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I. INTRODUCTION

At first blush, Svetlana Galina appeared to present a persuasive asylum claim when the Board of Immigration Appeals ("BIA") reviewed her deportation order in 1999.[1] Galina had lived in Latvia her whole life, but she was stateless: since she was of Russian Jewish origin and born in Latvia after its annexation by the Soviet Union, Latvian laws did not accord her citizenship. Her boss, the head of a Latvian political party, placed her on a secret list of persons subject to deportation in 1993.[2] Galina found this document at work and noticed that all the people listed were of Russian Jewish origin. Over the next year she received menacing telephone calls, her daughter and husband were assaulted, and finally Galina herself was abducted, tied to a tree, and told to leave the country. On each occasion, the perpetrators referred to the list Galina had found at work. Since Galina feared that the attackers themselves had "official connections," she sought only limited help from the police. Galina fled to the United States in 1994; her husband followed the next year.[3]

Under the Immigration and Nationality Act ("INA"), those aliens who have suffered past persecution in their country of origin or last residence and those who have a well-founded fear of future persecution are defined

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[1] Galina v. INS, 213 F.3d 955 (7th Cir. 2000).

[2] *Id.* at 956-57.

[3] *Id.*

independently as "refugees."[4] However, a grant of asylum does not flow directly from satisfaction of the refugee definition, since asylum is a discretionary remedy.[5] In other words, an INA refugee may be denied asylum.[6] The governing asylum regulation supplies a double standard for "past persecution" and "well-founded fear" applicants. Members of the latter group, as long as they meet the standard set forth in *INS v. Cardoza-Fonseca* and are not affirmatively barred from asylum eligibility by any of the factors listed in the governing regulation,[7] are automatically eligible for a positive exercise of discretion. Past persecution applicants, on the other hand, enjoy only a presumption of eligibility for a grant of asylum. The Immigration and Naturalization Service ("INS")[8] may rebut this presump-

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[4] Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1997). The U.S. Supreme Court construed the "well-founded fear" standard in *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), concluding that the test does not require a greater than 50% likelihood of future persecution, but instead that the applicant merely show a "reasonable possibility" of persecution and a bona fide fear of such treatment. *Id.* at 440.

[5] *See* 8 C.F.R. § 208.13(b)(1)(i) (2002). The term "refugee" is defined in two ways in American asylum law. First, those who are officially designated refugees by international organizations in camps abroad carry refugee status when they arrive in the United States; these refugees need not apply for asylum. The second definition of refugee concerns those who satisfy the refugee definition under the INA § 101(a)(42). While these persons are statutory refugees, their status does not support any grant of a visa to remain in the United States. These individuals must apply for asylum after arriving in the United States. *See* THOMAS A. ALEINKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 987 (4th ed. 1998). However, the core refugee definition applied to both asylum seekers in the United States and refugees abroad is the same: the individual must possess a well-founded fear of future persecution if returned to (or forced to remain in) the country of origin or last residence. *Id.*

[6] Although the Attorney General may deny asylum in the exercise of discretion, the principle of *non-refoulement* prohibits deportation of individuals who face a clear probability of persecution—a higher standard than the well-founded fear showing required for eligibility for asylum—if returned to the country of origin. The withholding of removal remedy in the U.S. codifies this principle. *See generally* KAREN MUSALO ET AL., REFUGEE LAW AND POLICY 80 (2d ed. 2002).

[7] *See* 8 C.F.R. § 208.13(c)(1) (2002).

[8] As of March 1, 2003, the INS's immigration processing functions were transferred to the new Bureau of Citizenship and Immigration Services ("BCIS"), under the authority of the Homeland Security Act of 2002 (H.R. 5005), signed into law by President Bush on November 25, 2002. Because this Note assesses immigration policies predating the shift, it will refer to the agency by its previous acronym (INS).

tion by showing that circumstances in the applicant's country of origin have fundamentally changed such that she would not face a well-founded fear if returned, or that the applicant has a viable option of relocating to a different area of the country of origin where she would not face persecution.[9] The BIA and federal case law indicate that the immigration judge ("IJ") or BIA may take administrative notice of changes eliminating the well-founded fear; in order to meet its rebuttal burden, the INS is not required to submit documentation of changes in country conditions obviating the threat of persecution.[10]

In *Galina v. INS*, the BIA found that the applicant had met her initial burden of proof by demonstrating past persecution on the basis of her religion and nationality. The BIA denied Galina's asylum claim, however, based on administrative notice of an excerpt of the U.S. State Department's 1998 Country Report for Latvia indicating that Latvia had conducted "free and fair elections" in 1996.[11] The Board judged that the report indicated "an improved human rights situation in Latvia," and that Galina would therefore no longer face a well-founded fear of persecution if she returned to the country.[12] The Seventh Circuit Court of Appeals, in an opinion by Judge Richard Posner, reversed the BIA's denial of Galina's claim. Posner held that the BIA may not give outcome-determinative weight to human rights reports that are "brief and general, and may fail to identify specific, perhaps local, dangers to particular, perhaps obscure, individuals."[13]

The facts and procedural history of *Galina* reveal one of the most puzzling aspects of asylum adjudications: while the refugee definition as set forth in international human rights instruments[14] and as incorporated

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[9] 8 C.F.R. § 208(b)(i)(A)-(B) (2002).

[10] *See* Kowalczyk v. I.N.S., 245 F.3d 1143 (10th Cir. 2001). *See also* Vincente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J. L. SOC. PROBS. 411, 415 (1994) (explaining that the rationale behind administrative notice is that changes in country conditions constitute "common knowledge" to an expert fact-finder such as an agency adjudicator).

[11] Galina v. INS, 213 F.3d 955, 957 (7th Cir. 2000).

[12] *Id.*

[13] *Id.* at 959.

[14] *See* United Nations Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention]; United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol]. The Protocol retained the Convention's conceptual framework, defining refugee status similarly; however, while the Convention limited its definition of refugees to those persecuted as a result of events occurring before 1951, the Protocol contained no

into federal statutes and regulations emphasizes an individualized assessment of the applicant's well-founded fear of persecution,[15] the final outcome in asylum proceedings often hinges upon administrative law judges' interpretations of materials having no specific relationship to the applicant's claim. *Galina* dramatizes the risk that uncarefully-drawn connections between purported political reforms and "life on the ground" may yield inaccurate results in asylum adjudications. The extenuating circumstances that render an individual a refugee also frequently deprive her of evidence showing that, despite broad improvements in political conditions in her country of origin, she continues to fear mistreatment as the basis of a protected ground. The United Nations High Commission for Refugees ("UNHCR") *Handbook on Procedures and Criteria for Determining Refugee Status* ("*Handbook*"), designated by the U.S. Supreme Court as persuasive authority in interpreting the international human rights instruments on which U.S. asylum law is based,[16] anticipated these problems of proof. The *Handbook* suggests that, given refugees' dire situations, an over-strict application of the requirement of evidence would thwart the international instruments' purpose.[17] Instead, it argues, objective support for the applicant's fear should be assessed on the basis of her account's internal consistency, not on the basis of external materials.[18]

Nonetheless, as asylum applications have soared in the U.S., IJs have increasingly looked outside the four corners of the asylum applicant's claim, seeking corroborative support from sources such as U.S. Department of Justice human rights reports to assess the credibility of the applicant's fear.[19] IJs' reliance on U.S. State Department country reports in their

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temporal cap on refugee status. *See generally* A. Roman Boed, Note, *Past Persecution Standard for Asylum Eligibility in the Seventh Circuit: Bygones Are Bygones*, 43 DEPAUL L. REV. 147, 154 (1993). While the United States was not a party to the Convention, it acceded to the Protocol in 1968. *See infra* Part II.

[15] The 1951 Convention was a significant departure from previous instruments, that had defined refugees according to broad classifications of their ethnic or social groups—not individually. *See generally* MUSALO ET AL., *supra* note 6, at 29.

[16] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (stating that the *Handbook* "provides significant guidance" in the interpretation of the Convention).

[17] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 197 (1979) [hereinafter UNHCR HANDBOOK].

[18] *Id.*

[19] *See* Galina v. INS, 213 F.3d 955, 959 (7th Cir. 2000) (rebuking the BIA for giving outcome-determinative weight to U.S. State Department country reports without scrutinizing the relationship between these reports and the specifics of the applicant's claim).

assessment of claims—by no means a new practice—adds an inevitable realpolitik dimension to the asylum adjudication. The practice permits IJs to evaluate aliens' claims through the lens of U.S. foreign relations. The administrative notice mechanism enhances the role of these human rights reports by allowing IJs and the BIA to consider them *sua sponte*. In addition, the asylum regulation implemented in 2000,[20] which in its concise statement of purpose incorporated the BIA's holding in *In re N—M—A—*,[21] has limited the INS's burden for rebutting the presumption that past persecution implies a well-founded fear of future similar treatment. This regulation has facilitated the INS's rebuttal effort by broadening the array of evidence available to the Service in making its showing.[22] Notably, however, even as the new regulation limits the past persecution ground, it also provides a significant loophole for unsuccessful past persecution applicants by expanding the availability of "humanitarian" asylum grants.[23]

This Note argues that, despite its broadening of the humanitarian ground for asylum, the new regulatory scheme challenges both international law norms and principles of due process by unfairly impeding the path to asylum for applicants recognized as refugees by the Immigration and Nationality Act. The applicants most negatively affected by the regulatory changes—victims of unrepeatable harms (female genital mutilation ("FGM") and forced sterilization or abortion) and applicants fleeing persecution in the midst of chaotic regime change in their countries of origin—are refugees for whose welfare Congress has demonstrated particular concern both historically and over the past decade.[24] After

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[20] 8 C.F.R. § 208.13 (2002).

[21] *See* 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (noting that the regulation implicitly incorporates *In re N—M—A—*); *see also In re* N—M—A—, 22 I. & N. Dec. 312 (BIA 1998).

[22] *See* Immigration and Naturalization Service Asylum Procedures, 65 Fed. Reg. 76,127 (Dec. 6, 2000) (codified at 8 C.F.R. Pt. 208). The regulations have broadened the scope of evidence the INS may use to rebut the presumption by allowing the Service to demonstrate that changes in the applicant's *personal* circumstances—not just changes in country conditions—have negated the applicant's fear of persecution.

[23] *See* 8 C.F.R. § 208.13(b)(1)(iii)(A) (2002). Asylum in general is a discretionary and humanitarian form of relief. The use of the term "humanitarian grant" in this Note refers to situations in which the Attorney General grants asylum despite finding no present fear of persecution in the country of origin.

[24] *See generally* Immigration and Nationality Act § 101(a)(42) (defining forced sterilization and abortion as persecution); *see also* Constitution of the International Refugee Organization, *cited in* MUSALO ET AL., *supra* note 6, at 28 (expressing

examination in Part II of the international law principles animating the past persecution ground in American asylum jurisprudence,[25] this Note assesses three significant factors limiting the viability of past persecution as an independent ground for asylum. Part III explores the BIA holding in *In re N—M—A—*, which permits the INS to rebut the presumption in favor of past persecution applicants merely by demonstrating that the applicant no longer faces a threat of persecution emanating from the same agent as her past persecution.[26] Part IV considers the effects of the regulation promulgated in 2000, which provides that the INS may draw upon changes in an applicant's personal situation—including her previous subjection to an unrepeatable form of persecution—to rebut the presumption that the applicant faces a well-founded fear of future persecution.[27] Part V examines BIA's use of the administrative notice mechanism to integrate an assessment of the human rights situation in the applicant's country of origin, often inflected with U.S. foreign policy concerns, into the asylum adjudication.[28] This Note argues that three urgent concerns—the adherence of United States asylum law to international human rights instruments, the procedural due process rights of applicants, and the institutional need for efficiency and accuracy in the asylum adjudication process—demand reconsideration of the 2000 regulation.

II. THE ROLE OF THE PAST PERSECUTION GROUND IN ASYLUM ADJUDICATION

The INA provides that aliens may qualify as refugees by demonstrating that they are "unable or unwilling" to return to their countries because of

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mission of organization to assist refugees in aftermath of post World War II regime change).

[25] *See infra* notes 29-92 and accompanying text.

[26] *See infra* notes 93-146 and accompanying text.

[27] *See infra* notes 147-76 and accompanying text. See also 8 C.F.R. § 208.13 (2002).

[28] *See infra* notes 177-221 and accompanying text. Recent scholarship has commented abundantly on the question of whether delay and the use of administrative notice in the asylum review process deny the applicant's due process rights. *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 112-50 (1999); *see also* Tome, *supra* note 10, at 411. Therefore, this Note addresses the due process aspects of administrative notice only in order to demonstrate how this practice affects the substantive limitations on asylum forming the focal point of the argument. *See infra* Part V.

either past persecution or a well-founded fear of future persecution.[29] The United Nations instruments informing U.S. asylum law contain only prospective tests for refugee status, but evidence of past persecution frequently provides the factual support necessary for a claim to refugee status under the instruments. While not mandated by the international instruments, therefore, the INA's past persecution ground accurately reflects their logic. The last decade has seen a progressive narrowing of the eligibility of past persecution refugees for discretionary grants of asylum in the United States. As a result, today the United States arguably defines "refugee" more expansively than do the international instruments, but it provides protective legal status for only a limited subset of these refugees.

A. International Law Underpinnings of the Past Persecution Ground

The past persecution ground for asylum eligibility in the United States drew its inspiration from both the political forces animating international refugee instruments, and a careful parsing of the refugee criteria under the instruments. On the political level, delegates representing the United States in the drafting of the Constitution of the International Refugee Organization ("IRO") insisted on a past persecution ground for refugee status, out of concern for the plight of Holocaust victims.[30] The delegates feared that political shifts in Germany and Eastern European countries would prevent victims from claiming refugee status despite the atrocities they endured.[31] The American delegation, headed by scholar Louis Henkin, believed that a fear of return based on purely subjective traumatic memories, absent objective evidence of a risk of present persecution, should suffice to classify these victims of atrocious torture as refugees.[32] American delegates were also concerned that, even in the absence of a continuing fear, the combination of past persecution and a subsequent decision to flee could sever all meaningful ties between persecuted individuals and their countries of origin.[33] While the United States' proposal prevailed at the IRO

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[29] Immigration and Nationality Act § 1101(a)(42).

[30] The IRO was founded in 1946, as a U.N. agency dealing with the problem of post-World War II refugees. Its activities continued until 1951, when the U.N. Convention supplanted it. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF REFUGEES 3-6 (1992).

[31] *See generally* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 68 (1991).

[32] *Id.*

[33] *Id.*

Convention, the past persecution ground was not included in the United Nations Convention Relating to the Status of Refugees ("Convention") of 1951, which superseded the IRO Constitution. The U.N. Convention defines "refugee" prospectively:

> [T]he term "refugee" shall apply to any person who: . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .[34]

The conceptual underpinnings of the past persecution ground in American refugee law, ironically, may be largely traced to the 1951 Convention and 1967 Protocol—the very instruments that, facially, reversed the past persecution ground found in the IRO Constitution. The Protocol binds signatories to the obligations of the Convention, while extending the Convention's refugee definition to omit its 1951 time-limit on refugee status.[35] The Convention does not feature a past persecution ground, but such a provision would harmonize with the Convention's individualized test for refugee status that is rooted in the alien's personal experiences. The U.N. Convention and the IRO Constitution signaled a sea-change in the means of designating refugees: while previous methods classified members of ethnic, religious, or racial minorities as refugees on a group basis, these new instruments focused entirely on individual factors in making the refugee determination.[36] The Convention's refugee definition contains subjective and objective elements. First, does the applicant possess a bona fide fear of persecution; and second, is that fear reasonable and justifiable in light of the applicant's circumstances?[37] While the subjective element of the inquiry is "inseparable from an assessment of the personality

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[34] Convention, *supra* note 14, at Ch. I, Art. 1(A)(2). This citation of the definition excludes the portions pertaining to stateless persons, as well as a clause stating that the fear of persecution must result from "events occurring before 1 January 1951." This Note does not assess the asylum claims of stateless persons. The 1951 cutoff for refugee status in the Convention definition was revoked in the Protocol, but the Protocol otherwise retained the Convention's refugee definition. *See* UNHCR HANDBOOK, *supra* note 17, ¶ 35.

[35] Protocol, *supra* note 14, at Art. 1.

[36] HATHAWAY, *supra* note 31, at 5 (noting that "[t]he essence of refugee status came to be discord between the individual refugee applicant's personal characteristics and convictions and the tenets of the political system in her country of origin").

[37] *See* UNHCR HANDBOOK, *supra* note 17, ¶¶ 40-42.

of the applicant," the objective element may be established if the applicant can demonstrate, "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. . . ."[38] Under such a standard, a showing of past persecution on the basis of one of the enumerated grounds would appear to form the strongest evidence of a well-founded fear of similar treatment in the future. Indeed, the *Handbook,* in its discussion of the objective prong of the test, states, "[i]t may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention."[39]

The Convention's Cessation Clauses, surprisingly, provide a second source of support for the past persecution provision. These clauses identify when a previously designated refugee loses that status. Their application to the asylum setting, in which applicants by definition have not been labeled refugees, may seem inept; however, scholars and courts have looked to the clauses for guidance in determining when improved country conditions negate the refugee status of a past persecution victim.[40] Under the clauses, a refugee's designation ends when, *inter alia,* "the circumstances in connexion with which he has been recognized as a refugee have ceased to exist."[41] However, the clauses contain an exception and a limitation indicating concern that protection for victims of persecution not be precipitously withdrawn. First, "this paragraph shall not apply to a refugee falling under section A(1) of this Article 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."[42] Scholars have interpreted this exception to the Cessation Clauses as an acceptance of humanitarian grants of status to prospective refugees who have suffered severe persecution, or for whom the prospect of returning to a site of trauma inspires debilitating fear.[43] Moreover, the Cessation Clauses, as interpreted in the

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[38] *Id.* ¶¶ 40, 42.

[39] *Id.* ¶ 45.

[40] *See* Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection,* 13 GEO. IMMIGR. L.J. 343, 357 (1999) (arguing that changed circumstance cases may be viewed as cessation cases, since most applicants met the U.N. refugee standard when they initially fled their countries of origin).

[41] Convention, *supra* note 14, at Ch. I, Art. 1(C)(5).

[42] *Id.* Refugees falling under A(1) of the article are those deemed refugees under the Constitution of the IRO, as well as under other previous refugee instruments ("statutory refugees").

[43] PHILIP G. SCHRAG, A WELL-FOUNDED FEAR 26-28 (2000). This provision corresponds to the "humanitarian" grant of asylum in U.S. asylum law in cases in which the severity of the past persecution would cause the applicant to experience

Handbook, contain a limitation: the *Handbook* makes clear that the word "circumstances" does *not* refer to mere regime change or social instability, but only to durable, fundamental, and effective changes in the country of origin that "remove the basis of the fear of persecution."[44] A plain-language reading of this section of the *Handbook* indicates a tension between international law principles and two recent developments discussed below: a requirement that the feared persecution arise from the same perpetrator as the past persecution,[45] and a provision that changes in personal circumstances, as well as changes in country conditions, may obviate the threat of persecution.[46]

B. *The Relationship Between Refugee Status and the Asylum Grant Under International Law*

Under the U.N. Convention, an individual becomes a refugee as soon as she finds herself outside her country of origin, unable to return due to a well-founded fear of persecution based on one of the protected grounds.[47] Therefore, signatory states must accord to asylum-seekers some protections contained in the Convention even before immigration authorities adjudicate their claims to refugee status. International law definitions of refugee status govern both the most expansive and most restrictive bounds of signatories' asylum standards, while affording the signatories considerable discretion within those limits. Parties to the Protocol may grant asylum to any individual who is a refugee under the Convention.[48] On the other hand, the international instruments place only limited restrictions on signatory states' capacity to exclude asylum-seeking refugees from their territories.[49] First, Article 33 of the Convention provides for *non-refoulement*: signatories may not expel or return a refugee to a country in which "his life or freedom would be threatened on account of his race, religion, nationality, member-

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"other serious harm," falling short of persecution, upon return. *See* Asylum Procedures, 8 C.F.R. § 208.13(b)(1)(iii)(A) & (B) (2000).

[44] *See* UNHCR HANDBOOK, *supra* note 17, ¶ 135.

[45] *See In re* N—M—A—, 22 I. & N. Dec. 312 (BIA 1998).

[46] *See* Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i)(A) (2002).

[47] *See* Fitzpatrick, *supra* note 40.

[48] *See Delaration on Territorial Asylum*, G.A. Res. 2312 (XXII); GAOR Supp. (No. 16) 81, U.N. Doc. A/6716 (1968).

[49] In the U.S. denials of asylum to those found to be refugees under the statute traditionally are rare. *See* Bucur v. INS, 109 F.3d 399, 402 (7th Cir. 1997) (citing 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02 (1995)).

ship of a particular social group or political opinion."[50] An alien who meets the higher standard of proof of threatened future persecution under *non-refoulement* has the right not to be returned to her country of origin, rather than just the right to request asylum.[51] Second, signatory states must adhere to due process of law in making individualized asylum determinations.[52] Finally, signatories may not expel refugees lawfully in their territory except on grounds of public order or national security.[53]

C. *Implementing an Independent Past Persecution Ground: The 1980 Refugee Act and* In re Chen

When the United States acceded to the Refugee Protocol in 1968, U.S. refugee policy bore the mark of obsolete immigration laws that differentiated among national origin groups through the use of a quota system. Conditional entry, one of the three mechanisms for admitting refugees

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[50] *See* Convention, *supra* note 14, at Art. 33(1). In order to comply with the *non-refoulement* provision, the U.S. in 1980 developed the withholding of removal remedy. *See* 8 C.F.R. § 208.13 (2002). While a grant of asylum permits the refugee to accede to legal permanent resident ("LPR") status one year after the grant, withholding of removal may not be converted into permanent resident status. The applicant must meet a higher standard to qualify for withholding of removal: she must demonstrate that she faces a *clear probability* of future persecution—not merely a well-founded fear. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 425-30 (1987).

[51] *Bucur*, 109 F.3d at 402-03.

[52] *See* Convention, *supra* note 14, at Art. 32(2).

[53] *Id.* at Art. 32(1). In practice, this provision provides few protections because of the large number of asylum applicants who arrive in the U.S. without visas, or with fraudulent visas, in the hope of declaring their intention to seek asylum once they reach American soil. Although BIA case law has held that the use of fraudulent visas or other documentation does not constitute an affirmative bar to a grant of asylum, illegal entry into the United States does place those refugees arriving without valid visas, who are not citizens of visa-waiver countries, and who have not been previously designated as refugees, into expedited removal proceedings. Under these proceedings, an asylum officer ("AO") may summarily exclude an alien from the U.S. unless he or she presents a credible fear of persecution. Since the Convention provides that only refugees lawfully in the territory shall not be expelled, unless based on national security or public order, those whose asylum claims follow credible fear interviews are not covered by the Convention. *See generally* MUSALO ET AL., *supra* note 6, at 129-34. *See also Matter of* Pula, 19 I. & N. Dec. 467 (BIA 1987) (holding that fraudulent entry into the United States does make applicant excludable under the Act).

lawfully into the country,[54] was the most blatantly biased according to political concerns because it was restricted to aliens fleeing Communism or the Middle East.[55] Only in 1980 with the passage of the Refugee Act did the U.S. incorporate the refugee designation principles set forth in the U.N. Convention, thus aligning U.S. law with its commitments under the Protocol.[56] In keeping with the "well-founded fear" test, the Act called for an individualized assessment of refugee status taking into account both the applicant's subjective fear and objective justifications for that fear.[57] However, the Refugee Act also broadened the refugee definition under the Convention in order explicitly to include an applicant's experience of past persecution as a separate, independent ground for refugee status.[58] The past persecution standard in the Act contained one major internal tension: since the Convention contained no explicit past persecution ground, how could the statute be implemented so as to ensure that asylum applicants had not ceased to be refugees under the Convention's Cessation Clauses during the time since their experience of persecution? The INS and the Department of Justice fleshed out this problem over the course of ten years of BIA jurisprudence, culminating in a 1990 regulation that clarified both the implementation of the past persecution ground and the relationship between the statute's refugee definition and the discretionary grant of asylum.[59]

A milestone BIA case, *In re Chen*, grappled with these contradictions.[60] In that case, the applicant, a Chinese national, had suffered severe torture at the hands of public officials throughout his childhood because his father was a Christian minister. As a result, he was permanently physically

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[54] At the time of the Protocol's ratification the three refugee protection procedures available in the U.S. were withholding of deportation, conditional entry, and parole. MUSALO ET AL., *supra* note 6, at 65.

[55] *Id.*

[56] *See* S. REP. 96-256, at 2 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 142 (indicating that a desire to revoke "discriminatory" refugee policies motivated passage of the Act); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (noting that bringing U.S. refugee law into conformity with U.S. obligations under the Protocol was a "primary purpose" of the Act).

[57] *See* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101 (1997).

[58] *Id.* It should be noted, however, that the Act requires that the alien be "unable or unwilling" to return to his home country because of the past persecution. Therefore, the mere showing of past persecution is not sufficient to merit refugee status under the Act. Practically speaking, however, it may be assumed that asylum applicants are unwilling to return to their country of origin.

[59] *Id.*

[60] *In re* Chen, 20 I. & N. Dec. 16 (BIA 1989).

handicapped and harbored suicidal urges. Chen advanced his application solely on the basis of this past persecution. For the first time, the BIA gave real content to the past persecution ground in the asylum adjudication process, stating, "[P]ast persecution and a well-founded fear of persecution are alternative methods of establishing eligibility for refugee status . . . . [Once an applicant] establishes that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum."[61]

At the same time, however, the BIA made clear that in the asylum setting a showing of past persecution merely triggers a *presumption* of a well-founded fear of persecution. Although past persecution and fear of future persecution form independent grounds for refugee status, the well-founded fear remains the core element of the asylum standard. The Board traced the broad outlines of a burden-shifting mechanism under which an asylum applicant may meet her initial burden simply by proving past persecution. Upon this showing, the burden transfers to the INS to prove "little likelihood" of future persecution.[62] Should the INS fail to meet its burden, the applicant will be eligible for a favorable exercise of discretion by the Attorney General. If the INS meets its burden, then the Attorney General is entitled to deny asylum in an exercise of discretion. The proof of little likelihood of future persecution does not, however, prohibit a grant of asylum. If the applicant has endured particularly severe persecution or is unable to repatriate successfully, she may be granted asylum on humanitarian principles.[63] In *Chen*, the BIA took administrative notice of the changed country conditions in China to conclude that, with the accession of Deng Xiaoping to power and the end of the Cultural Revolution, the political landscape of China had changed enough that the applicant would not encounter a comparable threat of religion-based persecution if returned. However, the BIA granted Chen asylum on humanitarian grounds, noting both the lifelong effects of his injuries and the fact that he lacked enduring family ties in China.[64] In deciding to grant asylum on a humanitar-

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[61] *Id.* at 18.

[62] *Id.* at 17-18, 20-21.

[63] *Id.* at 19.

[64] *Id.* at 19-21. The "humanitarian grant" of asylum, available to applicants who are not entitled to a presumption of a well-founded fear of present persecution, is derived from the Convention: "[A] refugee . . . 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. . ." does not cease to be a refugee despite fundamental changes in circumstances removing the basis of her fear. *See* Convention, *supra* note 14, at Art. 1(c)(5). After *Chen*, this humanitarian grant was

ian basis, the Board made an *ad hoc* decision; it did not set forth the weight to be accorded the severity of the past persecution or the personal and logistical problems associated with repatriation.

Chen's analysis was muddy in another important respect: it did not elucidate the burden-shifting mechanism it announced in past persecution cases. For example, after indicating that Chen had proven past persecution, but that changed country conditions had undercut the political situation giving rise to his fear, the Board remarked that "the respondent has not met his burden of establishing a well-founded fear of persecution."[65] The BIA effectively applied a double standard to Chen, requiring that he prove both past persecution *and* a fear of future persecution in order to establish his eligibility for a discretionary grant of asylum. Moreover, the Board provided relatively little guidance on the scope of the INS's burden of rebuttal, noting merely that the Service must show "little likelihood" of future persecution. It confused the matter further by listing improved political conditions in the country of origin as the only example of a factor enabling the INS to fulfill its rebuttal burden.[66]

The ensuing debate over the scope of the past persecution ground may be traced largely to opposing interpretations of the scope of the INS's burden of rebuttal under *Chen*. Should readings of the case be limited to its facts, permitting only significant changes in political conditions in the country of origin to rebut the presumption in favor of the applicant in past persecution cases? Conversely, should instead any development diminishing the likelihood of future persecution—including personal circumstances—suffice to fulfill the Service's burden? Similarly, does a regime change ousting the applicant's former persecutor presumptively show little likelihood of future persecution, or may the applicant demonstrate that she fears persecution from a new government or other group on the basis of the same protected grounds? *Chen* did not touch on the issues of personal circumstances or regime change; while the BIA noted the advent of a more moderate ruler, Deng Xiaoping, it based its finding of changed circum-

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codified in 8 C.F.R. § 208.13(b) (1998).

[65] *In re* Chen, 20 I. & N. Dec. at 21.

[66] Some commentators have construed *Chen* as providing that *any* proof of little likelihood of future persecution suffices to meet the INS burden. *See* Timothy McIlmail, *Toward a More Reasonably Rebutted Presumption: A Proposal to Amend the Past Persecution Asylum Regulation*, 12 GEO. IMMIGR. L.J. 265, 272 (1998). *But see* 8 C.F.R. § 208.13(b)(1) (2000), which "applied" *Chen* more narrowly, requiring a change of conditions in the country of origin, or proof that the applicant can avoid future persecution by moving to another part of the applicant's country.

stances more broadly on general improvements in China's human rights situation after the Cultural Revolution.[67] The BIA in *Chen* readily admitted that it did not reach many of the thorniest aspects of the past persecution presumption. Responding to the INS's argument that the BIA's stance on past persecution would lead to "endless litigation" and "frivolous claims," the Board merely stated, "[W]e believe that past persecution can form the basis for an asylum claim under the statute. When such claims are made, we believe that they can best be handled on a case-by-case basis."[68]

D. Asylum Regulation of 1990

The asylum regulation promulgated by the Department of Justice in 1990 responded to *Chen* by clarifying the respective burdens of the applicant and the Service in past persecution cases. The regulation was now compliant with the United States' obligations under the Refugee Protocol. It also set forth the criteria governing the humanitarian grant for applicants who failed to meet the past persecution criteria for asylum. The regulation stated that a person who makes a showing of past persecution is presumed to have a well-founded fear of future persecution unless "a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he [or she] were to return."[69] The regulation clearly resolved one of the problematic points addressed above—the role of personal circumstances in determining whether the INS has met its burden of proving little likelihood of future persecution—by stating that the INS may invoke only changed country conditions to carry its burden. This narrowing of the available rebuttal evidence to country conditions is consonant with international law; the *Handbook* provides that only political changes suffice to remove the basis of persecution under the Convention.[70]

The regulation did not expressly address the second aspect of the burden of INS rebuttal considered in this Note: the problem, arising most often in cases of regime change, of whether the INS may merely demonstrate that the applicant no longer may reasonably fear persecution by the same agent; or whether the Service must show that the applicant no longer fears persecution from *any source*. However, until the 1998 case *In re*

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[67] *See In re* Chen, 20 I. & N. Dec. at 21.

[68] *Id.* at 21-22.

[69] 8 C.F.R. § 208.13(b)(1)(i) (1990).

[70] See UNHCR HANDBOOK, *supra* note 17, ¶ 135.

N—M—A—, the Board appeared to apply an *expressio unis* analysis: it construed the regulation to provide that even if the applicant feared persecution from a new regime the Service could not prove rebuttal, so long as the applicant had an ongoing fear of persecution from *any source* on one of the five protected grounds.

Finally, the 1990 asylum regulation added flesh to the bones of the humanitarian grant set forth in *Chen*. Past persecution applicants who are ineligible for a discretionary grant because the adjudicator found no continuing fear of persecution may receive a humanitarian grant if "it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his [or her] country of nationality . . . arising out of the severity of the past persecution."[71] This provision echoes the language of the Convention, which provided a humanitarian grant for those whose refugee status was negated by the Cessation Clauses, in an almost identically-worded passage.[72] One major difference, however, rendered the humanitarian grant under the 1990 regulation narrower than the Convention: the Convention did not require that the applicant's reason to refuse return be linked to the severity of the past persecution.

E. Revised Asylum Regulation of 2000

Although the 1990 regulation both codified *Chen* and elaborated on it to ensure substantial compliance with the 1980 Act and the Convention, confusion lingered: when could refugees under the Act be denied asylum in the exercise of discretion? This continuing uncertainty did not result from faulty drafting of the regulations, but instead from dramatic shifts in both American politics and worldwide population movements during the 1990s, which caused Department of Justice policymakers to rethink some aspects of the regulation.[73] The influx of two new groups of asylum-seekers—those fleeing governments in transition from Communism to democracy and those victimized by unrepeatable harms—will be addressed in Parts III and IV below. Just as importantly, on the national level, the Illegal Immigration Reform and Immigration Responsibility Act of 1996

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[71] 8 C.F.R. § 208.13(b)(1)(ii) (1990).

[72] *See* Convention, *supra* note 14, at Art. 1(c)(6).

[73] Between 1988 and 1995, the annual number of asylum applications in the United States rose from 88,100 to 224,000. *See* European Migration Centre, Annual Number of Asylum Applications Submitted in Selected Countries (1988 to 1997), at http://www.emz-berlin.de/Statistik/weflu006.htm (last visited Apr. 11, 2003).

("IIRIRA") imposed additional statutory bars on asylum for some applicants considered to be national security threats. IIRIRA also instituted an "expedited removal" scheme permitting asylum officers to screen aliens arriving in the country illegally through "credible fear" interviews before making a non-reviewable decision whether to remove the individuals or permit them to apply for asylum.[74] This combination of external migration pressures and internal political shifts toward restricting immigration may have contributed to the Department of Justice's decision to modify its asylum regulation in 1998, ensuring that it did not permit a wider realm of asylum eligibility than mandated by treaties or domestic statutory law.[75]

The 1998 proposed rule suggested several significant changes to the regulation. First, for the protection of asylum applicants, the proposed rule elaborated the evidentiary burdens in past persecution cases: once the applicant makes a showing of past persecution, the burden shifts to the Service to demonstrate that no well-founded fear currently exists.[76] Second, the rule changed the wording of the INS rebuttal provision to set a higher substantive standard for the Service's showing: it must demonstrate "no reasonable possibility" of future persecution, rather than "little likelihood," as stated in the 1990 regulation.[77] Third, the proposed rule expanded the availability of humanitarian grants of asylum to those refugees unsuccessful under the past persecution provision. The proposed regulation featured a humanitarian grant both in cases of severe persecution and in cases in

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[74] *See generally* MUSALO ET AL., *supra* note 6, at 129. *See also* Michael D. Patrick, *The New Consequences of 'Unlawful Presence,'* 09/22/97 N.Y.L.J 3 (col. 1).

[75] *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,946 (June 11, 1998) (codified at 8 C.F.R. pt. 208) (stating that the goal of the proposed past persecution regulation is to ensure that the past persecution presumption works to the advantage only of those applicants who continue to fear persecution).

[76] *Id.* at 31,949 ("In cases where an applicant has demonstrated past persecution under paragraph (b)(1) of this section before an immigration judge, the Service shall bear the burden of establishing the requirements of paragraphs (b)(1)(i)(A) or (B) of this section."). The final regulation was amended to state that the INS bears this burden in *all* cases, including those before an asylum officer rather than an IJ. *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (codified at 8 C.F.R. pt. 208).

[77] *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. at 31,946 (noting that the new language conforms to the Supreme Court's well-founded fear standard in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

which "the applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal. . ."[78] This latter provision would permit the immigration adjudicator to consider a wide variety of factors, such as age, family ties, and the presence of civil unrest in the country of origin, in determining whether the applicant would face serious harm if forced to return.[79]

The first three changes listed inured to the benefit of applicants. Two other changes, arguably more momentous, restricted the scope of the Service's rebuttal burden, thereby decreasing the range of past persecution applicants eligible for asylum on non-humanitarian grounds. First, the proposed regulation implemented an "internal flight alternative" provision. While "well-founded fear" applicants bear the burden of establishing that they may not reasonably relocate to an area of the home country where they would not face persecution, past persecution applicants do not bear this burden.[80] However, the INS may rebut these applicants' eligibility by demonstrating that the applicant could avoid persecution by relocating.[81]

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[78] *Id.* at 31,949.

[79] *Id.* at 31,947. This broader humanitarian ground improves on the corresponding 1990 provision in two respects. First, this scope conforms more closely to the Convention, which does not require that applicants show "severe" persecution in order to be eligible for a humanitarian grant. (Notably, however, the HANDBOOK does not define the humanitarian grant so expansively; it provides that this grant should issue only in the "special case where a person may have been subjected to very serious persecution in the past. . . ." UNHCR HANDBOOK, *supra* note 17, ¶ 136.) Second, it adheres more to the logic of *Chen*; in that case, the decision to grant the applicant asylum on humanitarian grounds was based on both the severity of his prior mistreatment, his health, and his inability to reacclimate to life in China. *See In re* Chen, 20 I. & N. Dec. 16 (BIA 1989); *see also In re* H—, 21 I. & N. Dec. 337 (BIA 1996). This broadened ground is especially significant in light of the fact that appeals courts have given a very narrow construction to the "severe persecution" provision in the humanitarian grant, suggesting that only persecution rising to the level of the Holocaust in its inhumanity would render the individual eligible for the grant. *See generally* Boed, *supra* note 14, at 174 n.227.

[80] *See* 8 C.F.R. § 208.13(b)(3)(i)-(ii) (2002).

[81] *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. at 31,949. This Note does not assess the impact of the internal flight alternative ("IFA") provision, but it arguably plays a dramatic role in limiting the availability of the past persecution presumption. The new prominence of the IFA in the U.S. asylum regulation may be inspired in part by Canadian refugee law, which provides that the claimant is not a refugee unless the adjudicator is satisfied that no internal relocation possibility exists. *See generally* MUSALO ET AL., *supra* note 6, at 209. Both the new U.S. regulation and Canadian law place

Secondly, and most critically for the present analysis, the proposed rule stipulated that an IJ may find the past persecution presumption rebutted if "the applicant does not face a reasonable possibility of future persecution. . . ."[82] Omitting the requirement of changed country conditions, the rule would allow the Service to draw evidence from any source to show that an applicant's fear is extinguished—even if the evidence relates to the applicant's personal circumstances.[83] In proposing this rule, the Department clearly targeted unrepeatable harms, such as forced sterilization and FGM.[84]

In the notice-and-comment period following the 1998 proposed rule, thirty-five parties responded to the suggested changes. Twenty-six of the commenters sought wholesale abandonment of the proposed changes to the past prosecution provision, on two main grounds: first, that the Attorney General had acted *ultra vires* in limiting the grounds for asylum eligibility available in the INA;[85] and second, that the proposed changes in evidence admissible to rebut the claim violated customary international law, as articulated in the *Handbook*.[86] The other nine commenters, while not demanding complete withdrawal of the rule, nonetheless objected to almost

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more emphasis on the IFA than the *Handbook*, which provides that proof of countrywide persecution is *not* essential to establishing a valid asylum claim. *See* UNHCR HANDBOOK, *supra* note 17, ¶ 91. The *Handbook* does, however, provide that a showing of a *reasonable* IFA option may, under some circumstances, defeat an asylum claim. *Id.* UNHCR has more recently specified that IFA should be considered only where the asylum applicant fears persecution by a private actor, the state cannot control the actor, and effective state protection would be available in another part of the country. *See* MUSALO ET AL., *supra* note 6, at 208.

[82] New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. at 31,949.

[83] *Id.* at 31,946 - 31,947.

[84] *Id.* (discussing *C—Y—Z—*, a forced sterilization/abortion case in which the Board applied the rule that only country conditions may rebut a past persecution claim, but at the same time appeared to contest the rule's logic). *See infra* Part IV. Under the amended Act, forced sterilization or abortion constituting part of a population control program is deemed to be a form of persecution. *See* Immigration and Nationality Act § 101(42)(B), 8 U.S.C. § 1101(a)(42) (1997).

[85] *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000) (codified at 8 C.F.R. pt. 208).

[86] Unlike the proposed regulation, which provided that any information indicating the absence of an ongoing fear might obviate the applicant's claim, the HANDBOOK provides that only "fundamental changes *in the country*" may negate the applicant's claim. UNHCR HANDBOOK, *supra* note 17, ¶ 135 (emphasis added). *See infra* Part IV.

all of the proposed modifications.[87] Given the fact that the proposed rule, as noted above, contained provisions both expanding and restricting the past persecution ground—both "pros" and "cons" from the perspective of asylum advocates—this univocal rejection seems surprising. Upon parsing the proposed rule, however, it is clear that the proposals disadvantaging applicants—the internal flight alternative provision and the admission of any evidence to fulfill the Service's rebuttal burden—actually expanded the subject matter available to the INS to defeat a past persecution claim after the applicant has met her burden. Their effect did not depend upon the agency's construction of the regulation. The proposals benefiting applicants, on the other hand, such as the additional "other serious harm" humanitarian prong and the shift of the rebuttal showing from "little likelihood" to "no reasonable possibility," would likely have a much more attenuated effect, since they were contingent upon IJs' construction of the two new standards. The burden of proof provision, ostensibly benefiting applicants, held little punch since the doctrine of administrative notice permits the asylum adjudicator effectively to fill the Service's burden of proof for it through the introduction of country condition reports.[88]

In its final regulation, the Department of Justice rebuffed most of the comments, leaving the proposed rule largely intact. Responding particularly to the *ultra vires* contention, the Department reminded commenters that the Attorney General has the authority to place narrower limits on asylum eligibility than the statute places on refugee status.[89] At the same time, the final rule implemented three changes, none of which, from the perspective of asylum advocates, fully remedied the damaging aspects of the proposed rule. In a nod to the language of the *Handbook*, the final regulation deletes the "no reasonable possibility of future persecution" clause designating the Service's rebuttal burden, providing instead that the burden is met where "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution."[90] This language partially echoes the *Handbook*'s requirement that only a "fundamental change in the country" may negate the prospective refugee's

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[87] *See* Asylum Procedures, 65 Fed. Reg. at 76,126.

[88] *See infra* Part V.

[89] *See* Asylum Procedures, 65 Fed. Reg. at 76,121, 76,126 (noting, in response to comments that the new regulations were *ultra vires*, that the INA permits the Attorney General to impose asylum criteria supplementing those set forth in the statute).

[90] Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i)(A) (2000).

fear of persecution, but it omits the *Handbook*'s requirement that the change pertain only to circumstances in the applicant's country of origin.[91] The final regulation also clarifies that the burden-shifting scheme applies to adjudications by asylum officers, as well as IJs. Finally, and perhaps of most concern to asylum advocates, the regulation, in its statement of purpose, incorporates the BIA's opinion in *In re N—M—A—*, which held that the INS's rebuttal burden in past persecution cases is limited to disproving a continuing threat emanating from the application's previous persecutor.[92]

III. LIMITING THE SCOPE OF THE INS BURDEN: *IN RE N—M—A—*

Like the post-World War II era that spawned the international law framework for refugee status, the 1990s witnessed both widespread regime change and rapid shifts in political ideologies and methods of government. These trends were especially pronounced in Eastern Europe, where nascent democracies struggled with no preexisting infrastructures for representative government and only weak systems for providing social services. These chaotic circumstances tested the mettle of a refugee regime founded on an individualized inquiry into the asylum-seeker's basis for fearing persecution; such an inquiry would involve investigating country conditions in constant flux and the developing policies of new regimes toward religious, political, ethnic and social groups. Arguably in response to these challenges, the Department of Justice instituted a "same source" rule, first articulated in *In re N—M—A—*.[93] This rule provided that the INS may meet its burden of rebuttal in past persecution cases by demonstrating that the applicant's previous persecutor no longer poses a threat; thus, it impeded asylum eligibility for some applicants fleeing turbulent political conditions in the former Soviet bloc. Pragmatic foreign policy considerations may have dictated this partial abdication of international law refugee designation principles. As the *Galina* case demonstrated, the United States often supported fledgling post-Soviet regimes accused by asylum-seekers of continuing their predecessors' legacies of mistreating minorities.[94] As one scholar notes, in the post-Soviet era, "[l]ittle gain could be gleaned from the

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[91] UNHCR HANDBOOK, *supra* note 17, ¶ 135.

[92] *See In re* N—M—A—, 22 I. & N. Dec. 312 (BIA 1998).

[93] *Id.*

[94] *See supra* Part I.

'trophy refugee,' the living symbol of the rival ideology's failures."[95] This Part argues that the "same source" rule exceeds the statutory authority set forth by the INA; the rule also flies in the face of both the individualized test for refugee status in the Convention and the post-World War II rationale for the past persecution ground as an aid to refugees fleeing chaotic country conditions.

A. *The Broad Nexus Set Forth in* Chen *and the* Handbook*: Unchanged Basis of Fear*

Under *In re Chen*, as codified and altered in the 1990 asylum regulation, an applicant's showing of past persecution served alone to meet the applicant's burden of proof. While "well-founded fear" cases involve both objective and subjective components—separate analyses of the credibility and the sincerity of the applicant's fear—the applicant's burden in a past persecution case may be met by a purely objective showing of past events.[96] Under *Chen*, an applicant could be denied asylum in the exercise of discretion after meeting this burden of proof if the Service demonstrates that "there is little likelihood of present persecution."[97] The standard announced in *Chen* does *not* indicate that past persecution triggers a presumption only of similar or identical persecution in the future.

Moreover, the Convention and the *Handbook*, extensively cited in both *Chen* and the statement of purpose to the 2000 asylum regulation, support the view that the presumption is limited only by the *basis* of the applicant's fear, an internal standard—not the identity of the persecutor, an external one. Under the Convention's Cessation Clauses, refugee status ends when the individual "can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."[98] In glossing this provision, the *Handbook* notes that "'circumstances' refer to fundamental changes in the country, which can *be assumed*

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[95] Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 33 VA. J. INT'L. L. 13, 28 (1994).

[96] *See In re* Chen, 20 I. & N. Dec. 16, 18 (BIA 1989).

[97] *Id* at 18. The corresponding standard in the current regulation reads as follows: "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality. . . ." Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i)(A) (2000).

[98] Convention, *supra* note 14, at Article 1(C)(5).

to remove the basis of the fear of persecution."[99] This emphasis on the fear's basis reinforces the ultimate reference point in modern refugee determinations: "the general concept of 'fear' for a relevant motive."[100] By this reasoning, a political shift may not be deemed to eliminate the basis of an applicant's fear of persecution, absent an individualized inquiry into the new regime's motive—its attitude toward the characteristics that originally made the applicant a target for persecution. The facts of the *N—M—A* case, in which the applicant feared persecution at the hands of both secular and Islamist regimes, dramatically show that persecutors with opposite ideologies may target the same groups for mistreatment.[101]

A plain-language reading of *Chen* and the *Handbook*'s gloss of the Cessation Clauses indicates that, in the burden-shifting scheme advanced in *Chen*, the INS must demonstrate that the applicant no longer has *any* present fear of persecution based on the same protected ground that formed the basis of the past persecution, without respect to the form or source of the threat.

B. The "Same Source" Requirement of In re N—M—A—

A 1998 BIA case, *In re N—M—A—*, significantly alters the burden-shifting mechanism announced in *Chen* in two respects. First, the holding limits the Service's burden of proof by imposing a requirement that the agents of the past persecution and of the feared future persecution be identical.[102] Second, it injects a procedural wrinkle in the form of a reverse burden shift. If the Service demonstrates that the applicant does not fear persecution from the same source, "the applicant bears the burden of demonstrating that he has a well-founded fear of persecution from any new source."[103] Effectively, this provision returns to square one any asylum applicant who fears mistreatment at the hands of a different persecutor; she must prove both the subjective and objective elements of her present well-

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[99] UNHCR HANDBOOK, *supra* note 17, ¶ 135 (emphasis added). On a general level, the clauses establish that, in order for a past experience of persecution to continue to support refugee status, the *basis* of the refugee's fear of persecution must remain unchanged—*not* that the means by which that fear might be brought to fruition be identical.

[100] *Id.* ¶ 37.

[101] *In re* N—M—A—, 22 I. & N. Dec. 312 (BIA 1998).

[102] *Id.*

[103] *Id.* at 316.

founded fear.[104] Making this showing is particularly difficult when dramatic political change followed the applicant's flight.[105] Thus, the holding restricts the availability of past persecution as a truly independent asylum eligibility ground to those cases in which the applicant's original persecutor continues to pose a significant threat.

The applicant in *N—M—A—*, an Afghan *mujahidin* sympathizer, was persecuted by the communist government in 1989 because of his and his father's affiliations with a *mujahidin* faction.[106] In 1995, the IJ denied the applicant's claim based on administrative notice of changed country conditions. The *mujahidin*-sympathetic Jamiat faction, under Bernahuddin Rabbani, toppled the communist regime in 1992.[107] At the asylum hearing the IJ noted that the applicant still faced a risk of harm due to Rabbani's tenuous grip on power, but he stated that the applicant's fear resulted more from the chaos and remnants of civil war in the country than from a well-founded fear of persecution.[108] On appeal to the BIA, the applicant submitted evidence that since the original adjudication of his claim, the Taliban—not sympathetic to the *mujahidin*—had taken over almost three-fourths of Afghanistan.[109] Just as he had faced a threat from the communist government because his religious views conflicted with that regime's secularism, he now feared persecution by the Taliban because its extreme religious orientation conflicted with his more moderate beliefs and his support for democracy.[110]

Although the applicant's past persecution and his fear of future persecution arose from the same basis—government disapproval of his religious and political affiliations—the BIA found that the Service had met

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[104] My thanks to Mark von Sternberg, Senior Attorney, Refugee Services, Catholic Charities Archdiocese of New York, for this characterization of the *N—M—A—* burden shift.

[105] *See infra* Part III.D.

[106] The applicant was persecuted by the communist supported government in 1989 when the communist secret police discovered that his father had supplied clothing and medical supplies to the faction. The secret police abducted his father; the applicant never saw his father again. After the kidnapping, the applicant agreed to circulate fliers for the same faction his father had supported. The communist secret police again raided his home, found one of the fliers, and detained the applicant for one month. During this period the applicant was hit, kicked, and deprived of food for three days. *See In re* N—M—A—, 22 I. & N. Dec. at 314.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 316.

its burden of proving that the applicant no longer faced a well-founded fear.[111] Extending both the holding of *Chen* and the plain language of the 1990 regulation in an unforeseen manner, the Board construed them to require a nexus not just between the protected characteristics motivating past and feared future persecution, but also between the perpetrator of past persecution and the agent of the current threat.[112]

The majority construed the past persecution presumption as "an evidentiary presumption founded on the probability of a past event being indicative of a future event."[113] It viewed reasonable foreseeability as the rationale behind the presumption: "Because it is foreseeable that a persecutor would continue to be interested in one of his victims of persecution, the regulation removes the burden from the applicant to show that he may suffer persecution again at the hands of his past persecutor."[114] This interpretation, the majority stated, supports the accurate view of asylum as "a prophylactic protection for those who might face future persecution," not as a "remedy [for] the past."[115] This reading views the presumption as merely evidentiary and conducive to administrative efficiency; a showing of past persecution serves as a convenient proxy for proof of a present well-founded fear.[116] Allowing past persecution from one source to stand in for proof of feared harm from a different source would, under this reasoning, grant the applicant a windfall. Second, the majority cited the Cessation Clauses of the U.N. Convention to argue that, in order for the underlying circumstances of the past persecution to remain in existence, the applicant's present well-founded fear must emanate from the original persecutor.[117] The majority stated that its holding "does not stand for the proposition that any change in a regime automatically reverts the burden of proof back to the applicant to show that he has a well-founded fear of persecution from the changed regime or its successor."[118] The holding does, however, effectively limit the past persecution presumption in regime-change situations to two scenarios: either the original persecutor retains enough political control to pose an ongoing threat, although it does not lead the country; or the group that has risen to power in the previous

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[111] *Id.* at 317.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 316.
[116] *Id.*
[117] *Id.* at 318.
[118] *Id.* at 320.

persecutor's place does not have effective control over the previous persecutor.[119]

The dissenters in the case, on the other hand, read the past persecution presumption in American asylum law as a "humanitarian," rather than an "evidentiary," standard.[120] In a vigorous dissent, Board Member Lory Rosenberg contended that the majority borrowed selectively from the Convention in order to bolster a position which had no foundation in international law.[121] Rosenberg also argued that the majority acted *ultra vires* in extending the meaning of the regulation.[122] Rosenberg commented,

> "By interjecting into our application of the existing regulation—and our precedent—new and narrowing concepts that require evidence of the continuation of a 'particular threat' from an 'original persecutor' as opposed to a 'new source,' the majority has acted to restrict access to asylum based on past persecution to refugees in whose countries 'conditions' have been absolutely static."[123]

Some commentators, agreeing with the dissent, have noted that the *N—M—A—* holding threatens to "swallow" the past persecution ground entirely by dramatically diminishing the INS's rebuttal burden.[124]

C. In re N—M—A— *Unlawfully Extends the Regulation and Violates International Law Principles*

When assessed with an eye to the text of the asylum regulation (in its 1990 and 2000 forms), the enabling act, and the international refugee instruments, *N—M—A—* appears both to lack textual support and to undercut basic purposes of the past persecution ground. *N—M—A—* putatively only narrows the scope of the INS's burden of rebuttal in past persecution cases. In reality, however, it significantly alters the asylum adjudication, permitting the INS to satisfy its burden in cases of regime

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[119] *Id.*

[120] *Id.* at 327 (Rosenberg, J., dissenting).

[121] *Id.*

[122] *Id.*

[123] *Id.* at 330. This Note does not touch on the "same type" criterion implied in the opinion—the requirement that the applicant fear the same sort of persecution in the future as well as persecution from the same source.

[124] *See* Eleanor Acer & Beth Lyon, *And the Boat Is Still Rocking: Asylum Practice Update in the Midst of Shifting Regulations and Caselaw: Part Two*, 99-03 IMMIGR. BRIEFINGS 1, 3 (Mar. 1999).

change through generalized facts, without an individualized inquiry into the applicant's basis for fearing persecution.

First, as noted above, the Convention demands that the adjudicator assess the prospective refugee's subjective fear of persecution and the objective circumstances that gave rise to it.[125] A fundamental change in circumstances removing the basis of the applicant's fear may not be a purely external factor, such as a de jure regime change; the change must relate to the applicant's protected characteristic or affiliation. Hannah Arendt's case study of modern dictatorships, *The Origins of Totalitarianism*, makes clear that no matter what their political orientation, these regimes share the tendency to create pariahs.[126] Particularly if precedents of unequal treatment are deeply ingrained, assuming regime change to eradicate the "basis" of the applicant's fear is a tenuous claim.[127] Moreover, given that regime change often merely places the reins of human rights abuse in new hands—not changing the fundamental values and practices of a government—the *Handbook*'s "fundamental change" requirement is at cross-purposes with the "same source" rule of *N—M—A—*.[128]

Second, the holding arguably exceeds the scope of the agency's delegated authority under the Immigration and Nationality Act. The INA provides that the Attorney General "may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act." The Department of Justice cited this grant in its statement of purpose accompanying the 2000 regulation.[129] The Act provides that past persecution may serve as an independent basis of

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[125] UNHCR HANDBOOK, *supra* note 17, ¶ 37.

[126] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM xxxiii (1973).

[127] As Board member Rosenberg noted in dissent, characterizing the government alone as the "basis" for the applicant's fear, without assessing its relationship to his opinions, mischaracterizes the subjective element of well-founded fear standard. *See In re* N—M—A—, 22 I. & N. Dec. at 332.

[128] The Department of Justice implicitly acknowledged the tension between the new "fundamental change" provision and the "same source" rule in its preamble to the amended 2000 regulations. There, drafters of the regulation stated that the fundamental change requirement "is not intended to alter the holding in . . . *N—M—A—*." Asylum Procedures, 66 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (to be codified in 8 C.F.R. pt. 208). *See In re* N—M—A—, 22 I. & N. Dec. at 325. *Cf.* UNHCR Handbook, *supra* note 17, ¶ 136 ("Even though there may have been a change of regime . . . , this may not always produce a complete change of mind in the attitude of the population. . . .").

[129] *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000) (codified at 8 C.F.R. pt. 208).

refugee status so long as it renders the individual "unwilling or unable" to return to the country of origin.[130] A "same source" requirement is not consistent with this standard; as noted above, regime change does not routinely coincide with improvement in human rights practices. The "same source" rule injects into the asylum determination a rule unrelated to the validity of the ongoing fear of return, and is therefore counter to the purposes of the INA's asylum provisions.

Defenders of both *N—M—A—* and the 2000 regulation argue that to decry them as exceeding the scope of the statute is to confuse statutory refugee status with entitlement to a positive exercise of discretion.[131] This formalistic argument overlooks the fact that such a discrepancy between statutory refugee status and eligibility under the regulation creates a no-man's-land in which individuals entitled by the international instruments to seek refuge from persecution may no longer invoke the past persecution ground for asylum. The legislative history of the 1980 Refugee Act sheds light on the extent of the discretion that the Act conferred when permitting the Attorney General to impose additional restrictions on asylum criteria. The Senate report stating the purpose and background of the Act cites with support a letter from Senator Ted Kennedy to Secretary of State Cyrus Vance, in which Kennedy spoke of the "urgent need for the United States to begin to take the steps necessary to establish a long range refugee policy—a policy which will *treat all refugees fairly and assist all refugees equally*."[132] Imposing limits on the asylum adjudication unrelated to the statutory standard (whether past persecution has rendered the applicant unwilling and unable to return) would appear to contravene this goal. Moreover, addressing asylum provisions, the report repeatedly states that the U.N. Protocol should govern the substantive standard for asylum.[133] As noted above, a change in the identity of potential persecutors does not always mean that the circumstances surrounding the applicant's persecution have ceased to exist, as required by the Convention and Protocol. The Senate report indicates that the *N—M—A—* holding, as incorporated into

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[130] Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101 (1997).

[131] *See generally* Asylum Procedures, 65 Fed. Reg. at 76,127 (stating concisely of purpose behind 2000 regulation changes); *see also* McIlmail, *supra* note 66 (arguing that limitations on the Attorney General's exercise of discretion do not render asylum regulations *ultra vires*, so long as the statutory refugee definition remains consonant with the international instruments).

[132] S. REP. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 142 (emphasis added).

[133] *See id.* at 8.

the regulation, narrows the scope of the past persecution-based asylum grant to an extent unforeseen by the statute.

Finally, the *N—M—A—* holding exceeds the scope of the 1990 asylum regulation, as noted by Board Member Rosenberg.[134] It extends the regulation, even in its 2000 version, in a manner endangering applicants' procedural due process rights. According to the text of both the 1990 and 2000 versions, only a showing that the applicant no longer has a well-founded fear of persecution fulfills the Service's rebuttal burden.[135] As noted above, showing that a specific past persecutor no longer poses a threat does not disprove an ongoing fear of persecution. Some federal circuits have held that, in order to observe the asylum applicant's procedural due process rights under the regulation, the asylum adjudicator must conduct an individualized analysis to determine how country changes impact the applicant's fear of persecution.[136] As Board Member Rosenberg argued in dissent, a holding that effectively limits the Service's rebuttal burden on the basis of an external political factor such as regime change, without an inquiry into its effects on the applicant, denies that applicant the right to an individualized adjudication.[137] The restriction dramatically reduces the scope of the the presumption to which the applicant is entitled and does not represent a reasonable inference from the text of either the 1990 or the 2000 regulation, even though the statement of purpose accompanying the 2000 regulation expresses the Department of Justice's intent to retain the holding. The *N—M—A—* rule also effects a significant procedural change unanticipated by the language of the regulation by reverting the burden of proof to the applicant even in a situation where the BIA has not found the applicant's fear of persecution alleviated.

D. *The* In re N—M—A— *Rule Gives Rise to Cursory Conclusions that a Source of Past Persecution No Longer Exists*

Even for those applicants who *do* fear future harm from the agent of past persecution, the *N—M—A—* rule risks inaccurate denials of asylum. The dissenters' position in the case realistically acknowledges the difficulty

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[134] *See In re* N—M—A—, 22 I. &. N. Dec. at 330.

[135] *See* Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i) (1990); 8 C.F.R. § 208.13(b)(1)(i)(A) (2002).

[136] *See generally* Fergiste v. INS, 138 F.3d 14, 19-20 (1st Cir. 1998) (holding that the BIA may accept only individualized facts, rather than legislative facts concerning regime change, to find that the INS has met its burden of rebuttal).

[137] *See In re* N—M—A—, 22 I. & N. Dec. at 331.

of ascertaining the source of an asylum applicant's fear of persecution. The *N—M—A—* holding may permit improper denials for two categories of applicants: those who, because their group is equally mistreated by the former and current regimes, continue to have a well-founded fear in spite of regime change;[138] and those who continue to be threatened by a political faction that, while no longer in power, still wields considerable control over the applicant. The toppled faction may maintain power through the popularity of its party in certain areas of the country, through paramilitary organizations, or through the police force.[139] As Hannah Arendt notes in *The Origins of Totalitarianism*, repressive regimes operate chiefly by subterfuge and the bifurcation of formal and informal authority.[140] In this confusing environment, a faction nominally ousted may continue to pose a grave threat to citizens.

One commentator contrasts "formalist" and "dynamic" views of political power in the asylum assessment: formalists are more likely to view a report announcing the accession of a new leader to power as evidence that the perpetrator of past harms no longer has the power to persecute the applicant.[141] The *N—M—A—* holding, while stating that it does not automatically conflate a *de jure* regime change with the eradication of the applicant's fear of persecution from the previous regime,[142] risks permitting IJs, whose area of expertise is immigration law rather than geo-

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[138] In concept, these applicants are placed in the same position as any other "well-founded fear" applicants; they simply do not enjoy the presumption afforded by a finding of past persecution. In practice, however, once such applicants are forced to begin at square one, the proof of their case may be more difficult since they may no longer rely on a nexus between past mistreatment and present fears of persecution.

[139] While persecution is normally inflicted by the ruling government, it may also "emanate from sections of the population that do not respect the standards established by the laws of the country concerned"—groups over which the ruling regime does not exercise effective control. UNHCR HANDBOOK, *supra* note 17, ¶ 65.

[140] *See* ARENDT, *supra* note 126, at 474-76.

[141] *See* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 39-40 (2000) (arguing that the use of administrative notice to give outcome-determinative weight to human rights reports conflicts with the asylum-seeker's right to an individualized adjudication; the trend toward wholesale acceptance of such reports as indicators of a faction's ability to persecute constitutes a rise in "formalist" thinking).

[142] *In re* N—M—A—, 22 I. & N. Dec. 312 at 317.

politics,[143] to give disproportionate weight to superficial reports of country conditions in assessing whether the INS has met its burden of rebuttal. As Part IV below demonstrates, IJs and the BIA frequently take administrative notice of U.S. State Department or nonprofit organization human rights reports, or accept reports submitted by the INS as evidence of the applicant's lessened objective basis for fearing persecution. Evidence of regime change forms an enticingly simple alternative to assessing the complex power dynamics that result from the toppling of a repressive regime. The First, Seventh, and Ninth Circuits have blazed new paths in requiring that the BIA not accept generalized statements in human rights reports as wholesale evidence that the applicant no longer has a well-founded fear of persecution.[144] Nonetheless, the *N—M—A—* holding may yield an environment in which adjudicators rely on the "same source" requirement and then give excessive credence to general reports of regime change or human rights improvements. Because of the interrelationship of persecutors and the incapacity of even the best-informed IJs fully to assess the link between regime change and human rights improvements around the world, the *N—M—A—* holding prevents applicants from enjoying the past persecution presumption even when there is a significant factual nexus between past persecution and feared future persecution.

Notably, applicants ineligible for a past persecution grant due to *N—M—A—* have other available avenues to asylum. Even if their past persecution is not deemed "severe" by the IJ, they may seek a humanitarian grant under the "other serious harm" category.[145] In its proposal to add the "other serious harm" provision to the regulation, the Department of Justice cited *Matter of B—*, a case in which the applicant was granted asylum on

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[143] *See* Tome, *supra* note 10, at 437-38 (arguing that IJs in some circumstances lack the resources to make informed deductions about country conditions).

[144] *See infra* Part V. *See generally* Fergiste v. INS, 138 F.3d 14, 19-20 (1st Cir. 1998) (holding that the BIA may accept only individualized facts, rather than legislative facts concerning regime change, to find that the INS has met its burden of rebuttal); *see also* Galina v. INS, 213 F.3d 955, 958-59 (7th Cir. 2000) (holding that because State Department reports tend to "look on the bright side" when assessing human rights conditions in a country with which the United States has friendly relations, general statements in U.S. State Department reports noting human rights improvements may not alone fulfill the INS's burden of rebuttal); *see also* Castillo-Villagra v. INS, 972 F.2d 1017, 1030 (9th Cir. 1992) (holding that where the BIA takes administrative notice of regime change, the asylum applicant must be provided with the opportunity to rebut the noticed facts).

[145] Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(iii)(A)-(B) (2002).

humanitarian grounds due partly to the severity of his past persecution and partly to the chaotic atmosphere of civil war that would greet him were he returned to Afghanistan.[146] This may indicate that the Department considered this new humanitarian ground to be a gap-filler in regime change cases where, although the Service may demonstrate that the previous persecutor no longer has the capacity to harm, deportation would likely subject the applicant to mistreatment on the basis of a protected ground. In these cases, as well, the applicant might otherwise meet insurmountable barriers as a "well-founded fear" applicant, since tumultuous country conditions impede her from supplying proof that the new regime will single her out for persecution. Because humanitarian grants of asylum are considered under a "totality of the circumstances" test, however, with the factors balanced resting largely in the discretion of the agency, the "other serious harm" provision may not remedy the injustice worked by the *N—M—A—* rule. *N—M—A—* deprives past persecution refugees of an evidentiary presumption to which they are entitled under the text of the regulation, and it subverts the Convention's refugee designation principles by conditioning relief upon purely external political factors.

IV. NON-REPEATABLE HARMS AND THE "FUNDAMENTAL CHANGE" PROVISION OF THE 2000 REGULATIONS: EXPANDING THE EVIDENCE AVAILABLE TO THE INS TO REBUT THE PAST PERSECUTION PRESUMPTION

In the early 1990s, even as Congress prepared to tighten immigration controls, a movement developed to offer asylum to aliens who fled their countries because they had suffered or were threatened with inhumane procedures impairing their reproductive or sexual functions, such as forced abortion and sterilization and FGM.[147] In the landmark case *In re Kasinga*, the BIA found FGM to be a form of persecution.[148] In the wake of an

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[146] *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (June 11, 1998) (codified at 8 C.F.R. pt. 208) (citing *Matter of* B—, I. & N. Dec. 3251 (BIA 1995)).

[147] *See* Illegal Immigrant Responsibility and Immigration Reform Act (IIRIRA) § 601(a)(1), *amending* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1997). Congress enacted this provision in response to the BIA's holding in *In re* Chen, 20 I. & N. Dec. 16 (BIA 1989), in which the BIA denied asylum to an applicant who was threatened with coercive population control programs; on female genital mutilation, *see* Illegal Immigrant Responsibility and Immigration Reform Act § 645, 18 U.S.C. § 116 (2003), criminalizing the practice of FGM.

[148] *In re* Kasinga, 21 I. & N. Dec. 357, 357 (BIA 1996).

IIRIRA amendment to the INA defining forced abortion or sterilization of a person or his/her spouse as persecution when it is inflicted as part of a coercive population control program,[149] the immigration courts received an avalanche of asylum claims from victims of these abuses, and from applicants who feared that they or their spouses would fall victim to population control measures in the future.[150] In the case of victims of FGM or forced sterilization, immigration courts were faced with the daunting task of reconciling unrepeatable personal harms with the clause of the regulation providing that only changes in country conditions may fulfill the INS's rebuttal burden in past persecution cases.[151]

One commentator characterizes unrepeatable harms to the person under the 1990 regulation as an "irrebuttable presumption" of future harm.[152] Even if the persecutors continue such practices, the applicants cannot possibly fear similar harm in the future, since the first occurrence irrevocably damaged their bodies. As that author bluntly describes FGM, "Such an excision, or even a sunna-type procedure, if done 'correctly,' cannot be performed again; they are practices to be feared once."[153] The result, he argues, is "a particularly unsatisfying mechanical application divorced from reality"—a presumption without meaning.[154] This argument begs the question, raised in the *N—M—A—* case, of the required similarity of past and feared future persecution. For example, while an applicant may not suffer FGM twice, she may, through her objection to FGM, define herself as part of the social group of FGM victims targeted for government mistreatment because they speak out against the practice.[155] She would fear a different type of persecution, but one grounded in her prior experience of FGM. The treatment of unrepeatable harms in the asylum regulation pits

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[149] *See* Immigration and Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42) (1997). Forced sterilization is unrepeatable, effectively negating both the appellant's and his/her spouse's fear of future similar treatment. Forced abortion, a repeatable harm, does not raise the same issues.

[150] *See* Immigration and Nationality Act § 207(a)(5), 8 U.S.C. § 1157(a)(5) (2002) (Only 1000 aliens may be granted asylum on this basis each year. However, aliens may be granted withholding of removal on the basis of coercive family planning programs after the asylum quota has been met. Immigration and Nationality Act § 207(b)).

[151] Procedure for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i)(a) (1990).

[152] *See* McIlmail, *supra* note 66, at 276.

[153] *Id.*

[154] *Id.* at 274.

[155] *See In re* Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996).

two fundamental principles of international refugee law against each other: the respect to be accorded victims of atrocious harms; and the view of past persecution as a presumption of an ongoing well-founded fear, rather than an independently sufficient ground for asylum eligibility.

A. Looking Beyond Country Conditions to Determine Whether the Risk of Persecution Continues

In a series of cases in the mid-1990s, INS attorneys argued that the "country condition" requirement of the 1990 asylum regulation was phrased too narrowly to achieve the purpose of the *Chen* holding: ensuring that past persecution applicants enjoyed a presumption of asylum eligibility only as long as the INS could not prove future persecution unlikely.[156] The INS further contended that, because applicants faced little likelihood of similar future treatment in unrepeatable harm cases, they must demonstrate that the forced sterilization or abortion was carried out in such a way as to constitute an "atrocious form" of persecution.[157] In effect, the INS sought to limit the asylum eligibility of FGM victims to the humanitarian ground, despite the fact that it could not demonstrate country conditions eliminating the victims' fears, as the regulation required.[158] The BIA rejected this rationale in *In re C—Y—Z—*, granting asylum on the basis of the past persecution presumption to an applicant whose wife had suffered forced sterilization.[159] Confronted by the seeming illogic of its quandary, the BIA stated, "[T]he regulatory presumption of a well-founded fear of future

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[156] *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945 (June 11, 1998) (codified at 8 C.F.R. pt. 208).

[157] *In re* C—Y—Z—, 21 I. & N. Dec. 915, 921 (BIA 1997) (noting that the Service argued that the applicant be required both to prove past sterilization and to show that the procedure was "atrocious"; the Board rejected this reasoning). The INS argued that this heightened showing should be required in cases involving both forced sterilization and forced abortion, seemingly overlooking the fact that forced abortion is not an unrepeatable form of persecution.

[158] *See id.*

[159] An applicant for asylum may "stand in the shoes" of his/her spouse for the purposes of a past persecution asylum claim involving forced sterilization or abortion. *See id.* at 918. The BIA also found that, because population control programs often sterilize only one spouse to destroy the couple's fertility, spouses of sterilization victims may be assumed not to fear similar future treatment. *Id.* This factor did not influence the outcome of *C—Y—Z—*, however, since the Board held that only changed country conditions could rebut the presumption in favor of the applicant.

persecution may not be rebutted in the absence of changed country conditions, regardless of the fact that the sterilization of the alien's spouse negates the likelihood of future sterilization to the alien."[160]

In arguing that its rebuttal burden not be limited to country conditions, the INS relied heavily on the vague language of *Chen*. As noted above, that holding stated that the Service's duty was limited to showing "little likelihood" of future persecution. At the same time, it listed country conditions as the only example of evidence sufficient to support such a showing. One commentator notes that the 1990 asylum regulation merely "tightened up the BIA's reasoning in *In re Chen* with regard to the burden on the INS."[161] Viewed in this manner, the 1990 regulation constituted a discretionary limit on the evidence available to the INS to meet its burden of rebuttal.

On the other hand, an approach emphasizing U.S. obligations under the U.N. Protocol seeks to define the scope of the INS rebuttal burden by the language not of *Chen,* but of the *Handbook*, which is persuasive authority for American courts.[162] The *Handbook* provides that only a fundamental, durable change in conditions *in the applicant's country of origin* may remove the basis of an applicant's fear of persecution and thus deprive her of refugee status.[163] A regulation permitting changes in personal circumstances (such as the occurrence of FGM or forced sterilization) to bar asylum eligibility arguably restricts the benefits available to statutory refugees in contravention of international law.

In December 2000, the Department of Justice put this debate to rest by omitting reference to changed country conditions in the new regulation. The regulation now provides that the INS, to rebut past persecution applicants' presumption of asylum eligibility, must show that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality. . . ."[164] The Department emphasized its reliance on international law concepts embodied in the *Handbook*—such as the requirement that the change in circumstances be "fundamental"—in its concise statement of purpose to the new regulation. However, the new clause conflicted with the *Handbook* by implicitly allowing changes in personal circumstances to

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[160] *Id.* at 915.

[161] McIlmail, *supra* note 66, at 270.

[162] *See supra* note 16.

[163] *See generally* Acer & Lyon, *supra* note 124, at 3.

[164] Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(i)(A) (2002).

negate an applicant's future fear of persecution.[165] The Department noted that the "fundamental change" language, as well as the omission of country conditions in the standard, brought the asylum regulation into alignment with the INA standard governing termination of asylum.[166]

B. *The "Fundamental Change" Provision of the 2000 Regulations Contravenes International Law Principles and Subverts Congressional Intent*

The debate over the treatment of unrepeatable harms in the new asylum regulation centers on the same two questions at the heart of the "same source" requirement of *N—M—A—*.[167] First, is the past persecution presumption an evidentiary or humanitarian tool? Second, as long as the statutory refugee definition contained in the INA complies with the international human rights instruments to which the United States is a party, may the Department of Justice through regulation constrain the Attorney General's discretion to grant asylum to the extent that asylum is a virtual impossibility for a large group of refugees who have suffered unrepeatable harms?

The past persecution presumption was clearly designed as a complex accommodation of persecution's lasting effects—not as a strict evidentiary presumption. Accounts of the drafting of the IRO Constitution demonstrate that humanitarian motives, not motives of administrative efficiency, drove the first articulation of the past persecution ground.[168] Based on respect for the trauma that Holocaust victims endured, this ground was intended to acknowledge the fact that the wide-ranging negative effects of past persecution often prevent a refugee from remaining in the country where she suffered the harm. Some of these effects include the involuntary replaying of traumatic experience (today classified as post-traumatic stress symptoms) and the frequent isolation of past persecution victims from

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[165] *See id.*

[166] *See* Immigration and Nationality Act § 208(c)(2)(A), 8 U.S.C. § 1158 (1997).

[167] *See supra* Part II.

[168] *See supra* notes 31-33. Under the Constitution, "Victims of the Nazi or fascist regimes" were defined as refugees despite the fact that these regimes had been removed from power when the document was drafted. *See* Constitution of the International Refugee Organization, February 16, 1946, 18 U.N.T.S. 3.

social and political life in their countries of origin.[169] Even if these negative experiences do not rise to the level of persecution, they do form part of an enduring legacy of past persecution. The *Handbook* also acknowledges the complex repercussions of past persecution.[170] The logic behind the 2000 asylum regulations, on the other hand, appears to regard persecution victims as receiving a windfall if they cannot demonstrate that they face a substantial probability of similar treatment if returned to their countries of origin.[171] This view greatly underestimates the lasting effects of persecution and deviates from the international law principles articulated in the UN Convention, the UN Protocol, and the *Handbook.*

The statement of purpose accompanying the amended 2000 asylum regulation defends limiting the availability of the past persecution ground to victims of unrepeatable harms on the argument that the regulation only constrains the discretion of the Attorney General in determining whether or not to grant asylum.[172] The statement goes on to provide that the amended regulation does not conflict with the statutory refugee definition contained in INA § 101(a)(42), which continues to define past persecution as an independent ground for refugee status.[173] One commentator makes a similar argument, noting that the amended past persecution regulations should be viewed as a roadmap governing the criteria for asylum grants, and not as an *ultra vires* limitation of the refugee definition.[174] While this distinction between statutory status and the exercise of discretion forms a tidy argument, it overlooks the fact that the regulation violates the spirit of the past persecution ground for refugee status by rendering a grant of asylum virtually impossible for many victims of the more atrocious forms of past persecution (such as forced sterilization and FGM), who often fall

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[169] *See generally In re* N—M—A—, 22 I. & N. Dec. 312 (BIA 1998) (Board Member Lory Rosenberg, dissenting) (arguing that the majority grossly mischaracterizes the nature of the past persecution presumption by labeling it an evidentiary tool).

[170] *See, e.g.*, UNHCR HANDBOOK, *supra* note 17, ¶ 136 (noting that, "even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his experiences, in the mind of the refugee").

[171] *See generally* McIlmail, *supra* note 66, at 272 (arguing that, where past persecution does not give rise to a substantial probability of similar treatment in the future, the past persecution ground constitutes a form of "compensation" rather than refuge).

[172] *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000).

[173] *Id.*

[174] *See* McIlmail, *supra* note 66, at 273.

within the refugee definition. Moreover, Congress, only three years before the promulgation of the regulation, expressed its will to provide remedies to victims of forced sterilization and abortion through an amendment to the INA classifying these practices as persecution.[175] A regulatory amendment so dramatically narrowing the availability of asylum to these refugees of special concern of Congress is at odds with the aims of the Act and hence, arguably, *ultra vires*.[176]

The harsh effects of the "fundamental change" rule, like those of the *N—M—A—* "same source" requirement, are to some degree cushioned by the broader, two-pronged humanitarian grant featured in the new asylum regulation. The new "other serious harm" provision means that victims of unrepeatable harms are not required to make a specific showing concerning the atrocious or severe nature of the mutilation they suffered—the showing the INS sought in *C—Y—Z—* to require of refugees seeking a humanitarian grant of asylum based on forced sterilization. However, even if adjudicators do, in keeping with the new wording of the humanitarian ground, construe it more broadly than the comparable provision in the 1990 regulation, this mechanism cannot compensate for the underlying incompatibility of the re-worded past persecution ground with both international human rights instruments and Congress' desire to protect victims of unrepeatable harms.

V. ADMINISTRATIVE NOTICE AND THE ASYLUM ADJUDICATION

The impact of regime change on an alien's prospect of persecution if returned to her country of origin often plays a decisive role in asylum adjudications today. The growing emphasis placed on country condition reports in past persecution cases results both from the political turbulence marking asylum source countries in the last decade, and from *N—M—A—*'s rule that a past persecution-based asylum claim may be invalidated upon a showing that the applicant no longer fears persecution from the same source. In this environment, many scholars have evaluated the propriety of asylum adjudicators' use of administrative notice to gain information on political conditions in applicants' countries of origin—information which in many cases determines the outcome of the asylum adjudication.[177]

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[175] *See* Immigration and Nationality Act § 101(42)(A), 8 U.S.C. § 1101 (1997).

[176] *See id.* § 208(d)(5)(B) (permitting the Attorney General to impose additional restrictions on asylum only to the extent consistent with the Act).

[177] *See generally* Tome, *supra* note 10 (arguing that the use of administrative notice triggers procedural due process concerns, and that affording advance warning and a pre-hearing opportunity to rebut noticed facts best serves the due

Judicial notice and administrative notice, while both permitting the consideration of non-evidentiary facts, differ significantly in their scope. While judicial notice is limited to facts that are " 'obvious,' 'notorious,' and 'capable of certain verification,' " administrative law judges may take notice of more nuanced facts—facts that are "obvious and notorious" only to a specialist in the field.[178] Several rationales undergird the different rules for administrative notice. First, since agencies are specialized bodies, administrative law judges grow familiar with factual issues that would be considered obscure in lay contexts; they may be permitted to "assume" facts that would not be apparent to an observer outside the area.[179] Second, some commentators argue that the use of administrative notice helps agencies function more efficiently. Since they encounter similar factual issues with great regularity, agency adjudicators may simplify their jobs and work more quickly by taking notice of facts that have become apparent to them as experts.[180] As a corollary of this argument, a Ninth Circuit judge noted somewhat drolly that the doctrine of administrative notice allows IJs to stay awake during hearings: if they were not permitted to take notice of familiar facts, they would be flooded with redundant facts throughout the day.[181] Finally, administrative notice inures to the benefit of the public; administrative law judges are not passive, but instead have the duty "to investigate independently matters of concern to the parties."[182] Under this rationale, asylum applicants are among the chief beneficiaries of the doctrine. Applicants frequently do not have access to information about conditions in the country of origin that might in fact support their case, and the IJ may serve as their advocate by taking notice of these facts.

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process rights of asylum-seekers); Margulies, *supra* note 141 (arguing that the use of administrative notice to give outcome-determinative weight to human rights reports conflicts with the asylum-seeker's right to an individualized adjudication); ANKER, *supra* note 28, at 112-50 (1999) (evaluating the use of the administrative notice mechanism under both constitutional and international human rights standards). Because of the wealth of commentary on administrative notice in the asylum adjudication, this Part of the Note seeks merely to highlight the relevance of the issue to the new limitations on the past persecution ground discussed above.

[178] Tome, *supra* note 10, at 418.

[179] *Id.* at 415.

[180] *Id.*

[181] *See* Castillo-Villagra v. INS, 972 F.2d 1017, 1027 (9th Cir. 1992) (noting that "officials may find it very hard to listen attentively after the first dozen or two repetitions").

[182] Tome, *supra* note 10, at 417.

A. The Uses and Limits of Administrative Notice

Administrative notice may be used in several stages of the asylum adjudication process. First, an IJ may take notice of improvements in human rights conditions in the asylum applicant's country of origin that have occurred since he or she fled the country. This use of administrative notice effectively allows the IJ to fill the INS's burden of proof for it; the agency's failure to bring such facts to light is not outcome-determinative. At the appeal level, the BIA may take administrative notice of improvements of country conditions intervening between the applicant's denial of asylum by the IJ and the hearing of her case on appeal. The Board may find the IJ's original ground for denial insufficient, but deny on the alternative basis of changed country conditions without notifying the applicant of its reliance on these new facts.[183] In addition, upon noticing improved country conditions, the Board may reverse an IJ's decision to grant asylum or remand a granted case to the IJ for further fact-finding.[184] The use of administrative notice by the BIA is particularly problematic in cases in which, after an applicant timely filed an appeal from the IJ's order of deportation or removal, the applicant's case languishes for years before being reviewed by the BIA.[185] The Tenth Circuit's decision in *Kowalczyk v. INS*—a particularly dramatic case of delay in which the BIA took notice of facts occurring nine years after the applicant's timely appeal of his deportation order—indicates that delay is a relevant consideration for the federal appellate court in determining whether the BIA's use of administrative notice constitutes a procedural due process violation.[186] In that case, the court found a due proces violation and reversed the deportation order.[187] Past persecution cases, as well, often raise serious concerns about the fairness of administrative notice, since the INS bears the burden of proof for establishing that the conditions giving rise to the applicant's have improved.[188]

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[183] *See* ANKER, *supra* note 28, at 112.

[184] *Id.*

[185] *See* Kowalczyk v. INS, 245 F. 3d 1143, 1149-50 (10th Cir. 2001) (holding that the BIA violated alien's due process rights by taking administrative notice of facts relating to changes in the Polish government in the decade since the alien had left Poland; these facts did not exist until nine years after the applicant had filed his timely appeal to the BIA).

[186] *Id.*

[187] *Id.*

[188] *See* ANKER, *supra* note 28, at 113 n.137.

The BIA must observe two limits on its use of the administrative notice mechanism: one constitutional, the other prudential. On the constitutional level, deportation and removal proceedings must conform to the Due Process Clause of the Fifth Amendment.[189] While aliens' rights in these settings do not encompass all the elements of a formal trial—indeed, aliens never even have the opportunity to appear before the BIA when it reviews deportation and removal orders against them[190]—they do possess the core due process rights ensured in most administrative hearings, such as the right to an individualized adjudication and the right to rebut evidence presented against them.[191] Although the INA and not the Administrative Procedures Act ("APA") governs asylum adjudications, appeals courts have based procedural due process findings in asylum hearings on factually similar APA cases.[192] The question of the propriety of administrative notice in asylum adjudications often reaches the federal courts through procedural due process challenges.

Second, the agency must observe certain "prudential" rules derived chiefly from factors articulated by administrative law scholar Kenneth Culp Davis.[193] Davis divides the universe of facts that of which agencies may take notice into the adjudicative, legislative, and judgmental categories. Legislative facts involve broad and verifiable statements about the political

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[189] *See* Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977). Since the implementation of IIRIRA in 1997 as well, federal courts have found that removal proceedings trigger the right to a full and fair hearing under the Due Process Clause. *See* Michel v. INS, 206 F.3d 253, 259 (2d Cir. 2000).

[190] Tome, *supra* note 10, at 426 (noting that asylum applicants do not have the opportunity to present testimony or make oral arguments before the BIA; therefore, applicants are not present to contest or rebut the use of administrative notice of changed country conditions).

[191] On the right to an individualized adjudication in the administrative law context, see Heckler v. Campbell, 461 U.S. 458 (1983). On the right to rebut a noticed fact with outcome-determinative effect, see Banks v. Schweiker, 654 F.2d 637, 641 (9th Cir. 1981). Applying these concepts to the deportation/removal context, see Ulloa v. INS, 944 F.2d 905 (6th Cir. 1991) (holding that the Board must give asylum applicants a "meaningful opportunity to respond to officially noticed facts that bear on the Board's decision-making process").

[192] *See* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) (holding that the INA displaces the APA in governing the procedural aspects of deportation, but that the applicant possesses a right to rebut administratively noticed adjudicative facts in both asylum cases and cases under the APA).

[193] *See generally* Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980).

or social situation of the asylum applicant's country of origin.[194] For example, administrative notice of a regime change is a legislative fact. Adjudicative facts are particular to the applicant and usually more salient to the merits of his or her asylum application.[195] "Judgmental facts" are those "mixed with judgement, policy ideas, opinion, discretion, or philosophical preference."[196] While courts generally notice only legislative facts, agencies may take notice of both legislative and adjudicative facts. A pivotal Ninth Circuit case, *Castillo-Villagra v. INS*,[197] noted that the distinction between legislative and adjudicative facts is often blurred when the BIA takes notice of changed country conditions in asylum proceedings.[198] Alone this is a legislative fact, but the BIA and IJs frequently extrapolate from such facts to conclude that the individual asylum applicant no longer faces a well-founded fear of persecution.[199] This deduction, which might be characterized as a judgmental fact, forms the most controversial element of the use of administrative notice in asylum hearings, since it often poses a threat to the applicant's right to an individualized adjudication.

B. The Dangers of Administrative Notice

As one commentator notes, the rationales behind administrative notice in the asylum context are arguably less persuasive than in other administrative law settings.[200] First, the assumption of agency expertise is tenuous in asylum cases, because judges would need to possess an encyclopedic knowledge of human rights conditions around the globe to be true "experts." The BIA, the highest reviewing body available in some asylum

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[194] *Id.*

[195] *Id.*

[196] *See* Tome, *supra* note 10, at 418, *citing* KENNETH C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 15.3, at 169 (2d ed. 1980).

[197] *Castillo-Villagra*, 972 F.2d at 1017 (*citing* Davis, *supra* note 193, at 932 (setting forth the following factors for courts to consider in concluding whether administrative notice of facts is proper: 1) Is the fact narrow or broad? 2) Is it central or peripheral to the case? 3) Is it readily accepted or controversial? 3) Is the noticed item purely factual or somewhat policy-driven? 4) Is the noticed fact provable? 5) Is the fact about the parties or unrelated to the parties?)).

[198] *Id.* at 1027.

[199] *Id.*

[200] *See* Tome, *supra* note 10, at 436 (arguing that IJs lack the resources or expertise to make informed deductions about country conditions).

cases, is specialized in U.S. immigration law—*not* in the human rights conditions in asylum applicants' countries of origin.[201] In a series of cases addressing the asylum claims of Eastern European nationals, the BIA utilized State Department reports of free and fair elections as wholesale disproof of applicants' fear of persecution in these countries.[202] This reliance on broad reports of country conditions suggests that administrative notice may sometimes foster inattention to the complex realities of life "on the ground" in countries experiencing political upheaval.

Second, and more critically, over-expansive use of the administrative notice mechanism undercuts aliens' due process rights. One commentator argues that noticing potentially outcome-determinative facts without affording an opportunity for rebuttal constitutes an unjustified procedure under the *Mathews v. Eldridge* due process analysis.[203] The author notes that the private interest involved—potential deportation—is of the direst nature, and that the potential for erroneous deprivation involved in the adjudication when the IJ does not confront evidence challenging a noticed fact outweighs the governmental interest in administrative efficiency and speedy removal of aliens' due process rights.[204] Similarly, in the international law context, the *Handbook* states that adjudicators of refugee status "are not required to pass judgment on conditions in the applicant's country of origin," but instead should view these as a "relevant background situation" in which to situate the facts of the applicant's claim.[205] Use of human rights reports to assess the claims of all members of a national-origin group jeopardizes these protections, and risks ignoring the key factors that Judge Posner characterized as "specific, perhaps local, dangers to particular, perhaps obscure, individuals."[206] The extreme diversity of asylum-seekers' backgrounds, narratives, and fears does not lend itself readily to group classifications based on highly general U.S. government and nonprofit organization reports.

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[201] *Id.* at 440. See also ANKER, *supra* note 28, at 119 (commenting that even the BIA does not justify its own use of administrative notice on the basis of specialized foreign affairs trainings).

[202] *See* Kowalczyk v. INS, 245 F.3d 1143 (10th Cir. 2001); Subramian v. District Director, U.S. INS, Denver, Colo., 724 F. Supp. 799 (D. Colo. 1989).

[203] *See* Tome, *supra* note 10, at 462-63. On the test for determining when an agency practice constitutes a deprivation of life, liberty or property unwarranted by the Due Process Clause, see Mathews v. Eldridge, 424 U.S. 319 (1976).

[204] *Id.*

[205] UNHCR HANDBOOK, *supra* note 17, ¶ 42.

[206] Galina v. INS, 213 F.3d 955, 959 (2000).

C. *Federal Courts' Mechanisms for Reviewing the Use of Administrative Notice*

A majority of the federal circuits have implemented mechanisms to ensure that the BIA's use of administrative notice does not violate asylum applicants' rights to an individualized adjudication. First, Seventh, and Ninth Circuit holdings represent three ways of scrutinizing the agency procedure. The First Circuit has taken a substantive approach, holding that the BIA may not take administrative notice of legislative facts, such as changed country conditions, in support of the INS's burden of rebuttal, unless it engages in an individualized assessment of the impact of these facts on the asylum applicant's fear of persecution.[207] For example, in *Fergiste v. INS*, the First Circuit held that the the BIA violated an applicant's procedural due process rights when it noticed a State Department report indicating that Aristide returned to power in Haiti as outcome-determinative evidence that the applicant no longer faced a well-founded fear of persecution.[208] In that case, the court found that where the only evidence to support the INS's position was U.S. State Department country reports and where the applicant had presented hundreds of pages of documentary evidence supporting a continuing fear of persecution, the BIA exceeded its discretion by finding that changed country conditions negated the applicant's well-founded fear.

The Ninth Circuit, on the other hand, has drawn on procedural mechanisms to regulate the use of administrative notice—a complex approach fully elucidated in *Castillo-Villagra v. INS*.[209] In that case, the BIA used administrative notice of President Violeta Chamorro's election in Nicaragua to conclude that the applicants no longer feared persecution from the Sandinistas.[210] The Court held that in some circumstances asylum applicants must be given advance notice of the facts of which the BIA intends to take administrative notice. The applicant must also be given an opportunity to rebut these facts.[211] Whether notice to the applicant and an opportunity to rebut must be afforded is an *ad hoc* decision to be made on the basis of the factors the court borrowed from Professor Davis' categorization of noticed facts.[212] While the agency is not required to give the alien

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[207] *See generally* Tome, *supra* note 10, at 450-56 (contrasting substantive and procedural approaches).

[208] *See* Fergiste v. INS, 138 F.3d 14 (1st Cir. 1998).

[209] *See* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992).

[210] *Id.* at 1018.

[211] *Id.* at 1025.

[212] *See supra* note 197.

warning that it plans to take notice of common knowledge facts, it must warn the alien if it plans to apply these legislative facts to the specifics of the alien's claim; such was the case in *Castillo-Villagra*.[213] The Court held that the availability of a motion to reopen is not sufficient to protect the alien's due process rights. Because the motion is discretionary, it does not guarantee the alien the right to rebut facts salient to her case.[214] This stance differs from that of the First, Fifth, Seventh, and District of Columbia Circuits, which hold that the motion to reopen is sufficient to protect the alien's due process rights.[215]

Recent cases indicate, however, that the Ninth Circuit has departed from its purely procedural approach. In *Rios v. Ashcroft*, the court held that the BIA may not find that the INS has met its burden of rebuttal solely on the basis of a U.S. State Department Country Report suggesting improved human rights conditions.[216] In another recent case, the court held that the BIA must conduct an individualized inquiry based on the noticed facts, inquiring how the applicant's fate, if she were returned to the country of origin, might differ from that of those similarly situated who never fled persecution.[217]

The Seventh Circuit, rather than focusing on which facts the agency may notice or whether it must provide applicants with the opportunity to rebut, emphasizes the weight the agency may permissibly accord to the noticed facts. The Seventh Circuit rejects the procedural approach, holding that the agency is not obligated to provide the applicant with the opportunity to rebut noticed facts; the motion to reopen, it holds, is sufficient to protect due process rights.[218] Instead, as the *Galina* case demonstrates, the Seventh Circuit focuses on whether the facts have particular relevance to the individual applicant.[219] Facts of general applicability (such as broad statements in State Department reports) may not be given outcome-determinative weight; they alone may not serve to fill the INS's burden of rebuttal.[220] The general or particular applicability analysis appears,

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[213] *Castillo-Villagra*, 972 F.2d at 1029.

[214] *Id.* The Sixth and Tenth Circuits have also held that advance warning is required in some circumstances. *See* Ulloa v. INS, 944 F.2d 905 (6th Cir. 1991); Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1999).

[215] *See* Kazmarczyk v. INS, 933 F.2d 588, 597 (7th Cir. 1991); Gebremichael v. INS, 10 F.3d 28, 38 (1st Cir. 1993); Rivera-Cruz v. INS, 948 F.2d 962, 967 (5th Cir. 1991); Gutierrez-Rogue v. INS, 954 F.2d 769, 772 (D.C. Cir. 1992).

[216] *See* Rios v. Ashcroft, 287 F.3d 895 (9th Cir. 2002).

[217] *See* Lal v. INS, 255 F.3d 998 (9th Cir. 2001).

[218] *See Kazmarczyk*, 933 F.2d at 597.

[219] *See* Galina v. INS, 213 F.3d 955 (7th Cir. 2000).

[220] *Id.*

ultimately, identical to the distinction between legislative and adjudicative facts espoused in the First and Ninth Circuits.

The substantive approach in the final analysis may provide greater protection to aliens, since it does not rely on the applicant to rebut facts that she may not have the resources or knowledge to refute. On the other hand, the procedural approach allows the well-informed applicant to draw on the advantage of an intimate knowledge of political conditions in her country of origin to demonstrate the inaccuracy of generalized statements of human rights improvements. The current trend in the federal appeals courts toward scrutinizing the use of administrative notice in asylum adjudications bodes well for the future protection of aliens' procedural due process rights. When not carefully applied, the administrative notice mechanism may overemphasize U.S. State Department assessments of country conditions to the exclusion of a close consideration of the alien's case. Because such reports have the tendency, as Judge Posner notes, to "look on the bright side" regarding countries with which the United States has friendly relations, over-reliance on human rights reports may infuse a biased political factor into the asylum adjudication and prevent the individualized inquiry demanded by the Constitution and international human rights instruments.[221]

VI. CONCLUSION

As implemented in the United States, the past persecution ground for asylum straddles a paradox. It respects the legacy of prior harms by creating a presumption that the applicant continues to fear similar treatment. At the same time, however, government-inflicted harms occur most often in countries whose political and social climates are characterized by constant upheaval. Assuming any constant—including a constant source or form of government mistreatment—implies a degree of predictability rarely found in countries with poor human rights records. This irony makes clear that the past persecution presumption is ultimately a humanitarian fiction, permitting the U.S. to offer asylum to refugees whose past victimization suggests a significant threat of future persecution, but who may not meet the "well-founded fear" test articulated in *INS v. Cardoza-Fonseca*.[222]

Over the last decade, several compelling influences—the dizzying rate of regime change around the world, the rise in asylum claims in the United States,[223] and national security concerns provoked by terrorist threats—

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[221] *See id.* at 957.

[222] INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see supra* note 4.

[223] *See supra* note 73.

have led policymakers to depart from the humanitarian underpinnings of international refugee law and to view the past persecution presumption as an evidentiary tool. Both the *N—M—A—* "same source" rule and the reworded "fundamental change" provision of the 2000 asylum regulation reflect a trend toward devaluing the impact of past harms and oversimplifying the landscape of human rights conditions in applicants' countries of origin. These two new developments reflect faltering attention to the spirit of the international refugee instruments at a time when concern for human rights crises around the world is more critical than ever. Exacerbating the effect of these new restrictions on asylum eligibility, expansive application of the administrative notice mechanism threatens the very foundation of the asylum inquiry in the United States: an individualized assessment of the alien's risk of harm if returned to her home country. The impact of these trends is presently hard to assess, since the extent to which they limit the availability of asylum to victims of past persecution depends in part upon how broadly IJs construe the new "other serious harms" humanitarian grant in the asylum regulation. A return to the past persecution provisions contained in the 1990 regulations, however, would ensure greater compliance with both international human rights principles and the purposes of the INA's past persecution ground.