3

Well-Founded Fear

The hallmark of a Convention refugee is the inability or unwillingness to return home due to a "well-founded fear of being persecuted". Not all involuntary migrants qualify as refugees in law: only those who face a genuine risk of persecution in their state of origin are entitled to the protections established by the Convention. The scope and meaning of persecution will be discussed in Chapter 4, while this chapter addresses the notion of well-founded fear.

It is generally asserted that "well-founded fear" entails two requirements. The first[1] criterion is that the refugee claimant perceive herself to stand in "terror of persecution";[2] her very personal response[3] to the prospect of return to her home country must be an extreme form of anxiety that is neither feigned nor overstated, but is rather sincere and reasonable.[4] Second, the subjective perception[5] of risk must be consistent with available information on conditions in the state of origin, as only those persons whose fear is reasonable can be said to stand in need of international protection. This chapter argues that this two-pronged approach to the definition of "well-founded fear" is neither historically defensible nor practically meaningful. Well-founded fear has nothing to do with the state of mind of the applicant for refugee status, except insofar as the claimant's testimony may provide some evidence of the state of affairs in her home country.[6] The concept of well-founded fear is rather inherently objective, and was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.

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[1] It has been argued that " . . . the significance of the Convention's definition of refugee in the realm of international refugee law consists of its substantial, if not predominant, reliance on *subjective* elements": R. Sexton, "Political Refugees, Nonrefoulement and State Practice: A Comparative Study" (1985), 18 Vanderbilt J. Transntl. L. 731, at 733.

[2] Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L. 24, at 33.

[3] A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 53.

[4] G. Melander, "The Protection of Refugees" (1974), 18 Scandinavian Studies in Law 153, at 158.

[5] M. Posner, "Who Should We Let In?" (1981), 9 Human Rts. 16, at 18.

[6] *Accord* K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 724.

3.1 Fear: The Requirement for Prospective Assessment of Risk

In a linguistic context, it is understandable that the reference to "fear" in the Convention definition has led many commentators to assume the relevance of a psychological assessment of the claimant's reaction to conditions in her state of origin.[7] While the word "fear" may imply a form of emotional response,[8] it may also be used to signal an anticipatory appraisal of risk.[9] That is, a person may fear a particular event in the sense that she apprehends that it may occur, yet she may or may not (depending on her personality and emotional makeup) stand in trepidation of it actually taking place. It is clear from an examination of the drafting history of the Convention that the term "fear" was employed to mandate a forward-looking assessment of risk, not to require an examination of the emotional reaction of the claimant.[10]

3.1.1 Historical Foundation of the Prospective Risk Requirement

The immediate legal predecessor of the modern refugee convention was the Constitution of the International Refugee Organization.[11] The IRO definition of a refugee included persons who expressed "valid reasons" for not returning to their country of nationality, including "[p]ersecution, or fear, based on reasonable grounds of persecution . . . ."[12] That is, the Organization had competence over persons who had *already* suffered persecution in their home state, as well as over persons judged by the administering authorities to face a *prospective risk* of persecution were they to be returned to their own country.

[7] "An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions": United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, p. 12 (1979). *Accord* P. Weis, "The concept of the refugee in international law" (1960), 87 J. du droit intl. 928, at 970; S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons" (1976), Recueil des cours 287, at 297; M. Chemille-Gendreau, "Le concept de réfugié en droit international et ses limites" (1981), 28 Pluriel 3, at 9; P. Hyndman, "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Sri Lankan Tamil Applicants" (1987), 9 Human Rts. Q. 49, at 68.

[8] "Fear" may defined as "[t]he emotion of pain or uneasiness caused by the sense of impending danger": IV *The Oxford English Dictionary* 117 (1961).

[9] "Fear" may also mean "a particular apprehension of some future evil . . . (an) [a]pprehensive feeling towards anything regarded as a source of danger, or towards a person regarded as able to inflict injury or punishment": *The Oxford English Dictionary, supra*, note 8.

[10] Such an interpretation is consistent with the French-language text of the Convention definition ("*craignant* avec raison d'être persécutée") [Emphasis added]: *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).

[11] 18 U.N.T.S. 3, 15 December 1946 ("IRO Constitution"). The IRO was established as a temporary specialized agency of the United Nations, and functioned between 1946 and the establishment of the United Nations High Commissioner for Refugees in 1950.

[12] *Id.*, at s. C(1)(a)(i).

The second part of this definition was particularized in that it took cognizance of "factors in the attitude of the individual himself".[13] From the state perspective, it was also functionally subjective: for political and strategic reasons, the Western states which dominated the IRO were prepared to assume the existence of the risks alleged by the refugee claimants to exist in their East Bloc states of origin.[14] The definitional framework itself nonetheless authorized an *objective* assessment of risk: Was the refugee claimant an individual who, even though she had not already been persecuted, might be in jeopardy in her state of origin because of who she was or what she believed? The establishment of the alternative formulation of refugee status was thus intended to recognize the importance not only of sheltering those who had already been persecuted, but equally of extending protection to those who could be spared from prospective harm. Both groups were viewed as having "valid reasons" for not returning to their home state. The IRO refugee definition did not, however, enable claimants to vindicate purely subjective concerns about impending harm, except insofar as the controlling states were prepared to classify such fears as objectively demonstrable.

The definitional structure of the IRO Constitution was the initial point of reference in formulating the Convention refugee definition.[15] Its dualistic central criterion — including either past persecution or prospective risk of persecution — was clearly the major influence on the three draft definitions submitted to the first session of the Ad Hoc Committee on Refugees and Stateless Persons. The United States' proposal,[16] for example, spoke of persons outside their country "because of persecution or fear of persecution";[17] the French[18] and British[19] advocated only the prospective branch

[13] Statement of the Secretary-General, U.N. Doc. A/C.3/527 at 7, October 26, 1949. *Accord* 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 175 (1966): "[I]t is apparent that the likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always remained obscure. Also, some persons are more strong-willed or more outspoken than others, and therefore more susceptible to attract the attention of the authorities than other people."

[14] It was the coincidence of ideology between the refugees and the Western states which operated the International Refugee Organization that gave the appearance of a subjectively inspired protection system. The "valid reasons" criterion itself provided a means by which states could require objective evidence of harm before granting refugee status. *See* J. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950" (1984), 33 I.C.L.Q. 348, at 374-79.

[15] [T]he General Assembly had envisaged a definition of refugees corresponding to that contained in the Constitution of the IRO, on the understanding that that definition must not be static . . . ": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.5, at 3, January 30, 1950. *Accord* A. Grahl-Madsen, *supra*, note 13, at 173: " 'Well-founded fear' is a technical term, evolved by the drafters of the Refugee Convention from the clumsy phrase 'persecution, or fear based on reasonable grounds of persecution' employed in Part I, section C, of Annex I to the IRO Convention."

[16] U.N. Doc. E/AC.32/L.4, January 18, 1950.

[17] *Id.*, at Art. A(2).

[18] U.N. Doc. E/AC.32/L.3, January 17, 1950.

[19] U.N. Doc. E/AC.32/L.2, January 17, 1950.

of the test: "owing to a justifiable fear of persecution"[20] and "serious apprehension based on reasonable grounds . . . of . . . persecution"[21] respectively.

The compromise that emerged from the drafting process was to establish present or prospective assessment of risk as the norm for refugee protection, but to continue to honour the past persecution standard for persons within the scope of a pre-1951 refugee agreement. The Israeli and American delegates took the lead in insisting that the victims of Naziism and other refugees already protected under earlier accords should retain their entitlement to protection either because of anticipated harm were they to be returned, or as a result of "sentimental reasons"[22] based on past persecution. The propriety of extending protection to these refugees on the basis of their subjective concerns was explicitly argued as a justifiable exception to the norm of objective, prospective assessment:

> If the objective criteria of the first category were applied to such cases, an injustice would be committed. In point of fact, the reasons why some of the refugees did not return to their countries of origin were not objective but subjective. They were not being prevented from returning; in some cases they were even invited to return. But they no longer had the courage or desire to do so. Thus, persons who had left Germany, not of their own accord, but for reasons outside their own desires, could not refer to persecutions which no longer existed. It was their horrifying memories which made it impossible for them to consider returning.[23]

In the Convention as ultimately adopted, therefore, persons determined to be refugees under earlier arrangements are not required to demonstrate a well-founded fear of being persecuted,[24] and are not automatically subject to cessation of refugee status if conditions become safe in their homeland.[25]

It was the intention of the drafters, however, that all other refugees should have to demonstrate "a present fear of persecution"[26] in the sense that they "are or may in the future be deprived of the protection of their country of origin".[27] Thus, it was agreed that the first branch of the IRO test[28] which

[20] *Supra*, note 18, at Art. 1(1)(b).

[21] *Supra*, note 19, at Art. 1(2)(b).

[22] Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.18, at 5, February 8, 1950.

[23] Statement of Mr. Robinson of Israel, U.N. Doc. E/AC.32/SR.18, at 4, February 8, 1950.

[24] *Convention*, *supra*, note 10, at Art. 1(A)(2).

[25] "This Convention shall cease to apply to any person (sic) falling under the terms of Section A if . . . [h]e can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuge to avail himself of the protection of the country of his nationality; [*p*]*rovided that this paragraph shall not apply to a refugee falling under section A(1) of this article* [*which lists refugees protected under earlier arrangements*] *who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality*" [Emphasis added]: *Convention*, *supra*, note 10, at Art. 1(C)(6).

[26] Statement of Sir Leslie Brass of the United Kingdom, U.N. Doc. E/AC.32/SR.18, at 6, February 8, 1950.

[27] Statement of Mr. Rochefort of France, U.N. Doc. A/C.3/529, at 4, November 2, 1949.

[28] *Supra*, note 12.

focused on past persecution should be omitted in favour of the "well-founded fear of being persecuted" standard,[29] involving evidence of a present or prospective risk in the country of origin. The use of the term "fear" was intended to emphasize the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind. This interpretation is buttressed by the fact that the Convention provides for the cessation of refugee status upon the establishment of safe conditions in the country of origin, whether or not the refugee continues to harbour a subjective fear of return.[30] In consequence, it is not accurate to speak of the Convention definition as "containing both a subjective and an objective element":[31] it is rather an objective test to be administered in the context of present or prospective risk for the claimant.

3.1.2 The Practical Imperative for Prospective Assessment of Risk

In addition to the historical reasons why "fear" should be interpreted as mandating an anticipatory, objective assessment of risk rather than a subjective evaluation of the claimant's concerns, it would be anomalous to define international legal obligations in such a way that persons facing the same harm would receive differential protection. Why should states be expected to distinguish among persons similarly at risk on the basis of variations of individual temperament or tolerance? Why should an individual of stoic disposition be viewed as less worthy of protection than one who is easily scared, or who proclaims her concerns with great fervour?[32] Yet surely this is the implication of giving "substantial, if not primary weight to a claimant's own assessment of his or her own situation."[33]

Logic dictates that since the central issue is whether or not an individual can safely return to her state,[34] the claimant's anxiety level is simply not a

[29] *Convention*, *supra*, note 10, at Art. 1(A)(2).

[30] *Convention*, *supra*, note 10, at Art. 1(C)(5) and (6).

[31] *See*, e.g., G. Melander, *supra*, note 4; G. Gilbert, "Right of Asylum: A Change of Direction" (1983), 32 I.C.L.Q. 633, at 644.

[32] *Accord* A. Grahl-Madsen, *supra*, note 13, at 174: "[T]he frame of mind of the individual hardly matters at all. Every person claiming . . . to be a refugee has 'fear' . . . of being persecuted in the sense of the present provision, irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers."

[33] R. Sexton, *supra*, note 1, at 733. *Accord* P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 149; "The decision-maker must be satisfied that the person in question subjectively has a real fear."

[34] "Some member of Congress claim that the reason for the original decision to leave is the only critical issue — and that the prospect of persecution upon return is insufficient to qualify a person as a refugee. That argument, however, transforms language that focuses on why an individual 'is unable or unwilling to return' into a provision that places sole emphasis on reasons for departing": H. Fish, Jr., "A Congressional Perspective on Refugee Policy", [1983] World Refugee Survey 48, at 50. *Accord* D. Gross, "The Right of Asylum Under United States Law" (1980), 80 Columbia L. Rev. 1125, at 1134.

relevant consideration. This is in keeping with the basic nature of the international human rights undertaking, which binds states to respect objective indicators of human dignity as defined in universal terms.[35] These standards are common to all, and do not vary as a function of particularized perceptions or concerns.

3.1.3 Subjective Fear as a Negative Constraint on the "Objective Trump"

The experience of Canadian courts in attempting to "acknowledge . . . the applicant's subjective fear"[36] in the process of refugee determination demonstrates the need to dispense with this erroneous interpretation of the Convention's structure. Proof of an "irrepressible",[37] "inconquerable"[38] fear is asserted to be at the heart of the protection decision. The individuality of feelings and variations in their intensity are said to be recognized[39] in the context of a host of factors, including "age, education, physical and moral strength of the subject".[40] Indeed, several Canadian decisions have explicitly adopted the UNHCR's position:

> An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.[41]

In reality, though, the practical impediments[42] to the meaningful evaluation of the claimant's subjective assessment of concern have led courts to

[35] "The Universal Declaration not only reflects a consensus of world opinion on the nature of the fundamental rights and freedoms belonging to every individual, but also expresses a unanimity of belief in the principle that the inherent dignity and worth of the human person requires respect for and protection of that person's rights": V. Saari and R. Higgins Cass, "The United Nations and the International Protection of Human Rights: A Legal Analysis and Interpretation" (1977), Ca. W. Intl. L.J. 591, at 597.

[36] *Joseph Adjei v. Minister of Employment and Immigration* (1989), 7 Imm. L. Rev. (2d) 169 (F.C.A.), at 171.

[37] *Amjad Ali Chaudry*, Immigration Appeal Board Decision M82-1160, September 29, 1982, at 4; *Jose Mariano Aguilar Vides*, Immigration Appeal Board Decision M83-1009, February 3, 1983, at 2; *Rouzbeh Amjadishad*, Immigration Appeal Board Decision M85-1935, May 13, 1987, at 4.

[38] *Gilberto Chonta Gallegos*, Immigration Appeal Board Decision M83-1588, January 25, 1984, at 1.

[39] "Fear, even well-founded or reasonable fear, is a subjective feeling within the person who experiences it. Its compelling and constraining power can vary in intensity from one person to another and should be evaluated in the light of the particular circumstances of each case": *Louis-Paul Mingot* (1973), 8 I.A.C. 351, at 356. *Accord Marc Georges Sévère* (1974), 9 I.A.C. 42, at 46.

[40] *Lionel Medina Aragon*, Immigration Appeal Board Decision 77-1084, May 26, 1977, at 3.

[41] UNHCR, *supra*, note 7, p. 12. *See Ayadurai Gerard Ravindiran*, Immigration Appeal Board Decision V86-6067, March 26, 1987; *Sylvia Dytlow*, Immigration Appeal Board Decision V87-6361X, October 29, 1987, at 8, *per* A. Wlodyka; *Jorge Pizarro Parada*, Immigration Appeal Board Decision V87-6004, January 26, 1988, at 9, *per* A. Wlodyka; affirmed by Federal Court of Appeal Decision A-696-88, April 3, 1989.

[42] A sense of the awkwardness of the subjective assessment of risk can be gleaned from the guidelines prepared by the United Nations to assist states in the interpretation of the Convention definition: "It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences — in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in the circumstances of the case, such a state of mind can be regarded as justified": UNHCR, *supra*, note 7, p. 12.

apply something of an "objective trump" which makes it unnecessary to examine subjective fear in most cases with a strong objective foundation, and which enables evidence that tends to deny the existence of risk to override even the most fervently stated fear of persecution. In the result, the two-pronged "subjective" and "objective" assessment has been functionally converted to a single objective standard, ironically bringing Canadian practice into line with the original intentions of the drafters of the Convention.[43]

In *Maria Beatriz Maldonado Verga*,[44] for example, the Board was confronted with a claimant who suffered from neurotic anxiety as a result of what she perceived to be a pattern of taunting, ridicule, and surveillance consequent to her opposition to the Chilean military dictatorship. The decision in the case did not question the sincerity of the applicant's subjectively held fears, but nonetheless dismissed her claim on the ground that in objective terms her concerns were "exaggerated".[45] In *Bakhshish Gill Singh*,[46] the Board examined the claim of a former Indian government official who testified that he was being pursued by authorities in that country in consequence of his work on behalf of the Sikh cause:

> The majority of the Board is of the view that Mr. Gill has a subjective fear of returning to India . . . . In the opinion of the majority, his demeanour suggested a genuine subjective fear. The hasty reaction to a statement by a friend regarding a possible arrest, namely leaving his job of 22 years, is in keeping with such a subjective fear by a highly strung and excitable person . . . . However, the question that remains is whether Mr. Gill's fear is rationally based, in other words, whether an examination of the facts presented at the hearing suggests that . . . there is an objective basis for Mr. Gill's subjective fear. In the opinion of the majority, there is no such objective basis.[47]

Both of these cases exemplify the generally accepted view that subjective fear "must and can be assessed objectively".[48]

[43] *See* text *supra* at Section 3.1.1, note 26 ff.

[44] Immigration Appeal Board Decision 79-9002, C.L.I.C. Notes 6.16, March 22, 1979.

[45] *Id.*, at 11. *See also Jorge Pizarro Parada*, Immigration Appeal Board Decision V87-6004, January 26, 1988, at 10, *per* A. Wlodyka; affirmed by Federal Court of Appeal Decision A-696-88, April 3, 1989.

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

[47] *Id.*, at 4, *per* D. Anderson.

[48] *Munir Mohamad Adem Suleiman*, Immigration Appeal Board Decision V81-6246, November 16, 1983, *per* G. Loiselle. *Accord Marc Georges Sévère*, (1974) 9 I.A.C. 42; *Guillermo Lautaro Diaz Fuentes* (1974), 9 I.A.C. 323; affirmed on other grounds at (1974), 52 D.L.R. (3d) 463 (F.C.A.); *Oscar Suarez Cleito*, Immigration Appeal Board Decision M81-1219, December 8,

How is this objective assessment of subjective fear to occur? In *Rouzbeh Amjadishad*[49] the Board held:

> . . . Subjective fear is capable of objective assessment; in other words, a person claiming refugee status must establish consistently, plausibly and credibly that specific events or designated persons intervened in his life so that there arose in him an almost irrepressible feeling of a physical or psychological threat against him or against his fundamental rights as a human being.[50]

This analysis thus equates the sincerity of the claimant's subjective fear with the coherence of her testimony.[51] On the one hand, this approach is factually flawed because persons suffering from genuine, post-traumatic anxiety are often unable adequately to recall information, much less relate it in an articulate manner.[52] Moreover, it represents a simple collapsing of the "subjective element" into the "objective element"[53] of the refugee definition, since the assessment of credibility is supposed to be a means of establishing with as much precision as possible the true extent of the objective risk faced by the refugee claimant — not of giving force to emotions or feelings.

The more pernicious interpretations of the "fear" criterion involve the disentitlement of persons whose claims to refugee status may have been otherwise objectively solid. First, the Board has sometimes ruled that persons who do not avail themselves of the earliest opportunity to flee their state of origin cannot reasonably be said to fear persecution in that country.[54] Second,

1981; *Seraq Bozkal Mehmet Mohamed*, Immigration Appeal Board Decision M83-1011, January 25, 1983; *Jagdish Gill Singh*, Immigration Appeal Board Decision V86-6351X, April 22, 1987; *Carlos Alberto Sanes Suarez*, Immigration Appeal Board Decision M86-1587X, September 30, 1987.

[49] Immigration Appeal Board Decision M85-1935, May 13, 1987.

[50] *Id.*, at 4 *per* M. Doré. *Accord Raul Garcia Zavala*, Immigration Appeal Board Decision 81-1222, C.L.I.C. Notes 45.10, June 29, 1982.

[51] This view is consistent with the position of the United Nations: "Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case if not sufficiently clear from the facts of the record": UNHCR, *supra*, note 7, p. 12. The need to assess credibility is apparent, but it is not a means of giving force to subjective feelings. It is rather intended to test the objective plausibility of the testimony offered in evidence by the refugee claimant.

[52] *See* discussion of expert psychiatric evidence on this subject in *Mario Benito Fuentes Leiva*, Immigration Appeal Board Decision 79-9101, C.L.I.C. Notes 27.12, November 13, 1980, at 4-6.

[53] It is argued by some that this diminution of the role of a purely subjective element is part of an effort by states to minimize the influence of individual claimants in the refugee determination process: M. Chemille-Gendreau, *supra*, note 7, at 9.

[54] In *Oscar Manuel Diaz Duran*, the Board observed that " . . . the applicant alleged that for the period 1975 to 1979 he has had to move from friend to friend and never had an opportunity to work as he was afraid of being detained again as he was released by a friend, without authorization, and also because of the fact that he did not report for military service at age eighteen. The Board finds it incredible that after having suffered for all these years the applicant, after obtaining his passport on 18th January, 1979, waited until the 27th of May, 1979 to leave his country, a period of more than four months": Immigration Appeal Board Decision 80-9116, April 16, 1980, at 2-3, *per* U. Benedetti; affirmed on other grounds at (1980), 42 N.R. 342. *See generally* Section 2.3, *supra*.

claims have been denied on the ground that those who truly fear return to their state ought reasonably to claim protection in intermediate countries of potential refuge, rather than disclosing their fear only upon entry into Canada.[55] Third, and most frequently asserted, is the notion that genuinely fearful persons would not delay in making their need for protection known to Canadian authorities, and would in any event seek status before deportation is imminent.[56] In *Harjinder Dhillon Singh*,[57] for example, it was observed that the claimant

> . . . did not claim refugee status upon his arrival in Canada, . . . he worked illegally in Canada for a year and a half, using fraudulent documentation to do so, and only at the time of his arrest did he make a claim to refugee status. Is this the behaviour of a man with a well-founded fear of persecution? In the opinion of the Board, it is not.[58]

The conceptual difficulties in the drawing of these conclusions have been previously discussed,[59] but it must surely be conceded that whatever the relationship between delay in the presentation of a claim to refugee status and the genuineness of the need for protection, these concerns speak only to an objective evaluation of credibility, not to the assessment of subjective fear.[60]

[55] "It is hard to believe that a person in the grip of an uncontrollable fear of being persecuted for political or other reasons does not make any effort to eradicate this fear when the opportunity arises": *Luis Omar Reyes Ferrada*, Immigration Appeal Board Decision T81-9476, September 18, 1981, at 4, *per* J.-P. Houle. *Accord 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." The Federal Court of Appeal in *Marcel Simon Chang Tak Hue v. Minister of Employment and Immigration* has, however, recently confined this approach to situations where the objective need for protection has remained constant since departure from the state of origin: Federal Court of Appeal Decision A-196-87, March 8, 1988. *See generally* Section 2.3, *supra*.

[56] [H]e did not apply for [refugee status] on his arrival in Canada but waited until an Inquiry was convened by the Canadian Immigration authorities. The Board is of the opinion that the actions of the applicant are not those of a political refugee who is afraid of returning to his home country": *Tawfiq Mohammed Tawfiq Al-Shanti*, Immigration Appeal Board Decision 79-9055, April 5, 1979, at 7, *per* U. Benedetti. *Accord Yaw Opoku-Gyamfi*, Immigration Appeal Board Decision V80-6253, August 13, 1980; affirmed on other grounds by Federal Court of Appeal Decision 80-A-67; *Harbhajan Washir Singh*, Immigration Appeal Board, Decision T79-9454, December 7, 1982.

[57] Immigration Appeal Board Decision T84-9049, October 21, 1985.

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

[59] *See* text *supra* at Section 2.4, note 137 ff.

[60] Serious questions should be raised about the utility of this type of evidence in the objective context as well: "The Board seemed to prefer form to substance in attempting to rank the honesty and openness of the applicant as the primary consideration . . . . With little knowledge of the Canadian immigration process, the individual may not even know of the existence of this 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. That the applicant will demonstrate fear is expected; is it not logical that this fear will carry over

At most, then, delay in departure or the presentation of a refugee claim may need to be explained by a refugee claimant who wishes her testimony to be relied upon in support of her case.[61] It is entirely inappropriate, however, to equate delay with an absence of subjective fear, thereby giving unwarranted weight to one factor in the determination of a claimant's credibility.

3.1.4 Fear as an Aspect of the Objective Assessment of Risk

The recent decision of the British House of Lords in *Sivakumaran*[62] provides a thorough analysis of the meaning of the phrase "well-founded fear", drawing richly on the drafting history and internal context of the Convention. Lord Keith refutes the notion that the appropriate test is anything other than objective:

> . . . the general purpose of the convention is surely to afford protection and fair treatment to those for whom neither is available in their own country *and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question* . . . . Fear of persecution, in the sense of the convention, is not to be assimilated to a fear of instant personal danger arising out of an immediately presented predicament . . . . *The question is what might happen if he were to return to the country of his nationality*. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of affairs in that country. [Emphasis added][63]

In a concurring judgment, Lord Goff states succinctly:

> . . . the true object of the convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well founded.[64]

These conclusions are historically and logically compelling, and are moreover consistent with practice in continental Europe.[65] Their explicit adoption in Canadian law would serve two purposes: first, it would end the lip service currently paid to the relevance of the claimant's emotional state to the determination of risk; and, second, it would establish clearly that negative inferences tending to show an absence of subjective fear are not a sufficient ground upon which to deny refugee status. The sole implication of the "fear" criterion of the definition is that the assessment of risk must occur within a *prospective* context. In other words, irrespective of what the claimant has or has not already experienced, the question to be asked is whether there is reason to believe that she requires safe haven from anticipated risk in her state of origin.

3.2 Well-Founded Assessment of Risk: Stating the Test

If the Convention is concerned only with the prospective assessment of risk, what then is the threshold of concern required to substantiate a claim to refugee status? Under what circumstances can it be said that refugee law ought to recognize the legitimacy of a claimant's professed need for protection?

The drafting history of the Convention itself is informative in only the most general terms. An individual is a refugee if she has a "justifiable"[66] case, "good reasons"[67] to flee, and "reasonable grounds"[68] for concern. While these formulations reinforce the objective nature of the test, they do not set a clear standard for determination. Nor does the explanation offered by the UNHCR advance this understanding very far. We are told only that a "well-founded" fear is one that is "supported by an objective situation",[69] and that ultimately this objective test is rooted in subjectivity:

> In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become *intolerable to him* for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there. [Emphasis added][70]

This confusing formulation may be rooted in a well-meaning attempt to give priority to the claimant's subjective assessment of need and hence to expand the scope of refugee status. But if this is so, it is not in keeping with the

into dealings with governmental authorities generally?" C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 177.

[61] An example of the type of appropriately careful inquiry into delay in the presentation of a claim is provided by dissenting Board member A. Wlodyka in the decision of *Banta Dhaliwal Singh*: "The Board notes that the applicant did not immediately apply for refugee status status in Canada but rather remained some time here legally pursuant to his visa. However, the applicant did ultimately report voluntarily to Canada Immigration to make his refugee claim and the applicant has put forward an explanation of why he did so. His lack of success to obtain a visa from the American Embassy also explains some of his caution . . . . I am prepared to give the said applicant the benefit of the doubt in my finding that he has a subjective fear of persecution": Immigration Appeal Board Decision M87-6103X, April 30, 1987, at 12.

[62] *R. v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All E.R. 193 (H.L.).

[63] *Id.*, at 196-97, *per* Lord Keith of Kinkel.

[64] *Id.*, at 202, *per* Lord Goff of Chieveley.

[65] In the Federal Republic of Germany, for example, "[s]eule compte . . . selon la jurisprudence actuelle du Tribunal administratif fédéral, l'intention de persécution de l'Etat, indépendamment des convictions ou craintes subjectives du réfugié": P. Nicolaus, "La notion de réfugié dans le droit de R.F.A." (1985), 4 A.W.R. Bull. 158, at 160.

[66] Proposal of France, U.N. Doc. E/AC.32/L.3/Corr. 1, at 1.

[67] Statement of Sir Leslie Brass of the United Kingdom, U.N. Doc. E/AC.32/SR.18, at 6, February 8, 1950, adopted in the Report of the First Session of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, at 39.

[68] Proposal of the United Kingdom, U.N. Doc. E/AC.32/L.2, at 1, January 17, 1950.

[69] UNHCR, *supra*, note 7, p. 12.

[70] *Id.*, at 12-13.

intentions of the drafters of the Convention.[71] Moreover, this failure of the international community to come to grips with the essence of the objective test of well-founded fear has forced states to devise their own, and at times unduly restrictive, standards of assessment.

In the United States, for example, the accepted approach for many years was to insist on proof of risk on a balance of probabilities:[72] recognition as a refugee could occur only where harm was "reasonably likely to occur".[73] The Supreme Court of Canada concurred in this standard in a somewhat distinct context in its decision in the case of *Kwiatkowsky v. Minister of Manpower and Immigration*.[74] Drawing on the reasoning of the Federal Court of Appeal in *Lugano v. Minister of Manpower and Immigration*[75] that harm must be "more likely than not"[76] before a refugee claim could proceed to a full hearing, the Supreme Court determined that "the test of balance of probabilities . . . is the correct one."[77]

The *Kwiatkowsky* "balance of probabilities" standard was explicitly binding only on an application to receive a full oral hearing from the Immigration Appeal Board,[78] and did not address the substantive test that should ultimately govern the determination of the claim itself. While there was a formal commitment to the application of the same standard at both levels, the courts in practice tended to impose a somewhat lower threshold at this second stage, repeatedly citing the need to "establish the credibility and plausibility"[79] of the claim in order to meet the objective standard of the

[71] "The objects of the convention . . . will surely be fulfilled if refugee status is afforded in cases where there is a real and substantial risk of persecution for a convention reason. The travaux préparatoires, which I have studied with care, do not appear to me to be inconsistent with [this] interpretation . . . . Paragraph 42 of the *Handbook* amounts to a statement of the point of view espoused by the High Commissioner but provides no justification for that point of view as a matter of construction": *Supra*, note 62, at 202, *per* Lord Goff.

[72] A. Evans, "Political Refugees and the United States Immigration Laws: Further Developments" (1972), 66 A.J.I.L. 571, at 575.

[73] D. Gross, *supra*, note 34, at 1134; *accord* P. Woods, "The Term 'Refugee' in International and Municipal Law: An Inadequate Definition in Light of the Cuban Boatlift" (1981), ASILS Intl. L.J. 39, at 44.

[74] (1982), 45 N.R. 116 (S.C.C.).

[75] [1976] 2 F.C. 438, 13 N.R. 322 (C.A.).

[76] *Id.*, at 439.

[77] *Supra*, note 74, at 123, *per* Wilson J.

[78] Under the *Immigration Act* as it existed prior to the decision of the Supreme Court of Canada in the case of *Singh*, a refugee claimant was not entitled to an oral hearing before a person authorized to decide her case. Rather, an immigration official presided over an examination under oath concerning the facts of her claim. The transcript of this examination was then studied by the Refugee Status Advisory Committee, which made a recommendation to the Minister of Employment and Immigration regarding the merits of the case. Those persons who were determined not to be a Convention refugee could seek leave for an oral redetermination hearing before the Immigration Appeal Board.

[79] *Marc Georges Sévère* (1974), 9 I.A.C. 42, at 47, *per* J.-P. Houle. *Accord*, e.g., *Miroslaw Henryk Siedmiogrodzki*, Immigration Appeal Board Decision 80-1100, June 19, 1980; *Oscar Suarez Cleito*, Immigration Appeal Board Decision M81-1219, December 8, 1981; *Cumhur Dembil*, Immigration Appeal Board Decision M82-1275, January 6, 1983.

refugee definition. It was necessary to demonstrate a "cause and effect relationship which would show that the applicant has a genuine fear of returning to his country",[80] although there was no need to show that the claimant faced anything approaching certain persecution upon return.[81] The anomaly of a *de facto* insistence on a more stringent standard at the level of an application for leave than at the hearing on the merits was brought to an end by the Supreme Court of Canada's finding that the provisions of the *Immigration Act* upon which the first stage procedure was based were unconstitutional in that they failed to guarantee claimants the right to an oral hearing before the decision-maker.[82] As noted in a powerful dissenting opinion in *Robert Satiacum*,[83] "[n]ow that the language of the section has been struck down, it seems appropriate that the test which was based on that language also should be struck down".[84]

The creation of this opportunity in Canada for reconsideration of the standard of "well-founded" fear coincided with the issuance of pertinent judgments by each of the Supreme Court of the United States and the British House of Lords. In the case of *I.N.S. v. Cardoza-Fonseca*,[85] the American Supreme Court rejected the traditional "balance of probabilities" standard in favour of a more generous "reasonable possibility" test:

> There is simply no room in the United Nations definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening . . . . [A] moderate interpretation of the 'well-founded fear' standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.[86]

[80] *Harri Chandra Persaud*, Immigration Appeal Board Decision T84-9035, May 30, 1984, at 3, *per* B. Howard. The notion of a preponderance of proof was frequently invoked. *See* e.g., *Mahmuour Rahman*, Immigration Appeal Board Decision M86-1507X, November 5, 1986; *Gabriel Sarfo Kantanka*, Immigration Appeal Board Decision M87-1598X, September 16, 1987; and *Charles Benhene*, Immigration Appeal Board Decision M87-1609X, January 20, 1988.

[81] "[I]t is my opinion that the Board erred in imposing on this applicant and his wife the requirement that they *would be* subject to persecution since the statutory definition required only that they establish a 'well-founded fear of persecution'. The test imposed by the Board is a higher and more stringent test than that imposed by the statute": *Re Naredo and Minister of Employment and Immigration* (1981), 130 D.L.R. (3d) 752, at 753, *per* Heald J.

[82] *Singh et al v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

[83] Immigration Appeal Board Decision V85-6100, July 10, 1987. The dissenting opinion was affirmed by the Federal Court of Appeal on judicial review of this case: *Minister of Employment and Immigration v. Robert Satiacum*, Federal Court of Appeal Decision A-554-87, June 16, 1989.

[84] *Id.*, at 42, *per* D. Anderson.

[85] 467 U.S. 407 (1987).

[86] *Id.*, at 453, *per* Stevens J. *See generally* M. Gibney, "A 'Well-Founded Fear' of Persecution" (1988), 10(1) Human Rts. Q. 109.

This progressive interpretation of the substantive threshold was considered by the House of Lords in the *Sivakumaran*[87] case. The context, however, was quite different. Whereas the American Supreme Court was in the process of liberalizing an exceedingly strict standard of objective proof,[88] the House of Lords was confronted with a decision of the Court of Appeal that had effectively eroded the objective nature of the "well-founded fear" test:

> Fear is clearly an entirely subjective state experienced by the person who is afraid. The adjectival phrase 'well-founded' qualifies, but cannot transform, the subjective nature of the emotion. The qualification will exclude fears which can be dismissed as paranoid, but we do not understand why it should exclude those which, although fully justified on the face of the situation as it presented itself to the person who was afraid, can be shown objectively to have been misconceived.[89]

The House of Lords unanimously rejected this formulation, and insisted on the primacy of the objective foundation of a claim to refugee status. Lord Keith of Kinkel quotes with approval the test adopted by the Supreme Court of the United States,[90] but goes on to posit an arguably more restrictive standard of determination:

> In my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a *reasonable degree of likelihood* that he will be persecuted for a convention reason if returned to his own country. [Emphasis added][91]

In their concurring judgments, both Lord Templeman and Lord Goff of Chieveley softened the notion of "likelihood" in favour of a test which inquires whether there is evidence of a "real and substantial danger of persecution".[92] Overall, though, the House of Lords standard appears to be somewhat more exacting than the American "reasonable possibility" test.

The first Canadian reference to these emerging views is found in the dissenting opinion of Immigration Appeal Board member David Anderson in *Robert Satiacum*.[93] The judgment rejects the "balance of probabilities" approach as anachronistic,[94] and adopts a "reasonable chance"[95] standard that is indistinguishable from the American test in *Cardoza-Fonseca*.[96] This conceptual breakthrough was explicitly endorsed by the Federal Court of

[87] [1988] 1 All E.R. 193 (H.L.)
[88] *See* text *supra* at notes 72-73.
[89] [1987] 3 W.L.R. 1047 (C.A.), at 1052-1053, *per* Sir John Donaldson M.R.
[90] *Supra*, note 87, at 197.
[91] *Supra*, note 62, at 197-98.
[92] *Supra*, note 62, at 199, *per* Lord Templeman, and at 202, *per* Lord Goff of Chieveley.
[93] *Supra*, note 83.
[94] *Supra*, note 83, at 41-42, *See also* text *supra* at notes 78-84.
[95] *Supra*, note 83, at 43.
[96] *Supra*, note 85. *See* text *supra* at notes 85-86.

Appeal in the case of *Joseph Adjei v. Minister of Employment and Immigration*[97] in which the parties agreed to renounce the *Kwiatkowsky*[98]-based "balance of probabilities" test in favour of a new "reasonable chance" standard. Mr. Justice MacGuigan went on to equate the "reasonable chance"[99] test with "good grounds for fearing persecution",[100] and "a 'reasonable' or even a 'serious possibility' as opposed to a mere possibility"[101] of persecution. Most important, the decision expresses clearly its disapproval of the more restrictive British "real and substantial danger" test derived from *Sivakumaran*:[102]

> Despite the terminology sanctioned by the House of Lords for interpreting the British legislation, we are nevertheless of the opinion that the phrase "substantial grounds for thinking" is too ambiguous to be accepted in a Canadian context. It seems to go beyond . . . "good grounds" . . . and even to suggest probability.[103]

In the final analysis, then, Canadian law has chosen to follow the more liberal American trend. Insofar as there is objective evidence to show that there is a reasonable possibility or chance of relevant persecution in the claimant's state of origin, the claim should be adjudged well-founded. In adopting this position, Canada has come clearly into line with dominant[104] scholarly opinion which has consistently rejected the "balance of probabilities" standard in favour of such formulations as "good reasons",[105] "plausible danger",[106] "some proof",[107] "reasonable in the circumstances",[108] "real chance",[109] or "serious possibility".[110] The "reasonable possibility" test is the appropriate compromise between respect for the Convention's commitment to anchor protection decisions in objectively observable risks and the need simultane-

[97] (1989), 7 Imm. L.R. (2d) 169 (F.C.A.), at 172.
[98] (1982), 45 N.R. 116 (S.C.C.).
[99] *Supra*, note 97, at 172.
[100] *Id.*
[101] *Supra*, note 97, at 173.
[102] [1988] 1 All E.R. 193 (H.L.)
[103] *Supra*, note 97, at 173-74, *per* MacGuigan J.
[104] For a contrary view, *see*, e.g., D. Martin in C. Sumpter, "Mass Migration of Refugees — Law and Policy" (1982), 76 A.S.I.L.P. 13, at 13.
[105] P. Weis, "The concept of the refugee in international law" (1960), J. de droit intl. 928, at 970.
[106] G. Melander, "The Protection of Refugees" (1974), 18 Scandinavian Studies in Law 153, at 158.
[107] S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons" (1976), Recueil des cours 287, at 297.
[108] C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 170.
[109] A. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 Columbia Human Rts. L. Rev. 39, at 56.
[110] G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR" (1980), Michigan Y.B. Intl. L. Studies 291, at 299.

ously to avoid the establishment of an inappropriately high threshold of concern.

One potentially contentious issue that flows from this judicial shift to the "reasonable possibility" standard is that decision-makers may be inclined to set precise though arbitrary "percentage risk thresholds" short of the probability point as the minimum standard for refugee protection. Mr. Justice Stevens' reference to the sufficiency of a 10 per cent chance of persecution[111] should be viewed simply as an exhortation to abandon the rigidity of the "balance of probabilities" test, and not as an invitation to define new, equally rigid standards of attainment. Because the risk of persecution will never be definitively measurable, decision-makers should ask only whether the evidence as a whole discloses a risk of persecution which would cause a reasonable person in the claimant's circumstances to reject as insufficient whatever protection her state of origin is able and willing to afford her.

3.2.1 Relevance of General Evidence of Respect for Human Rights

The appropriate starting point for an analysis of objective conditions within the refugee claimant's state of origin is an examination of that country's general human rights record.[112] Because the insufficiency of state protection is the *sine qua non* for recognition as a refugee, persons who flee countries that are known to commit or acquiesce in persecutory behavior should benefit from a rebuttable presumption that they have a genuine need for protection.[113] The Federal Court made this point in overturning a negative decision involving a Ghanaian whose fear of persecution stemmed from the infamous activities of the Rawlings dictatorship:

> I have mentioned the Board's zeal to find instances of contradiction in the applicant's testimony. While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present respondent, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.[114]

Conversely, those claimants who come from states which have generally laudable human rights records face a tougher objective threshold: whether through their own testimony or whatever other evidence can be marshalled, they must counter the established perception that their country is one that can be relied upon to afford them meaningful protection.

An effort should be made to gather background human rights data from a broad cross-section of official and non-governmental sources[115] in order to supplement whatever evidence may be adduced by the claimant herself. It is critical that the process of garnering human rights information not be left solely to the refugee claimant: fact-finding is a responsibility that the applicant shares with the examining authority.[116] Moreover, all relevant information which comes to the attention of the determination authority must be shared with the refugee claimant in order that she may have "an opportunity to meet that evidence and to make representations thereon."[117]

In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability. Simply because a par-

[111] *Supra*, note 86.

[112] *Nana Adoma Frimpong v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-765-87, May 12, 1989; *Charles Kofi Owusu Ansah v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-1265-87, May 19, 1989. *Accord* C. Pompe, "The Convention of 28 July 1951 and the International Protection of Refugees" (1956), Rechtsgeleerd Magazyn Themis 425, republished in English as U.N. Doc. HCR/INF/42, at 10; G. Melander, *supra*, note 106, at 158; K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 724; B. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983), 5 Human Rts. Q. 348, at 365.

[113] "One reason why this rebuttable presumption can be so vital is that it is widely recognized by international bodies like the United Nations that the fleeing individual is often unable to gather and subsequently offer 'objective' evidence of the claimed persecution . . . . The rebuttable presumption suggested here, in a sense, *is* a form of objective evidence. What it does is to provide some information, some degree of probability, on the level of human rights violations in the claimant's homeland": M. Gibney, "A 'Well-Founded' Fear of Persecution" (1988), 10(1) Human Rights Q. 109, at 119. *Accord* G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986), 26(4) Virginia J. Intl. L. 897.

[114] *Benjamin Attakora v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-1091-87, May 19, 1989, at 4, *per* Hugessen J.; setting aside Immigration Appeal Board Decision T86-10336X, October 14, 1987.

[115] Strict reliance on official governmental reporting has been criticized in two recent Board decisions. In *Antonio Pereira Costa*, use of the U.S. *Country Reports on Human Rights Practices* was appropriately constrained: "The report of a department of government of a foreign state to its legislature can be of little weight, especially when the only purpose of the report is compliance with a named foreign law of which we know nothing and the provenance of the report and the qualifications of those who prepared it are nowhere disclosed": Immigration Appeal Board Decision T87-9107X, July 16, 1987, at 3-4, *per* G. Eglinton. A similar caution may apply with respect to reports generated by the Department of External Affairs: "The fact that no doubt conscientious, even distinguished, Canadian diplomats serving in West Africa have certain views about the nature of governance of Ghana and the legitimacy of the generality of refugee claims by Ghanaians . . . is of no relevance": *Joseph Manso Frimpong*, Immigration Appeal Board Decision T87-10043X, October 29, 1987, at 5, *per* G. Eglinton.

[116] "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while 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 necessary for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application": UNHCR, *supra*, note 7, p. 47. To assist this shared process of fact-finding in relation to human rights conditions, the Canadian Immigration and Refugee Board has established a national network of publicly accessible Documentation Centres, which collect and summarize all available sources of relevant information in relation to refugee-producing countries.

[117] *Leonel Eduardo Quinteros Hernandez v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-506-81, February 12, 1982, *per* Heald J. *Accord Swaran Singh v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-1346-83, December 3, 1984.

ticular state of affairs may be difficult to understand from the vantage point of the country of adjudication does not give licence to disregard relevant information. As the Immigration Appeal Board carefully observed in a case involving persecution based on family membership:

> We who live in a democratic society where order is maintained by peaceful means may find it hard to believe that the authorities would harass someone either directly or through his family simply because he bore a name that they held in abomination. However, we must keep our personal opinions to ourselves, and instead try to place the situation in its proper context . . . . It is not for me to judge this policy, and I am not about to do so. I am merely describing an internationally acknowledged phenomenon.[118]

Related to this point is the inherent political lens through which the human rights record of the country of origin is viewed.[119] As Goran Melander has noted, we have "a definition of the term 'refugee' which is applicable when political considerations do not prevent states from recognizing a person".[120] Because a finding that the claimant faces a risk of persecution is perceived to imply censure of the state of origin,[121] there is always a risk that concern for the protection of refugees may be subordinated to foreign policy concerns.[122] Where there is political antagonism between the states of origin and asylum, the political lens may result in an enhanced willingness on the part of decision-makers to emphasize negative aspects of the human rights profile.[123] Conversely, if the two states enjoy good relations, the generalized stereotype of the country of origin as an ally may stand in the way of an evenhanded assessment of the risk to a particular claimant.[124] Human rights

[118] *Luis Enrique Toha Seguel*, Immigration Appeal Board Decision 79-1150, C.L.I.C. Notes 28.8, November 13, 1980, at 4, *per* J.-P. Houle. *Accord Muhammad Shahidul Islam*, Immigration Appeal Board Decision M82-1278, C.L.I.C. Notes 72.5, June 4, 1984, at 3, *per* E. Chambers.

[119] *See* F. Krenz, "The Refugee as a Subject of International Law" (1966), 15, I.C.L.Q. 90, at 102; M. Iognat-Prat, "L'évolution du concept de réfugié: Pratiques contemporaines en France" (1981), 28 Pluriel 13, at 21; and P. Nicolaus, "La notion de réfugié dans le droit de R.F.A." (1985), 4 A.W.R. Bull. 158, at 160.

[120] G. Melander, *supra*, note 106, at 161.

[121] World Peace Through Law Centre, *Toward the Second Quarter Century of Refugee Law*, p. 11 (1976); P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 149.

[122] D. Rickard, "The Rhetoric and the Reality" (1986), Legal Services Bull. 214, at 216.

[123] "If there is political antipathy between the governments of the country of origin and of the country of refuge, it may not be too difficult to win recognition as a refugee. Failing this political constellation, the situation becomes much tougher for the individuals concerned. The different American attitudes to 'refugees' from Cuba and 'entrants' from Haiti may be a case in point": A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), 20 Archiv des Völkerrechts 411, at 421.

[124] "But those determining eligibility are rather inclined to think in stereotypes, i.e. that a political situation in another country is such that the fear can be regarded as 'well-founded' and that in another country it is not, and here political considerations often play a role": P. Weis, "Convention Refugees and *De Facto* Refugees", in G. Melander and P. Nobel, eds., *African Refugees and the Law*, p. 16 (1978). *Accord* F. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" (1983), 35(2) Revista española de derecho internacional 337, at 352.

information must therefore be considered in as full and value-neutral a way as possible.[125] If the focus is genuinely to be the welfare of the involuntary migrant,[126] decision-makers must afford weight to inconvenient and politically awkward information that is demonstrative of the risk associated with return.

Finally, it is important to recognize that background human rights information, while important, is not determinative of a claim to refugee status. Its utility is to establish a *rebuttable presumption* of risk or the absence thereof, which must be tested against the whole of the evidence presented. In particular, the testimony of the claimant in relation to her circumstances must always be the central factor in the process of assessing the risk of persecution in the state of origin.[127]

3.2.2 Role of the Refugee Claimant's Testimony

The heart of the refugee determination process is the careful consideration of the claimant's own evidence, whether provided orally or in documentary form.[128] Both the Convention and the UNHCR guidelines are conspicuously silent on the issue of entitlement to an oral hearing.[129] Since the decision of the Supreme Court of Canada in *Singh et al v. Minister of Employment and Immigration*,[130] however, Canadian law has required that all applicants for refugee status receive an opportunity to be heard by the authority responsible for the adjudication of their case.[131] What is the weight,

[125] Given that political goals were arguably at the root of the conceptual framework incorporated in the Convention, there are real limits to the promotion of a neutral humanitarian or human rights based perspective. *See* J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990), 31(1) Harvard Intl. L. J. 129; and M. Chemille-Gendreau, "Le concept de réfugié en droit international et ses limites" (1981), 28 Pluriel 3, at 9.

[126] "The humanitarian thrust of the refugee problem can be lost in a maze of political manoeuvres": C. Wydrzynski, *supra*, note 108, at 170.

[127] "Comment apprécier si la crainte est fondée? La seule solution consiste à mettre en parallèle l'histoire personnelle de l'intéressé et la situation politique dans le pays qu'il a été constraint de fuir": M. Iognat-Prat, *supra*, note 119, at 21. *Accord* K. Petrini, *supra*, note 112, at 724.

[128] "[T]he credibility of an applicant . . . is usually the main factor in establishing whether there exists a 'well-founded fear of persecution' ": *Leonel Eduardo Quinteros Hernandez*, Immigration Appeal Board Decision V80-6192, C.L.I.C. Notes 35.11, August 18, 1981, at 4, *per* F. Glogowski.

[129] "Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and to the 1967 Protocol vary considerably": UNHCR, *supra*, note 7, p. 45. The guidelines prepared by the Executive Committee of UNHCR require only that "[t]he applicant should be given the necessary facilities . . . for submitting his case to the authorities concerned": U.N. Doc. A/32/12/Add.1, at para. 53(6)(e)(iv).

[130] [1985] 1 S.C.R. 177.

[131] Indeed, the Board has expressed its concern that failure to testify may preclude the proper assessment of the claim: *Ebrahim Zbedat*, Immigration Appeal Board Decision 86-9954, C.L.I.C. Notes 106.17, October 30, 1986; affirmed by Federal Court of Appeal Decision A-693-86, October

then, that should be attached to the claimant's own testimony in the assessment of the possibility of persecution?

In Canada, so long as the claimant's testimony is plausible, credible, and frank, it may constitute the whole of the evidence of objective risk necessary to support an affirmative finding of refugee status,[132] even where it consists largely of hearsay evidence.[133] There is no requirement of external corroboration of an uncontradicted credible account,[134] although the refugee claimant may reasonably be expected to address any apparently inconsistent evidence, including that which may be contained in general human rights reports.

In what circumstances will testimony be adjudged plausible, credible, and frank, and hence sufficient to establish the objective foundation of a claim to refugee status? The primary rule has been stated by the Federal Court of Appeal to be that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."[135] In view of this basic premise, two forms of caution are appropriate before any inferences are drawn that might discount the sworn testimony of a refugee claimant.[136]

First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright

8, 1987; *José Manuel Elias da Cruz*, Immigration Appeal Board Decision T87-9255X, October 27, 1987; *Ajit Singh*, Immigration Appeal Board Decision T81-9741, January 6, 1988; *Lottay Singh*, Immigration Appeal Board Decision V84-6176, February 11, 1988.

[132] C. Blum, 'Who Is a Refugee? Canadian Interpretation of the Refugee Definition" (1986), 1 Imm. J. 8, at 9.

[133] J. Grey, *Immigration Law in Canada*, p. 117 (1984).

[134] *Aram Ovakimoglu v. Minister of Employment and Immigration* (1983), 52 N.R. 67 (F.C.A.), at 6; *Juan Antonio Quereillac Acevedo*, Immigration Appeal Board Decision M85-1398, October 7, 1987. This view contrasts sharply with the traditional preoccupation of authorities in the United States with documentary evidence and the testimony of corroborative witnesses. *See*, e.g., G. Pick, "People Who Live on Hope — and Little Else" (1983), 11 Student Lawyer 12, at 35.

[135] *Ranjit Thind Singh v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-538-83, November 27, 1983, *per* Heald J.; *accord Alfredo Nelson Villarroel Salvatierra v. Minister of Employment and Immigration*, (1979), 31 N.R. 50 (F.C.A.); and *Pedro Enrique Juarez Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 (C.A.).

[136] The Immigration Appeal Board has frequently suggested that a more exacting test be applied in assessing credibility, including " . . . the witness' desire to be truthful; other motives; general integrity; general intelligence; relationship or friendship to other parties; opportunity for exact observations; capacity to observe accurately; firmness of his memory to carry in his mind the facts as observed; ability to resist the influence, frequently unconscious, to modify his recollection; capacity to express what is clearly in his mind; ability to reproduce in the witness box the facts observed; and his demeanour while testifying": *Graciano de Jesus de Almeida*, Immigration Appeal Board Decision T87-9819X, January 7, 1988, at 4, *per* L. Goodspeed. *Accord*, e.g., *Henrie Ezambe*, Immigration Appeal Board Decision M87-1106, June 9, 1987; *Jean Maxene Moly*, Immigration Appeal Board Decision M87-1836X, April 5, 1988.

in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the Board of assessing credibility on the basis of the timeliness of the claim to refugee status,[137] compliance with immigration laws,[138] or the consistency of statements made on arrival with the testimony given at the hearing[139] is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.[140]

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony.[141] A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution.[142] Because an understandable anxiety affects most claimants compelled to recount painful facts

[137] *See*, e.g., *Jaime Vladimiro Colima Acuna*, Immigration Appeal Board Decision 80-9125, at 5, *per* U. Benedetti: "[T]he applicant decided to come as a visitor and only after being here approximately a week made a claim to refugee status." *But see Muhammad Shahidul Islam*, Immigration Appeal Board Decision M82-1278, C.L.I.C. Notes 72.5, June 4, 1984, at 4, *per* E. Chambers: "Much was made of the fact that Mr. Islam did not immediately, upon his arrival in Canada, declare himself as a refugee claimant to the immigration authorities. Again, we should not apply our standards to one who has lived in fear of uniformed authorities for so long a period. We cannot assume that the niceties of Canadian immigration law are well-known to the inhabitants of the bazaars and villages of Bangladesh." *Accord* C. Wydrzynski, "Refugees and the *Immigration Act*" (1979), 25 McGill L.J. 154, at 177; Minister of Employment and Immigration, "New Refugee Status Advisory Committee Guidelines on Refugee Definition and Assessment of Credibility" (1982), at Guideline 18(a): "A claim may be credible even though it was not made at the earliest possible opportunity. A genuine refugee may well wait until he is safely in the country before making a claim. He cannot, in every case, be expected to claim refugee status at the port of entry."

[138] *See*, e.g., *Ricknauth Mohan*, Immigration Appeal Board Decision T82-9251, May 4, 1982, at 3, *per* U. Benedetti: "On more than one occasion [the claimant] was not very honest in dealing with the immigration authorities . . . . "

[139] *See*, e.g., *Mario Benito Fuentes Leiva*, Immigration Appeal Board Decision 79-9101, April 5, 1979. *But see Abu Sayeed Mohammed Jabed Hossein*, Immigration Appeal Board Decision M87-1040X, April 30, 1987, at 4, *per* R. Julien: "The Board is of the opinion that it is acceptable for a person who had barely arrived in Canada and was in a precarious situation in which he did not know all the hazards of our system, strictly speaking, to answer only the questions asked, without providing further explanations": *Yim Shing Mak*, Immigration Appeal Board Decision V87-6640X, May 17, 1988; Minister of Employment and Immigration, *supra*, note 137, at Guideline 18(e).

[140] *See* Chapter 2, *supra*, at note 103 ff. This is particularly true where the allegedly inconsistent testimony was given through an interpreter. In *Abdi Mohamed Ali*, Immigration Appeal Board Decision T87-9585, February 14, 1989, at 3, member E. Rotman noted that ". . . the Board is satisfied that translation could be a factor in the inconsistencies in the account of events and dates. The Board believes that the claimant should be given the benefit of the doubt."

[141] *Benjamin Attakora v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-1091-87, May 19, 1989.

[142] This problem was explicitly acknowledged by the Board in *Mario Angel Molina Riquelme*, Immigration Appeal Board Decision 79-9363, C.L.I.C. Notes 22.6, July 9, 1980. In practice, however, the Board has sometimes imposed unwarranted expectations on claimants. In *Jagir Ghuman Singh*, for example, the Board found the applicant's testimony that he had been picked

in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true. As stated in *Francisco Edulfo Valverde Cerna*:[143]

> The Board does not expect an applicant for Convention refugee status to have a photographic memory for details of events and dates that happened a long time ago, but it is reasonable to expect that important events that happened as a consequence of other events should be found to have taken place in some consistent and logical order.[144]

Ultimately, however, even clear evidence of a lack of candour does not necessarily negate a claimant's need for protection:

> Even where the statement is material, and is not believed, a person may, nonetheless, be a refugee. "Lies do not prove the converse." Where a claimant is lying, and the lie is material to his case, the [determination authority] must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in *support* of credibility.[145]

Given the objective focus of the Convention definition, the purpose of eliciting evidence from the claimant herself is not to ascertain whether she harbours a subjective fear of return. Rather, it is to establish how circumstances in the homeland impact on her own security, and why she feels compelled to seek protection abroad.[146] Against the backdrop of human rights

up and beaten by the police on two or three occasions not to be credible because "[w]hen questioned regarding the alleged beatings, Mr. Singh could not elaborate nor could he support his contention that he would be picked up and jailed were he to return to India": Immigration Appeal Board Decision T82-9689, October 25, 1982, at 3, *per* E. Teitelbaum. *Accord Victor Manuel Trauco Arias*, Immigration Appeal Board Decision T84-9334, February 5, 1986, in which the claimant's confusion at hearing led to a negative assessment of credibility; and *Jaswant Singh*, Immigration Appeal Board Decision T87-9326, September 28, 1987, in which the claimant's inability to recall certain dates of national significance resulted in a finding of lack of credibility.

[143] Immigration Appeal Board Decision V87-6608X, March 7, 1988.

[144] *Id.*, at 4-5, *per* B. Howard.

[145] Minister of Employment and Immigration, *supra*, note 137, at Guideline 18(d). *Accord Oscar Roberto Cruz*, Immigration Appeal Board Decision V83-6807, June 26, 1986; *Monoranchitarasa Nalliah*, Immigration Appeal Board Decision M84-1642, October 20, 1987; and *Tacir Yaliniz v. Minister of Employment and Immigration* (1989), 7 Imm. L.R. (2d) 163 (F.C.A.), at 164, *per* Marceau J.: "While we agree that it is within the province of the Board to assess credibility, we are of the view that the Board's apparently complete rejection of the Applicant's statements was not justified. It seems to us that the Board should have asked itself whether, even assuming some exaggerations, the Applicant had not shown that he had undoubtedly been the victim of harassment of a variety of forms amounting to persecution, making thereby his fear to go back not only genuine but objectively founded."

[146] *See*, e.g., *Vidya Ajodhia*, Immigration Appeal Board Decision M85-1709, November 12, 1987, in which member P. Davey gives more weight to the applicant's account of the racially inspired risk in which she found herself in Guyana than to the official assessments of human rights conditions.

reports from the country of origin, the determination authority must decide whether the individual applicant faces a reasonable chance of serious harm if returned to her home.

3.2.3 Evidence of Individualized Past Persecution

Past persecution is in no sense a condition precedent to recognition as a refugee. The Convention is concerned with protection from prospective risk of persecution,[147] and does not require that an individual should already have been victimized. This principle was recognized in Canada[148] by the decision in *Guillermo Lautaro Diaz Fuentes*:[149]

> . . . he does not need to establish that there has already been persecution; what he is obliged to prove is that he has well-founded fear of being persecuted if he remains in or returns to the country of which he is a citizen or resident, and that owing to such fear he is unable or unwilling to avail himself of the protection of the country of which he is a national.[150]

While the Board's jurisprudence has at times exhibited an unhealthy fixation with past maltreatment,[151] the Federal Court of Appeal has consistently affirmed the propriety of a forward-looking assessment of risk, notably in the cases of *Waldeck Sylvestre v. Minister of Employment and Immigration*,[152] *Re Naredo and Minister of Employment and Immigration*,[153] and

[147] "[T]he word 'fear' refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution": UNHCR, *supra*, note 7, p. 13.

[148] This view is not shared throughout the community of states parties to the Convention. "A restrictive approach, espoused, for example, by Denmark and Norway, interprets 'well-founded fear' as requiring the applicant to show *prior* persecution at the hands of the oppressive government": A. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" (1983), 15 Columbia Human Rts. L. Rev. 39, at 57. *See also* F. Marino-Menendez, "El concepto de refugiado en un contexto de derecho internacional general" (1983), 35(2) Revista española de derecho internacional 337, at 354.

[149] (1974), 9 I.A.C. 323.

[150] *Id.* at 341, *per* J.-P. Houle. *Accord* Minister of Employment and Immigration, *supra*, note 137, at Guideline 18(f): "A person may be credible claimant even though he has never been persecuted. The absence of actual detention or detection by the authorities or of wounds should not lead to the assumption of fabrication."

[151] *See*, e.g., *Lionel Medina Aragon*, Immigration Appeal Board Decision 77-1084, May 26, 1977 (" . . . in most cases fear can be proven only by substantial evidence e.g. former acts of active persecution"); *Hector Eduardo Contreras Guttierez*, Immigration Appeal Board Decision V80-6220, C.L.I.C. Notes 30.11, March 16, 1981 (concern expressed in majority opinion that claimant "was not disabled in any way in the alleged beatings and torture he received"); *Orhan Demir*, Immigration Appeal Board Decision M82-1274, January 6, 1983 (" . . . he has not produced any evidence that he was persecuted in any way for his religious opinions"); and *Seraq Bozkal Mehmet Mohamed*, Immigration Appeal Board Decision M83-1011, January 25, 1983 ("[T]he only persons who can be recognized as refugees within the meaning of the Convention and of the Act are those who meet the criteria set forth in the definition, and who can demonstrate in a consistent and credible manner that they were victims of acts committed by authorities in their country of nationality . . . .)

[152] Federal Court of Appeal Decision A-34-78, June 12, 1978.

[153] (1981), 130 D.L.R. (3d) 752 (F.C.A.).

Alfredo Manuel Oyarzo Marchant v. Minister of Employment and Immigration:[154]

> . . . the Board appears to have treated what happened to the applicant . . . as not amounting to persecution because it did not include arrest or detention. In so doing the Board . . . has failed to consider what happened not only as to whether it could be in itself a form of persecution, but also whether *it could be the basis*, along with the incidents of 1973 and 1974, of a well-founded *fear of future persecution* . . . . [Emphasis added][155]

It is thus unnecessary to establish past persecution in order to succeed on a claim to refugee status. Where evidence of past maltreatment exists, however, it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home. Unless there has been a major change of circumstances within that country that makes prospective persecution unlikely, past experience under a particular regime should be considered probative of future risk.[156] As the Federal Court of Appeal noted in the *Oyarzo Marchant*[157] decision:

> . . . since it is the foundation for a present fear that must be considered, such incidents in the past are part of the whole picture and cannot be discarded entirely as a basis for fear, even though what has happened since has left them in the background.[158]

The issue is not the fact of the past persecution, but rather whether "that which happened in the past may happen in the future".[159] As cogently stated in the guidelines employed by the now disbanded Refugee Status Advisory Committee:

> Past persecution is evidence to substantiate a well-founded fear. However, it is not the only evidence. A person may not have been persecuted in the past, and yet still be a refugee. Looking, as it does, to the future, the refugee definition is concerned with possibilities and probabilities rather than with certainties.[160]

In sum, evidence of individualized past persecution is generally a sufficient,[161] though not a mandatory, means of establishing prospective risk.

[154] [1982] 2 F.C. 779.

[155] *Id.* at 781, *per* Thurlow C.J.

[156] *See*, e.g., *Francisco Humberto Gonzalez Galindo*, [1981] 2 F.C. 781 (C.A.). In this decision, the Court set aside a judgment of the Immigration Appeal Board on the ground that it had failed to take due account of independent medical evidence that the claimant's condition was consistent with having already been a victim of torture. This evidence was deemed sufficient to override the Board's concern that the claimant's relatively minor political involvement was inconsistent with a well-founded fear of persecution.

[157] *Supra*, note 154.

[158] *Supra*, note 154, at 781, *per* Thurlow C.J.

[159] *Marek Musial*, Immigration Appeal Board Decision V80-6368, November 19, 1980, at 2, *per* B. Howard.

[160] Minister of Employment and Immigration, *supra*, note 137, at Guideline 4.

[161] C. Blum, "Who Is a Refugee? Canadian Interpretation of the Refugee Definition" (1986), 1 Imm. J. 8, at 9.

Where the claimant testifies that she has left her country in anticipation of serious harm, both the general human rights record of her state and the experiences of other similarly situated persons are appropriately considered as alternative means of establishing the objective risk associated with return.

3.2.4 Evidence of Harm to Persons Similarly Situated

Insofar as there is no evidence of past persecution of the claimant herself, the concrete foundation for a claim to refugee status may be established by circumstantial evidence[162] that persons similarly situated to the claimant are at risk in the state of origin. While an individual need not already have suffered harm in order to qualify as a refugee,[163] there must nonetheless be some evidence on the basis of which the decision-maker can reasonably judge whether or not the applicant faces a reasonable chance of persecution were she to be returned to her home state. The best circumstantial indicator of risk is the experience of those persons perceived by authorities in the state of origin to be most closely connected to the claimant, generally including persons who share the racial, religious, national, social, or political affiliation upon which the claimant bases her case.[164] This information may be gleaned from general human rights data, the claimant's testimony, or any other evidence adduced at the hearing.

An example of the application of this principle in Canadian law can be found in the decision of the Federal Court of Appeal in *Anthony Andre Williams v. Minister of Employment and Immigration*.[165] In that case the Court directed the Immigration Appeal Board to take cognizance of letters from the applicant's brother and mother in which the nature of the risk to family members was set out, and held that these forms of evidence could provide a sufficient objective basis for the claim to refugee status.

A similar position was taken in the case of *Chaudri v. Minister of Employment and Immigration*,[166] this time in the context of the experiences of friends

[162] "The adjective 'well-founded' was meant to signify that 'a person has either been actually a victim of persecution or can show why he fears persecution.' In other words, the contracting party has to agree that 'a well-founded fear' of persecution does exist on the basis of circumstantial evidence to corroborate a person's personal judgment derived from his state of mind": Y. Shimada, "The Concept of the Political Refugee in International Law" (1975), 19 Japanese Ann. Intl. L. 24, at 33-34.

[163] J. van der Veen, "Does Persecution by Fellow-Citizens in Certain Regions of a State Fall Within the Definition of 'Persecution' in the Convention Relating to the Status of Refugees of 1951?" (1980), 11 Netherlands Y.B. Intl. L. 167, at 168; G. Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR" (1980), Michigan Y.B Intl. L. Studies 291, at fn. 47.

[164] "He may well have a well-founded fear of persecution if relatives, friends, or other members of the same racial or social group have been persecuted": D. Anker and M. Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980" (1981), 82 San Diego L. Rev. 1, at 67. *Accord* M. Ryan, "Political Asylum for the Haitians?" (1982), 14 Case Western Reserve J. Intl. L. 155, at 171.

[165] Federal Court of Appeal Decision A-57-81, June 16, 1981.

[166] (1986), 69 N.R. 114 (F.C.A.).

and associates. The claimant had been involved with political affairs in Pakistan before coming to Canada on a student visa. During his time in Canada, a violent political coup took place, and martial law was imposed. The Immigration Appeal Board found that because the applicant's political activities had been of a fairly minor nature, he was unlikely to be at risk if returned to Pakistan, and dismissed his claim to refugee status. The Federal Court of Appeal set this decision aside because *inter alia* the Board had failed to consider evidence that other persons who, like the claimant, had engaged in minor forms of political activism, were in fact experiencing severe problems in Pakistan:

> Neither the applicant's "minor" role nor the length of his absence from Pakistan were relevant in the light of the uncontradicted evidence which the Board had accepted, namely, that others who had played the same role had been persecuted and that political persecutions of former members of the P.P.P. were still current at the time of the appeal. In the circumstances, it appears to me that, if the Board had not committed the errors which I have indicated, it could only have come to the conclusion that the applicant had satisfied the definition of Convention Refugee.[167]

This decision demonstrates the importance of seeking out contextualized surrogate indicators of risk (what is *in fact* happening to persons like the claimant?)[168] rather than relying on generic or intuitive reasoning about the likelihood of harm (is it reasonable that persons who played minor roles in the past are in danger?). By defining the community of persons at the focus of the inquiry to coincide as closely as possible with the basis of the claim to refugee status, it is possible both to provide prospective protection and to reserve recognition for those persons who are genuinely at risk of serious harm.

3.2.5 Assessing Risk Within the Context of Generalized Oppression

In view of the probative value of the experiences of persons similarly situated to the claimant, it is ironic that courts have shown a marked reluctance to recognize as refugees persons whose apprehension of risk is borne out in the suffering of large number of their fellow citizens. Rather than looking to the fate of other members of the claimant's racial, social, or other group as the best indicator of possible harm, decision-makers have routinely disfranchised refugees whose concerns are based on generalized, group-defined oppression.

This problem is most often manifested in the assertion that the claimant must be able to show that she has been "personally singled out"[169] for persecution, that is, that she fears something more than a generalized denial of human rights,[170] and can recount a "coherent program of opposition . . . or . . . personal histories of persecution".[171] Claims have been dismissed on the basis that "other suspects probably received the same treatment",[172] because the applicant "was only one of many thousands"[173] similarly situated, and where the country of origin is "a restless and violent society where racism and disorder are part of the human condition".[174] Typical of the oft-repeated particularized evidence rule is the decision in the case of Lebanese claimant *Mohammed Said Sleiman*:[175]

> . . . there is no evidence that he or any members of his family have ever suffered any persecution or faced any special difficulty . . . beyond the problems they would face in consequence of the generalized circumstances existing there. Further, there is no evidence . . . which would set [the claimant and his family] apart to the extent they would be selected for persecution.[176]

This approach confuses the requirement to assess risk on the basis of the claimant's particular circumstances[177] with some erroneous notion that refu-

[167] *Id.*, at 117, *per* Hugessen J.

[168] In *Carlos Alberto Sanes Suarez*, for example, the Board looked to the testimony of an expert witness to assess the risk of harm to persons similarly situated to the claimant: Immigration Appeal Board Decision M86-1587X, September 30, 1987.

[169] D. Martin in C. Sumpter, "Mass Migration of Refugees — Law and Policy" (1982), 76 A.S.I.L.P. 13, at 14; S. Lamar, "Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution", (1983) 18 New England L. Rev. 395, at 410; K. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" (1986), 26(4) Virginia J. Intl. L. 857, at 857.

[170] D. Roth, "The Right of Asylum Under United States Immigration Law" (1981), 33 U. Florida L. Rev. 530, at 549.

[171] G. Loescher and J. Scanlan, "Human Rights, U.S. Foreign Policy, and Haitian Refugees" (1984), 26(3) J. Interamerican Studies 313, at 327.

[172] *Julner Jean-Philippe*, Immigration Appeal Board Decision 75-1081, August 28, 1975, at 5, *per* R. Tremblay. *Accord Matija Sokol*, Immigration Appeal Board Decision 77-3022, April 29, 1977, and *Mohamed Anwar Hossan*, Immigration Appeal Board Decision M84-1277, November 14, 1984.

[173] *Jim Martin Kwesi Mensah*, Immigration Appeal Board Decision V79-6136, August 7, 1979, at 4, *per* C. Campbell; set aside on other grounds by Federal Court of Appeal Decision A-527-79, May 2, 1980; subsequently affirmed in Federal Court of Appeal (1981), 36 N.R. 332. *Accord Rashed Mohamed Mahmoud El Arabi*, Immigration Appeal Board Decision 74-10409, January 29, 1975; *Matija Sokol*, Immigration Appeal Board Decision 77-3022, April 29, 1977; and *Hector Ivan Olguin Herrera*, Immigration Appeal Board Decision T80-9358, October 14, 1980; affirmed by the Federal Court of Appeal at [1981] 2 F.C. 801.

[174] *Ramesh Mahadeo*, Immigration Appeal Board Decision T83-10420, December 20, 1983, at 5, *per* B. Howard. *Accord Fernando Alejandro Cordova Seguel*, Immigration Appeal Board Decision 76-1157, August 11, 1977, at 5, *per* J.-P. Houle: "[T]he definiton does not expand on what is to be understood by 'persecution' in an international society where it has been proven, or, at the very least, where it is public knowledge that large sectors of this society use denunciation, torture and detention as instruments of vengeance against political adversaries or, worse yet, as instruments of government."

[175] Immigration Appeal Board Decision V79-6125, C.L.I.C. Notes 18.13, April 10, 1980; affirmed by Federal Court of Appeal Decision A-437-80, September 30, 1980.

[176] *Id.*, at 2, *per* C. Campbell.

[177] "The collective aspect of the 'refugee' phenomenon thus ceased to be decisive in granting refugee status, the emphasis being placed henceforth on the situation of the individual": S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons" (1976), Recueil des cours 287, at 297. *Accord* P. Hyndman, "The 1951 Convention Definition of Refugee" (1987),

gee status must be based on a completely personalized set of facts.[178] The issue to be addressed is whether the applicant for refugee status faces a reasonable chance of being persecuted because of who she is or what she believes,[179] not whether that chance is identifiable to her alone, or is supported by a unique dossier of experiences.[180] As the ministerial guidelines for the Refugee Status Advisory Committee[181] noted:

> A person is a refugee whether he is persecuted alone, or persecuted with others. A person need not be singled out for persecution in order to be a refugee. Each claim must be assessed individually. Once that assessment takes place, a claim cannot be rejected simply because a large number of others could also legitimately fear the same persecution.[182]

The tendency to reject claims based on broadly based phenomena may derive from a mistaken extrapolation of the principle that persons at risk of generalized, indiscriminate forms of harm are not refugees.[183] The rationale for considering the victims of natural disasters or widespread turmoil to be outside the scope of the Convention[184] is not, however, their adverse impact

9 Human Rts. Q. 49, at 51: "At the outset a point that needs to be emphasized is that the definition is worded in terms of individuals."

[178] "Under a strict reading of this definition, those fleeing wars, or those seeking refuge from mass slaughter, are often not considered bona fide refugees because they are not singled out for persecution . . . ": M. Gibney, "A 'Well-Founded Fear' of Persecution" (1988), 10(1) Human Rts Q. 109, at 114. The more desirable position is that "the alien should only be required to show a valid fear of generalized persecution, and not necessarily a fear of persecution which would be leveled at the alien as an individual": L. Wildes, "The Dilemma of the Refugee: His Standard for Relief" (1983), 4 Cardoza L. Rev. 353, at 372.

[179] "[I]f a person is subjected to any such measure as deprivation of life or physical freedom for political reasons, he is a victim of persecution. It does not alleviate his situation in the very least if the measure is part of a general policy or if the whole strata of the population are subjected to the same kind of measures": *Mauricio Eliseo Pacheco Martinez*, Immigration Appeal Board Decision M87-1506X, September 9, 1987, at 3, *per* P. Arsenault.

[180] "The definition of 'Convention refugee' does not necessarily require that the applicant be the sole target of acts of persecution. The fact that he suffers the same treatment as other inhabitants of his country does not affect the validity of his claim": *Joseph Vester Bellefleur*, Immigration Appeal Board Decision M87-1593X, September 1, 1987, at 2, *per* P. Arsenault. *Accord Helena Olearczyk v. Minister of Employment and Immigration* (1990), 8 Imm. L.R. (2d) 18.

[181] Minister of Employment and Immigration, *supra*, note 137.

[182] *Id.*, at Guideline 9.

[183] "[A] person fleeing his country because of a natural disaster such as a flood or earthquake is not covered; neither is a person fleeing his country because of war, foreign domination or occupation or civil disturbance, *if there is absent the fear of persecution*"[Emphasis added]: World Peace Through Law Centre, *Toward the Second Quarter Century of Refugee Law*, p. 4 (1976). *See generally* Chapter 5, *infra*.

[184] This general position should be qualified in two ways. First, institutional efforts under the auspices of the UNHCR and regional developments in Africa, Asia, and Latin America have moved toward enfranchising a greater range of the victims of natural and man-made disasters than does the Convention. With respect to UNHCR efforts, *see* S. Aga Khan, *supra*, note 177, at 348; and P. Hartling, "Concept and Definition of 'Refugee' — Legal and Humanitarian Aspects", paper given at Second Nordic Seminar on Refugee Law, Copenhagen, pp. 11-14 (1979, unpublished); regarding efforts in Africa, Asia, and Latin America respectively, *see* G. Coles, "Some Reflections on the Protection of Refugees from Armed Conflict Situations" (1984), In Defense of the Alien 78, at 79; J. Patrnogic, "Refugees — A Continuing Challenge" (1982), 30 Annuaire de droit international médical 73, at 77; and Note, "International Protection in Latin America" (1985), 14 Refugees 5, at 5. Second, as discussed in Section 1.5 *supra*, the position has recently been argued that customary international law recognizes a duty to a "third category" of humanitarian refugees. *See* G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986), 26(4) Virginia J. Intl. L. 897, at 905.

on large numbers of persons, but is rather the non-discriminatory nature of the risk:

> The text . . . obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion or political opinion. Nor did that text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities . . . .[185]

Because, as is discussed in detail in Chapter 5, refugee law is concerned only with protection from serious harm tied to a claimant's civil or political status, persons who fear harm as the result of a non-selective phenomenon are excluded. Those impacted by natural calamities,[186] weak economies,[187] civil unrest,[188] war,[189] and even generalized failure to adhere to basic standards of human rights are not, therefore, entitled to refugee status on that basis alone.

This having been said, refugee law does extend protection in even these situations where there is some element of differential intent or impact based on civil or political status.[190] The genuineness of claims grounded in a form of broadly based harm, like all others, is a function of two basic issues. First, is the anticipated state-tolerated harm of sufficient gravity to constitute persecution?[191] If so, is there a connection between the risk faced and the clai-

[185] Statement of Mr. Robinson of Israel, U.N. Doc. A/CONF.2/SR.22, at 6, July 16, 1951.

[186] T. Le and M. Esser, "The Vietnamese Refugee and U.S. Law" (1981), 56 Notre Dame Lawyer 656, at 665-66.

[187] I. Foighel, "Legal Status of the Boat People" (1979), 48 Nordisk Tidsskrift Intl. Ret. 217, at 222.

[188] "The definition of Convention refugee does not include genuine fear, however well founded, of living in a country in a state of total unrest": *Geda Laguerre*, Immigration Appeal Board Decision M87-1511X, August 24, 1987, at 4, *per* D. Ange. *Accord* M. Schultheis, "A Continent in Crisis: Migrants and Refugees in Africa", paper prepared for conference on "The African Context of Human Rights", p. 11 (1987, unpublished).

[189] UNHCR, *supra* note 7, p. 39.

[190] "Membership in a minority group is in itself insufficient to establish refugee status. Government laws or policies that discriminate against persons because of their membership in a minority group, however, tend to create a *prima facie* case of persecution": D. Roth, *supra*, note 170, at 549.

[191] "Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to conse-

mant's race, religion, nationality, social group, or political opinion?[192] If the harm is both sufficiently serious and has a differential impact based on civil or political status, then a claim to Convention refugee status is made out, however many people are similarly affected.

By way of example, the victims of a flood or earthquake are not *per se* Convention refugees,[193] even if they have fled to a neighbouring state because their own government was unable or unwilling to provide them with relief assistance. If, on the other hand, the government of the home state chose to limit its relief efforts to those victims who were members of the majority race, forcing a minority group to flee to another country in order to avoid starvation or exposure, a claim to refugee status should succeed because the harm feared is serious and connected to the state, and the requisite element of civil or political differentiation is present. Gilbert Jaeger provides a similar illustration in the context of economic oppression:

> Economic oppression and deprivation are unfortunately rife the world over. In a number of countries, they affect the population as a whole or its overwhelming majority (often with the exception of the privileged old or new class at the top and possibly of a more or less significant buffer group — the middle and lower middle classes — in between). In such cases, economic oppression and deprivation are not related to any of the five bases of persecution specified by the general definition and would not qualify the oppressed and deprived for refugee status.
>
> In countries which are more stratified socially or in societies segmented through ethnic or religious cleavage, economic oppression and deprivation may strike a specific group — whether through active measures or resulting from a policy of neglect. In such circumstances, any member of that group may individually qualify for refugee status, particularly if the economic oppression and deprivation are tantamount to destitution or otherwise of a serious nature.[194]

Similar examples would be the sheltering of only members of a particular political group during civil insurrection or war, the provision of core freedoms or entitlements to all but the adherents of a certain religion, or the

quences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities": UNHCR, *supra*, note 7, p. 15. *See generally* Chapter 4, *infra*.

[192] "[A] well-founded fear . . . is different from an apprehension about facts and circumstances that would be the result of a general situation which affects people indiscriminately, for example, poor economic conditions or war": *Ismail Hassan Dembil*, Immigration Appeal Board Decision M80-1018, March 7, 1980, at 2, *per* J.-P. Houle. *Accord* UNHCR, *supra*, note 7, p. 17.

[193] *Supra*, note 186. *Accord* A. Fragomen, "The Refugee: A Problem of Definition" (1970), 3 Case Western Reserve J. Intl. L. 45, at 58: "Applicants for refugee status may have difficulty coming within one of the enumerated grounds of persecution . . . . Frequently, [the applicant's] movements were the result of natural calamity, military operations, or civil war. None of these occurrences would result in the person being accorded refugee status."

[194] G. Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends", [1983] World Refugee Survey 5, at 7.

exclusion of members of a given nationality or social group from access to the general system of police or judicial protection. However many people may be affected, the relevant issues are the seriousness of the harm that may eventuate, and its linkage to civil or political status.

This rejection of the particularized evidence rule is supported by three auxiliary concerns, including the historical context in which the Convention was established, the logic of protection based on need, and the desirability of conformity with the "reasonable chance" test articulated by the Federal Court of Appeal in *Adjei*.[195]

First, the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who have access to evidence of particularized risk. The primary intended beneficiaries of the Convention were the many displaced victims of the Second World War and the ideological dissidents from Eastern Europe,[196] virtually all of whom were assumed to be worthy of protection by reason of their group-defined predicament. When refugee law evolved through the Protocol[197] to protect refugees from outside Europe, no new conceptual limitations were added, as a result of which there is no basis in law for reading a particularized evidence rule into the Convention-based regime.[198]

Second, it is logically inconsistent from either a humanitarian or human rights perspective to refuse cases arising from broadly based persecution. To do so is to advantage the claims of the élite, as only "[a] few persons who have become prominent and who may have done well in their home country

[195] *See* Section 3.2, *supra*, at note 97 ff.

[196] "The proposed definition covered four groups of refugees . . . . In the first appeared the so-called refugees of the First World War . . . . The second group comprised the refugees of the period between the two wars, the victims of fascism and naziism . . . . That was a clearly defined group to whom the convention should apply . . . . Thirdly, there was the group of 'neo-refugees', the definition of which was broad enough to allow the inclusion of persons who had left their home since the beginning of the Second World War as the result of political, racial, or religious persecution, or those who might be obliged to flee from their countries for similar reasons in the future . . . . The fourth group covered displaced persons and unaccompanied children": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.3, at 10, January 26, 1950.

[197] 606 U.N.T.S. 8791, entered into force on October 4, 1967. *See generally* Section 1.3, *supra*.

[198] It is arguable that in the post-Protocol era, the conceptual scope of the Convention is roughly the equivalent of the Statute of the UNHCR. The Statute was intended to apply to the victims of broadly based persecution, as the following exchange from its drafting history demonstrates. The delegate of the United Kingdom enquired of his American counterpart, " . . . whether the United States definition would cover the case where, as the result of a revolutionary change of government . . . say for the sake of argument, in Great Britain, a large section of the population was vicitimized and found it necessary to flee the country?" Mr. Henkin of the United States replied that " . . . the definition would cover those who had to flee from the country to another as the result of a major political upheaval of the kind all had in mind. If the political changes were of a minor nature, the definition, he felt, would not cover them." U.N. Doc. E/AC.7/SR.173, at 5, August 12, 1950.

[will] be able to show that they have been the target of concrete measures amounting to persecution by the authorities."[199] Moreover, because many extremely heinous violations of human rights, including genocide,[200] are by their very nature aimed at groups rather than individuals, the particularized evidence rule would marginalize refugee law in the extreme:

> Consider, for example, the case of a black South African applying here for asylum, and assume that he would, upon return, be subject to no extra or particular persecution for having attempted to gain asylum. Surely a court . . . would be bound to consider evidence of the way that country's political system structurally persecutes blacks and, having considered such evidence, to hold that this structural persecution was sufficient to make out his asylum claim. It would betray not only the proper, but also the required, judicial role for a court to bar itself from assessing whether the systemic hardship inflicted on blacks in South Africa amounts to persecution . . . .[201]

Third, the notion of restricting refugee status to persons who have been "singled out" for persecution is inconsistent with the ruling of the Federal Court of Appeal[202] that a claimant need only demonstrate a "reasonable chance" or "serious possibility"[203] of persecution for her claim to be considered well-founded. Forcing an applicant to show that she has somehow been targeted for persecution goes substantially beyond this idea of "good grounds for fearing persecution",[204] and suggests instead a probability of harm,[205] the very standard that was rejected by the Court.[206] In the United States where the standard of determination is indistinguishable from that in Canada,[207] appellate courts have recognized the inappropriateness of the "singled out" standard, and have rejected its application in decisions involving the generalized oppression of union members[208] and pervasive violence[209] in El Salvador. Indeed, in the case of *Bolanos Hernandez v. I.N.S.*,[210] the Court of Appeals (9th Circuit) not only reversed a finding that a refugee claim could be dismissed merely because the applicant came from a country where the lives and freedom of a large number of people are at risk, but went so far as to characterize reasoning of that sort as "turn[ing] logic on its head".[211]

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm in her country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection she is properly considered to be a Convention refugee.[212] As Atle Grahl-Madsen has observed, "[o]nce a person is subjected to a measure of such gravity that we consider it 'persecution', that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures."[213]

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[199] A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), 20 Archiv des Völkerrechts 411, at 421.

[200] T. Cox, "Well-Founded Fear of Being Persecuted: The Sources and Application of a Criterion of Refugee Status" (1984), 10 Brooklyn J. Intl. L. 333, at 350.

[201] Note, "Political Legitimacy in the Law of Political Asylum" (1985), 99 Harvard L. Rev. 450, at 469.

[202] *Joseph Adjei v. M.E.I.* (1989), 7 Imm. L.R. (2d) 169 (F.C.A.).

[203] *Id.*, at 173, *per* MacGuigan J.

[204] *Id.*, at 174.

[205] " 'Good reasons' requires that some objective element be considered in the determination of refugee status, but this element cannot be construed so strictly as to conflict with the primary emphasis on the 'plausible account.' It cannot be demanded, as a prerequisite to the grant of refugee status, that an individual prove either the objective conditions existing in the country of origin or that he will be singled out for persecution": T. Cox, *supra*, note 200, at 350.

[206] "Despite the terminology sanctioned by the House of Lords for interpreting the British legislation, we are nonetheless of the opinion that the phrase 'substantial grounds for thinking' is too ambiguous to be accepted in a Canadian context. It seems to go beyond . . . 'good grounds' . . . and even to suggest probability": *Supra*, note 202, at 173-74, *per* MacGuigan J.

[207] The relevant phraseology is "reasonable possibility" of persecution, comparable to the Canadian "reasonable chance" of persecution. *See* Section 3.2, *supra*, at note 85 ff.

[208] *Zavala Bonilla v. I.N.S.*, 730 F. 2d 562 (9th Cir., 1984), cited in Note, *supra*, note 201, at 470.

[209] *Bolanos Hernandez v. I.N.S.*, 749 F. 2d 1316 (9th Cir. 1984), cited in Note, *supra*, note 201, at 470. *See also* D. Anker, "American Immigration Policy and Asylum" (1987), 38(4) Harvard L. Bull. 4, at 8.

[210] *Id.*

[211] *Id.*, at 1323, cited in Note, *supra*, note 201, at 470. This position has recently been codified in the United States: "In evaluating whether the applicant has sustained his burden of [proof] . . . the asylum officer or immigration judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if . . . he establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant . . .; and he establishes his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable": 8 C.F.R. 208.13(b)(2)(i), July 27, 1990.

[212] The preceding formulation of the generalized circumstances test was adopted by the Federal Court of Appeal in *Vajie Salibian v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-479-89, May 24, 1990, at 9-10, *per* Decary J. Persons affected by broadly based oppression may be refugees "if it can be shown that such a regime is indeed dangerous for them": E. Huyck and L. Bouvier, "The Demography of Refugees" (1983), 467 The Annuals Am. Academy 39, at 41.

[213] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 213 (1966). This quotation has been adopted by the Immigration Appeal Board in cases such as *Joseph Vester Bellefleur*, Immigration Appeal Board Decision M87-1593X, September 1, 1987; and *Mauricio Eliseo Pacheco Martinez*, Immigration Appeal Board Decision M87-1506X, September 9, 1987.