CORIOLAN V. IMMIGRATION AND NATURALIZATION SERVICE: A CLOSER LOOK AT IMMIGRATION LAW AND THE POLITICAL REFUGEE

I. INTRODUCTION

In recent years concern about international human rights has notably increased. There is a closer scrutiny of the repressive policies of many countries. As President Carter continues his worldwide fight for human rights,[1] Americans are becoming gradually aware of the pitiful conditions prevalent in a number of foreign countries.[2] Few nations can boast their governments are free of human rights violations.[3] Upon a closer examination it is apparent that a large number of countries are in the practice of restricting the social, economic, and political rights of their citizens.[4]

As a result of such oppressive conditions, many people seek refuge in the United States. One method for seeking refuge is by claiming that one has been persecuted because of one's race, religion, or political opinion. Relief of this nature is provided for by the Immigration and Nationality Act[5] and in the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[6] Unfortunately, the administration of such applicable laws is far from adequate.

Various factors, both political and legal, weigh heavily against the alien. These factors include the reluctance of the United States to open its gates to floods of repressed people throughout the world, the constraint of the United States' foreign policy and its requisite support of leaders of repressive governments,[7] the severe restrictions on review of the Immigration and Naturalization Service's (INS)

1. N.Y. Times, June 22, 1978, § A, at 17. In welcoming foreign ministers of Latin America to the 8th General Assembly of the Organization of American States in Washington on June 21, 1978, President Carter stated: "My Government will not be deterred from our open and enthusiastic policy of promoting human rights, in whatever way we can." *Id.*

2. *See New Hopes for Human Rights*, 77 DEP'T STATE BULL. 556 (1977) (address by Charles W. Maynes, Ass't Sec. for International Organizations Affairs, made before the National United Nations Day Committee of the U.N. Association of the U.S.A., in New York on Sept. 9, 1977); *The United States and Africa: Building Positive Relations*, 77 DEP'T STATE BULL. 165 (1977) (address by Secretary of State Vance); N.Y. Times, Feb. 10, 1978, § A, at 1, col. 3; *id.* § A, at 14.

3. *U.S. Responsibility Toward Peace and Human Rights*, 77 DEP'T STATE BULL. 759 (1977) (address by President Carter made before a meeting of the General Council of the World Jewish Congress in Washington, D.C. on Nov. 2, 1977).

4. N.Y. Times, Feb. 10, 1978, § A, at 1, col. 3.

5. 8 U.S.C. § 1253(h) (1976).

6. *Done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (effective Nov. 1, 1968) [hereinafter cited as 1967 Protocol].

7. See note 59 *infra* and accompanying text.

administrative decisions,[8] and the inability of the alien to procure evidence that is likely to carry great weight in the decision-making process.[9]

In *Coriolan v. Immigration and Naturalization Service*,[10] the Fifth Circuit took significant steps to alleviate and clarify the obstacles presented to the alien seeking refuge in this country. *Coriolan* liberalized current interpretations of immigration law by relaxing, somewhat, the evidentiary burden facing the alien seeking political refuge in the United States. The concepts articulated in *Coriolan* provide a more humanitarian approach for refugees and are the key to a more realistic interpretation of the law.

II. CORIOLAN V. IMMIGRATION AND NATURALIZATION SERVICE

The petitioners, Raymond Coriolan and Willy Bonannee, sought review of the deportation orders entered by the INS which denied their request for political asylum.[11] Both of the petitioners had entered the United States illegally by boat during 1974[12] and they were therefore clearly deportable.[13] The petitioners were Haitian nationals who claimed they would be persecuted if they were forced to return to Haiti.[14]

If the petitioners' claims were judged meritorious, the statutory provisions would block their deportation. On July 13, 1975, the INS convened the petitioners' deportation hearing.[15] At the hearing, the petitioners stipulated to their deportability and then applied to the district director for political asylum.[16] The district director denied the petitioners' requests.[17] The aliens then sought relief under section 243(h) of the Immigration and Nationality Act.[18] The statute states:

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8. See notes 82-102 *infra* and accompanying text.

9. See text accompanying notes 44-71, *infra*.

10. 559 F.2d 993 (5th Cir. 1977).

11. *Id.* at 995.

12. While the petitioners did not arrive on the same day, both entered the United States at or near Miami, during 1974. *Id.*, n.1.

13. 8 U.S.C. § 1251(a)(2) (1976) provides that any alien who enters the United States "without inspection or at any time or place other than as designated by the Attorney General is deportable."

14. 559 F.2d at 995.

15. The procedure for a deportation hearing can be found in 8 C.F.R. § 242.16 (1978).

16. 559 F.2d at 995.

17. *Id.*

18. 8 U.S.C. § 1253(h) (1976).

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems it to be necessary for such reason.[19]

The petitioners in *Coriolan* were given the opportunity to present evidence to prove that they would be persecuted if returned to Haiti. The only type of evidence available to the petitioners, however, was their own statements. The first petitioner's (Coriolan) accounts were sharply self-contradictory. In his sworn request for asylum, he stated that the secret police came to his home to arrest him.[20] Then, in a later interview with an INS investigator, Coriolan changed his story and reported that he was never suspected of being a Communist and and that the police never came to his home to arrest him.[21] During that same interview, Coriolan stated that he came to the United States to work, but that he also had "small problems" with the police in Haiti.[22] Evidently he was involved with a man who had problems with the police and who was about to be arrested.[23] Coriolan claimed that he would be jailed or killed upon his return to Haiti, as it was the policy of the Haitian government to persecute returning nationals who fled the country illegally.[24]

In his request for asylum, the second petitioner (Bonannee) claimed that he feared persecution by the Haitian secret police (Ton Ton Macoutes) because of his father's involvement in anti-Duvalier activities.[25] Bonannee testified that he had been arrested and charged with speaking against the government.[26] Bonannee, like Coriolan, also feared prosecution for his illegal departure and stated

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19. *Id.*

20. 559 F.2d at 995. Coriolan also swore that the police suspected him of being a Communist because he had been seen speaking to another Communist, Louis Pierre, who allegedly was later jailed and disappeared. *Id.*

21. *Id.*

22. *Id.* At this point, he related the fate of his mother's cousin who was murdered because he refused to give the Ton Ton Macoutes a piece of cloth. *Id.*

23. *Id.*

24. *Id.* Coriolan expressed this fear both in his original written request for asylum and at his final deportation hearing. *Id.*

25. *Id.* at 995-96. Bonannee stated that his father had been suspected of involvement in an anti-Duvalier movement in 1971, and consequently fled to Cuba. The petitioner went on to state that in 1973 his father's brother had been apprehended and never heard from again. *Id.*

26. *Id.* at 996. In his testimony, Bonannee stated, "The Ton Tons said I was the same breed as my father. . . . The change [sic] was speaking against the government. I don't know reason for release." *Id.*

that he expected to be shot or jailed if forced to return to Haiti.[27]

Bonannee's assertions remained essentially the same throughout his oral interview, though he supplemented his written request in some areas.[28] During its investigation, the INS received a letter from the Department of State which addressed Bonannee's claims.[29] The letter stated that while the claim had some substance, the political incidents in which his father had been involved had actually taken place in the 1950's. Taking this into consideration, the State Department concluded that is was unlikely that the incident concerning his father had lead to Bonannee's arrest.[30] Ultimately, Bonannee confirmed that the incident took place in 1956, and that it was in that year his father fled to Cuba.[31] Finally, Bonannee described the events which led to his arrest, namely, he had a fight with a militiaman who then recognized him as a member of a family known to be anti-Duvalier.[32] After consideration of the evidence, the immigration judge denied both the petitioners' requests under section 243(h) and ordered deportation.[33]

The immigration judge based his decision on the petitioners' failure to prove any actual instances of persecution and consequently concluded that the aliens had failed to show a well-founded fear that their lives or freedom would be threatened in Haiti.[34] The Board of Immigration Appeals (BIA), subsequently affirmed the lower administrative decision.[35] The BIA's decision simply reiterated the immigration judge's conclusion that the aliens had failed to show a "well-founded fear of persecution."[36] The petitioners then

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27. *Id.*

28. *Id.* Bonannee attributed his arrest in 1973 to becoming an adult (although he said he was born in 1941). The petitioner also claimed that after release from prison he remained in hiding almost six months, until coming to the United States. *Id.*

29. *Id.* 8 C.F.R. § 108.2 (1978) requires the district director of the Immigration and Naturalization Service (INS) to obtain the opinion of the State Department when he denies a request for asylum as "clearly lacking in substance." Evidently the district director wrote a letter requesting this information on December 22, 1975 and obtained a response on April 12, 1976. 559 F.2d at 996 n.5.

30. *Id.* at 996.

31. *Id.*

32. *Id.* Bonannee also said his "wife" was put in jail after he left the country. Wife in Haitian parlance appears to mean the woman with whom he was living. *Id.*

33. *Id.* at 995 n.2. The Attorney General has vested this power in the immigration judges, whose decisions are then reviewable by the Board of Immigration Appeals (BIA). 8 C.F.R. §§ 2.1, 242.21 (1978); *see* 8 C.F.R. § 100.2(d) (1978).

34. 559 F.2d at 998.

35. *Id.* at 997.

36. The BIA's brief decision did not indicate the grounds or the reasoning that the Board used in reaching its decision. Thus, the court of appeals had to resort to the immigration

appealed to the Fifth Circuit Court of Appeals, seeking review of the administrative decision and a request for a reopening of the administrative proceedings for receipt of new evidence, in the form of an Amnesty International report.[37] The report was compiled by a private group and went to the issue of whether Haitian political conditions are so specially oppressive that a wider range of claims or persecution must be given credence.[38]

The Fifth Circuit agreed to review the administrative decision. The court held that the immigration judge may have erred on two important legal points. First, in his evaluation of whether the petitioners would be persecuted upon return to Haiti,[39] the immigration judge assumed that prosecution for illegal departure was not persecution for one's political views. Second, the immigration judge made certain assumptions based on the premise that people without overt political activity cannot be subject to political persecution in Haiti.[40] It was the majority opinion for the Fifth Circuit that in view of the petitioners' new evidence, the Amnesty International report,[41] the petitioners' claims should have been considered with credence, especially with regard to the oppressive conditions present in Haiti and alleged in the report.[42] The Court of Appeals reversed and remanded the case for reconsideration in light of the aforementioned report.[43]

The claims raised in this case are similar to claims advanced by other petitioners in past years. Section 243(h) has, however, been consistently interpreted as giving limited, if any, relief. As mentioned earlier, factors weigh heavily against the alien. Foremost among these factors, and an important topic considered in *Coriolan,* is the weight to be given the evidence that the alien produces to support his case. A related and initial problem that the alien faces is the stiff standard of evidence or the burden of proof.

III. THE STANDARD OF EVIDENCE

Persecution, under the section 243(h) standard, is defined in

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judge's reasoned opinion. *Id.* at 997-98. The Board utilized the standard articulated in the 1967 Protocol, *supra* note 6. *See* text accompanying note 135, *infra.*

37. 559 F.2d at 1003.
38. *Id.*
39. *Id.* at 1000-01.
40. *Id.* at 1000-02.
41. *Id.* at 1002-04.
42. *Id.* at 1004.
43. *Id.*

Kovac v. Immigration and Naturalization Service[44] as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."[45] Recently, the United States Government attorneys in *Moghanian v. United States Department of Justice*,[46] urged the court to forsake the more lenient standard of *Kovac* and adopt the stricter standard articulated by the BIA in *In re Dunar*.[47] The standard the agency advocated required that the petitioner show that "his life or freedom would be threatened . . . on account of his race, religion, nationality, membership in a particular social group, or political opinion."[48] The Ninth Circuit in *Moghanian*, refused to apply the stricter standard, mentioning that *Kovac* was a well-reasoned decision and the court could see no basis for re-examination at that time.[49]

It is clear from interpretation of section 243(h), that the alien has the burden of proving to the special inquiry officer[50] that he would be subject to persecution on account of race, religion, or political opinion, as claimed.[51] In considering this issue, the standard of proof[52] consistently adhered to is that the alien must present a "clear probability of persecution"[53] to obtain the discretionary withholding of deportation. Typically, the most serious problem facing the alien is producing persuasive evidence of political persecution.

This burden of proof is difficult for the alien to meet,[54] because access to evidence of the requisite weight is simply not available. The types of reports that are relied on by the INS and the courts are those of an official nature, and understandably, not usually available to the alien.[55] The Government has an advantage because it is able to produce evidence of this nature, in the form of affidavits and summaries compiled by the State Department. Through this

44. 407 F.2d 102 (9th Cir. 1969).

45. *Id.* at 107.

46. 577 F.2d 141, 142 (9th Cir. 1978).

47. 14 I. & N. Dec. 310 (1973).

48. 577 F.2d at 142.

49. *Id.*

50. A special inquiry officer is a technical term for an immigration judge. See note 33 *supra*.

51. 8 C.F.R. § 242.17(c) (1978).

52. For an alternate standard, see text accompanying notes 133-139 *infra*.

53. Lena v. Immigration & Naturalization Service, 379 F.2d 536, 538 (7th Cir. 1967).

54. The court in *Kovac* reasoned that the 1965 amendments to the Immigration and Nationality Act lightened the burden of the alien, but never indicated the extent of the reduction. 407 F.2d at 106. See text accompanying notes 83-85 *infra*.

55. *In re* Tayeb, 12 I. & N. Dec. 739 (1968) (no documentary proof available); *In re* Cha, B.I.A. No. 14100755 (1971) (unpublished) (documentary proof rarely available).

method, the BIA and the immigration judge are able to request information relating to the alien's case.[56]

As a result of the evidentiary problem, the Government's evidence, which is based on official reports,[57] is difficult to refute. As a rule, the INS does not question these reports.[58] This practice is one of the major problems in an equitable determination of the issue. The INS' failure to question these reports is the reason why the Government's position contesting the alien's persecution is so unsatisfactory.

It is wholly inappropriate that the reports offered by the State Department should be accorded the weight they have received. In many instances, the United States has a significant interest in the foreign government that the alien is fleeing from.[59] The State Department desires to preserve the status quo, in order to avoid evoking the displeasure of a foreign government. A conflict arises in the case of an alien seeking political refuge in the United States. In preparing their reports, the State Department may at times be faced with the dilemma of disclosing human rights violations at the risk of loss of political support from the alleged violators. The State Department's possible conflict of interest is too great to accord its reports the weight they have been given in the past.

It is apparent that the State Department reports have a heavy impact at the administrative level, because the reports are documented and appear to be well supported. Furthermore, the effect of the report is felt at the appellate court level because of the limited scope of judicial review. Depending on a particular circuit's theory on review of agency fact finding, the circuit court may not closely review the evidence and thus the report will have the same conclusive effect that it had at the administrative level.[60] While the INS

56. Section 243.3(b), Immigration and Naturalization Service, Operating Instructions (April 7, 1971). The Service has been requesting such information from the Department of State since 1963. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.10d, at 5-130 (rev. ed. 1978).

57. The INS requests for information are channelled to the American Embassy in the state of proposed destination, whereupon, the Embassy makes inquiries into the status or condition of that country, and about the ethnic, social, or political class or group in which the alien claims membership. Inquiry is also made as to the alien himself to determine if there is a possibility of persecution within the terms of section 243(h). *E.g.*, Asghari v. Immigration & Naturalization Service, 396 F.2d 391 (9th Cir. 1968).

58. United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953); Sovich v. Esperdy, 206 F.Supp. 558 (S.D.N.Y. 1962), *rev'd*, 319 F.2d 21 (2d Cir. 1963).

59. The United States recognized the Duvalier government and has provided funds to train the military police. THE NEW YORKER, Mar. 31, 1975, at 50.

60. *See* Kasravi v. Immigration & Naturalization Service, 400 F.2d 675 (9th Cir. 1968). In *Kasravi*, the Ninth Circuit noted that the State Department's letter lacked persuasiveness.

does have to request a report from the State Department concerning the alien's allegations, the results of the report are not conclusive.

The INS has no obligation to rely on State Department reports concerning the alien's allegations of persecution or to accept the Department's opinion on whether refuge should be granted.[61] The Department's opinions are merely advisory,[62] but the trend is to give their reports great weight.[63] At times the alien is not even allowed to see the recommendation to refute its contents, and such information need not be made a part of the record if, in the opinion of the special inquiry officer or the BIA, the disclosure of such information would be prejudicial to the interests of the United States.[64]

As a result of the evidentiary problem, often the alien has only his own statements to rely on.[65] Other forms of evidence which have been offered by claimants include the testimony of relatives,[66] experts,[67] and newspaper articles,[68] all having limited success. In the

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The court went on to question the Department's possible lack of competence to address matters such as the ones at hand. Nevertheless, the court sustained the BIA's decision, which was based upon the State Department letter. The Ninth Circuit justified its action on the ground that the court cannot substitute its judgment for that of the Attorney General. For a discussion on the limited reviewability of administrative decisions, see notes 79-101 *infra* and accompanying text. *See also* Note, *Persecution Claims — The Expanding Scope of Section 243(h) of the Immigration and Nationality Act*, 13 TEX. INT'L L.J. 327, 332-33 (1978) [hereinafter cited as *Persecution Claims*].

61. *In re* Lee, 13 I & N. Dec. 236 (1969).

62. *See* Zamora v. Immigration & Naturalization Service, 534 F.2d 1055 (2d Cir. 1976). The court of appeals was critical of the State Department letters received in evidence in persecution claims under section 243(h) of the Immigration and Nationality Act. The Second Circuit felt that the Department went too far when it made recommendations concerning particular aliens. The court was disturbed by the weight the INS gave the evidence adduced by the Department, and suggested that the Department refrain from applying knowledge of the country to a particular case. The court went on to suggest that the State Department limit themselves to giving useful information, "legislative facts," about the conditions in the foreign country. *Id.* at 1063. In a footnote, the court added that it would be helpful if the INS would furnish the State Department with the names of aliens whose section 243(h) claims had been denied, so that the Department could do follow-ups on what had happened to the aliens. This would help make the Department analysis of the current situation more realistic. *Id.* at 1062 n.5.

63. *See id.* at 1063.

64. 8 C.F.R. § 242.17(c) (1978). For a more detailed explanation of this case, see Evans, *The Political Refugee in the United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969).

65. *In re* Sihasale, 11 I. & N. Dec. 759, 762 (1966).

66. Hyppolite v. Immigration & Naturalization Service, 382 F.2d 98 (7th Cir. 1967) (relatives and friends); United States *ex rel.* Kordic v. Esperdy, 276 F.Supp. 1 (S.D.N.Y. 1967) (two brothers).

67. *In re* Liao, 11 I. & N. Dec. 113 (1965) (former Governor of Formosa); *In re* Torres Tejeda, 10 I. & N. Dec. 435 (1964) (former agent of a quasi-military security unit in Trujillo regime).

case of *Coriolan*, additional evidence was available in the form of the Amnesty International report.[69] Coriolan sought to have the proceeding reopened upon the receipt of this new evidence.[70]

When seeking to reopen the hearing to present new evidence, the alien faces the same onerous burden of persuasion. Courts require the alien to show "some likelihood that reopening the proceedings will result in a stay of deportation."[71] Thus, the alien must demonstrate a "clear probability of persecution."[72] One court determined that aliens must, at the least, advance "some evidence indicating they would be subject to persecution . . . ."[73]

In *Coriolan*, the court maintained that the Amnesty International report[74] on conditions in Haiti was clearly material.[75] The

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68. *See* 11 I. & N. Dec. at 759; 11 I. & N. Dec. at 113; *cf.* Henry v. Immigration & Naturalization Service, 552 F.2d 130 (5th Cir. 1977) (unauthenticated reports).

69. Coriolan v. Immigration & Naturalization Service, 559 F.2d 993, 1002 (5th Cir. 1977).

70. *Id.*

71. Cheng Kai Fu v. Immigration & Naturalization Service, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lam Leung Kam v. Esperdy, 274 F.Supp. 485, 488 (S.D.N.Y. 1967).

72. Rosa v. Immigration & Naturalization Service, 440 F.2d 100, 102 (1st Cir. 1971); 386 F.2d at 753.

73. 386 F.2d at 753.

74. For excerpts of the text of the report, see 559 F.2d at 1002.

75. *Id.* at 1003. The INS, in *Coriolan*, asserted that reopening the case to accept new evidence was beyond the power of the court because the provision of the statute enabling review did not cover this case. *Id.* (citing 8 U.S.C. § 1005a(a)(4) (1970)). The INS urged that this statute directed the court to review INS action solely on the administrative record. The statute, in pertinent part, states:

> (4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive . . . .

8 U.S.C. § 1105a(a)(4) (1976). The INS contended that section 1105a(a)(4) barred the reviewing court from using its power to remand upon the receipt of evidence which up to that point, had not been admitted into the record. 559 F.2d at 1003. The power to remand is granted by 28 U.S.C. § 2347(c) (1976), which reads as folllows:

> (c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—
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> (1) the additional evidence is material; and
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> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
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> the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken . . . .

The majority did not agree with this analysis. In the opinion, it was pointed out that the INS did not cite any cases to support its statutory construction. The court relied on Paul v. Immigration & Naturalization Service, 521 F.2d 194 (5th Cir. 1975), in which the Fifth Circuit

holding in this case demonstrates that increased weight must be given to different types of evidence in order to augment the record for a clearer understanding of the claimant's position.[76] Judicial and administrative notice of the foreign country's conditions are important factors, especially in view of the unavailability of other types of evidence.[77] More liberal treatment of the evidence available to the alien is necessary.

The view usually espoused by the court in similar cases was aptly argued in the dissent,[78] where the majority was severely admonished for giving weight to "an authorized report."[79] The dissent reviewed a number of cases[80] dealing with the deportation of Haitian nationals and concluded that Coriolan and Bonannee "never came within shouting distance" of meeting the burden of persuasion.[81]

In support for his contention that the petitioners had not met their burden, the dissent cited *Henry v. Immigration and Naturalization Service*,[82] for the proposition that the court's ability to review the petitioner's failure to meet the burden of proof extends only to whether the applicant had been accorded procedural due process and to whether the decision was reached according to the applicable rules of law.[83] The dissent criticized the court for its departure from cases such as *Henry* which had refused to grant relief to allegations being supported only by "conclusory statements from personal

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entertained a request for a reopening pursuant to section 2347(c). In *Paul*, the request was denied because the evidence sought to be admitted was not material. The *Coriolan* court stated that the court in *Paul* made no suggestion that section 2347(c) was inapplicable to INS cases. 559 F.2d at 1003. Rather, the court decided that the section "authorizes this court to order a remand if the additional evidence is material and there were reasonable grounds for failure to adduce the evidence before the agency." *Id.*

76. More recent clarification of this right to reopen is found in Martinez de Mendoza v. Immigration & Naturalization Service, 567 F.2d 1222, 1226 n.9 (3rd Cir. 1977). Here, the court cautioned that under normal circumstances a party asserting new and material evidence should first resort to the administrative remedies under 8 C.F.R. § 3.2 (1978), rather than invoking the court's power under section 2347(c). *Id.*

77. *See, e.g., In re* Joseph, 13 I. & N. Dec. 70, 72 (1968). There, the Board took administrative notice of the fact that conditions in Haiti had not improved to any extent since 1964 (the death of "Papa Doc" Duvalier).

78. 559 F.2d at 1004 (Coleman, J., dissenting).

79. *Id.* at 1005. Judge Coleman characterized the evidence as "an unauthenticated report distributed by a private group which purports to deal generally with conditions in Haiti, not the circumstances of the petitioners themselves." *Id.*

80. *Id.* at 1004-05 (citing Martineau v. Immigration & Naturalization Service, 556 F.2d 306 (5th Cir. 1977); Henry v. Immigration & Naturalization Service, 552 F.2d 130 (5th Cir. 1977)).

81. 559 F.2d at 1005.

82. 552 F.2d 130 (5th Cir. 1977).

83. 559 F.2d at 1005 (citing 552 F.2d at 131).

knowledge and unauthenticated reports."[84] The dissenting judge characterized the Amnesty International report as an "unauthenticated report distributed by a private group which purports to deal generally with conditions in Haiti, not the circumstances of the petitioners themselves."[85]

If State Department reports are to be the only type of document acceptable in a refugee's search for relief, then it appears that section 243(h) will be of little help to the alien. The decision in *Coriolan* is important for a number of reasons, foremost among these is the court's willingness to recognize the importance of new forms of evidence. More liberal concepts of evidence are essential, especially when one considers the severely limited reviewability of INS decisions.

IV. REVIEWABILITY OF ADMINISTRATIVE DECISIONS

A. Errors of Fact

Although the court of appeals has exclusive jurisdiction to review final orders of deportation,[86] such decisions by the INS are traditionally discretionary[87] and subject to limited review.[88] As a general rule, courts are reluctant to review the discretionary decisions of the Attorney General involving findings of fact which have been imprecise in explaining the contents or process of what analysis has occurred.[89] The courts have the power to review for abuse of discretion as well as arbitrary and capricious action on the part of the Attorney General.[90] Many courts state they cannot substitute

84. *Id.*

85. *Id.*

86. Foti v. Immigration & Naturalization Service, 375 U.S. 217, 222 (1963). *See* 8 U.S.C. § 1105a(a) (1976). The text of the statute reads as follows: "The procedure prescribed by . . . shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . ."

87. 375 U.S. at 222. In this case, the Supreme Court held that a challenge to the exercise of discretion by the Attorney General was reviewable only in the court of appeals. Although *Foti* did not involve a request for relief under section 243(h), the Court indicated the rule applied to other provisions of the immigration laws in which the Attorney General was authorized to use his discretion. *Id.* at 229.

88. The courts are reluctant to interfere with the Attorney General's discretion unless the decision is arbitrary, capricious, or violative of the law. *See* Carlson v. Landon, 342 U.S. 524 (1952); *see also* Spinella v. Esperdy, 188 F.Supp. 535, 543-44 (S.D.N.Y. 1960) (quoting Fougherouse v. Brownell, 163 F. Supp. 580, 584 (D. Ore. 1958)).

89. *See generally In re* Dunar, 14 I. & N. Dec. 310 (1973) (discussing Muskardin v. Immigration & Naturalization Service, 415 F.2d 865 (2d Cir. 1969); Kasravi v. Immigration & Naturalization Service, 400 F.2d 675 (9th Cir. 1968)).

90. *See* Shkukani v. Immigration & Naturalization Service, 435 F.2d 1378, 1380 (8th Cir. 1971), *cert. denied*, 403 U.S. 920 (1971); Kerkai v. Immigration & Naturalization Service, 418

their opinion for that of the Attorney General. Instead, these courts satisfy themselves by examining whether the denial of relief is supported by a "reasonable foundation,"[91] "ample evidence,"[92] or some other evidentiary standard. In other cases, the courts have been known to examine the case only to the extent of determining whether the Attorney General's reasons are "sufficient on their face."[93]

When a court does review for abuse of discretion or arbitrary and capricious action on the part of the Attorney General, it is reluctant to fully explain its reasoning. Congress eliminated the need for a factual finding by the Attorney General in section 243(h) decisions, which makes abuse of discretion for findings of fact especially difficult to establish.[94] With some exceptions, courts have rarely found abuse of discretion by the Attorney General in denial of section 243(h) relief.[95] Furthermore, in the cases where the courts have found abuse of discretion, the courts have not clearly articulated their reasoning. It is apparent, however, from the small number of successful claims, that very few aliens can satisfy the requirements necessary to obtain relief.

While the court in *Coriolan* did not base its decision on an abuse of discretion in the findings of fact, the court pointed out the deficiencies in the agency's treatment of the evidence.[96] The Fifth

F.2d 217, 219 (3rd Cir. 1969), *cert. denied*, 297 U.S. 1067 (1970); Hosseinmardi v. Immigration & Naturalization Service, 405 F.2d 25, 27 (9th Cir. 1968); Siu Fung v. Rosenberg, 409 F.2d 555, 559 (9th Cir. 1969), *cert. denied*, 396 U.S. 801 (1969); Morin v. Bouchard, 311 F.2d 181, 182 (3d Cir. 1962); United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 719 (2d Cir. 1955). For a general discussion of the scope of review on appeal, see *Persecution Claims*, *supra* note 60, at 332-34.

91. *See* Khalil v. District Director of the Immigration & Naturalization Service, 457 F.2d 1276, 1277 (9th Cir. 1972); Chi Sheng Liu v. Holton, 297 F.2d 740, 742 (9th Cir. 1961).

92. Antolos v. Immigration & Naturalization Service, 402 F.2d 463, 464 (9th Cir. 1968).

93. Lena v. Immigration & Naturalization Service, 379 F.2d 536, 537 (7th Cir. 1967).

94. Coriolan v. Immigration & Naturalization Service, 559 F.2d 993, 999-1000 (5th Cir. 1977).

95. Kovac v. Immigration & Naturalization Service, 407 F.2d 102, 107 (9th Cir. 1969) (the circuit court held that the Board's decision was arbitrary and capricious because it was based on "patent misconstruction of the record" and did not weigh the evidence); United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715 (2d Cir. 1955) (the court took judicial notice of the "ruthless behavior" and "hazardous conditions" in Communist China and ruled that an administrative decision of fact contrary to a fact judicially known is arbitrary and capricious); United States *ex rel.* Mercer v. Esperdy, 234 F.Supp. 611, 615-17 (S.D.N.Y. 1964) (the court held that the special inquiry officer, in refusing to reopen proceedings to permit respondent to submit her section 243(h) application, acted in an arbitrary and capricious manner. The court went on to conclude that the special inquiry officer's decision was an abuse of discretion because he had failed to take administrative notice of the repressive conditions in Haiti.).

96. 559 F.2d at 999.

Circuit commented that while the judge's decision may be able to withstand review, his decision should be articulated since, "it is also a familiar principle of administrative law that a reviewing court will not supply a reasoned basis for agency action that the agency itself did not articulate."[97]

The majority opinion indicated that it was difficult to discern the basis on which the immigration judge had made his opinion.[98] The court recognized that the immigration judge probably discounted Coriolan's testimony because of his contradictory testimony and expressed dissatisfaction with the immigration judge's even more ambiguous decision as to Bonannee's claim.[99] Here, the immigration judge could have based his decision on a number of reasons, yet none were set forth.[100] Although the majority indicated that they considered this lack of clarity to be significant, they did not base their holding on this issue. Rather, they went on to discuss the possible errors of law present in the case.

B. *Errors of Law and Statutory Construction*

Appellate courts have been willing to review cases involving section 243(h) decisions for errors of law and statutory construction. Generally, this review has centered around interpretation of the phrase "persecution on account of race, religion, or political opinion."[101] Courts have reversed decisions of the BIA or immigration judges upon finding that the section was misconstrued.[102] In *Sovich v. Esperdy*[103] the Second Circuit held that it had authority to review in order to determine whether the Attorney General used the proper

97. *Id.* The Supreme Court has made clear it "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Ark.—Best Freight System, Inc., 419 U.S. 281, 286 (1974).

98. 559 F.2d at 999. The immigration judge concluded that there was no evidence that Coriolan had ever been arrested or in trouble with the Haitian police. This decision conflicts with Coriolan's statement that the police had come to his house to arrest him because of his implications with a Communist. *Id.*

99. *Id.*

100. *Id.* These reasons included: lack of credibility produced by Bonannee's testimony, disbelief that Bonannee would be punished for his father's deeds of 1956, or that the real cause of the arrest was the fight with the militiaman—and this did not constitute a section 243(h) persecution. *Id.*

101. *See* Kovac v. Immigration & Naturalization Service, 407 F.2d 102 (9th Cir. 1969) (denial of employment and prosecution for illegal departure as persecution); Diminich v. Esperdy, 299 F.2d 244 (2d Cir. 1961), *cert. denied*, 369 U.S. 884 (1962) (economic sanctions as "physical persecution").

102. Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Dunat v. Hurney, 297 F.2d 744 (3d Cir. 1961).

103. 319 F.2d 21 (2d Cir. 1963).

statutory standards in his exercise of discretion.[104] Ultimately, the court found he had not and remanded the case so that a new application for relief could be considered using the correct standards.[105]

Further clarification of the right to review for errors of law can be found in *Kovac v. Immigration & Naturalization Service.*[106] In this case, the alien, a Yugoslavian national of Hungarian descent, left his ship which was docked in a United States port, and concealed himself until the ship departed from the port. The alien then presented himself to the INS and sought asylum claiming he would be subjected to physical abuse and confinement if he was forced to return to Yugoslavia.[107] In *Kovac,* the Ninth Circuit reversed and remanded the BIA's decision to deport the alien, in light of the 1965 amendments to the Immigration and Nationality Act.[108] The 1965 amendments eliminated the premise on which the BIA based its decision, namely, that to come within section 243(h), a denial of employment opportunities must extend to "all" means of gaining a livelihood.[109]

The court in *Coriolan* based its decision on the possible errors of law present in the case.[110] The majority was disturbed by the immigration judge's treatment of the aliens in two important areas of the law.[111] The court criticized the immigration judge for his poor treatment of the petitioners' persecution claims,[112] as well as his premise that the petitioners, because of their lack of political activity, are unlikely to be the victims of political persecution.[113]

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104. *Id.* at 25-27.

105. *Id.* at 29. The court pointed out that the special inquiry officer had erred and misconstrued the statute by assuming that conviction for illegal departure, a crime cognizable in another legal system, was never physical persecution, by assuming that punishment for illegal departure would not be politically motivated and would therefore not fit the statute's requirement of persecution "because of . . . political opinion," and in failing to include confinement as a possible form of persecution. *Id.* at 28-29.

106. 407 F.2d 102 (9th Cir. 1969). Kovac alleged he would be imprisoned upon return to Yugoslavia because his desertion would be interpreted as a denunciation of Communism. *Id.* at 104.

107. *Id.*

108. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 918 (current version at 8 U.S.C. § 1253(h) (1976)). The amendments were viewed by the court as shifting the emphasis from the consequences of the oppression to the motives behind it, as well as lightening the burden of proof faced by the alien by removing the requirement that the claimant must show threat of bodily harm. 407 F.2d at 106-07. See text accompanying notes 44-49 *supra.*

109. 407 F.2d at 106-07.

110. 559 F.2d at 1000-02.

111. *Id.* at 1000.

112. *Id.*

113. *Id.* at 1001.

Upon hearing the aliens' contention that they would be persecuted for illegal departure if forced to return to Haiti, the immigration judge wrote, "[i]llegal departure might possibly result in prosecution. Prosecution cannot be considered, under such circumstances, persecution because of one's political opinions."[114] This statement disturbed the court because of the long line of cases which held that prosecution for illegal departure can amount to persecution, and in these circumstances relief should be granted.[115] With this in mind, the court stated "we doubt that the immigration judge in fact meant to exclude all claims of political persecution based on the threat of punishment for illegal departure. If not, however, then we must speculate as to the actual basis for his rejection of this claim."[116] This need to speculate led the court to consider the judge's decision concerning the aliens' illegal departure to be a possible error of law. The appellate court did not dwell on this issue because it considered the immigration judge's view of Haitian political conditions more disturbing.[117]

The court noted that the immigration judge based his observations on a faulty premise. The immigration judge assumed that because neither Bonannee nor Coriolan belonged to any political organization in Haiti and that since their political opinions did not differ substantially from the vast majority of Haitians, they would not suffer political persecution. The immigration judge was inaccurately relying on the supposition, "that people without overt political activity, or minority political opinions, are unlikely to be the victims of political persecution."[118] The court pointed out that citizens of Haiti can become the victims of government persecution without committing conventional "political" acts,[119] noting that a variety of

114. *Id.* at 1000.

115. *Id.* (citing Berdo v. Immigration & Naturalization Service, 432 F.2d 824 (6th Cir. 1970); Kovac v. Immigration & Naturalization Service, 407 F.2d 102 (9th Cir. 1969); Janus & Janek, 12 I. & N. Dec. 866 (1968)).

116. 559 F.2d at 1000. The court went on to examine the possible reasons the immigration judge might have had for rejecting the claim, including rejection of the petitioner's credibility, refusal to believe the contention that the government prosecution was political in nature (prosecution for fairly administered passport laws is not persecution), and disbelief that the petitioners left Haiti for political reasons. *Id.*

117. *Id.* The court said: "In short, we would have great difficulty in effectively reviewing the immigration's [sic] judge's dismissal of petitioner's fear of persecution for their illegal departure. But the failure to adequately evaluate the significance of the illegal departure is overshadowed by a more fundamental omission."

118. *Id.* at 1001.

119. *Id.*

cases have been decided both for[120] and against[121] the alien where there has been no overt political action.

In some of the instances where the alien has prevailed, the courts have taken judicial notice of the political atmosphere within the country.[122] In *Coriolan,* the court took the opportunity to explain, "we do not believe that the immigration authorities could properly decide an alien's fate without taking note of conditions in the alien's country, to the extent that an awareness of these conditions had become a part of the INS expertise."[123] This statement is significant because the court took judicial notice of the oppressive conditions present in Haiti, on the basis of the evidence presented and thereby placed in question the immigration judge's perception that people without overt political opinions are unlikely to be the victims of political persecution in Haiti. If read consistently with the case law in this area,[124] one might argue that the immigration judge abused his discretion when he viewed the evidence before him as raising no more than the usual allegations of persecution. The Fifth Circuit did not pursue this issue, however, and instead looked to the admissibility of new evidence as a basis on which to remand for a reopening of the proceedings.[125] The court also chose not to rely

120. United States *ex rel.* Mercer v. Esperdy, 234 F.Supp. 611 (S.D.N.Y. 1964) (the court held that the alien's evidence of extensive government danger gave her claim "at least prime facie credibility" and maintained the INS refusal to reopen was arbitrary and capricious. The court also went on to take judicial notice of the conditions in Haiti.); *In re* Joseph, 13 I. & N. Dec. 70, 72 (1968) (the Board also invoked notice similar to that taken by the court in *Mercer* when it stated, "It is a matter of common knowledge and this Board takes administrative notice that conditions in Haiti have not improved to any extent since 1964.").

121. *See* Paul v. Immigration & Naturalization Service, 521 F.2d 194 (5th Cir. 1975) (aliens alleged government beatings, murders, and jailings); Gena v. Immigration & Naturalization Service, 424 F.2d 227 (5th Cir. 1970) (alien alleged that his fear of police was the result of one of the Ton Tons taking an interest in his wife); Hyppolite v. Immigration & Naturalization Service, 382 F.2d 98 (7th Cir. 1967) (alien's father was murdered, friends reported the police were questioning her whereabouts); *In re* Pierre, 15 I. & N. Dec. No. 2433 (Sept. 16, 1975), *aff'd sub nom.* Pierre v. United States, 547 F.2d 1281 (5th Cir.), *vacated,* 434 U.S. 962 (1977).

122. 559 F.2d at 1001.

123. *Id.* at 1002.

124. *See* United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 719 (2d Cir. 1955) ("On the basis of a fact which we know judicially, an administrative determination of the contrary fact is arbitrary and capricious, and therefore administrative action grounded on that finding is outside the administrative discretion conferred by the statute."). *But see* Paul v. Immigration & Naturalization Service, 521 F.2d 194, 199 (5th Cir. 1975) (where failure by the immigration judge to take notice of the conditions in Haiti was alleged to be prejudicial to the alien's rights, but nevertheless was held to be not an abuse of discretion).

125. 559 F.2d at 1002.

heavily on the United Nations Protocol Relating to the Status of Refugees,[126] a treaty established to protect the rights of refugees.

V. THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

Section 243(h) has been the subject of much criticism in recent years, because of the narrow scope and the limited interpretation given it by the courts.[127] It has been characterized as being incompatible with the broad humanitarian policies of the United States and as affording little protection to the alien.[128] Perhaps, because of the poor rate of success in cases under section 243(h),[129] litigants attempt to seek relief under the 1967 Protocol.

The United States ratified the 1967 Protocol in 1968, thereby making key provisions of the 1951 Convention Relating to the Status of Refugees (1951 Convention)[130] applicable to the United States. The introduction of the 1967 Protocol into the refugee scene places in question the issue of whether the language of the 1967 Protocol profoundly alters section 243(h), the current refugee legislation. It has been argued that the language of the 1967 Protocol is couched in noticeably different terms from section 243(h) and therefore the two provisions are in conflict.[131] Two major areas of concern involve

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126. 1967 Protocol, *supra* note 6.

127. *See* Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204, 230-33 (1969) [hereinafter cited as Evans, *The Political Refugee*]; *see generally* Evans, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571 (1972), [hereinafter cited as Evans, *Further Developments*].

128. Evans, *The Political Refugee*, *supra* note 127, at 253.

129. *Id.* at 242.

130. *Done* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (entered into force (U.S.) Nov. 1, 1968) [hereinafter cited as 1951 Convention]. While the United States was not an original party to the 1951 Convention, when the country ratified the 1967 Protocol, it also made applicable articles 2 through 34 of the 1951 Convention. *See* 1967 Protocol, *supra*, note 6, art. 1(1).

131. *See* Comment, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CALIF. W. INT'L L.J. 129, 151 (1975). It is further asserted by the author that section 243(h) is ripe for supercession. *Id.* In determining whether the 1967 Protocol is a self-executing treaty and therefore supercedes the Act, consideration is given to the treaty's history as well as the problems it was created to solve. Comment, *Self-Executing Treaties and the Human Rights Provisions of the United States Charter: A Separation of Powers Problem*, 25 BUFFALO L. REV. 773, 776 (1976) (citing Eck v. United Arab Airlines, 15 N.Y.2d 53, 59, 203 N.E.2d 640, 642, 255 N.Y.S.2d 249, 252 (1964); Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT'L L. 255, 271-81 (1971)) [hereinafter cited as *Self-Executing Treaties*].

Many other criteria are examined to determine the impact of a treaty. These include the terms of the treaty, whereby the treaty is examined for express stipulation that the treaty

the question of whether the alien's burden of proof has been lessened and whether the discretion of the Attorney General has been altered by the language of the 1967 Protocol.[132]

The 1951 Convention defined "refugee" for the first time. Under the Convention, a refugee is said to be one who, because of a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, is unwilling or unable to return to his country due to that fear.[133]

The evidence a refugee must present, to lend support to his claim, is a difficult burden to bear.[134] To alleviate this burden, the petitioner in *In re Dunar* argued that the standard of showing a "well-founded fear of being prosecuted," as set forth in article 33 of the 1951 Convention[135] relieved the alien of the burden of showing a "clear probability of persecution."[136] This argument would have changed the standard held applicable in earlier section 243(h) cases,[137] by maintaining that it was one's state of mind that was at issue, not the likelihood of persecution.[138] The BIA rejected this reasoning and held that since the fear had to be "well-founded," it

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was or was not intended to be self-executing. *Self-Executing Treaties, supra*, at 776 (citing Jones v. Meehan, 175 U.S. 1, 10 (1899)). The actual language of the treaty is also examined. *See id.* If the treaty's language is in the present tense, it is argued this provides evidence of an intent to make a self-executing treaty. *Id.* (citing Asakura v. Seattle, 265 U.S. 332, 342 (1924)). Whereas language in the future usually indicates a non-self-executing treaty. *Id.* (citing Robertson v. General Elec. Co., 32 F.2d 495, 501 (4th Cir. 1929)). The circumstances surrounding the treaty's execution is checked. *Id.* This would include diplomatic correspondence and interpretative documents. *Id.* (citing Jones v. Meehan, 175 U.S. 1 (1899)). *See also* 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 180-83 (1943). Finally, the subject matter of the treaty is also examined. *See Self-Executing Treaties, supra*, at 778. The subject matter approach finds its roots in the separation of powers concept. Certain types of treaties within presidential control of foreign affairs are inherently more likely to be self-executing (i.e. extradition, consular rights, friendship, smuggling and rights or treatment of aliens), whereas treaties within the control of Congress (i.e. appropriations, custom duties and disposition of government property) are more likely to be non-self-executing. *Id.*

132. Comment, *supra* note 131.

133. 1951 Convention, *supra* note 130, art. 1(2).

134. See text accompanying notes 44-68 *supra*.

135. 1951 Convention, *supra* note 130, art. 33.

136. 14 I. & N. Dec. 310, 319 (1973).

137. *E.g.*, Rosa v. Immigration & Naturalization Service, 440 F.2d 100 (1st Cir. 1971); Hamad v. Immigration & Naturalization Service, 420 F.2d 645 (D.C Cir. 1969); Cheng Kai Fu v. Immigration & Naturalization Service, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. Immigration & Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

138. In other words, "it is not necessary that the individual seeking asylum be able to prove that he would actually face persecution upon his return, but rather that he established that his fear of being persecuted, based on his previous activities or other factors, is a reasonable one." ROBERTS, ASYLUM AND CURRENT REFUGEE DETERMINATIONS, 53 INT. REL. No. 20 (May 25, 1976).

could not be merely subjective.[139] A recent Seventh Circuit decision supported this conclusion and denied relief.[140] Finally, the Supreme Court was given the opportunity to review the issue in *Pierre v. United States.*[141] Here the Court, in a summary disposition, granted certiorari, but then vacated the judgment and remanded the case for consideration of the question of mootness.[142] Unfortunately, this summary action gives no indication to lower courts as to what weight the 1967 Protocol should have.

In reaching decisions like *Pierre,* the courts have derived their support almost exclusively from the legislative history surrounding the accession to the 1951 Convention and the 1967 Protocol. An examination of the legislative materials reveals that the Senate did not contemplate radical change in the existing immigration laws since they thought the laws were generous and a model for the world.[143] In this case, however, the immigration laws can hardly be described as generous for refugees.[144] Rather, the courts should look to the ideals of humanitarianism espoused by many presidents and diplomats.[145] The United States can hardly be viewed as an example of humanitarianism when the Government itself does not follow its treaties, and the statute it purports to follow is a virtual nullity.

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139. 14 I. & N. Dec. at 319. The Board looked to an early report of the *Ad Hoc* Committee which framed the provision: "The expression well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." Report of the *Ad Hoc* Committee on Statelessness and Related Problems, 10 U.N. ESCOR, Annex II, 1 at 39, U.N. Doc. No. E/1618 (1950), *quoted in* 14 I. & N. Dec. at 319.

140. Kashani v. Immigration & Naturalization Service, 547 F.2d 276, 279 (7th Cir. 1977).

141. 434 U.S. 962 (1977).

142. *Id.*

143. *See generally* President Johnson's message to the Senate, S. Exec. K., 90th Cong., 2d Sess., at III, in which the President states: "It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecutions."

144. For a good discussion of one such instance, see Johnson, *Haitian Refugees to Press U.S. for Political Asylum,* N.Y. Times, Jan. 26, 1977, § A, at 10, col. 1.

145. Presidents, since Truman, have voiced concern for the plight of refugees. In a letter of submittal to President Johnson, Secretary of State Rusk informed him that, "United States accession to the 1967 Protocol would not infringe adversely upon the laws of the country." S. Exec. K., 90th Cong., 2d Sess., at VII. The Secretary of State went on to state:

> Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional humanitarian concerns and leadership in this field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution. Actually, most refugees in the United States already enjoy legal and political rights which are equivalent to those which states acceding to the Convention or the Protocol are committed to extend to refugees within their territories.

Id. at VIII.

In examining the question of whether article 33 of the 1951 Convention changes the scope of the Attorney General's discretion, one cannot help but notice that the language of the two provisions is cast in vastly different terms. Article 33 speaks in mandatory terms, "[n]o Contracting State shall expel or return ("refouler") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened . . . ."[146] Section 2 of article 33 carves out the only exception to the rule, denying relief when an alien constitutes a security threat to the host country or has been convicted of a serious crime.[147] Section 243(h), on the other hand, merely "authorizes" the Attorney General to withhold deportation where it is his "opinion" that the alien would face persecution.[148] Using these criteria, courts repeatedly construed section 243(h) as giving the Attorney General "broad discretion" to withhold deportation.[149] The mandatory standard of the 1967 Protocol would be a more realistic way of determining relief, rather than depending on the discretion of the Attorney General.

After extensively reviewing much of the 1967 Protocol's legislative history, the BIA in *Dunar* considered the question of whether article 33 of the 1951 Convention compelled a change in the Attorney General's broad discretionary powers. The BIA implied that the Attorney General's discretion afforded the alien enough protection.[150] It found no substantial difference in coverage of article 33 and section 243(h),[151] and instead down played the issue by declaring that the BIA was not aware of any cases in which the Attorney General's discretionary relief was denied where the alien showed a "clear probability of persecution."[152]

In summary, the BIA concluded that article 33 effected no substantial change in the application of section 243(h) "either by way

146. 1951 Convention, *supra* note 130, art. 33, § 1 (emphasis added).

147. *Id.* art. 33, § 2. Section 2 reads as follows:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

148. Immigration & Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1976).

149. *See* Muskardin v. Immigration & Naturalization Service, 415 F.2d 865 (2d Cir. 1969); Kasravi v. Immigration & Naturalization Service, 400 F.2d 675 (9th Cir. 1968); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955); United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

150. *See In re* Dunar, 14 I. & N. Dec. 310, 322 (1975).

151. *Id.* at 320 n.20.

152. *Id.* at 322. For a complete discussion of this issue, see Comment, *supra* note 131.

of burden of proof, coverage, or manner of arriving at decisions."[153] This position was supported by a subsequent BIA decision[154] as well as the court of appeals.[155]

The majority in *Coriolan*, while not addressing the issue fully, did state that the broad grant of discretion given to the Attorney General must be measured in light of the 1967 Protocol.[156] The court noted that here still existed the question of whether the Attorney General's broad discretion had been altered by the 1967 Protocol.[157] The court, however, briefly passed over this issue in order to reach the broader conclusion that adherence to the 1967 Protocol

> reflects or even augments the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law. It may be appropriate to add that the foreign policy of the United States has recently become more dramatically focused in the protection of human rights around the world.[158]

This humanitarian approach of the 1967 Protocol, to the refugee situation, is totally different from the spirit in which section 243(h) was enacted. It is argued that the enactment of the 1967 Protocol was meant to be a step toward a more sympathetic attitude to refugees, and thus modifies section 243(h). Better understanding of this argument is obtained by looking at the section's legislative history.

VI. THE LEGISLATIVE HISTORY OF SECTION 243(h)

Section 243(h) was first enacted, in a form somewhat similar to the present one, in section 23 of the Internal Security Act of 1950,[159] which read, "[n]o alien shall be deported under any provision of this Act to any country in which the Attorney General shall find that such alien would be subject to physical persecution."[160] Under

153. 14 I. & N. Dec. at 322.

154. *In re* Cenatice, I. & N. Dec. No. 2571 (Mar. 28, 1977).

155. Pierre v. United States, 547 F.2d 1281 (5th Cir. 1977) *vacated*, 434 U.S. 962 (1977) (the Court left intact the Service's procedure for determining refugee status); Kashani v. Immigration & Naturalization Service, 547 F.2d 376 (7th Cir. 1977); Cisternas-Estay v. Immigration & Naturalization Service, 531 F.2d 155 (3rd Cir. 1976), *cert. denied*, 429 U.S. 853 (1976).

156. 559 F.2d 993, 996 (5th Cir. 1977).

157. *Id.* at 997. The court felt that the 1967 Protocol did not "profoundly [alter] American refugee law." *Id.* In *Pierre*, the court did not decide the issue of the 1967 Protocol's effect on United States laws. 546 F.2d at 1289.

158. 559 F.2d at 997.

159. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987 (commonly known as the Subversive Activities Control Act of 1950, codified at 50 U.S.C. §§ 781-798 (1976)).

160. 559 F.2d at 1010.

this provision the burden of proving "physical persecution" rested on the alien, but the decision of whether to deport was not discretionary. The Attorney General was *required* to suspend deportation when he found the alien would be subject to physical persecution if he returned.[161]

In 1952, the Immigration and Nationality Act,[162] while retaining the possibility of a plea of physical persecution, amended section 23 to emphasize the discretionary nature of the Attorney General.[163] The amended action read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reasons.[164]

Dissatisfaction with the stringent terms of the 1952 version of the Immigration and Nationality Act was expressed by Presidents Truman,[165] Eisenhower,[166] Kennedy,[167] and Johnson.[168] On July 23, 1963,

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161. The Act was passed over presidential veto. *See* 96 CONG. REC. 15629 (1950). This Act was not implemented to direct relief to refugees, rather it was focused at controlling the spread of communism in the United States. *See id.* The Act reflected some awareness of Congress to the situation faced by refugees. S. REP. No. 2239, 81st Cong., 2d Sess. 4 (1950). Although the House of Representatives' draft of the Internal Security Act of 1950 did not recognize the political dangers to which a refugee might be subjected, the Senate amended the draft to include a provision for refugees. *Id.*

162. Pub. L. No. 82-414, 66 Stat. 163 (1952).

163. *See* United States *ex rel.* Camezon v. District Director of Immigration & Naturalization Service, 105 F.Supp. 32, 38 (S.D.N.Y. 1952). "It is apparent that the amendment of Title 8 U.S.C.A. § 156 by § 23 of the Internal Security Act of 1950 was made with the internal security of the nation in mind and not with any solicitude for the objectionable alien's welfare." *Id.*

164. Pub. L. No. 82-414, 66 Stat. 163, 214 (1952) (emphasis added) (passed over the veto of President Truman). The Act constituted a codification and revision of the immigration laws then in effect. It was not designed to encourage an influx of aliens, including political refugees. *See* S. REP. No. 2239, 81st Cong., 2d Sess. 5 (1950).

165. The President's Commission on Immigration & Naturalization, appointed by President Truman in 1952 and headed by former Solicitor General Philip B. Perlman, severely criticized the 1952 Act in its report. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME (1953). The Commission said with regard to political asylum:

> One of our national traditions is that we have provided asylum and haven to the oppressed of other lands. This we were able to do until 1924 because our law was flexible enough to meet such situations. Asylum for the oppressed is thwarted by the national origins system. . . .
>
> The United States is one of the few major democratic countries of the free world whose present laws impede and frequently prevent providing asylum.

Id.

166. President Eisenhower recommended changes in the Act on a number of occasions. *E.g.*, H.R. Doc. No. 1, 87th Cong., 1st Sess. 13 (1961).

President Kennedy submitted a comprehensive program for revision[169] to Congress, which was endorsed by President Johnson and enacted into law in 1965.[170]

The 1965 amendments affected the political refugee by substituting the phrase "persecution on account of race, religion or political opinion" for "physical persecution" in section 243(h).[171] The legislature recognized that "[t]echniques of persecution are not limited to bodily violence alone."[172] The implications of the 1965 amendments are unclear. The amendments may be read as liberalizing the heavy burden of proof. There is, however, no indication in the legislative history or congressional intent to support this conclusion. Indeed, given the continuation of the Attorney General's grant of discretion, it may be argued that Congress merely expanded the types of persecution covered by the section and did not alter the burden of proof the alien must meet. As evidenced by cases following the 1965 amendments, little practical change has occurred in the operation of the statute.[173] As mentioned previously, however, the United States is becoming more aware of persecution throughout the world,[174] with this perception, comes a need to adapt our statutory provisions to make them consistent with current attitudes. The 1967 Protocol provides a new route to effectively and moderately adapt the current statutes.

VII. CONCLUSION

Coriolan is an example of a court taking a more contemporary approach to the refugee problem. In *Coriolan*, for the first time the court did not delve deeply into the legislative history of the 1967 Protocol for an excuse to escape applying the treaty's plain lan-

167. President Kennedy expressed dissatisfaction with the Act in his book. J. KENNEDY, A NATION OF IMMIGRANTS 77 (rev. ed. 1964).

168. President Johnson urged changes in the Act. *E.g.*, Remarks to Representatives of Organizations Interested in Immigration and the Problems of Refugees, 1 PUB. PAPERS 123 (Jan. 13, 1964).

169. *See* Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, 1 PUB. PAPERS 594 (July 23, 1963).

170. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. §§ 1101-1557 (1976)).

171. *Id.* at 918.

172. H.R. REP. No. 745, 89th Cong., 1st Sess., 22 (1965).

173. *But see*, Kovac v. Immigration & Naturalization Service, 407 F.2d 102, 106 (9th Cir. 1969). The court in *Kovac* reasoned that the 1965 amendments lightened the burden of the alien. The burden, according to *Kovac*, is met by showing that "he would probably suffer persecution." *Id.* at 107.

174. See notes 1-4 *supra* and accompanying text.

guage. Instead, the *Coriolan* court looked to the humanitarian ideals that the 1967 Protocol sought to implement, rather than looking to the restrictive mood in which section 243(h) was originally enacted.[175] There is support for this approach throughout the history of immigration policy. Following the enactment of the Internal Security Act of 1950,[176] American immigration policy gradually evolved to become a more humanitarian concept. The United States moved away from the restrictive construction of the Internal Security Act of 1950, by enacting the Immigration and Nationality Act,[177] which repealed many of the Internal Security Act's provisions.[178] Further liberalization and expansion of the scope of the statute can be seen in the addition of the 1965 amendments.[179] It is reasonable to assume that the next step in the evolution of the doctrine would be implementation of a policy consistent with the 1967 Protocol. The United States prides itself as being in the forefront on issues concerning human rights.[180] The 1967 Protocol provides the means by which the United States can follow through her commitments. It would be inappropriate for the United States to expect other signatories of the 1967 Protocol[181] to follow the treaty's provisions

175. See note 159 *supra* and accompanying text.

176. Ch. 1024 § 23, 64 Stat. 987.

177. Pub. L. No. 82-414, 66 Stat. 163 (1952).

178. *Id.* at 279-280.

179. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. §§ 1101-1557 (1976)).

180. *See* S. Exec. K., 90th Cong., 2d Sess., at III. In his message to the Senate, regarding the 1967 Protocol and State Department report the President stated:

> It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere. This impetus would be enhanced by the fact that most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries. Thus, United States accession should help advance acceptance of the Protocol and observance of its humane standards by States in which, presently, guarantees and practices relating to protection and other rights for refugees are less liberal than in our own country.

Id. See also TIME, Feb. 27, 1978, at 22.

181. These include: Algeria, Argentina, Australia, Austria, Belgium, Benin, Botswana, Brazil, Cameroon, Canada, Central African Rep., Chile, Congo (Brazzaville), Cyprus, Denmark, Ecuador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Fed. Rep. of Germany, Ghana, Greece, Guinea, Guinea-Bissau, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Liechtenstein, Luxembourg, Mali, Malta, Morocco, the Netherlands, New Zealand, Niger, Nigeria, Norway, Paraguay, Portugal, Senegal, Sudan, Swaziland, Sweden, Tanzania, Togo, Tunisia, Turkey, Uganda, United Kingdom, United States, Uruguay, Yugoslavia, Zaire, and Zambia.

when the United States, who played such a large role in its ratification, refuses to do so. The approach followed by the court in *Coriolan* better reflects the current American policy of protection of human rights throughout the world.

It is important to remember that seeking refuge under section 243(h) is a last resort, often a life or death measure for the refugee. After an alien is denied relief under section 243(h), he has no alternative but to leave the United States. For this reason, sympathetic attention must be given to the alien's plea for relief. The United States has, for many years, recognized the existence of the refugee problem. Adequate legislation exists. The existing legislation need only be applied in a humanitarian manner, consistent with contemporary American views on human rights.

It is argued that section 243(h) is ripe for supercession and that article 33 lessens the burden of proof that the alien is forced to bear.[182] A more modern approach to the burden of proof issue would support the goals the treaty sought to achieve, and make the alien's burden more realistic. One reason the aliens burden is so oppressive, is that he simply does not have access to authoritative evidence. The Fifth Circuit in *Coriolan* accepted the Amnesty International report as relevant material.[183] In giving more weight to a new and different type of evidence, such as the reports of private groups and private citizens living in foreign countries, the claimants are given a fairer chance for relief.

Other proposed forms of relief include clarification of section 243(h) by Congress and a more sympathetic and realistic approach by the Attorney General when exercising his discretion. The statement that article 33 does not change the immigration laws can be negated when one views the apparent problems in implementation of section 243(h). One can hardly believe that Congress intended to enact a statute which is a virtual nullity. The forerunner of section 243(h) was enacted in the spirit of the 1950's,[184] at a time in which the country was more interested in restricting immigration than aiding refugees. The attitudes of Americans have changed substantially since the 1950's, evolving toward a more humanitarian approach. Currently, while section 243(h) is used by the alien seeking asylum, it rarely gives relief.[185] A positive approach to the situation

182. Comment, *supra* note 131, at 151-52.

183. 559 F.2d at 1002-03.

184. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987 (commonly known as the Subversive Activities Control Act of 1950, codified at 50 U.S.C. §§ 781-798 (1976)).

185. Since the 1965 amendments, the BIA has granted a stay of deportation under §

and a liberal interpretation of *Coriolan* will have the effect of breathing new life into a statute which up to this point has lost most of its effectiveness.

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243(h) in only four reported cases: *In re* Joseph, 13 I. & N. Dec. 70; *In re* Janus & Janek, 12 I. & N. Dec. 866 (1968); *In re* Salama, 11 I. & N. Dec. 536 (1966); *In re* Alfonso-Bermudey, 12 I. & N. Dec. 225 (1965).