for federal action finally resulted in legislation. In 1875 a federal statute barred convicts and prostitutes and inaugurated the United States national policy of restriction.¹⁰² The 1875 statute was followed by the adoption of the first general immigration statute in 1882.¹⁰³ The 1882 Act imposed a head tax of fifty cents on immigrants and excluded convicts, lunatics, idiots and people likely to become public charges. A codification of the general immigration law in 1891¹⁰⁴ provided for the exclusion of additional classes including those previously convicted of a criminal offense involving moral turpitude. It also allowed the deportation within one year of aliens who had entered illegally. Another codification in 1907¹⁰⁵ further extended the excluded classes to include persons who admitted the commission of a crime involving

98. Immigration Act ch. 141, 18 Stat. 477 (1875).

99. Immigration & Nationality Act of 1952, *supra* note 68.

100. Alien Act, ch. LVIII, 1 Stat. 570 (1798).

101. *See* Smith v. Turner, 48 U.S. 283 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

102. Immigration Act, *supra* note 98.

103. Immigration Act, ch. 376, 22 Stat. 214 (1882).

104. Immigration Act, ch. 551, 26 Stat. 1084 (1891).

105. Immigration Act, ch. 1134, 34 Stat. 898 (1917).

moral turpitude. Between 1917 and 1924 the development of the restrictive immigration policy reached fruition. In 1917 Congress passed a comprehensive revision of the immigration laws,¹⁰⁶ over the veto of President Wilson. The most controversial innovation of this legislation was the literacy test. The 1917 Act also codified other qualitative restrictions, including the criminal exclusion, broadened the powers of immigration officers, and conferred discretionary authority to admit certain barred groups.

At the conclusion of World War I immigration again began to increase. There was a widespread fear in the United States of an inundation of immigrants from the war-devastated countries of Europe. This concern, combined with a severe post-war depression, augmented the already large sentiment for further restrictions on immigration. The result was the Quota Law of 1921.¹⁰⁷ Enacted as a temporary measure, this legislation was designed to place numerical limitations on immigration. In 1924 a permanent policy of numerical limitation was enacted.¹⁰⁸ The Immigration Act of 1917, establishing qualitative restrictions and the Immigration Act of 1924, proclaiming numerical limitations, remained substantially unchanged until 1952. Enactments during this period amplified the permanent structure of immigration laws. The Alien Registration Act of 1940,¹⁰⁹ enacted during World War II, expanded the directives for the exclusion and deportation of criminal and subversive groups.

The Immigration and Nationality Act of 1952¹¹⁰ made many changes in the existing law. Under the 1952 Act the grounds for exclusion were detailed and generally barred those who were objectionable on health, criminal, moral, economic, subversive, or other specifically enumerated grounds, or who had not complied with applicable quota or visa requirements.¹¹¹ Two sections of the 1952 Act specifically barred criminals. The first barred aliens who had been convicted, or who admitted the commission of, a crime involving moral turpitude, or who admitted to acts which constituted the essential elements of such crime.¹¹² The second section prohibited the entry of aliens who had been convicted of two or more offenses, regardless of whether the offenses involved moral turpitude.¹¹³ The aggregated sentences to confinement imposed must have been at least five years. This second section eliminated moral turpitude as a consideration when two or more offenses were involved.

106. Immigration Act, ch. 29, 39 Stat. 874 (1917).

107. Quota Law, ch. 8, 42 Stat. 5 (1921).

108. Immigration Act, ch. 190, 43 Stat. 153 (1924).

109. Alien Registration Act, ch. 439, 54 Stat. 670 (1940).

110. Immigration & Nationality Act of 1952, *supra* note 68.

111. *Id.*

112. *Id.* § 212(a)(9); The designation of a crime involving moral turpitude has been used in immigration law as the standard of excludibility. Moral turpitude has not been clearly or certainly defined by the courts, apparently because it encompasses moral rather than legal standards. Attempts to arrive at a workable definition of moral turpitude has not yielded entire satisfaction. One definition that has been frequently used describes moral turpitude as connoting an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rules of right and duty between man and man. Crimes generally agreed to involve moral turpitude include rape, lewdness, gross indecency, murder, voluntary manslaughter, fraud, arson, forgery, robbery, larceny, blackmail, burglary and extortion.

113. *Id.* § 212(a)(10).

Under the 1952 exclusion provisions an alien seeking admission could be excluded for criminal conviction(s), or by admitting to a crime involving moral turpitude. Where an admission was made, certain limitations were set due to the serious consequences of such an admission. First, it had to be clear that the conduct in question was a crime under the law of the place where it was committed.¹¹⁴ Moreover, the admission had to relate to a crime involving moral turpitude, although it was not necessary for the alien to admit this legal conclusion. The label given a crime was not decisive as to whether it involved moral turpitude. A misdemeanor as well as a felony could involve moral turpitude. Where an offense was committed in a foreign country, whether it involved moral turpitude would be judged by the standards prevailing in the United States.¹¹⁵ Second, the alien must have been clearly advised of the essential elements of the crime in understandable terms.¹¹⁶ Third, the alien must have admitted all acts constituting the essential elements of the crime.¹¹⁷ However, if a conviction were proven, the admission of the crime was irrelevant. Fourth, the admission had to be unequivocal, unqualified, voluntary and made by the alien himself.¹¹⁸ Finally, other circumstances affected the validity of an admission. An admission could not be predicated on a plea of guilty which was followed by a new trial and dismissal of the charges.¹¹⁹ Once an admission had been made, however, efforts to retract it need not be believed and it could be used in subsequent hearings.¹²⁰ Nor did a foreign pardon avert excludability for a crime. Such pardons were apparently rejected due to the ancient apprehension that foreign governments might amnesty their convicts in order to allow them to migrate to the United States.

Minor amendments relating to the criminal exclusion provisions were adopted after 1952. One amended the law itself by specifying that conviction for possessing narcotics was a ground for exclusion or deportation.¹²¹ Another appeared as a rider to a private law to admit shepherders, and exempted aliens from exclusion for convictions of a single petty offense.¹²² This statute allowed entry to an immigrant who had committed only one misdemeanor¹²³ classified as a petty offense as defined by 18 U.S.C. § 1 (1976) or by reason of the punishment actually imposed, or who was excludable as one who admitted the commission of a misdemeanor. The alien had to be otherwise admissible. The statute defined a petty offense as a misdemeanor for which the penalty did not exceed six months imprisonment. The waiver of excludability under this statute was mandatory and not permissive. It automatically benefitted those who came within its terms.¹²⁴ This

114. *Matter of DeS.*, 1 I. & N. 553 (1943).

115. *See generally Matter of B.M.*, 6 I. & N. 806 (1955).

116. *Matter of K.*, 7 I. & N. 594, 597 (1957).

117. *Id.*

118. *Cf. Matter of E.N.*, 7 I. & N. 153 (1956).

119. *Matter of C.Y.P.*, 3 I. & N. 623, 630 (1950).

120. *Matter of O.O.*, 4 I. & N. 765, 766 (1952).

121. Immigration Act, ch. 629, 70 Stat. 555 (1954).

122. Shepherders Act, ch. 1170, 68 Stat. 1145 (1954).

123. Section 1 of title 18 of the United States Code defines a felony as an offense punishable by death or by imprisonment exceeding one year, and designates all other offenses as misdemeanors. It stipulates that a petty offense is any misdemeanor for which the penalty does not exceed six months imprisonment. 18 U.S.C. 1 (1976).

124. *Matter of H.*, 6 I. & N. 738, 741 (1955).

waiver was applied at deportation, as well as exclusion hearings. To qualify for this dispensation: (1) the alien must have been excludable because of a crime involving moral turpitude; (2) the crime must have been a misdemeanor—however, where a person admitted a crime punishable either as a felony or misdemeanor, he was deemed to have admitted to the commission of a misdemeanor for purposes of the statute; (3) the punishment actually imposed upon conviction must have been six months or less, or a fine of \$500 or less, or both; (4) only a single offense must have been involved; and (5) the alien had to be a relative of an American citizen or resident alien.¹²⁵

Congress has also disregarded a juvenile offense under certain circumstances. The 1952 Act permits entry of an alien who had committed a single offense involving moral turpitude while under 18 years of age.¹²⁶ Five years must also have passed from the time of the offense or release from prison to the time of the application for entry. This statute only applied to crimes. Since juvenile delinquency is not a crime, the commission of an offense for which the alien was prosecuted as a juvenile offender did not have to be taken into account in determining the eligibility for this waiver.¹²⁷

Additional exemptions and waivers existed for those arriving with criminal records. The Act of 1952 specified that excludability could not be premised on purely political offenses. This limitation attached whether the exclusion derived from a single crime or several crimes.¹²⁸ The objective of this waiver was to benefit those whose punishment emerged from measures for the oppression of racial, religious, or political minorities. However, mere membership in one of these groups did not in itself warrant the conclusion that the offense was political.¹²⁹ These subsequent amendments to the 1952 Act were a method of recognizing that the operation of the criminal exclusion provisions had sometimes produced undesired results.¹³⁰

2. *Current Application of the Exclusion Provisions*

Historically, a refugee had to comply with the general requirements for entry under immigration laws¹³¹ which were supplemented by refugee acts. The 1980 Refugee Act¹³² represents current legislation supplementing immigration laws. It adopts the language of the Protocol defining persecution, which is slightly more expansive than language found in earlier immigration statutes and excludes persons involved in persecuting others.¹³³ While the 1980 Act makes no substantial change in the status of aliens admitted as refugees, it does establish several changes which may directly bear on the admission of refugees with criminal records. Under the 1980 Act, the parole power¹³⁴ of the Attorney General can be used to admit in individual refu-

125. See generally, Shepherders Act, *supra* note 122.

126. Immigration & Nationality Act of 1952, *supra* note 71 at § 212(a)(9).

127. Matter of C.M., 5 I. & N. 327, 328 (1953).

128. Immigration & Nationality Act of 1952, *supra* note 71, at § 212(a)(9) and (10).

129. *Department of State Visa Off. Bull.*, no. 30, May 28, 1978, lists a number of political crimes.

130. The provisions for exclusion remain much the same in the 1965, 1970, 1977 and 1978 Amendments to the Act.

131. Under the 1952 Act, every alien seeking entry in the United States was deemed an immigrant, and thus subject to the restrictions of the immigration laws.

132. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

133. *Id.* § 243(h)(2)(A).

134. The Attorney General had the power to parole aliens into the United States under the 1952

gees for compelling reasons in the public interest.¹³⁵ The statute specifies that the Attorney General, subject to numerical limitations set by the President, in his discretion and pursuant to regulations he prescribes, may admit any refugee who is not firmly resettled in a foreign country, who is determined to be of specific humanitarian concern to the United States, and who is admissible as an immigrant.¹³⁶ Under this section the refugee does not have to have a relative within the United States in order to be eligible for waiver of the criminal exclusion and the Attorney General has the discretion to waive more offenses, provided that no threat to United States security is posed and no serious crimes are involved.¹³⁷

Prior administrative practice requiring admissibility as an immigrant is codified in the 1980 Act. However, the exclusion provisions relating to labor certification, public charge and literacy, inter alia, are inapplicable to any alien seeking admission as a refugee.¹³⁸ Although the criminal conviction is not enunciated as an inapplicable basis for exclusion, the Attorney General has the power to waive this exclusion on behalf of a refugee for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. However, the Attorney General cannot waive grounds for exclusion where they relate to national security, Nazis, serious crimes and trafficking in narcotics.¹³⁹ The provision for waiver of "other" exclusions is quite generous and goes beyond previous waivers related to criminal exclusions in that such waivers may be given not only to relatives, but also may be given for humanitarian purposes or for reasons in the public interest. Theoretically, the discretion vested in the Attorney General allows him to take into account mitigating circumstances in determining whether to waive criminal exclusion provisions. But such wide discretion is subject to abuse. Historically, aliens from communist dominated countries have been more readily classified as political refugees and granted asylum. Poor and uneducated immigrants from impoverished developing countries such as Haiti, who are likely to impose a social welfare burden on the community, have had considerably more difficulty establishing successful asylum claims.

The U.S. Government's position toward Haitian refugees contrast sharply with the warm welcome extended the Cuban refugees (who are mostly

Act, upon such conditions as he saw fit. However, when the purpose of the parole or "conditional entry" had been served, the alien could be returned to the custody from which he was paroled.

135. This parole power was used in the admission process of 100,000 Cuban refugees and thousands of Haitian refugees, who entered the United States between April 21 and June 19, 1980.

136. Sec. 207(c), Act of 1952, 8 U.S.C. § 1157(c), added by Sec. 201(b) Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980).

137. Pub. L. No. 96-212, tit. II, sec. 203(e).

138. *Id.* § 204(c)(3).

139. Sec. 243(h) as recently amended now provides:

- (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that:
- (A) 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;
 - (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
 - (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
 - (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

white) and to refugees from left-wing dictatorships. A serious question exists as to whether that governmental policy towards refugees racially and politically discriminates against those who are Black and/or fleeing right-wing dictatorships.¹⁴⁰

While the 1980 Act purports to eliminate discrimination through adoption of the Protocol definition of a refugee, that discrimination is once again possible under the broad waiver provisions.

Section 243(h) of the Immigration and Nationality Act does limit the discretion of the Attorney General. Section 243(h)¹⁴¹ conforms to the language of the Protocol and precludes the application of its benefits to aliens who have engaged in persecution, who pose a threat to the security of the United States, or who have committed serious crimes. (No comprehensive attempt has yet been made to categorize serious crimes). However, section 243(h) does not reach the issue of discrimination or discrepancy in treatment. Thus, in the exclusion proceedings in *Matter of Castellon*,¹⁴² a Cuban refugee who had been paroled into the United States was found excludable, upon revocation of parole by the District Director, on the grounds that he lacked immigration documents. This was the case even though the INS failed to establish the companion ground of excludability: commission of a crime involving moral turpitude, which had caused the exclusion proceedings to be initiated. The refugee also made an application for asylum. It was denied because the Cuban refugee had only his unsupported claim that his imprisonment for theft was a politically motivated entrapment. *Castellon* makes the discretion of the Attorney General (the Immigration Board acts as the surrogate of the Attorney General) manifest and the opportunity for discrimination clear.

In *Matter of Rodriguez-Palma*,¹⁴³ the Board addressed the issue of what constitutes a "serious non-political crime." *Rodriguez-Palma* involved a Cuban alien who was charged with being excludable under sections 212(a)(9) and 212(a)(20) of the Immigration Act, as having been convicted of a crime involving moral turpitude and as an immigrant not in possession of a valid unexpired immigrant visa or other valid entry document. *Rodriguez-Palma*'s excludability under section 212(a)(9) (criminal exclusion) was established through admission. Therefore, the Board did not reach the excludability issue under section 212(a)(20) (lack of immigration documents). The Cuban alien also applied for asylum, which was denied. The only issue on appeal was the correctness of the denial of asylum,¹⁴⁴ i.e., whether the asylum applicant's 1968 Cuban conviction was for a "serious non-political crime" within the meaning of section 243(4)(2)(c).¹⁴⁵

The term serious crime is new to the Immigration Act and is not defined therein. The Board, therefore, consistent with Congressional intent, looked to the application of the term under the Protocol for guidance. The defini-

140. *Hearing on International Relations*, *supra* note 3, at 70.

141. Congress in Sec. 243(h) adopted, almost verbatim, the language of the 1951 Convention and the 1967 Protocol. See art. 1, para. A, para. F and art. 33 of the Convention.

142. U.S. Bd. of Immigration & Naturalization Appeals No. 2847 (1980).

143. *Matter of Rodriguez-Palma*, A 22792193, Interim Decision 2815 (BIA 1980).

144. *Id.* at 5.

145. *Id.* at 7.

tion¹⁴⁶ states:

In the present context, however, a serious crime must be a capital crime or a very grave punishable act. Minor offenses punishable by moderate sentences are not grounds for exclusion under Article 1, § F(b) even if technically referred to as crimes in the penal law of the country concerned.¹⁴⁷

The Board also referred to the Protocol Standard for applying the exclusion which states:

In applying the exclusion clause, it is also necessary to strike a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very serious in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.¹⁴⁸

Thus the Protocol suggests a balancing test, weighing the nature of the offense against the degree of persecution feared. This requires a case by case analysis. In *Rodriguez-Palma*, the Board weighed the crime of robbery, a felony under common law and the statutes, against the persecution feared. Likelihood of persecution was determined to be minimal since the refugee had never acted in any manner as to demonstrate opposition to the Cuban government. The Board denied asylum. The preceding cases demonstrate that the eligibility standards for asylum continue to be drawn restrictively. Factors not relevant to the basic asylum inquiry of whether the alien will be persecuted if repatriated continue to play a role in asylum decisions.

B. *International Law*

It is an accepted maxim of international law that every sovereign nation has the inherent power to forbid the entrance of foreigners within its boundaries, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.¹⁴⁹ In the absence of an international agreement to the contrary, a state is under no duty to admit nationals of another state into its territory and incurs no international responsibility if it deports them. However, the United States has ratified the Protocol which contains certain minimum obligations toward refugees. These obligations include the duty not to discriminate and the prohibition against refoulment.

Although the purpose of the Protocol is to protect refugees, several categories of persons are excluded from the protection of the Protocol definition. Persons who have committed a crime under international law are excluded

146. The term "serious nonpolitical crime" used in the Protocol is not further defined therein. However, the Office of the High Commissioner of Refugees, which has the responsibility for supervising the application of the Protocol provisions, has published the HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS which provides an interpretation of the meaning of the application of the terms used in the Protocol. Paragraphs 151 through 161, pp. 36-8 of the HANDBOOK are concerned with the term serious nonpolitical crime.

147. OFFICE OF THE HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, para. 155, 37 (1979).

148. *Id.* para. 156.

149. *Ekiu v. U.S.*, 142 U.S. 651, (1892).

under Protocol Article 1, § F(a), (c). International crimes include a crime against peace, a crime against humanity, and acts contrary to the purposes and principles of the United Nations. Persons who have committed a serious non-political crime are also excluded from the Protocol definition.¹⁵⁰ The provision of the Protocol [and new section 243(h)], denying protection to aliens who have committed serious non-political crimes outside the country of refuge, is a major barrier confronting the Haitian alien who has committed a crime recognized in United States law. What constitutes a serious non-political crime is determined on a case by case basis in United States domestic tribunals. As suggested in *Rodriguez-Palma*, under the Protocol a balancing test is to be employed in determining whether criminal convictions vitiate a bona fide political refugee status.

IV. LOOKING BEYOND THE CRIMINAL CONVICTION

The "act of state doctrine" in its traditional formulation precludes the courts of this country from inquiring into the validity of the acts a recognized foreign sovereign power commits within its own territory.¹⁵¹ The general view is that when public officers of a foreign country perform official acts in avowed pursuance of their authority, the court of another power will accept such acts as lawful and will not undertake to examine the validity under local law.¹⁵² The underlying policy is that to adjudicate validity of acts of foreign governments under its own laws in United States courts would imperil amicable relations between governments and vex the peace of nations. Therefore, the judiciary abstains from decisions in ordinary act of state cases.¹⁵³ Nonetheless, no law of its own force has any effect outside the territory of the state or nation from which its authority is derived, although foreign laws may, within certain limits, be given effect. However, comity will not be extended to foreign law if it is contrary to the public policy of the forum state.¹⁵⁴ Comity is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience. In determining whether to accord comity to a decision of a foreign court, a forum court must determine whether the foreign court is one of competent jurisdiction and whether recognizing the foreign court's decision would violate the laws and policies of the forum nation.¹⁵⁵

Under the comity limitation to the act of state doctrine, cooperation between states is not without a certain reserve. This reserve is especially acute when there is a great difference between prevailing ideologies and systems of government in the foreign country and those in the United States. Haiti's human rights practices are clearly violative of prevailing practices in the United States. The disregard of human rights by the Haitian govern-

150. Pub. L. No. 96-212, tit. II, sec. 203(e).

151. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Anderson v. Gladden*, 368 U.S. 949 (1955).

152. *Union Shipping & Trading Co. v. U.S.*, 127 F.2d 771, 774 (1942); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.* 392 F.2d 706, 712 (1968).

153. *Jimenez v. Aristeguieta*, 311 F.2d 547, 558 (1962).

154. *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978).

155. *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.* 477 F. Supp. 737, 742 (S.D.N.Y. 1979).

ment, which results in the persecution of innocent people along with those who offer resistance to oppression, underscores the basic difference in ideologies and the need for viewing asylum as an ultimate human right. Although there may be concern that the grant of asylum to aliens from friendly or allied states will appear to be an unfriendly act, this is not a legitimate component of an asylum decision under the Protocol. The Protocol requires that the decision be based exclusively on the merits of the individual case. Haiti is in violation of its international duty to provide minimum human rights to its citizens. By granting asylum to Haitian nationals fleeing Haiti's oppressive regime the United States registers disapproval of the human rights violations found in Haiti.

Should a Haitian national who has been convicted of a common crime be excluded? Should asylum applicants such as those in *Castellon* and *Rodriguez-Palma* be able to attack the validity of the convictions underlying their exclusion? In prescribing exclusion upon conviction of a serious crime, usually a crime involving moral turpitude, American law does not give immigration officers the power to review the basic criminal proceeding. The seriousness and turpitude of a crime is determined by its nature rather than by the particular circumstances. This should not be the case where a nation's practices are oppressive and violative of human rights as those in Haiti. United States policy should not be static. Rather, it should adjust in keeping with standards of fairness. Thus, American officials should not be proscribed from taking into consideration the circumstances in which a conviction occurs. Considering the circumstances does not necessarily mean that the United States government would be ignoring or overriding foreign judgments. Such considerations would only go to the weight to be given convictions. This is particularly relevant under the Protocol standard which requires a balancing of the nature of the offense against the likelihood of persecution. This case by case approach would take into account such factors as oppressive political practices and whether there is a defense or justification under United States law. Alleged commission of a crime should not automatically negate the right of asylum under the Protocol, thereby limiting the alien to the possibility of discretionary relief. The purpose of the Protocol in denying the right of asylum to those who have committed a serious non-political crime was to protect the right of sovereign states to impose legitimate criminal punishment. But in a situation such as that found in Haiti, criminal punishment is not a legitimate exercise of authority; it is rather a measure of oppression. Conviction and imprisonment are arbitrary and bear no necessary relation to the crime committed. Therefore, the fact that the government may have a political objective in punishment must be taken into account. Where it is clear that international human rights are not being met, United States officials should take note of violations of human rights and lack of due process and weigh criminal convictions accordingly. Whether a conviction, obtained in a proceeding lacking in due process by international and United States domestic law standards, should form the basis for exclusion would therefore depend on the circumstances of each individual case.

CONCLUSION

As noted in *Coriolan*, the fact that an alien comes from Haiti, a state where overt political activity is not necessary to invoke persecution, should not foreclose a claim for political refugee status. The status of the Haitian national as political refugee should be closely related to violations of human rights found in Haiti. Perhaps human rights violations should not automatically confer political refugee status; however, they certainly should be relevant to the determination of that status. Even where the Haitian refugee has been criminally convicted the circumstances of Haitian politics should be deemed relevant indicators of the validity of the conviction. Such factors are arbitrary arrests, convictions and imprisonment should be considered in evaluating the asylum claim, thereby affecting the weight to be given a conviction obtained in Haiti's politically oppressive regime.