2

Alienage

The first element of Convention refugee status is that the claimant must be outside her country of origin.[1] There is nothing intuitively obvious about this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their state.[2] Their plight may be every bit as serious as that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection.

The strict insistence on this territorial criterion[3] has prompted concern that there is a mismatch between the definition and the human suffering consequent to involuntary migration.[4] In one sense, the exclusion of internal refugees is clearly unfair: it does not recognize the existence of social, legal, and economic barriers which make it impossible for all to escape to international protection.[5] The Convention definition of refugee status therefore responds

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[1] "The first requirement, that the refugee should be an alien, is undisputed": G. Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends" [1983], World Refugee Survey 5, at 5.

[2] "Many people may find themselves in refugee-like situations, and may have fled considerable distances, but if no border has been crossed they will not be considered to be refugees. An example of people in this situation would be the many displaced persons in Vietnam during the 1970s. Many people within Africa also fall within this category": P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 149.

[3] "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule": United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 21 (1979). *Accord* J. Patrnogic, "Refugees — A Continuing Challenge" (1982), 30 Ann. de droit international médical 73, at 74: "In the general concept, a refugee is a person who flees to find refuge and who feels compelled to leave his normal place of abode on account of any kind of circumstance . . . . In the international legal concept, a refugee is an alien who finds himself outside his country of origin or nationality for serious reasons . . . . Thus, while in municipal law the term refugee can also be applied to nationals, in international law the refugee is an alien."

[4] "The mismatch between a legal definition and actions of governments, and the inadequacies of a cold, legal definition in the face of human suffering, are all too apparent": C. Keely and P. Elwell, *Global Refugee Policy: The Case for a Development-Oriented Strategy*, p. 11 (1981).

[5] "Refugee flows occasioned by expulsion or flight are but one of the outcomes of political persecution; paradoxically, the refugees may be the more fortunate segment of the original tar-

in a less than even-handed way to the protection needs of persons similarly at risk of persecution.[6]

There is a threefold historical rationale for the requirement that only persons outside their state be eligible for Convention refugee status. First, the Convention was drafted with a specific purpose in the context of limited international resources. Its intent was not to relieve the suffering of all involuntary migrants, but rather to deal "only with the problem of legal protection and status."[7] Its goal was to assist a subset of involuntary migrants composed of persons who were "outside their own countries [and] who lacked the protection of a government",[8] and who consequently required short-term surrogate international rights until they acquired new or renewed national protection.[9] Internal refugee displacements, while of humanitarian note, "were separate problems of a different character",[10] the alleviation of which would demand a more sustained commitment of resources than was available to the international community.[11]

Second, there was a very practical concern that the inclusion of internal refugees in the international protection regime might prompt states to attempt to shift responsibility for the well-being of large parts of their own population to the world community.[12] The obligations of states under the Convention would thereby be increased, as a result of which fewer states would be likely to participate in the Convention regime.[13]

Third and most fundamental, there was anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the state within which the refugee resided.[14] Refugee law, as a part of international human rights law, constitutes a recent and carefully constrained exception to the long-standing rule of exclusive jurisdiction of states over their inhabitants.[15] While it was increasingly accepted in the early 1950s that the world community had a legitimate right to set standards and scrutinize the human rights record of the various countries, it was unthinkable that refugee law would intervene in the territory of a state to protect citizens from their own government.[16] The best that could be achieved within the context of the accepted rules of international law was the sheltering of such persons as were able to liberate themselves from the territorial jurisdiction of a persecutory state.

None of the three factors which dictated the exclusion of internal refugees — limited resources, concern about state participation, or respect for sovereignty — was so much a matter of conceptual principle, as it was a reflection of the limited reach of international law. As Andrew Shacknove has observed, "alienage is an unnecessary condition for establishing refugee status. It . . . is a subset of a broader category: the physical access of the international community to the unprotected person."[17] In other words, the physical presence of the unprotected person outside her country of origin is not a constitutive element of her refugeehood, but is rather a practical

get, others of whom may be subjected to a worse fate, including not only immobilization but even murder": A. Zolberg, "The Formation of New States as a Refugee-Generating Process" (1983), 467 The Annals Am. Academy Pol. Soc. Science 24, at 27.

[6] The same advantages make it possible for some refugees to seek out more commodious states of asylum: "Refugees who are persistent and innovative (and who are overwhelmingly male) dominate the spontaneous arrivals into Canada; in camps, women and children predominate, and they and others in the camps rarely have the resources or the independence to make Canada a country of first asylum": H. Adelman, "Refuge or Asylum — A Philosophical Perspective" (1988), 1(1) J. Refugee Studies 7, at 9.

[7] Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.161, at 7, August 18, 1950.

[8] Statement of Mrs. Roosevelt of the United States of America, 5 UNGAOR at 473, December 2, 1949.

[9] "The proposals of the Economic and Social Council were designed, however, to meet the needs of refugees who were outside their countries of origin for social, religious or political reasons, were unable to return thereto and required protection under international auspices until they acquired a new nationality or reassumed their former nationality": Statement of Mrs. Roosevelt of the United States of America, 5 UNGAOR at 363, November 29, 1950.

[10] Statement of Mrs. Roosevelt, *supra*, note 8.

[11] "[W]hile he would like to see the Convention drafted to cover as many refugees as possible, he nevertheless appreciated how difficult it would be for governments to provide what the Ad Hoc Committee had described as a blank cheque . . . ": Statement of Mr. van Heuven Goedhart, United Nations High Commissioner for Refugees, U.N. Doc. A/CONF.2/SR.21, at 12, July 14, 1951.

[12] "While, in principle, it favoured the elimination of all exceptions, the United States Government wanted to maintain that of refugees of German ethnic origin residing in Germany because it considered that group of nearly eight million persons as normally under the jurisdiction of the German Government and it did not want to encourage that government to renounce all responsibility toward them by placing them under international protection": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.5, at 5, January 30, 1950.

[13] "He felt that the extension of the Convention to internal refugees, which was implied in the [Belgian, Canadian, and Turkish] draft [U.N. Doc. A/C.3/L.130] could only encourage the diplomatic conference to adopt some other definition": Statement of Mr. Rochefort of France, 5 UNGAOR at 391, December 4, 1950.

[14] "Whatever [definitional] formula might ultimately be chosen, it would not and could not in any event apply to internal refugees who were citizens of a particular country and enjoyed the protection of the government of that country. There was no general definition covering such refugees, since any such definition would involve an infringement of national sovereignty": Statement of Mr. Rochefort of France, U.N. Doc. E/AC.7/SR.172, at 4, August 12, 1950.

[15] "Since the beginnings of the Law of Nations, one of its fundamental principles was that of national sovereignty, which reserves to each sovereign State the exclusive right to take any action it thinks fit, provided only that the action does not interfere with the rights of other States, and is not prohibited by international law on that or any other ground . . . . It follows from this principle that, in all matters falling within the 'domestic jurisdiction' of any State, international law does not permit any interference, let alone any intervention, by any other State": P. Sieghart, *The International Law of Human Rights*, p. 10 (1983).

[16] "[F]rom the legal standpoint refugee law was bound up with the existence of a multinational society and implies the existence of a variety of political and administrative systems in a number of comparatively watertight national territories. In a uninational society or in a federation of States there would doubtless be castaways, there might be political victims, but there would clearly be no refugees in the exact sense of them": J. Vernant, *The Refugee in the Post-War World*, p. 4 (1953).

[17] A. Shacknove, "Who Is a Refugee?" (1985), 95 Ethics 274, at 277.

condition precedent to placing her within the effective scope of international protection.

The territorial dimension of the Convention definition of refugee status, then, was dictated by the extant authority of international law. Its purpose was not to divide involuntary migrants into those who are worthy of assistance and those who are not deserving, but was instead to define the scope of refugee law in a realistic, workable way. As the authority of the international community over human rights has increased with the passage of time,[18] so too has the reach of refugee law expanded, at least tentatively, to protect some internal refugees.

First, since 1972 the United Nations High Commissioner for Refugees has been called on to provide material assistance to various groups of refugees within their national boundaries.[19] This assistance has been premised on the concurrence of the state concerned and the willingness of the international community to provide funding,[20] but is nonetheless indicative of an enhanced recognition of an international role in the protection of internal refugees. Second, and more dramatic, is the establishment of orderly departure programs in collaboration with refugee-producing states, whereby refugees may make application from within their country of origin for resettlement abroad under international auspices.[21] Both of these developments bear witness to Shacknove's position[22] that the territorial limitation in the Convention refugee definition is a function of "the art of the possible", which may decrease in importance as unprotected persons still within their states become more accessible to the international community.

The alienage requirement raises a number of specific issues. First, must an individual *leave* her country as a result of fear of persecution, or may

[18] "Whether or not national states will yield enough of their external sovereignty in our lifetime to make international government possible . . . one basic fact emerges from our study. It is that the individual, not the sovereign state, is the end purpose of the new legal order that has been erected in our generation under the title of Human Rights": J. Joyce, *The New Politics of Human Rights*, p. 225 (1978).

[19] P. Hartling, "Concept and Definition of 'Refugee' — Legal and Humanitarian Aspects", Inaugural lecture given on April 23, 1979, at the Second Nordic Seminar on Refugee Law, University of Copenhagen 14-15 (unpublished, 1979).

[20] It is noteworthy that the whole approach of UNHCR to the provision of assistance to non-mandate refugees is within the control of Western developed states. This is so because the only core funding that the United Nations provides the UNHCR is to cover routine administrative expenses. The operating budget of the organization is thus nearly completely derived from the voluntary contributions of a fairly small number of developed states: Executive Committee of the High Commissioner's Programme, "Voluntary Funds Administered by the United Nations High Commissioner for Refugees: Accounts for the Year 1987 and Report to the Board of Auditors Thereon", U.N. Doc. A/AC.96/707 (1988).

[21] "Calls for orderly departure agreements for the Vietnamese or the airlift agreement between Cuba and the United States in the 1960s indicate a willingness to extend the refugee label to people in their own country": C. Keely and P. Elwell, *supra*, note 4, at 9.

[22] *See* text *supra* at note 17.

she successfully claim Convention refugee status if her fear arises at a time when she is already abroad? Second, does it matter if the putative refugee left her country with or without the official authorization of her state? Third, must a refugee claim status in the country nearest her home, or in the first state to which she flees? Fourth, what is the implication of entry into an asylum state by fraudulent means or in contravention of applicable immigration laws? Finally, *what* country must an individual be outside of in order to qualify for Convention refugee status where she is, for example, possessed of dual or multiple nationality, or conversely is stateless?

2.1 Refugees *sur place*

The Convention refugee definition does not distinguish between persons who flee their country in order to avoid the prospect of persecution and those who, while already abroad, determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin.[23] By virtue of its requirement that the claimant "*is* outside the country of his nationality . . . "[24] the Convention protects refugees *sur place* on an equal footing with those who cross a border after the risk of persecution is already apparent. This position is consonant with the general rule that the territorial requirement of the Convention definition is intended to identify those involuntary migrants within the effective reach of international law: whether already present or arriving in a foreign state, the refugee claimant is clearly able to benefit from protection against return.

2.1.1 Claims Grounded in Events in the Country of Origin

The classic *sur place* refugee claim[25] derives from a significant change of circumstances in the country of origin at a time when the claimant is abroad

[23] "A person who has left his country for whatever reason but subsequently owing to well-founded fear of being persecuted refuses or becomes unable to avail himself of being persecuted refuses or becomes unable to avail himself of the protection of that country or, in the case of a stateless person owing to well-founded fear of being persecuted refuses or becomes unable to return to the country of his former habitual residence, is equally a refugee. These persons have become known as *réfugiés sur place*": P. Weis, "The concept of the refugee in international law" (1960), J. du droit international 928, at 972. *Accord* UNHCR, *supra*, note 3, at 22.

[24] *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 2545, entered into force April 22, 1954 ("*Convention*"), at Art. 1(A)(2).

[25] This type of claim was clearly contemplated by the drafters of the Convention. Mr. Rain of France, for example, stated that the definition extended to "not only those who had actually left their country owing to persecution, but also those who had already been outside their country before the persecution began and were unable to return for fear of persecution": U.N. Doc. E/AC.32/SR.17, at 3, February 6, 1950. Similarly, Mr. Robinson of Israel cited as an example of a refugee *sur place* persons who "went abroad on a diplomatic mission or to study and, while still abroad, were overtaken by a revolution which made it impossible for them to return": U.N. Doc. A/CONF.2/SR.23, at 9, July 16, 1951. *Accord* Mr. Petren of Sweden: U.N. Doc. A/CONF.2/SR.23, at 10, July 16, 1951.

for reasons wholly unrelated to a need for protection.[26] At the time of departure from her state, she may have intended only to vacation, study, or do business abroad, and then to return home.[27] If, however, events subsequent to her departure would put her at risk of serious harm upon return home, she may claim protection as a Convention refugee.

For example, the decision in *Chaudri v. Minister of Employment and Immigration*[28] involved a Pakistani citizen who had been an activist in the ruling People's Party of Pakistan prior to the military overthrow of 1979. Mr. Chaudri had been in Canada for some three years prior to the coup. In 1980, he learned that the new military government of Pakistan had issued a politically inspired warrant for his arrest that could lead to indefinite detention. The Federal Court of Appeal held that he was properly considered a Convention refugee *sur place* since his fear of persecution, while not extant at the time of his departure from Pakistan, was nonetheless well-founded in subsequent events. The same result was reached in the case of *Almaz Isebella Kebede Fernandes*,[29] involving an Ethiopian student abroad when the military ousted Emperor Haile Selassi. Her father, the Emperor's bodyguard, had been killed by the military, and all of her immediate family was either in detention or in receipt of asylum in other countries. In the circumstances, the Immigration Appeal Board found her to be a Convention refugee in that she "could not possibly return to her country at the present time and expect to be treated favourably by the military junta."[30]

A variant of the classical *sur place* situation involves the dramatic intensification of pre-existing factors since departure from one's home country. While distinguishable from the first category by the fact that the claimant may have been aware of, or even motivated to depart by, disturbing events in her home country, these cases are characterized by an escalation of events post-departure which is sufficient to give rise to a reasonable risk of persecution upon return.

In a series of decisions involving Eritrean seamen,[31] the Immigration Appeal

[26] "If he is outside his homeland when conditions change in such a manner that his return would lead to a well-founded fear of persecution, the person is classified as a refugee": A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 55.

[27] "If he is outside his country he can make an application for asylum no matter why he left": G. Gilbert, "Right of Asylum: A Change of Direction" (1983), 32 I.C.L.Q. 633, at 646.

[28] (1986), 69 N.R. 114. *See also Mohammad Mushtaq*, Immigration Appeal Board Decision M81-1122, C.L.I.C. Notes 47.6, October 26, 1982, where the same result was reached in the case of a Pakistani abroad prior to the coup who arrived in Canada only after the Bhutto government was overthrown.

[29] Immigration Appeal Board Decision 77-1036, October 6, 1977.

[30] *Id.*, at 3, *per* J.-P. Houle.

[31] *Tekeste Kifletsion*, Immigration Appeal Board Decision 79-1136, C.L.I.C. Notes 20.3, February 29, 1980; *Kidane Ghebreiyesus*, Immigration Appeal Board Decision 79-1137, C.L.I.C. Notes 20.3, March 21, 1980; *Isaak Afework*, Immigration Appeal Board Decision 79-1139, C.L.I.C. Notes 20.3, May 21, 1980; and *Kidane Tegegne*, Immigration Appeal Board Decision M80-1034, February 25, 1981.

Board found that the long-standing mistreatment of this ethnic group by Ethiopian authorities had so intensified during the claimants' time abroad that it was reasonable for them to conclude that their lives or liberty would be at risk upon return to their country.[32] Similarly, in the case of *Thillainathan Srikanthan*[33] the Board determined that "*recent events* in the State of Sri Lanka lead the Board to believe that the applicant, although marginally involved in political events *at the time of his residence* in that country, may encounter some problems if he were to be returned . . . *at the present time* the applicant has good reason to fear persecution"[Emphasis added].[34] The Immigration Appeal Board also considered the intensification of harm doctrine in a number of cases involving allegations of increased governmental hostility toward Sikhs in the State of Punjab, but found that the changes in government policy there did not yet amount to a sufficiently serious risk of harm.[35]

2.1.2 Claims Grounded in the Asylum Seeker's Activities Abroad

In addition to claims grounded in either new circumstances or a dramatic intensification of pre-existing conditions in the country of origin, a *sur place* claim to refugee status may also be based on the activities of the refugee claimant since leaving her country.[36] International law recognizes that if while abroad an individual expresses views or engages in activities which jeopardize the possibility of safe return to her state, she may be considered a Convention refugee. The key issues are whether the activities abroad are likely to have come to the attention of the authorities in the claimant's country of origin and, if so, how they are likely to be viewed and responded to.

The leading Canadian authority on this point is the decision of the Federal Court of Appeal in *Mohamed Ahmed Urur v. Minister of Employment and Immigration*.[37] Responding to the Immigration Appeal Board's refusal to receive photographic evidence of the claimant's participation in a demonstration in Ottawa in front of the embassy of his country of origin, the Court

[32] "When the applicant left his country to work as a seaman, he did not have the intention of becoming a refugee, but as the situation deteriorated, he realized that his liberty and his life would be in jeopardy if he returned to Ethiopia. The United Nations Convention applies to someone who comes within the definition *sur place*": *Id.*, (common to all four decisions), *per* R. Tremblay.

[33] Immigration Appeal Board Decision T83-10351, May 23, 1985.

[34] *Id.*, at 5, *per* B. Suppa.

[35] *See*, e.g., *Lakhbir Gill Singh*, Immigration Appeal Board Decision V83-6279, February 13, 1986; *Mohinder Parmar Singh*, Immigration Appeal Board Decision V87-6247X, August 10, 1987; and *Santokh Bhopal Singh*, Immigration Appeal Board Decision V87-6245X, August 17, 1987.

[36] "[C]onduct in which the person has engaged while outside of his homeland may also give rise to a well-founded fear of persecution upon his return": A. Fragomen, *supra*, note 26, at 55. *Accord* UNHCR, *supra*, note 3, at 22.

[37] Federal Court of Appeal Decision A-228-87, January 15, 1988; affirming on other grounds Immigration Appeal Board Decision M86-1601X, April 8, 1987.

held that "[t]his refusal by the Board was manifestly wrong. An alien in Canada may be a refugee as a consequence of facts which have occurred since his arrival."[38] A *sur place* claim to refugee status was recognized, for example, in the case of *Irfam Ismailovski*,[39] who had helped to publish anti-government propaganda directed to the Albanian exile community in Canada, thereby placing himself at risk of incarceration by his home authorities.

Other very similar claims have, however, been rejected. The Board in *Carlos Armando Guerra Morales*[40] denied refugee status to a Chilean émigré journalist who had been "since his arrival, engaged in many activities directed against the present regime in his native country."[41] Involvement with politically hostile emigrant groups has likewise been looked upon with scepticism,[42] even where such activity has been clearly publicized.[43] The Immigration Appeal Board has asserted that "it is not reasonable that a person may place himself in jeopardy with the laws of his country . . . and thereby claim special status if it is that act itself which creates the claim for refugee status."[44]

Canadian decision-makers are not alone in taking this position. Except where foreign policy goals are served, American authorities have also rejected most claims grounded in political activity in the United States.[45] Because persons might engage in oppositional activity strictly or primarily with the intention of placing themselves at risk, there is concern that such claims present a clear opportunity for abuse by persons who are not really in need of protection.[46]

Such an absolutist preoccupation with the possibility of fraud ignores the basic right of all persons to be free to express themselves, to associate with whomever they wish, to pursue the development of their own personalities.[47] Logically, visitors from abroad who exercise their right to speak out against their home government, who associate with opposition emigrant groups, or who otherwise engage in lawful activity perceived by their state of origin to be inappropriate should be protected from return where there is a serious risk of persecution as a result of those actions.[48] Since the voluntary issuance of the challenge to the home state is clearly lawful in and of itself, any reticence to acknowledge the validity of a claim to protection in such circumstances "chills an alien's constitutionally protected freedom of expression."[49]

Because the expression of oppositional opinion is lawful, there is no good reason to focus on the question of voluntariness *per se*.[50] The conceptual

[38] *Id.*, at 2, *per* Pratte J. The Federal Court nonetheless dismissed this application for review because the Board had admitted oral evidence to the same end.

[39] Immigration Appeal Board Decision 75-10266, June 8, 1976.

[40] Immigration Appeal Board Decision 76-1057, March 10, 1977. While the claim to Convention refugee status was denied, the Board nonetheless chose to admit Mr. Guerra Morales under its then extant authority to direct landing in situations of unusual hardship.

[41] *Id.*, at 3, *per* F. Glogowski.

[42] *See*, e.g., the case of *Meril Meryse*, Immigration Appeal Board Decision M73-2608, April 30, 1975, in which active involvement with the Bureau de la communauté chrétienne des Haitiens à Montréal, an anti-Duvalier organization, was held to be an insufficient ground for refugee status; and *Charan Batth Singh*, Immigration Appeal Board Decision V86-6189, April 10, 1987, involving a Sikh claimant who had come to the attention of Indian authorities for preaching to the expatriate community in Canada. This approach is contrary to accepted doctrine: "Circumstances occurring outside a refugee's country of origin may also make his fear well-founded, e.g. a person may be considered as having well-founded fear of being persecuted in his country of origin if he can show that he is suspected of having associated with *émigré* circles considered hostile by the authorities in his country of origin": P. Weis, *supra*, note 23, at 972.

[43] In the case of *Leszek Adamczenko*, Immigration Appeal Board Decision 80-9339, November 20, 1980, the unsuccessful applicant had participated as a newsman, commentator and news announcer on a Canadian television program addressed to the Polish expatriate community. A *sur place* claim to refugee status was also denied in the case of *Manuel Antonio Rosario Estrella*, whose family home abroad had been searched following publication of his photograph in a Montreal newspaper: Immigration Appeal Board Decision M85-1097, C.L.I.C. Notes 83.13, August 19, 1985.

[44] *Lech Jankowski*, Immigration Appeal Board Decision V80-6410, C.L.I.C. Notes 26.11, January 5, 1981, at 4, *per* B. Howard.

[45] "In the cases of political refugees claiming to fear persecution resulting from activities within the United States in opposition to their native regimes, the courts have consistently denied refugee status to claimants from non-communist countries": J. Zimmer, "Political Refugees: A Study in Selective Compassion" (1978), 1 Loyola L.A. Intl. Comp. L. Ann. 121, at 134. *Accord* D. Roth, "The Right of Asylum Under United States Immigration Law" (1981), 33 U. Florida L. Rev. 539, at 552-53. See also *Matter of Mogharrabi*, Board of Immigration Appeals Interim Decision 3028, June 12, 1987, in which the *sur place* claim of an Iranian citizen was recognized on the basis of the risk flowing from a dispute with Iranian consular officials in the United States.

[46] "Bootstrap refugees are people who had no problem in their home country before they left, but left anyway, came here and decided they wanted to stay. In most blatant form, bootstrap refugees are those who, having decided they want to stay here, then issue a statement denouncing the home government, which they promptly use as the basis of their asylum application. Surely, they argue, if the government hears about this, it will persecute us when we get home": D. Martin in C. Sumpter, "Mass Migration of Refugees — Law and Policy" (1982), 76 A.S.I.L.P. 13, at 15.

[47] "[R]efugee status is not restricted to martyrs. If an individual can demonstrate that flight was a manifestation of an opinion that would have resulted in persecution if expressed, should he be denied asylum if persecution would ensue upon deportation?": K. Brill, "The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act" (1983), 32 Cleveland State L. Rev. 117, at 135.

[48] "Consider the situation of a student . . . who comes here from a repressive country, who may never have paid much attention to political developments there or may never have had an opportunity to think seriously or to speak out about the political situation in that country. The student comes here, indulges in the . . . freedoms of which we are justly proud, and awakens to the political repression, the problems that exist in the home country, and now begins to speak out. Whether the student did that consciously, knowing of the risk that she may be generating if she ever were to return, or not, we probably would agree that this country stands for encouraging that sort of awakening — at least so long as it reflects a real personal change and not a blatant attempt to affect immigration status. If that speaking out leads to a strong showing that she will be persecuted on return, I submit that most of us would not vote to send the student back to the home country": D. Martin in C. Sumpter, *supra*, note 46, at 16.

[49] D. Roth, *supra*, note 45, at 553.

[50] *But see* text at note 44, *supra*. Grahl-Madsen similarly emphasizes the issue of voluntariness: "[W]e may have to draw a distinction . . . between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may

awkwardness in recognizing these claims derives rather from the fact that not all instances of voluntary alienation give rise to a risk of harm which can readily be linked to one of the five forms of civil or political status set out in the Convention.[51] Specifically, it is legitimate to grant refugee status in this type of case only insofar as the claimant's post-departure activities may genuinely be seen to reflect her true political opinion, or alternatively where there is evidence that those activities may lead to the attribution to her of a political opinion by authorities in her home state. Otherwise, whatever consequences ensue from her actions abroad are the result only of her unfounded or untruthful assertions, a predicament outside the scope of the Convention definition.

In the case of persons who have chosen to be politically active in their state of origin, the authenticity of the political opinion underlying the activism is generally assumed. This is sensible, because an individual would be unlikely to make insincere attacks on her state at a time when she remains within its grasp. The ability of the state to exert control and to punish is an implied barometer of authenticity. In contrast, an individual *outside* the jurisdiction of her state of origin may be subject to no such automatic and effective control mechanism. It is thus more readily conceivable that an oppositional stance could be assumed simply for the purpose of fabricating a claim to refugee status,[52] and thus not reflect a political opinion as required by the definition. The challenge, then, is to respond to this real evidentiary difference without being dismissive of such protection needs as may arise from the expression of sincerely held convictions at a time when an individual is abroad.

This can be done by canvassing a number of issues. First, does the claimant retain close personal connections to family, friends, or institutions in her home state? Insofar as such a nexus exists, it affords a surrogate indicator of sincerity, as the claimant would be less likely to engage in unfounded opposition where persons who are important to her are at risk. Second, are the claimant's statements or actions abroad consistent with her behaviour prior to departure? If so, the consistency affords some evidence of veracity. If there is no consistency, are there valid reasons to explain the claimant's openness or change of views once abroad? Third, can the firmness of the claimant's newly expressed convictions be tested? To the extent that she has a clear understanding of relevant concerns and issues and has become significantly involved in their propagation, it is more likely that she genuinely embraces the belief underlying her statements or actions.

not"; 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 252 (1966). This dichotomy does not account for the possibility of fully *bona fide* expressions of opposition that may be voluntarily made while abroad.

[51] *See* Chapter 5, *infra*.

[52] "Asylum law protects those who *in good faith* need to be sheltered from persecution. This protection was not meant to encompass those who make political statements for the sole purpose of becoming refugees" [Emphasis added]: K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 729.

It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.[53]

This issue is most poignantly raised when it is alleged that the fact of having made an unfounded asylum claim[54] may *per se* give rise to a serious risk of persecution. While these cases provide perhaps the most obvious potential for "bootstrapping",[55] there must nonetheless be a clear acknowledgment and assessment of any risk to basic human rights upon return which may follow from the state's imputation of an unacceptable political opinion to the claimant. The mere fact that the claimant might suffer some form of penalty may not be sufficiently serious to constitute persecution,[56] but there are clearly situations where the consequence of return may be said to give rise to a well-founded fear of persecution. For example, in *Slawomir Krzystof Hubicki*[57] evidence was adduced that under then-prevailing Polish criminal law, the claimant would face imprisonment of up to eight years because he had made a refugee claim in Canada. In such situations, the basis of claim is not the fraudulent activity or assertion itself, but is rather the political opinion of disloyalty imputed to the claimant by her state. Where such an imputation exists, the gravity of consequential harm and other definitional criteria should be assessed to determine whether refugee status is warranted.

2.2 Departure from the State of Origin

The second aspect of alienage is concerned with the means by which the refugee claimant exited her country of origin. First, can the fact of illegal

[53] Such an approach would conform to the basic principle enunciated by Grahl-Madsen that "the behaviour of the persecutors is decisive with respect to which persons shall be considered refugees": A. Grahl-Madsen, *supra*, note 50, pp. 251-52.

[54] Not all cases based on the fact of a prior unsuccessful refugee claim are *per se* fraudulent. "[W]hen faced with an asylum claim based on a previous unsuccessful claim, the courts must determine (1) the applicant's background and conditions in his country of origin, (2) whether the first asylum claim had a good faith, substantive basis, and (3) whether the first asylum claim was simply a bootstrap for the second asylum claim": K. Petrini, *supra*, note 52, at 730.

[55] *Lech Jankowski*, *supra*, note 44.

[56] *See* Chapter 4, *infra*.

[57] Immigration Appeal Board Decision 81-6325, October 19, 1981. The claim to refugee status was denied by the Board without any explicit consideration of the potential criminal penalties upon return to Poland.

departure or stay abroad be said to give rise *per se* to a genuine risk of serious harm? Second, to what extent are issues of authorized or unauthorized departure probative of the genuineness of the claim to refugee status? Third, can a refugee claim arise where the state of origin not only authorizes, but in some sense facilitates the claimant's departure?

2.2.1 Illegal Departure or Stay Abroad

The mere fact that an individual either departs her country or stays abroad without authorization does not always entitle her to refugee status.[58] However, if two conditions are met, a genuine refugee claim may be established.

First, the country of origin must punish unauthorized exit or stay abroad in a harsh or oppressive manner.[59] The prospect of reasonable penalties for breach of a fairly administered passport law, for example, is not a harm of sufficient gravity to warrant protection as a refugee.[60] On the other hand, where the sanctions for illicit travel abroad are so severe that they effectively negate the fundamental human right to leave and return to one's country,[61] there is the basis for a claim to refugee status.[62]

[58] *See*, e.g., P. Nicolaus, "La notion de réfugié dans le droit de la R.F.A." (1985), 4 A.W.R. Bull. 158, at 159.

[59] UNHCR, *supra*, note 3, at 16. An excellent example of the need for protection is cited in G. Gilbert, *supra*, note 27, at 644-45: "Difficulties arise, however, where the offence for which he could be prosecuted is one which would be regarded as oppressive or contrary to human rights in the asylum State. This occurred recently in the United Kingdom in relation to Stancu Papusoiu, a Romanian. On his return Papusoiu would face prosecution for illegally leaving Romania . . . . In Papusoiu's case it is possible that the British Government has erred in deporting him. Of the past 11 years he has spent ten in gaol for attempting illegally to leave Romania."

[60] *See*, e.g., *Jacek Marian Olszak*, Immigration Appeal Board Decision T87-9085X, October 26, 1987, in which the Board found that the Polish claimant would face only minor disciplinary action for his violation of Polish emigration law, and was not therefore at risk of sufficient harm to be classed as a refugee. This is consistent with the appellate jurisprudence in the United States of America: *see Coriolan v. I.N.S.*, 559 F. 2d 993, at 1000 (5th Cir. 1977), cited in K. Brill, *supra*, note 47, at 132-33.

[61] "Everyone has the right to leave any country, including his own, and to return to his country": Universal Declaration of Human Rights, G.A. Res. 217A (III), December 10, 1948 ("*UDHR*"), at Art. 13(2). *Accord* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976, at Art. 12(2-4): "Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order ("ordre public"), public health or morals or the rights and freedoms of others, and are consistent with th other rights recognized in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country."

[62] R. DeVecchi, "Determining Refugee Status: Towards a Coherent Policy" (1983), World Refugee Survey 10, at 13. *Accord* D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L. Rev. 1125, at 1142-143: "Leaving a country is not normally considered an act of political expression, and punishment based on departure or failure to return in violation of travel restrictions would not normally be considered persecution for political opinion. However, in its 1965 reforms, Congress evinced a general desire to protect aliens facing punishment for illegal departure. Some courts have shown a similar willingness to let such aliens remain

Second, the illegal departure or stay abroad must either be explicitly politically motivated, or the state of origin must view the unauthorized departure or stay abroad as an implied political statement of disloyalty or defiance.[63] Whether by law or administrative practice, it must be clear that the home country disapproves of illicit emigration, and views those who breach its rules on exit or travel abroad as non-conforming dissidents. This perspective is exemplified by those societies in which it is considered a crime to seek to withdraw from the national community by emigration, and which brand all those who leave as traitors.[64] Claims should not be denied simply because they are prompted by an intention to secure asylum abroad. As in the case of *sur place* claims based on post-departure voluntary acts,[65] refugee status should be recognized where there is a prospect of serious harm upon return[66] as the result of the imputation to the claimant of an unacceptable political opinion.[67]

Insofar as a refugee claimant can meet this two-part test, she falls within the scope of the Convention definition. She reasonably fears persecution because of her home government's established practice of harshly oppressive punishment. The reason she is at risk is moreover directly related to the political opinion that her government attributes to her unauthorized departure or stay, or to its view that her disloyal behavior has set her fundamentally apart from the national community.

Recent practice in North America has been less generous to persons who leave or remain outside their country illegally. In the United States, the individual's motives at the time of flight are viewed as determinative, whatever the position taken by the state of origin. Thus, unless the refugee leaves her country for specifically political reasons, she is not a refugee.[68] Cana-

in the United States, based on the idea that the crime of illegal departure imposes punishment for the exercise of a fundamental human right, the right to travel." This position has recently been codified in the United States: "The asylum officer or immigration judge shall give due consideration to evidence that the government of the applicant's country of nationality or last habitual residence persecutes its nationals or residents if they leave the country without authorization or seek asylum in another country": 8 C.F.R. 208.13(b)(2)(B)(ii), July 27, 1990.

[63] In reference to the Vietnamese "boat people", for example, it may be contended that although some may have departed for strictly economic reasons, " . . . by joining the exodus they have put themselves in a situation where they are likely to suffer persecution if they ever return home . . . . The relevant reasons here must be their political opinion *because they have by implication expressed their disgust for Vietnamese political system* . . . . The attitude of the home government must be taken into consideration in such cases" [Emphasis added]: B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 369-70.

[64] "Some States have made it a crime to withdraw from society without permission ('Republikflucht'), and anyone who manages to escape may face stiff penalties if he ever returns": A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), Archiv des Völkerrechts 411, at 421.

[65] *See* text *supra* at notes 49-52.

[66] *See* text *supra* at note 56 ff. at which relevant concerns are discussed.

[67] *See* text *supra* at note 53.

[68] K. Brill, *supra*, note 47, at 132.

dian courts have adopted a similar position: fear of reprisals for unauthorized departure or stay may be invoked as an auxiliary ground of claim, but is not sufficient to meet the refugee definition in and of itself.[69]

The Immigration Appeal Board consistently noted that "violating the laws of one's country and having to face the consequences does not make one a refugee."[70] Even where the penalties for the breach of controls on emigration are clearly inordinate, the Board refused to bend. For example, notwithstanding evidence that Polish law would impose a five-year prison term for illegal exit, it was held that " . . . if [the claimant] were to be imprisoned for leaving his country without proper authorization, this would not be considered persecution — but rather prosecution."[71] Similarly, even though it was shown that illegal departees from the Soviet Union " . . . under Russian law have committed treason and are subject to heavy penalties on their return",[72] it was decided that "[s]erious as this is for them, it is not persecution as defined in the Convention but the consequence of breaking Russian law."[73] This refusal to examine the substance of the state's response to unauthorized exit or sojourn (rather than just its form) is not in keeping with the Convention.[74] Extreme, clearly unreasonable penalties for the breach of travel restrictions convert what might otherwise have been routine prosecution into the type of serious harm encompassed by the notion of persecution.

The often callous disregard for the plight of persons who face severe penalties for illegal departure or stay abroad is further evinced by the Immigration Appeal Board's view that because the potential sanctions are the same for all nationals of the country of origin,[75] they are inherently non-

[69] The Immigration Appeal Board has adopted the view that "[a] person who flees his country by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is justified in placing before the Board his additional fear of reprisal for leaving his country in an unlawful manner. *Such action, by itself, does not make a person a Convention refugee*" [Emphasis added]: *Stanislaw Julian Jodlowski*, Immigration Appeal Board Decision V81-6166, June 18, 1981, at 6-7, *per* D. Davey.

[70] *Henryk Stanley Komisarski*, Immigration Appeal Board Decision V81-6162, May 28, 1981, at 2, *per* C.M. Campbell. *Accord,* e.g., *Jean-Claude Delva*, Immigration Appeal Board Decision 74-1091, December 31, 1974;; *Gizella Litter*, Immigration Appeal Board Decision M77-1051, April 25, 1977; *Lech Jankowski*, Immigration Appeal Board Decision V80-6410, C.L.I.C. Notes 26.11, January 5, 1981.

[71] *Jerzy Malek*, Immigration Appeal Board Decision 76-9092, March 10, 1976, at 3, *per* A.B. Weselak.

[72] *Viatcheslav Drozd and Tatiana Drozd*, Immigration Appeal Board Decision T79-9395, C.L.I.C. Notes 18.12, March 6, 1980, at 3, *per* C.M. Campbell.

[73] *Id.*

[74] "Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties, his recognition as a refugee will be justified" if causally related to a ground of protection enumerated in the Convention: UNHCR, *supra*, note 3, at 16.

[75] References to the inapplicability of refugee protection due to the general application of travel restrictions abound in the case law of the Immigration Appeal Board. *See*, e.g., *Vladimir Stojka*, Immigration Appeal Board Decision 74-10198, September 12, 1974, at 5, *per* A.B. Weselak ("This is the lot of all Czechoslovakians . . . "); *Edmund Kroszkini*, Immigration Appeal Board

persecutory.[76] It is simply incorrect to argue that the pervasive nature of the restriction makes refugee protection unviable or inappropriate. By way of comparison, many societies have rules of universal application against freedom of expression. Refugee law does not purport to assist all persons who live within these societies, but rather only those whose defiance of the generalized rule has placed them at risk of serious harm. Similarly, only the minority of persons at risk in consequence of broadly based migration restrictions — namely, those who have contravened the standards — merits protection as refugees. It is not, however, sensible to ignore the reality of the minority genuinely at peril simply because any member of the home society could, if similarly situated, also become at risk.

2.2.2 Inferences Based on the Legality of Departure

A related question is the extent to which issues of authorized or unauthorized departure are probative of the genuineness of a claim to refugee status. The general rule, of course, is that if a person faces the risk of serious harm, the means by which she left her country of origin is essentially irrelevant.[77] An individual may depart her country without impediment, even travel on a valid passport, and still be a genuine refugee[78] if the balance of the evidence in favour of recognition as a refugee is compelling. Moreover, the Federal Court of Appeal has held unequivocally that illegal departure, even involving forged documentation, is also no bar to a refugee claim. In *Benjamin Attakora v. Minister of Employment and Immigration*,[79] the Court noted:

> . . . [T]he Board found that the applicant's credibility was weakened by his statement that, while on the plane to Canada, he destroyed a passport, Canadian visitor's visa and airline ticket, all of which were in the name of a friend and had been used by him in order to get away. The Board, after noting that

Decision 75-10374, December 15, 1975, at 3, *per* A.B. Weselak ("This is the lot of all Poles . . . "); *Frantisek Horbal*, Immigration Appeal Board Decision T77-9138, April 27, 1977, at 4, *per* D. Petrie (" . . . [T]his is prosecution for breaking the law of his country, applicable to all, and not persecution").

[76] "If the appellant will be prosecuted and jailed on his return to Poland for deserting his ship, this is not tantamount to persecution, but only the implementation of the Polish law governing that state, which is applicable to all ship-deserters and not only to non-communist or Catholic ship-deserters. The fact that Mr. Mazur does not agree with the political situation in Poland does not permit the Board to recognize him as a political refugee as there must be several thousand who also do not agree with the present regime": *Jerzy Mazur*, Immigration Appeal Board Decision 76-9327, June 29, 1976, at 3, *per* U. Benedetti.

[77] G.J.L. Coles, "Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons" 102 (unpublished, 1980).

[78] "The fact that a person has left his country legally with a valid passport is no bar to refugee status": P. Weis "The concept of the refugee in international law" (1960), J. du droit international 928, at 972.

[79] Federal Court of Appeal Decision A-1091-87, May 19, 1989; setting aside Immigration Appeal Board Decision T86-10336X, October 14, 1987.

> the applicant had said that he destroyed the documents because he was afraid that, if they were discovered, he might be arrested and sent back, concluded, without more, that this element of his testimony lacked credibility.
>
> The Board's finding on this point is, to say the least, puzzling. There is certainly nothing inherently incredible in a refugee saying that he destroyed false documents in order to avoid detection and arrest once they had served their purpose. In the circumstances of this case, the destruction of such documents could not have had any conceivable relevance to any issue which the Board has to decide. I can only conclude that the Board's insistence upon its significance is founded upon some erroneous view of the law. Does the Board think that only persons who arrive with their travel documents in order can be refugees? Or that those who arrive with false documents have some obligation to preserve them?[80]

Nonetheless, there are two situations where it is appropriate to consider information on the mode of departure.

First, evidence of difficulty in securing official permission to leave may be probative of a negative relationship between the claimant and her state, and thus corroborate other evidence tending to show a genuine risk of harm. In *Joseph Khouri*,[81] for example, the Board looked to Syria's refusal of an exit visa to the claimant in order to substantiate the assertion that certain actions, which might otherwise have been politically ambiguous, were viewed by the government to have been traitorous. Too, evidence that bribery or influence was required in order to secure travel documents may infer the absence of a normal relationship between the claimant and her state,[82] and thereby support a claim to refugee status.[83] In *Shahram Nassirbake*,[84] for example, the Board acknowledged the probative value of the Iranian claimant's need to pay a substantial sum to be smuggled out of his country, in view of the government's policy of refusing passports to its opponents.

Second and conversely, where the evidence of serious risk is less than clear-cut, evidence of undue ease of departure tends to discredit a claim to fear serious harm at the hands of the state. At least in countries that have sophisti-

[80] *Id.*, at 3-4, *per* Hugessen J.

[81] Immigration Appeal Board Decision T82-9804, October 2, 1984.

[82] "Should the authorities assist a person in leaving the country of flight by means of illegal bribes, illegal issuance of travel documents, or illegal passivity, and if this is the only possible way in which the authorities could assist, such circumstances actually underline the situation of persecution. The fact that certain authorities — on financial or humanitarian grounds — are willing to break the law in order to assist persons in leaving the country is, incidentally, a familiar phenomenon under any regime and, so far, it has not led to any doubts regarding the international refugee status of the persons involved": I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift for International Ret. 217, at 224.

[83] "The Board also appears to have overlooked the fact that his passport may not have been obtained routinely since it was obtained through his brother's *contacts* who work in government offices": *Pedro Enrique Juarez Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 (C.A.), at 304, *per* Heald J. (setting aside a refusal to grant refugee status at the Immigration Appeal Board level).

[84] Immigration Appeal Board Decision V87-6134, April 23, 1987, at 15-16, *per* N. Mawani.

cated bureaucracies and information storage and retrieval systems, issuance of a passport or exit visa may indicate that the government has no particular concern to persecute the claimant. In the case of *Oscar Manuel Diaz Duran*,[85] for example, the Immigration Appeal Board legitimately questioned the credibility of the Chilean claimant's vague assertion of risk on the ground that he had been issued a valid passport and exit visa, in contrast to his government's established practice of refusing travel documents to its political opponents. In *Bakhshish Gill Singh*,[86] the Board observed that it had

> . . . heard many accounts of Indian police incompetence in refugee determination cases, but there is a limit to such claimed incompetence beyond which credibility disappears. In this connection, it is hard to believe that Mr. Gill would have succeeded in obtaining a "no objection certificate" and an extension of his passport, quite apart from succeeding in getting through controls at Delhi airport, were there any serious desire on the part of the authorities to arrest him.[87]

Evidence of this kind, whether positive or negative, is not however determinative, but should rather be weighed together with other facts to discern the true extent of the risk faced by the refugee claimant. There is an unfortunate tendency to be reflexively dismissive of claimants who have freely exited their country or who possess valid travel documents.[88] Suspicion is particularly high in the case of persons who have been actively assisted to leave their country.[89] Yet in even these situations where the refugee's departure is facilitated by the state of origin, a genuine claim to refugee status can be established. As Foighel has noted,[90] Convention refugee status is fundamentally a function of the risk faced by the claimant, not of her mode of departure; state practice has not resulted in the generalized denial of protection to refugees who were assisted to leave by their home state; geographical or political limitations may mean that for some refugees the collaboration of their government is the only means of escape; and the extensive exclusion clauses of the Convention make no reference to the issue of the facilitation of departure by home authorities. In the result, the role of evidence on mode of departure should be carefully confined to situations of evidentiary ambiguity, and should not be allowed to override the fundamental concern to identify persons who would be at genuine risk of serious harm upon return to their state of origin.

[85] Immigration Appeal Board Decision 80-9116, April 16, 1980; affirmed on other grounds, (1982) 42 N.R. 342 (F.C.A.).

[86] Immigration Appeal Board Decision V87-6246X, July 22, 1987.

[87] *Id.*, at 5, *per* D. Anderson.

[88] F.M. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" (1983), 35(2) Revista española de derecho internacional 337, at 356.

[89] D. Roth, "The Right of Asylum Under United States Immigration Law" (1981), 33 U. Florida L. Rev. 539, at 554.

[90] *Supra*, note 82, at 224-25.

2.3 Choice of the Country of Asylum

There is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection.[91] The universal scope of post-Protocol refugee law[92] effectively allows most refugees to choose for themselves the country in which they will claim refugee status.

This basic premise flows from the Universal Declaration of Human Rights,[93] and was confirmed, subject to minor qualification, by Conclusion 15 of the Executive Committee of the UNHCR:

> The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.[94]

This basic standard unequivocally refutes the legitimacy of a so-called "direct flight" requirement, under which only persons coming directly to an asylum state from their country of origin would be eligible for protection.[95] It rather establishes the right of a state to *defer* its duty to protect where a claimant has a pre-existing connection or close links with another state. In such a case, if it is both "fair and reasonable," the country in which the asylum claim is made may suspend its procedures pending a decision by authorities in the state with which the claimant is affiliated. In *R. v. Immigration Appeal Tribunal, ex parte Steven Miller*,[96] for example, the English Divisional Court considered Conclusion 15 in deciding that a Jewish South African who had

[91] *See* e.g., the case of Mr. B. Conté, reported at [1981] Recueil des décisions du Conseil d'Etat 20-21, in which the French Conseil d'Etat considered the case of a Guinean who had resided for four years in Senegal before seeking asylum in France. Looking to the purposes and structure of the 1951 Convention, the Court properly held that Mr. Conté could be excluded only if determined to be a *de facto* national of Senegal, in accordance with Art. 1(E). Cited in E. Vierdag, "The Country of 'First Asylum': Some European Aspects", in D. Martin, ed., *The New Asylum Seekers: Refugee Law in the 1980s*, pp. 79-80 (1988).

[92] *See* Section 1.3, *supra*.

[93] "Everyone has the right to seek and to enjoy in other countries asylum from persecution": *UDHR, supra*, note 63, at Art. 14(1).

[94] Conclusion 15(XXX) of the Executive Committee of the High Commissioner's Programme, at para. (h)(iii)-(iv), U.N. Doc. HCR/IP/2/Eng./REV.1986 (1979).

[95] Goran Melander succinctly states the underlying rationale for this concept: "It is considered that any asylum seeker should ask for asylum in the state he first enters after his flight from a country in which he has a well-founded fear of persecution. He has no right to choose his country of asylum. The movement of refugees should be controlled . . . ": G. Melander, "Refugees in Orbit" (1978), 16 A.W.R. Bull. 59, at 60.

[96] [1988] Imm. A.R. 1.

resided in Israel for nearly four years before coming to the United Kingdom, and who appeared to be entitled to immigrant status in Israel pursuant to the Law of Return, ought reasonably to seek protection from Israel before claiming status elsewhere. Nonetheless, such a decision is suspensive only, since Conclusion 15 requires that status determination proceed in the event that the state with which the claimant has close links ultimately declines protection.

This principle, however, is increasingly questioned. At the international level, a conclusion of the Executive Committee[97] foreshadows the exclusion of "irregular" asylum seekers,[98] that is, refugees whose protection needs can be met in some other state. While not as yet fully defined, this notion could ultimately legitimate the refusal of claims from, for example, persons who have family connections or long-term work authorization in a safe intermediary country.[99]

Beyond this initiative at the universal level, European states are moving rapidly toward a system designed to limit the right of refugees to choose their place of asylum within that regional community.[100] Canada's new legislation, in this respect still not proclaimed, also authorizes the turning away of asylum seekers eligible to have the merits of their claim determined in another state.[101] Schemes of this sort are inconsistent with the spirit of the Convention, and reflect a weakening of the commitment to the refugee's right to decide for herself the most effective means of securing safety from persecution. Direct flight schemes also infringe the principle of burden-sharing, as those countries closest to the site of refugee movements will bear a disproportionate share of the collective duty of protection.[102]

At present, then, the only claims to refugee status which may be deflected under international law remain those from the narrow category of persons defined in Conclusion 15,[103] and then only insofar as the state with which they are affiliated agrees to extend protection. Otherwise, unless the refugee secures the actual or *de facto* nationality of another state,[104] she is entitled to have her claim to refugee status determined in the country of her choice.

[97] Conclusion 36(XXXVI) of the Executive Committee of the High Commissioner's Programme, at para. (j), U.N. Doc. HCR/IP/2/Eng./REV. 1986 (1985).

[98] *See* J. Hathaway, " 'Irregular' Asylum Seekers: What's All The Fuss?" (1988), 8(2) Refuge 1.

[99] *See*, e.g., comments of Dr. Marie-Odile Wiederkehr of the Council of Europe, quoted in E. Vierdag, *supra*, note 91, pp. 81-82.

[100] *See Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Community* ("Dublin Convention"), June 1990.

[101] *Immigration Act, 1976*, now R.S.C. 1985, c. I-2, s. 46.01(1)(b) [en. 1985, c. 28 (4th Supp.), s. 14].

[102] *See*, e.g., D. Hull, "Displaced Persons: 'The New Refugees' " (1983), 13 Georgia J. Intl. Comp. L. 755, at 772.

[103] *Supra*, note 94.

[104] *See* Sections 6.2.2 and 6.2.3, *infra*.

In Canada, there has been an attempt indirectly to incorporate a direct flight rule by impugning the credibility of claimants who do not claim refugee status in other countries of passage or residence. Persons who have spent substantial time in one[105] or more[106] countries, who have enjoyed short-term status in an intermediate state,[107] and even those who have merely transited through another country[108] have frequently been viewed with mistrust because of their failure to claim refugee status before arriving in Canada. As noted in the case of Ghanaian *Anthony Appiah Asamoah*,[109]

> . . . [T]he applicant's failure to seek asylum in any other country than Canada, although he passed through several intervening countries . . . is not consistent with an intention to flee from one's pursuers and therefore the concurrent imperative to seek haven wherever one can. Surely it is reasonable to expect one to seek help at the first convenient venue.[110]

[105] *See* e.g., *Jeno Pillmayer*, Immigration Appeal Board Decision V84-6254, November 20, 1986 (rejecting the claim of a Hungarian who failed to claim refugee status during nine years' residence in Sweden); and *Guadalupe Quintanilla Ruiz*, Immigration Appeal Board Decision V87-6662X, April 26, 1988 (in which the Salvadoran claimant's credibility was questioned because she failed to claim refugee status during two years' illegal residence in the United States).

[106] *See*, e.g., *Mahmoud Saddo*, Immigration Appeal Board Decision M80-1123, July 24, 1980; set aside on other grounds by Federal Court of Appeal Decision A-574-80, January 19, 1981; claim ultimately rejected by the Board on February 25, 1981, in which the Board commented negatively on the fact that the Ethiopian claimant had spent six years in Iraq, Sudan, Saudi Arabia, and Kuwait before coming to Canada; *Munir Mohamad Adem Suleiman*, Immigration Appeal Board Decision V81-6246, July 23, 1981; set aside on other grounds by the Federal Court of Appeal on October 6, 1982; claim ultimately rejected by the Board on November 16, 1983, in which the Board criticized the two years spent by the Ethiopian applicant in Sudan and Saudi Arabia as inconsistent with refugee status; and *Jasbir Singh*, Immigration Appeal Board Decision T83-9400, April 14, 1983, at 5, *per* D. Davey ("Whereas the Board has consistently held that it is not necessary to seek refugee status in the first country reached, it is not supportive of a genuine fear of persecution for a person to travel by ship to fifteen or sixteen countries without seeking refugee status."

[107] *See*, e.g., *Alfredo Nelson Salvatierra Villarroel*, Immigration Appeal Board Decision T78-9173, October 31, 1978; affirmed on other grounds by the Federal Court of Appeal at (1979), 31 N.R. 50 (in which the Board drew a negative inference from the failure of the Chilean claimant to remain in Spain, where he had resided for four months without permission to work); and *Harjinder Dhillon Singh*, Immigration Appeal Board Decision T84-9049, October 21, 1985, at 5, *per* B. Suppa (" . . . [H]e never claimed refugee status while he was in Sweden for three months . . . . Is this the behaviour of a man with a well-founded fear of persecution? In the opinion of the Board, it is not.")

[108] *See*, e.g., *Fernando Segundo Hidalgo*, Immigration Appeal Board Decision 74-10354, January 29, 1975; set aside on other grounds by Federal Court of Appeal Decision A-71-75, May 26, 1975; claim ultimately rejected by the Board on September 16, 1975, in which the Board criticized the Argentinian claimant's failure to seek protection during a one-day stop in the United States; and *Rajinder Prashad Sharma*, Immigration Appeal Board Decision V82-6401, January 27, 1984; set aside on other grounds by Federal Court of Appeal Decision A-1255-82, January 27, 1984, which took into account the failure of the Indian applicant to claim status during a stopover in the United Kingdom.

[109] Immigration Appeal Board Decision T87-9902, January 19, 1988.

[110] *Id.*, at 3, *per* J. Weisdorf.

By characterizing the issue as one of credibility, it is possible simultaneously to refuse the claims of persons arriving indirectly while maintaining a formal commitment to the impropriety of a direct flight rule:[111]

> . . . [I]f the applicant had experienced a well-founded fear, he had at least two opportunities of expressing and establishing it . . . . It is hard to believe that a person in the grip of an uncontrollable fear . . . does not make any effort to eradicate this fear when the opportunity arises. I use the expression "hard to believe" because I know that there is nothing in the Act that makes it compulsory for a person to apply for refugee status at the first port he reaches.[112]

Fortunately, the Federal Court of Appeal has intervened to constrain this implied direct flight rule. First, in its decision in *Marcel Simon Chang Tak Hue v. Minister of Employment and Immigration*,[113] the Court recognized that failure to make a claim to refugee status does not raise an issue of credibility if it can be explained, for example, by the absence of an immediate need for protection against *refoulement*:

> The Board rejected the Applicant's claim . . . on the sole ground that he had not made it in 1981 when he went to Greece and boarded his ship. This, for the Board, would show that the applicant's fear was not real and that his contention to that effect, his having waited so long before making it, was not credible. While we do not dispute that the delay in making a claim for refugee status may be an important factor to take into consideration in trying to assess the seriousness of the applicant's contentions, we disagree completely with the Board's reasoning in the present case. It seems to us obvious that the Applicant's fear is in relation to his having to return to the Seychelles and as long as he had his sailor's papers and a ship to sail on, he did not have to seek protection.[114]

The Federal Court expanded on this approach in *Charles Kofi Owusu Ansah v. Minister of Employment and Immigration*,[115] in which the Board had attacked the Ghanaian claimant's credibility because he had failed to claim protection in any of three countries visited before coming to Canada:

[111] "[T]here is nothing in the Convention that obliges a person fleeing his country owing to fear of being persecuted to seek refuge in the closest neighbouring country or in the first country he reaches. The Convention refers, simply, to a person who is outside the country of his nationality . . . ": *Juan Alejandro Araya Heredio*, Immigration Appeal Board Decision 76-1127, January 6, 1977, at 6, *per* J.-P. Houle.

[112] *Luis Omar Reyes Ferrada*, Immigration Appeal Board Decision T81-9476, September 18, 1981, at 4, *per* J.-P. Houle; affirmed by Federal Court of Appeal Decision A-572-81, May 3, 1982. *Accord Farah Shire Abdurahaman*, Immigration Appeal Board Decision T82-9419, C.L.I.C. Notes 50.8, November 3, 1982, at 8, *per* G. Tisshaw; affirmed on other grounds by the Federal Court of Appeal at (1983), 50 N.R. 315: "[W]as his fear well-founded if he never in any of the Western European democracies he visited approached the authorities for refugee status? It is not credible that he would prolong his ordeal under the circumstances."

[113] Federal Court of Appeal Decision A-196-87, March 8, 1988; setting aside Immigration Appeal Board Decision M87-1079X, March 25, 1987.

[114] *Id.*, at 2, *per* Marceau J.

[115] Federal Court of Appeal Decision A-1265-87, May 19, 1989; setting aside Immigration Appeal Board Decision T87-9386X, November 10, 1987.

> It was, indeed, 53 days from the date the applicant left Ghana, May 30, until he arrived in Canada, July 23. He was at sea 16 of them but there were 37 days during which he might have claimed to be a Convention refugee in a country other than Canada, assuming, of course, that those countries are parties to the Convention and have implemented it by whatever domestic process prevails . . . . The significant point is that the Applicant did offer explanations as to why he had not sought to remain or claim to be a refugee in Togo, Nigeria and Brazil. Each explanation appears plausible.[116]

Specifically, Owusu Ansah did not seek status in Togo because he feared kidnapping by the nearby Ghanaian authorities; he avoided Nigerian authorities because he felt that country's military government could not be trusted to respect human rights; and he did not make a claim in Brazil because he preferred to come to an English-speaking country.

Reading these decisions together, the Federal Court's position is that a claimant's credibility cannot be discounted if there is a reasonable explanation for failure to claim refugee status during passage through or sojourn in other countries which adhere to the Convention. The Court has thus far accepted as plausible reasons the lack of impending threat of return, a desire to distance oneself from incursions by authorities of the home state, concern regarding the true adequacy of protection, and preference to make a claim in a country in which one's language is spoken. Similarly, one ought reasonably to take account of such factors as desire to be reunited with family, close friends, or an ethnic community; the compatibility of the asylum state with personal needs and goals; and a decision by the claimant to delay seeking status until in a country with a fully adequate determination procedure.

Even in those rare cases where no credible explanation for delay in claiming status is advanced, it does not follow that the refugee claim is necessarily unfounded. While the lack of a plausible account for delay may render the claimant's own testimony insufficiently credible for it alone to establish the need for protection, independent evidence of possible harm may nonetheless found the case for refugee status.

2.4 Illegal Entry or Stay in an Asylum State

A claim to Convention refugee status is not in any sense compromised by illicit arrival in the state in which protection is sought. Persons who sneak across frontiers or who disguise their true motive when they seek entrance may still be genuine refugees if they otherwise meet the requirements of the definition.

The eligibility of illegal entrants to qualify as refugees is clear from the absence of any reference in the Convention to legal admission as a criterion of refugee status. This possibility was explicitly raised and rejected at the

[116] *Id.*, at 3, *per* Mahoney J.A.

Conference of Plenipotentiaries by way of an unsuccessful Australian proposal to exclude fraudulent entrants from the scope of protection.[117]

To the contrary, the granting of refugee status to illegal entrants was specifically contemplated by incorporation in the Convention of Article 31, titled "Refugees unlawfully in the country of refuge."[118] In this provision, the Conference went so far as to require contracting states to exempt refugees from ordinary penalties that might attach to illegal entry or presence in their territory. While this article does not prohibit the eventual deportation of a refugee to a state in which she is not at risk,[119] it provides ample support for the position that illegal entry is not a sufficient concern to deprive an individual of the right to have her refugee claim determined in accordance with the Convention.

This approach is consistent with the predicament in which refugees find themselves. As Sadruddin Aga Khan has noted, most refugees do not enjoy the luxury of immigration through customary channels, and thus find themselves compelled to seek asylum by irregular entry to a safe country.[120] In contrast, the recent practice of states has often demonstrated a near obsession with the manner by which a refugee claimant has entered an asylum state. Historically, American case law has placed "an exaggerated — indeed, almost exclusive — emphasis on factors related to the applicant's manner

[117] "The present Convention shall not apply to a person who has been admitted to the territory of a Contracting State for a specific purpose and who did not at the time of entry apply for permission to reside permanently therein, unless such person can establish to the satisfaction of the Contracting State that since the date of his admission circumstances have arisen which justify his claiming the rights and privileges intended to be secured by this Convention for a *bona fide* refugee": Proposal for a new article submitted by Australia, U.N. Doc. A/CONF.2/42, July 6, 1951. This proposal was *not* incorporated in the final version of the Convention.

[118] "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": *Convention, supra*, note 24, at Art. 31(1).

[119] The Belgian and Canadian delegations in particular stressed that the prohibition in Article 31 on penalties on account of illegal entry or presence meant the imposition of a fine or imprisonment, and did not include deportation: Statements of Mr. Herment of Belgium and Mr. Winter of Canada, U.N. Doc. E/AC.32/SR.40 at 4-5, cited in 2 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 210 (1972). Nor does the prohibition in Article 32 on the expulsion of refugees apply to illegal entrants, as it is explicitly confined to the case of refugees "lawfully in [the state's] territory." Thus, the primary protection available to illegal entrant refugees is the prohibition on return to a country of persecution, found in Article 33.

[120] "The situation of a refugee differs . . . from that of an ordinary alien, who . . . holding a national passport, enjoys the protection of the authorities of his country, to which he may return if he so desires. This is not so in the case of a refugee. Having, in many cases, entered the country in an irregular manner, he is immediately at odds with the authorities of the country of reception . . . ": S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons" (1976), Recueil des cours 287, at 313.

of entering the United States."[121] While the recent decision in *Matter of Pula*[122] has significantly restricted the importance to be attached to evidence of illegal entry, the circumvention of immigration rules nonetheless remains "a proper and relevant discretionary factor"[123] in determining an asylum claim.

Canadian practice conforms somewhat more closely to international standards, although it too demonstrates a frequently disproportionate concern with the refugee claimant's mode of entry to the asylum state.[124] The basic principle that illegal entrants are eligible to have their claims to Convention refugee status determined in accordance with law is nonetheless clear from the important dictum of Mr. Justice MacGuigan of the Federal Court of Appeal in the case of *Surujpal v. Minister of Employment and Immigration*:[125]

> It does not stand to the applicants' credit that, after entering Canada as visitors, they illegally obtained Canadian social insurance cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations. . . .[126]

This position respects the fundamentally protective purpose of refugee law, and reinforces the primacy in the determination process of the risk faced by the refugee claimant.[127]

The decision in *Khemraj Surujpal*,[128] however, impliedly approves of a

[121] D. Anker, "Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980" (1987), 28(1) Virginia J. Intl. L. 1, at 4.

[122] Board of Immigration Appeals Interim Decision No. 3033, September 22, 1987, cited in D. Anker, *supra*, note 121, at 68.

[123] *Supra*, note 122, at 9.

[124] *See*, e.g., *St. Gardien Giraud*, Immigration Appeal Board Decision T81-9669, March 20, 1986, at 5, *per* B. Suppa: "His action in using a false passport in his attempt to enter Canada hardly supports his claim." *Accord Harjinder Dillon Singh*, Immigration Appeal Board Decision T84-9049, October 21, 1985 (no refugee claim until time of arrest); *Moustafa Salamat*, Immigration Appeal Board Decision M86-1142, April 13, 1987 (tearing up passport on plane); and *Santokh Bhopal Singh*, Immigration Appeal Board Decision V87-6245X, August 17, 1987 (two-year delay before presenting claim to refugee status).

[125] (1985), 60 N.R. 73 (F.C.A.). There is a foundation for these comments in two earlier judgments of the Federal Court of Appeal: *Lloyd Oswald Forbes v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-655-83, November 8, 1983, *per* Thurlow J.; and *Rajinder Prashad Sharma v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-1255-82, January 27, 1984, *per* Stone J.

[126] *Id.*, at 73-74, *per* MacGuigan J.

[127] "[P]rovisions on the punishment for unauthorised entry and sojourn . . . should be read in conjunction with art. 31 para. 1 of the Refugee Convention, which prescribes that a refugee who is coming directly from a territory where his life or freedom is threatened in the sense of art. 1, shall not be punished for his unauthorised entry, provided he present himself without delay": G. Melander, *supra*, note 95, at 61.

[128] *Supra*, note 125.

more limited role for evidence of illegal entry or presence in the assessment of the claimant's credibility.[129] While it is clearly inappropriate to disallow a refugee claim on the ground of illicit arrival or stay, the Convention establishes an obligation on refugees to "present themselves without delay to the authorities and show good cause for their illegal entry or presence."[130] It seems right, therefore, to inquire into the circumstances of any protracted postponement of a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. As observed in *Jeno Pillmayer*:[131]

> The Board cannot assume that the niceties of Canadian immigration law were known by the applicant. However, it is reasonable to expect that given his stated intention to make a refugee claim, the applicant would have shown some due diligence in pursuing his claim after his arrival in Canada or at least provide the Board with an explanation for the delay.[132]

Where there is no reasonable excuse for the delay, an inference of evasion going to credibility is often warranted. Acceptable explanations would include, for example, lack of familiarity with or trust in the claims procedure[133] or reliance on events which have occurred only since arrival in Canada.[134]

The case of *Malik Abdul Majad*[135] offers a good example of the circumstances in which a negative assessment of credibility may reasonably be derived from the circumstances of illegal entry or stay. The claimant entered Canada as a visitor, and did not report to immigration authorities upon the expiration of his visa. He was arrested more than a year after his status in

[129] *Accord Bakhshish Gill Singh*, Immigration Appeal Board Decision V87-6246X, July 22, 1987, at 11-12 *per* D. Anderson: "Counsel for the Minister argued that the applicant's long delay in filing his claim to refugee status suggests that his claim is frivolous. At most, such delay might be a factor to be considered in assessing the credibility of the claimant . . . ."

[130] *Convention, supra*, note 24, at Art. 31(1). The text of this article is reproduced at note 118, *supra*.

[131] Immigration Appeal Board Decision V84-6254, C.L.I.C. Notes 100.17, November 20, 1986.

[132] *Id.*, at 10, *per* A. Wlodyka.

[133] "A claimant may be credible even though the claim was not made at the earliest possible opportunity. He may be in the country for some time before he becomes aware of the refugee claims procedure": *Rajinder Kumar*, Immigration Appeal Board Decision T83-9484, March 31, 1987, at 6, *per* E. Rotman.

[134] "Whether a person is a refugee or not is a matter that inevitably varies dramatically with political events in that person's country of nationality or country of former habitual residence. A person could meet the definition of Convention refugee one week, and the next, by reason of political events thousands of kilometres away, no longer meet that definition. Two weeks after that it is perfectly conceivable that the definition would be met once more. Under the circumstances . . . [i]t therefore appears appropriate that the concept of the continuing jurisdiction of the Board apply, in some degree at least, in refugee cases": *Palwinder Kaur Gill*, Immigration Appeal Board Decision V86-6012, July 11, 1986, at 8, *per* D. Anderson (dissenting). *Accord Bakhshish Gill Singh*, Immigration Appeal Board Decision V87-6246X, July 22, 1987, at 11-12, *per* D. Anderson: "[W]here he claims to be a refugee *sur place* delay can be of little relevance and on its own, hardly amounts to grounds for denying the claim."

[135] Immigration Appeal Board Decision T76-9507, December 17, 1976.

Canada had come to an end, and claimed refugee status at his special inquiry. There was evidence that Mr. Majad was well-acquainted with formal refugee determination procedures even before his arrival in Canada, and that he had attempted to bribe officials to grant him legal status. No explanation for delay in presenting his case was offered. In view of all of the evidence, the Immigration Appeal Board correctly concluded that the claimant had not "complied with the spirit of the Convention as set out in Article 31",[136] as a result of which the credibility of his claim to protection was weakened.

On the other hand, as Christopher Wydrzynski has noted, the Immigration Appeal Board has frequently "seemed to prefer form to substance in attempting to rank the honesty and openness of the applicant . . . . [Where] the applicant had lied on arrival and had only formulated his intent to apply for refugee status when deportation became inevitable, this was fatal to his claim."[137] This type of absolutism is unwarranted if there is a reasonable explanation for delay. For example, the case of *Ashfaq Ahmad Sheikh*[138] involved a citizen of Pakistan who had been advised by a lawyer upon arrival to keep a low profile in Canada in the hope that the situation in his home state would normalize in the short term, thus permitting his return. The Board nonetheless found it "incredible"[139] that he would not apply for refugee status in Canada if his claim were genuine, and dismissed the claim to refugee status. In *Oscar Manuel Diaz Duran*,[140] the Chilean claimant voluntarily presented himself to immigration authorities to make a refugee claim one day after the expiration of his visitor's visa. He delayed in approaching officials on the advice of an expatriate friend in Canada, presumably aware of the then prevailing rule against the issuance of interim work permits to persons who made refugee claims while lawfully in Canada. This explanation for delay, however, "[did] not make too much sense",[141] as a result of which the Immigration Appeal Board chose to discount the claimant's testimony and determined him not to be a refugee. The Immigration Appeal Board's perspective is typified by remarks made in the case of *Roberto Osvaldo Ramirez Rojas*:[142]

> . . . [I]t was not until after his arrest by immigration authorities, when he was liable to deportation or removal, that the applicant, for the first time, claimed to be a Convention refugee. *A claim made in such a way is not that of an authentic visitor or true refugee.* [Emphasis added][143]

[136] *Id.*, at 3, *per* D. Petrie. *Accord Malkit Katnoria Singh*, Immigration Appeal Board Decision V84-6133, April 30, 1987, at 4, *per* B. Howard: "Furthermore the Board regards the explanation of his failure to apply for refugee status in Canada until after his arrest as far fetched and not credible in the light of his claimed attempts to earlier obtain refugee status in Jordan and West Germany."

[137] C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 177.

[138] Immigration Appeal Board Decision 77-3021, September 6, 1977; affirmed on other grounds by Federal Court of Appeal, [1981] 2 F.C. 161.

[139] *Id.*, at 6, *per* J. Campbell.

[140] *Supra*, note 85.

[141] *Supra*, note 85, at 1, *per* U. Benedetti.

[142] Immigration Appeal Board Decision M80-1010, January 29, 1980.

Both Christopher Wydrzynski[144] and Deborah Anker[145] criticize this approach on the ground that the duress under which asylum seekers live often leads them to be less than forthright in dealing with or even approaching officials of the asylum state. The fear of encounters with authority figures in their state of origin carries over to the state of reception, prompts many refugees to seek entry by any means, and induces them to go underground in order to avoid the risk of rejection or deportation at the hands of an unknown system.

The propriety of considering evidence of illegal entry or stay in the assessment of credibility is therefore dependent upon the willingness of the decision-maker to examine those facts *in context*. It does not follow that all refugee claims made at a time when deportation for an immigration offence is imminent should be discounted. The concern should be to identify those cases where the breach of immigration rules is fraudulent, and to discount the claimant's credibility accordingly. On the other hand, where the illicit arrival or overstay is a result of misunderstanding, bad advice, mistrust of officials, or fear of reprisal or penalty, the refugee claim should be examined on its merits without reference to the circumstances of entry or stay in the country of asylum.

2.5 Determining the State of Reference

Where a refugee claimant possesses a formal nationality, her claim to protection should be assessed with reference to conditions in the state of nationality. Issues of surrogate protection in another state may arise at the final stage of the determination process,[146] but the initial inquiry should be limited to an examination of the relationship between the claimant and the country of which she is formally a national.[147]

[143] *Id.*, at 10, *per* J.-P. Houle.

[144] "The desire not to return to a place where his life may be in danger is frequently the refugee's prime motivation. With little knowledge of the Canadian immigration process, the individual may not even know of the existence of the privilege to claim protection as a refugee under the Act. The timeliness of the application does not make an individual any more or less of a refugee until all the facts are examined": C. Wydrzynski, *supra*, note 137, at 177.

[145] "Misrepresentations or other irregularities in the entry process are excusable because of the special duress which compels the refugee, who lacks the protection of his country of origin, to take extreme measures in his search for protection and security elsewhere": D. Anker, *supra*, note 121, at 53.

[146] For example, a refugee claimant may have a right of residence in a country other than the country of her nationality, in which case her need for protection may already have been met. This issue is discussed *infra* at Section 6.2.3.

[147] "In order to be considered eligible, persons possessing a nationality must fear persecution in the country of their nationality . . . . Their nationality may, therefore, have to be determined as a preliminary question in eligibility proceedings": P. Weis, "The concept of the refugee in international law" (1960), J. du droit international 928, at 972.

This basic principle was incorporated in Canadian law by the Federal Court of Appeal in the decision of *Hurt v. Minister of Manpower and Immigration*.[148] The claimant was a Polish citizen who had resided in West Germany for five years before coming to Canada. The Immigration Appeal Board determined that he had no fear of persecution in West Germany, and declared him not to be a Convention refugee. The Federal Court of Appeal set this decision aside on the ground that the claim should have been assessed with reference to Poland, the claimant's country of nationality. The Court held that the issue of surrogate protection in West Germany, while relevant, was appropriately addressed as a matter of exclusion from refugee status, subsequent to the primary determination.[149]

This view is consistent with UNHCR recommendations,[150] and ensures that the central issue of risk upon return is addressed before alternatives to protection by the asylum state are canvassed. Because deportation or expulsion will normally be effected to the state of nationality,[151] an assessment of potential harm in that country is of the essence.

In most cases, the claimant's nationality can be discerned from her own testimony, buttressed by documentary evidence such as a passport, visa, or transportation ticket. In some cases, however, it will have been necessary for the refugee to secure false documentation in order to successfully exit her country, or in order to circumvent the visa controls imposed by some asylum states on the nationals of refugee-producing countries.[152] In these

[148] [1978] 2 F.C. 340 (C.A.). Prior to this decision, it had been held by the Immigration Appeal Board that "a claim must be determined in relation to the claimant's country of residence and not in relation to the country which originally prompted the emigration": C. Wydrzynski, *supra*, note 137, at 171.

[149] Adherence to this practice is demonstrated in the decisions of the Immigration Appeal Board, e.g., *Ashfaq Ahmad Sheikh*, Immigration Appeal Board Decision 77-3021, September 6, 1977; set aside on other grounds by the Federal Court of Appeal, [1981] 2 F.C. 161 (C.A.), in which the claim of a citizen of Pakistan resident in Bangladesh was determined by reference to Pakistan; and *Miwako Maejima*, Immigration Appeal Board Decision 80-1072, June 5, 1980, in which the risk faced by a Japanese citizen who resided in South Africa was assessed by reference to Japan.

[150] "Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses. This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes — not of a fundamental character — in the situation prevailing in their country of origin": UNHCR, *supra*, note 3, at 26.

[151] Under international law, the state of nationality is generally obliged to admit its nationals who have been lawfully expelled or deported: G. Goodwin-Gill, *International Law and the Movement of Persons between States*, p. 136 (1978).

[152] "Since the current (Canadian) *Immigration Act* was passed, fifteen visa requirements have been levied, and eleven of them were imposed in response to growing volumes of refugee claims . . . ": R. Girard, "Speaking Notes for an Address at the Conference on 'Refuge or Asylum — A Choice for Canada' at York University" (1986), p. 4. In the result, "[v]isa requirements often block an important escape route to Canada which may be the most logical and accessible country of refuge for the claimant . . . ": M. Schelew, "A Lawyer's Perspective on Canadian Refugee Policy" (1984), 3(4) Refuge 11, at 14.

cases of conflict between the claimant's assertion and the corroborative evidence of nationality, primary regard should be had to the characterization of the claimant's status by the country whose travel document the individual holds, or which was her immediate point of departure for the asylum state. Because international law allows each state to determine for itself those persons who are its nationals,[153] a nationality cannot be attributed to a refugee claimant where the authorities of that state take a contrary position.

Thus, where the refugee claimant alleges that documentary or other indicia of nationality are inaccurate, the authorities of the asylum country have a duty to consult the apparent state of origin in an effort to verify the claimant's status.[154] If the country that issued the documentation cannot confirm the status of the claimant as its national, the need for protection should be determined with reference to the state which the claimant asserts to be her country of origin.[155]

2.5.1 Persons with Dual or Multiple Nationality

It is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection.[156] In the drafting of the Convention, delegates were clear in their view that no person should be recognized as a refugee unless she is either unwilling or unable to avail herself of the protection of *all* countries of which she is a national.[157] Even if an individual has a genuine fear of persecution in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is prepared to afford her protection.[158]

[153] P. Weis, *Nationality and Statelessness in International Law*, p. 92 (1956).

[154] In a trilogy of cases in which the claimants possessed Djiboutian passports, but alleged that they were not in fact nationals of that state, the Immigration Appeal Board held, on a full oral hearing ordered by the Federal Court of Appeal, that the Canadian government "could and should have checked the validity of the Djiboutian passports with the authorities of Djibouti . . . . This failure might be conclusive in an appropriate case . . . ": *Zahara Hassan Dembil*, Immigration Appeal Board Decision 80-1025, May 21, 1982; *Ismail Hassan Dembil*, Immigration Appeal Board Decision 80-1018, May 21, 1982; and *Hassan Ahmed Ali Dembil*, Immigration Appeal Board Decision 80-1026, May 21, 1982.

[155] "[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. 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": UNHCR, *supra*, note 3, at 47.

[156] UNHCR, *supra*, note 3, at 24.

[157] "[P]ersons with dual or even plural nationality would be considered as refugees only after it had been ascertained that they were either unable or unwilling to avail themselves of the protection of the governments of any of their nationalities": Statement of Mr. Fearnley of the United Kingdom, U.N. Doc. E/AC.7/SR.160, at 6, August 18, 1950.

[158] "[S]o long as a person had one nationality and no reasons not to avail himself of the protection of the government concerned, he could not be considered as a refugee": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.160, at 7, August 18, 1950.

This principle of the Convention[159] is not explicitly incorporated in the *Immigration Act*.[160] However, the courts have seen fit to exclude, for example, the claim of an at-risk citizen and resident of Angola who retained Portuguese citizenship by virtue of his birth in that country.[161] The fear of return of a Turkish national was also examined from the perspective of the risk he would face in Australia, a country whose citizenship he had acquired through naturalization during childhood.[162] Even where the dual citizen has *never* set foot in her second country of nationality, refugee law requires an assessment of the degree of risk, if any, in that state as a prerequisite to international protection.[163] This principle was recently affirmed by the Federal Court of Appeal in *Attorney General of Canada v. Patrick Francis Ward*.[164] Explicitly citing the second paragraph of Article 1(A)(2) of the Convention, which, while "not binding upon us since it has not been incorporated into Canadian law, . . . is persuasive as forming a logical construction of the Convention refugee definition",[165] the Court held:

> . . . [I]f it is found that he has more than one country of nationality the claimant is obliged to establish his unwillingness to avail himself of the protection *of each* of his countries of nationality before he can be considered to be a Convention refugee.[166]

[159] "In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national": *Convention, supra*, note 24, at Art. 1(A)(2), para. 2.

[160] Notwithstanding the absence of reference to Art. 1(A)(2) of the Convention in the *Immigration Act*, reliance was placed on this provision in several decisions of the Immigration Appeal Board, including *Slobodan Popovich*, Immigration Appeal Board Decision M76-1081, March 4, 1977, and *Carlos Fernando Amara de Carvalho*, Immigration Appeal Board Decision 77-1071, May 19, 1977.

[161] *Agostinho de Oliveira Duarte*, Immigration Appeal Board Decision 76-9051, February 6, 1976.

[162] *Gelil Nuh*, Immigration Appeal Board Decision T81-9273, July 5, 1981.

[163] In three decisions involving Angolan citizens who retained Portuguese citizenship by virtue of their birth in Angola prior to independence, the Immigration Appeal Board correctly assessed their claims with reference to conditions in both Angola and Portugal, and denied refugee status on the ground that effective protection by Portugal was available to the claimants: *Americo Antonio da Costa*, Immigration Appeal Board Decision 76-9401, August 26, 1976; *Jose Manuel Costa de Carvalho*, Immigration Appeal Board Decision T77-9040, February 10, 1977; and *Carlos Fernando Amara de Carvalho*, Immigration Appeal Board Decision 77-1071, May 19, 1977. *Accord* R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum", (1977) 15 San Diego L. Rev. 45, at 55: "Persons displaced by the changes of government in Angola and Mozambique, eligible to claim or maintain Portuguese nationality, do not quality as refugees if willing to seek Portuguese protection. In the event of their emigration to Portugal, they are designated as *returnees*, though they may never have been in Portugal and may not be of Portuguese descent."

[164] Federal Court of Appeal Decision A-1190-88, March 5, 1990; leave to appeal granted by the Supreme Court of Canada on November 8, 1990: Supreme Court Bulletin 2347.

[165] *Id.*, at 19, *per* Urie J.

[166] *Id.*, at 18, *per* Urie J. *Accord* concurring judgment of MacGuigan J., *id.*, at 18.

The major caveat to the principle of deferring to protection by a state of citizenship is the need to ensure *effective*, rather than merely formal, nationality. It is not enough, for example, that the claimant carries a second passport from a non-persecutory state if that state is not *in fact* willing to afford protection against return to the country of persecution. While it is appropriate to presume a willingness on the part of a country of nationality to protect in the absence of evidence to the contrary, facts that call into question the existence of basic protection against return must be carefully assessed.

In the case of *Harbans Rai Singh*,[167] for example, the Immigration Appeal Board dismissed the applicant's alleged fear of persecution in his country of birth, India, on the ground that he possessed a British passport, and could accordingly expect to be protected by the United Kingdom. Evidence was adduced that the claimant's passport had been altered to delete his right of abode in the United Kingdom, thus raising the obvious possibility that the claimant's British nationality would provide him with less than fully effective protection. In these circumstances, the Board should have satisfied itself that its reliance on apparent second nationality was warranted before dismissing the claim.

Similarly, dual nationality is not to be equated with the right to claim a second nationality. In *James Patrick Gillen*[168] the Board treated the claimant's apparent right to qualify for a British passport as sufficient to constitute both his country of citizenship, the Republic of Ireland, and the United Kingdom as countries of reference. There was no evidence that the claimant had ever been admitted to British territory outside Northern Ireland; moreover, the claimant gave uncontradicted testimony that entry to the United Kingdom had in fact been refused to other persons similarly situated. The dilemma here is a logical extension of the concern to ensure *effective* nationality before assessing the adequacy of a refugee claim: only the degree of risk in those states that are known to be obliged to allow the re-entry of the claimant is relevant, as it is to one of those states that the putative refugee would in most cases be sent back if not admitted to the country of refuge.

2.5.2 Stateless Persons

Refugee law exists to interpose the protection of the international system where a domestic government fails to protect an individual or collectivity under its national jurisdiction. The position of stateless persons is thus anomalous: Are all stateless persons refugees because by definition they do not benefit from national protection? Or conversely are stateless persons excluded from refugee status because their dilemma stems not from the failure of a national government to protect them, but rather from the absence of a state that can be said to have a duty of protection toward them?

[167] Immigration Appeal Board Decision T82-9359, C.L.I.C. Notes 44.7, July 8, 1982.

[168] Immigration Appeal Board Decision T83-9750, August 15, 1984. *See also Attorney General of Canada v. Patrick Francis Ward*, *supra*, note 164.

This conceptual confusion is historically explicable. In the first phase of international refugee law, formal statelessness was a condition precedent to recognition as a refugee.[169] The expanded focus of refugee law in the years leading up to the Second World War recognized *de facto* lack of protection as an equally compelling basis for international protection, but continued to protect stateless persons adrift in the international system as refugees.[170] The divorce of *de jure* statelessness and refugee status came only during the drafting of the 1951 Convention.

The background study prepared by the Secretary General in 1949[171] proposed a revised and consolidated convention relating to the status of all persons without national protection. The Economic and Social Council approved the drafting of a convention which would extend comprehensive humanitarian protection to both persons who lacked formal or *de jure* protection ("stateless persons") and persons who lacked *de facto* protection, notwithstanding their retention of a particular nationality ("refugees").[172] The Conference of Plenipotentiaries, however, was of the view that refugees presented a more serious problem of humanitarian need:[173] the problems of stateless persons were characterized as distinct,[174] less urgent than the needs of refugees,[175] and fundamentally giving rise to less of a social problem[176] than the international protection of refugees. As such, it was agreed to restrict the scope of the Convention to those persons who required protection from a state to which they were formally returnable, and to leave the problems of the stateless population to be dealt with by a later and less comprehensive conventional regime.[177]

[169] *See* Section 1.1.1, *supra*.

[170] *See* Section 1.1.2, *supra*.

[171] U.N. Doc. E/1112, February 1, 1949.

[172] *Id.*, at 1.

[173] "The applicability of the draft convention should . . . be limited to refugees. It should not be based upon a confusion between the humanitarian problems of refugees and the primarily legal problems of stateless persons, which should be dealt with by a body of legal experts, but should not be included in the proposed convention": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.2, at 6, January 26, 1950.

[174] "Like the French Government, the Government of the United States considered that the problem of refugees differed from that of stateless persons and ought to be considered separately": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.2, at 5, January 26, 1950.

[175] "It was . . . indisputable that refugees and *de facto* stateless persons were more unfortunately placed than *de jure* stateless persons, and it was therefore more urgent to remedy their situation": Statement of Mr. Gurreiro of Brazil, U.N. Doc. E/AC.32/SR.3, at 4, January 26, 1950. Several other delegates, including the representatives of both Denmark and Turkey, agreed: U.N. Doc. E/AC.32/SR.3, at 6, January 26, 1950.

[176] "[I]ncluding in the convention provisions to cover stateless persons who were not refugees . . . was secondary in the sense that the situation of stateless persons who were not refugees did not raise any urgent social or humanitarian problem": Statement of Mr. Rain of France, U.N. Doc. E/AC.32/SR.3, at 4, January 26, 1950.

[177] The *Convention relating to the Status of Stateless Persons*, 360 U.N.T.S. 5158, did not come into force until June 6, 1960. While the structure of the two conventions is quite similar, "[t]he draft Convention on the Status of Refugees, however, gave somewhat greater benefits, it being assumed that States would be willing to go further in respect of refugees than in respect of stateless persons generally, in view of the greater humanitarian factors involved": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.7/SR.158, at 13, August 15, 1950.

It is thus clear that statelessness *per se* does not give rise to a claim to refugee status.[178] On the other hand, the drafters of the Convention were equally unequivocal in their view that stateless persons could, in some situations, qualify as refugees.[179] Where a stateless person has been admitted to a given country with a view to continuing residence of some duration,[180] and subsequently finds herself in a position of being deprived of the protection of that state, she may find herself in a predicament comparable to that of a refugee with a nationality. This is only so, however, when the stateless person can be said to have a country of "former habitual residence" in the sense of a state that has evinced some degree of willingness to allow her to remain in its territory and to which she would be returnable if refugee protection were not granted.[181]

To qualify as a refugee, then, the stateless person must stand in a relationship to a state which is broadly comparable to the relationship between a citizen and her country of nationality. Because the notion of a "former habitual residence" is intended to establish a point of reference for stateless refugee claimants that is the functional equivalent of a country of nationality,[182] it implies some degree of formal responsibility for protection of the putative refugee.[183] A purposive interpretation of "former habitual residence"

[178] "The problem of stateless persons who were not refugees should, however, be kept separate from the question of refugees, especially since there were doubtless stateless persons who were in no need of protection by the United Nations": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.2, at 8, January 26, 1950.

[179] [T]here were two categories of stateless persons: those who were also refugees, who would, of course, benefit from the draft convention, and those who were not refugees. Almost all refugees were in need, a fact which gave the problem its special urgency. The same could not be said of stateless persons who were not also refugees": Statement of Mr. Rain of France, U.N. Doc. E/AC.32/SR.2, at 7, January 26, 1950.

[180] Statement of Sir Leslie Brass of the United Kingdom, U.N. Doc. E/AC.32/SR.3, at 3, January 26, 1950.

[181] "[T]he real difference between a refugee and a stateless person was that whereas the former might have some sort of travel document, and a particular country might claim his allegiance, the stateless person [who is not also a refugee] would have neither a travel document nor a country of allegiance": Statement of Mr. Robinson of Israel, U.N. Doc. A/CONF.2/SR.31, at 19, July 20, 1951.

[182] The notion of a "country of his former habitual residence" as an appropriate state of reference is applicable only to stateless persons: *see Convention*, *supra*, note 24, at Art. 1(A)(2), para. 1. This structure was intended to meet the concern expressed by the Director of the International Refugee Organization during the drafting process: "The term 'former habitual residence' has been interpreted by the IRO to apply only to stateless persons . . . . It is, therefore, suggested to reconsider the wording of para. A(2)(i). In case the words 'former habitual residence' should be retained, they might at least be qualified by the terms 'in the case of stateless persons' ": U.N. Doc. E/AC.32/L.16, at 3, January 30, 1950.

[183] "[T]he sub-paragraph had been intended to include persons who had been given the status of refugee by the receiving countries although they had not come under the conventions in force when they entered those countries": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.17, at 7, February 6, 1950.

focuses on the nature of the ties between the claimant and countries in which she has resided, with a particular view to the identification of one or more countries to which she is readmissible. Since refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution exists, the proper point of reference is the country to which the claimant would normally be expected to return if not admitted to the asylum state.

Under this rubric, Atle Grahl-Madsen's argument that country of former habitual residence should usually be equated with the state in which the stateless claimant first experienced persecution[184] is not fully sustainable. The country from which flight first occurred *is* often the state to which the refugee claimant retains the greatest formal legal ties, simply because subsequent states of residence which admitted her on the basis of her fear of persecution may not have granted her an unconditional right to return.[185] On the other hand, the refugee claimant may have as strong or stronger formal ties to some other country or countries, in which case the claim to need protection should be assessed in relation to any and all countries to which she is formally returnable. This position respects the need for symmetrical treatment of persons with and without nationality, since in the case of the former group the Convention requires proof of lack of protection in all states of nationality.[186]

Conversely, where the stateless refugee claimant has no right to return to her country of first persecution or to any other state, she cannot qualify as a refugee because she is not at risk of return to persecution. Assessment of the claimant's fear of returning to the country of first persecution is a nonsensical exercise, as she could not be sent back there in any event. Thus, when it is determined that the claimant does not have a right to return to any state, and does not therefore have a country of "former habitual residence", her needs should be addressed within the context of the conventional regime for stateless persons[187] rather than under refugee law.

Canadian practice has not clearly interpreted "former habitual residence" in the context of applications by stateless persons, but has defined the notion

[184] "[T]he country from which a stateless person had to flee in the first instance remains the 'country of his former habitual residence' throughout his life as a refugee, irrespective of any subsequent changes of factual residence": 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 162 (1966).

[185] In contradistinction to nationals, refugees who choose to leave a country which has provided them with asylum are not necessarily readmissible to that country. While under Article 28 of the *Convention*, *supra*, note 24, states are obliged in most circumstances to issue a Convention travel document to refugees lawfully staying in their territory, they are entitled to impose a temporal limitation on return: *see Convention*, *supra*, note 24, at Annex, para. 3. Refugees who fail to return to the issuing state by the specified date may find themselves without the protection of that country. Moreover, refugees who do not travel on either a Convention travel document or a document issued by the state of asylum may have no right of re-entry at all.

[186] *See* Section 2.4.1, *supra*.

[187] *See* note 177, *supra*.

in relation to prior protection. First, the case law has required a significant period of *de facto* residence in the putative state of reference: one year appears to be accepted as a reasonable threshold standard,[188] although most relevant decisions have in fact involved persons who resided in a foreign state for several years.[189] Second, former habitual residence implies *de facto* abode, and not merely ongoing transient presence.[190] Third, and most important, a state is a country of former habitual residence only if the claimant is legally able to return there.[191] These indicia conform to the basic tenets of the concept of former habitual residence in international law, and provide the basis for a jurisprudence interpreting the criteria for determining when a stateless person may properly invoke the protection of refugee law.

[188] "It is apparent from the appellant's declaration under oath that she found refuge in France; whether she actually chose France as a country of refuge or whether she went there with her family is immaterial; the fact remains that she did indeed find refuge in France *where she had her last habitual residence for at least one year* before coming to Canada"[Emphasis added]: *Thi Chien Le*, Immigration Appeal Board Decision 77-1099, June 20, 1977, at 3, *per* J.-P. Houle.

[189] For example, six years' residence in the United States as a refugee by a Czech national: *Jiri Kovar* (1973), 8 I.A.C. 226; more than sixteen years' residence in the United Kingdom by a citizen of Hungary: *Gregor Steven Harmaty* (1976), 11 I.A.C. 202; a Hungarian who had accumulated eleven years' combined residence in Switzerland and Austria: *Magdolna Haidekker* (1977), 11 I.A.C. 442; and two years in the Netherlands in the case of a Chilean refugee: *Mireya del Carmen Arriagada Lopez*, Immigration Appeal Board Decision 77-9216, May 31, 1977.

[190] "The (Ethiopian) appellant left home to make a life at sea in 1968 . . . . He established a base and a way of life in the Greek economy . . . . He never applied for refugee status in Greece where he had established a base or in any other country he visited": *Teum Mehamed Abubeker*, Immigration Appeal Board Decision V76-6125, August 26, 1977, at 6, *per* C. Campbell. The claim to refugee status in Canada was granted in the circumstances, as his connection to Greece was insufficient to constitute that country a state of reference.

[191] *Guillermo Sergio Francisco Valenzuela Ponce*, Immigration Appeal Board Decision 81-1231, C.L.I.C. Notes 38.12, November 12, 1981. In this case, the Immigration Appeal Board declined to consider the appellant's claim to be a refugee from his country of refuge, Argentina, on the ground that he did not possess status in that country sufficient to permit his return there.