Colloquy: Perspectives on Complementary Protection
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I. Introduction

A. Three Issues: Scope, Justiciability, and Harmonization

1. First, whether to afford protection to asylum claimants who do not meet the Convention definition of refugee, but who, if they face expulsion, would be subject to a "real risk of torture or of inhuman and degrading treatment and punishment." (The *scope* of Complementary Protection.)

2. Second, the fact that most schemes of protecting such individuals are carried out on an ad hoc basis and purely on the grounds of executive decision-making, thus not involving any independent, judicial resolution of claims to such protection. (The *justiciability* of Complementary Protection.)

3. Third, the lack of international norms in this area, thus leading States to adopt their own schemes without reference to common standards that would encourage burden-sharing and serve as a benchmark against which States (and parties such as the UNHCR and NGOs) could evaluate their scope of protection. (The *harmonization* of Complementary Protection.)

B. Additional Perspectives and Issues. Participants in the discussion regarding Complementary Protection, coming at the issue from varying perspectives, have identified the following trends and concerns (among others), many of which are mentioned in Hugo Storey's paper.

1. *The current trend in many nations towards restriction of access to asylum, or at least to some of the social/employment benefits that previously have been granted to asylum-seekers.* The vast increase in the number of asylum applications in some countries, most of which are not granted, and in some cases are found to be frivolous or fraudulent, contributes to this trend, as does the concern that seeking asylum can be a "back door" to avoid rules relating to legal immigration. How will enhancing or harmonizing schemes of Complementary Protection affect this trend? Will political leaders view Complementary Protection as adding to migration burdens, or potentially mitigating those burdens?

2. *Whether Complementary Protection will truly* complement, *or in practice,* stifle, *the further development of national and international refugee law.*

a. A Research Report prepared under the direction of James Hathaway (1992-1997) suggested a reformulated approach to international refugee law that did not alter or amend the definition of "refugee" in the 1951 Convention and 1967 Protocol. Rather, the Report

suggested a renewed look at temporary protection and residual solutions for refugees of long duration. This Report referred to the purpose of reform (quoting Bill Frelick of the US Committee on Refugees) as devising "a system that allows persons faced with serious harm in their home countries universally to seek and enjoy protection from such harm." This could result in "a broader (if shallower) level of protection for most of the world's refugees." The project of defining and harmonizing international standards for Complementary Protection would appear to be consistent with this "reformulated approach."

b. Other advocates would express concern that the availability of Complementary Protection could have the effect of retarding the extension of protection under the Refugee Convention. It is alleged that this could happen in two ways:

(1) Complementary Protection could be established as a *de jure* substitute for asylum/refugee protection, meaning that persons granted Complementary Protection will be prohibited from access to more durable forms of protection.

(2) By providing the option of Complementary Protection to categories such as battered women, those fleeing armed conflict, and those threatened by ingrained cultural practices (e.g., Female Genital Mutilation), for example, States will make it less likely that asylum and refugee jurisprudence will move in the direction of recognizing such persons as Convention refugees. While formalizing the concept of Complementary Protection is a worthy objective, particularly within structures of international law, some argue that Complementary Protection may "freeze in time" the further development of refugee under the Convention. (The Hathaway Report responded to such concerns by referencing "the political dimension" — the reality that any broadening of refugee protection would unlikely be accepted if it resulted in a dramatic increase in permanent resettlements.)

3. *The "magnet effect"*:

a. The availability of Complementary Protection could encourage flight, particularly to more distant "host countries" in which the benefits of Complementary Protection are relatively generous.

b. The magnet effect should be considered not only vis-a-vis incentives for individual migrants to leave their homelands, but for them to seek out the aid of international alien smuggling enterprises that are able to move migrants from continent to continent.

c. The magnet effect is exacerbated by the lack of credible and enforceable policies for return of applicants to their home countries when their applications for protection are denied, or when the circumstances leading to a grant of protection have changed.

4. *The "deterrent effect" of current legal trends and individual circumstances.* Legal barriers regarding access to asylum or difficulties in accessing refugee adjudication procedures owing to personal/social circumstances or circumstances of migration can deter valid claims for protection. Categories vulnerable in this manner can include children; women, especially those smuggled for commercial purposes; abandoned and battered women; the handicapped; and migrants uprooted by sudden warfare or natural disaster. They also may include nationals of countries whose economies or social/political systems are so damaged that the host country, while unwilling to offer permanent status, also is unwilling to compel return.

5. *The "cumulative effect" of adding new obligations of protection.* The desire to regularize, codify, and harmonize standards of Complementary Protection is understandable. However, it will have the effect of pushing against the boundaries of protection obligations that States believed they agreed to when they signed on to instruments such as the Refugee Convention and the Convention Against Torture. (For example, much discussion of Complementary Protection seems an effort to protect persons who are not within the scope of the CAT as set forth by article 16 of the CAT.) Executive-based schemes of protection may achieve many of the goals of Complementary Protection without contributing to a sense that the enforceable "obligation" to provide protection is ever-expanding in scope.

C. Objectives. This Outline will attempt to accomplish the following:

1. Provide perspectives regarding the potential *scope*, *justiciability*, and *harmonization* of schemes of Complementary Protection.

2. Critically examine proposals for an enhanced judicial role in Complementary Protection (which assumes a case-by-case adjudication) as against the option of blanket, temporary protection offered to all nationals of designated countries. How can such an enhanced role advance the goals of Complementary Protection without becoming an undue burden?

3. Propose that Complementary Protection address as a priority the concerns of "vulnerable categories" deterred from access to procedures for determining Convention refugee status. This can include a process for return of those who are economic migrants, while affording protection for those who are not.

4. Propose a specific role for immigration and refugee law judges in:

   a. identifying the chief issues that should be addressed in devising national schemes of Complementary Protection and regional and international understandings regarding the same;

   b. helping to determine whether "blanket protection" or "case-by-case adjudication" is the "best practice" for Complementary Protection;

   c. advancing understanding of the relationship between Complementary Protection and protection traditionally afforded under the Convention.

II. Is Complementary Protection an Obligation of International Law?

A. Emergence of an International Norm

1. Legal commentators generally agree that a norm of temporary protection for certain classes of non-Convention refugees has emerged, based on international understandings, State practice, and international cooperation in addressing particular crises.

2. The jurisprudential basis for the norm of temporary or complementary protection, however, is less clear. The "norm" is based more on what States actually *do*, individually or collectively, than upon an agreed set of legal principles that are enforced within the legal systems of particular countries, as in the case of the Refugee Convention.

3. Thus, while temporary protection may be a "norm," adherence to the norm remains in control of Executive policy-making — even if that policy-making has been made more transparent.

4. A recent exception is the *Convention Against Torture* — this provides a more certain jurisprudential basis that may remove questions of scope of protection from the exclusive domain of executive policy-makers and into the judiciary.

5. Further clarification of international norms relating to Complementary Protection is likely to emerge as part of a process of *regional agreements* on this issue.

B. International Understandings on De Facto Refugees

1. *United Nations:*

a. General Assembly authorized UNHCR to act on behalf of mass influxes of persons who may not meet the definition of a refugee but who, nonetheless, find themselves in need of refuge as a result of man-made events over which they have no control. G.A. Resolution 3454, U.N. GAOR, 30th Sess., Supp. No. 34 at 92, UN Doc. A/10034 (1975).

b. *Example - Convention Against Torture:*

(1) Article 3 provides that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger or being subjected to torture." See Convention Against Torture, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

(2) Article 1 defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

2. *Convention on the Specific Aspects of Refugee Problems in Africa* (Organization of African Unity, 1975). Extends protection to "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

3. *Cartagena Declaration* (Organization of American States, 1985), adopted by 10 Latin American states in 1984, expands the Convention refugee definition to include those who flee their country because their "lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that have seriously disturbed public order. The General Assembly of the Organization of American States approved this definition in 1985.

4. *European Union:* In an October 14, 1996 Council Resolution laying down the priorities for co-operation in the field of justice and home affairs for the period from July 1, 1996 to June 30, 1998, this body committed itself at paragraph 4(g) to "examination of forms of alternative protection (de facto protection and humanitarian residence permits)." (Storey paper, Heading B).

C. State Practices

1. A summary of individual State practices is beyond the scope of this Outline. Our focus on practices in the United States will illustrate both the development and current practice of Complementary Protection in one leading "host country."

2. In general, Complementary Protection appears to take three forms:

   a. Deferral or suspension of forced return *without limitation* on right to seek Convention refugee status (asylum) or permanent residence.

   b. Deferral or suspension of forced return *with limitation* on rights to seek Convention refugee protection (asylum) or other grant of permanent residence.

   c. Provision of temporary "safe haven" in territory controlled by host country, but with no general access to the host country.

3. Some countries, such as the United States, have offered all three of these forms of protection. Moreover, certain groups have "moved" from a lower to a higher level of protection, particularly after having been granted a lengthy period of "temporary" protection. But key differences surrounding the *type* of protection do exist.

4. Key differences also exist as to the *scope* of protection. In the United States, the recent designation of Central American countries devastated by Hurricane Mitch for purposes of Temporary Protected Status highlighted the availability of such relief in cases of natural disaster. Other countries limit formal

Complementary Protection schemes to conditions that are more akin to concerns of the Refugee convention — warfare, civil strife, and ethnic cleansing. (Such concerns have led to grants of Temporary Protected Status in the United States as well.)

D. United States: Not a Judicially Enforceable Obligation

1. A key issue in further development of international norms for Complementary Protection is whether the judicial systems of individual States find such norms to be self-enforcing in the absence of specific legislation.

2. In the United States, the answer thus far is negative; the (administrative) Immigration Courts and Board of Immigration Appeals, and the (constitutional) Federal circuit courts and the Supreme Court have declined to find a judicially-enforceable right to Complementary Protection outside of that expressly authorized by Congress and implemented by regulation.

3. *Matter of Medina*, 19 I&N Dec. 734 (BIA 1988)

   a. Neither the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, nor customary international law, create a potential remedy from deportation that can be sought by individual aliens in deportation proceedings over and above that provided by the Immigration and Nationality Act (INA), as implemented by regulation. *Accord, Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973) (Article 33 of Refugee Convention did not require alteration in then-existing U.S. law providing protection against persecution).

   b. The Immigration Judge's and the Board's jurisdiction is limited by statute and regulation.

   c. This limitation extends to avenues of Complementary Protection that exist under U.S. law, but are administered by Executive branch *policy-makers* (as opposed to Executive branch "quasi-judicial" administrative judges). Thus, as discussed above, *Medina* denied an individual applicant's claim for "extended voluntary departure," a form of complementary relief that had not been granted as a blanket form of relief to persons of her nationality.

4. Federal courts have upheld the *Medina* principle, holding in addition that they lack authority to compel the Executive to grant Complementary Protection to particular nationalities or individuals. *See Galo-Garcia v. INS*,

86 F.3d 916 (9th Cir. 1996); *Bradvica v. INS*, 128 F.3d 1009 (7th Cir. 1997); *Echeverria-Hernandez v. INS*, 923 F.2d 688 (9th Cir. 1991).

5. *Matter of H-M-V-*, Interim Decision 3365 (BIA 1998)

   a. Even in the area of the Convention Against Torture, the Board of Immigration Appeals held that Article 3 of the Convention is not a "self-executing treaty," and thus, the BIA and Immigration Courts lack jurisdiction to adjudicate a claim under the Convention absent specific legislation implementing its provisions.

   b. Subsequent to *H-M-V-*, Congress implemented the provisions of Article 3, and the Convention Against Torture now serves as a form of Complementary Protection in the United States. See section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, enacted as Division G of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-761, 822 (Oct. 21, 1998).

E. Harmonization: Opportunities and Obstacles

1. Perceived inconsistencies and the lack of transparency in Executive decisions to grant Complementary Protection have led to proposals for more formal and integrated international understandings. These would both more clearly define the obligations of States, and potentially provide for case-by-case adjudication of claims in a system that is not dependent upon Executive designation of certain countries to which persons will not be returned.

2. Securing the agreement of States to such a course will depend upon their perspective: Will a State be burdened by new and unwanted obligations beyond that which it already has accepted? Or will the State benefit from an opportunity to ratify its current practices within an international framework, and thus define (and limit) its expected obligations in the future?

3. A similar set of questions need to be considered by those who advocate a more prominent judicial role.

   a. Since immigration and asylum adjudication processes in many host countries are already over-burdened, contributing to delays both in granting relief to deserving applicants and in executing removal of failed applicants, is it prudent to add a new burden of adjudication?

b. What decisions relating to Complementary Protection might best be reserved to the Executive? Are blanket, nationality-based grants of relief genuinely inconsistent with the existence of international norms?

c. What decisions relating to Complementary Protection are best suited for the judiciary?

4. The Outline will return to these and related questions in subsequent headings.

III. Perspectives on Scope of Complementary Protection — United States

A. Background

1. The Storey paper proposes that claims to complementary protection, as is the case with asylum and other matters that may result in return to an alien's native country, should be safeguarded through a full and fair hearing before an impartial body. "A mismatch is seen to exist between on the one hand a sophisticated rights-based system for deciding refugee status and on the other hand a system based largely on national policy and governmental discretion subject to little judicial supervision." (Head A, ¶6)

2. The history of procedures for Complementary Protection in U.S. law mirrors this description. Congress and the executive have from time to time determined that certain aliens not eligible for protection under traditional categories of political or religious persecution should nevertheless be protected from deportation.

3. The impetus for developing new forms of complementary protection in the United States historically has arisen from the same types of concerns mentioned by the drafters of the Geneva Convention: the need for humanitarian protection of displaced persons who may not qualify as Convention refugees.

4. While numerous forms of protection, including simple discretionary non-enforced orders of deportation, have been used, three types of mechanisms have been most prominent: Parole, Voluntary Departure, and Temporary Protected Status. In addition, Immigration Judges have the authority to grant certain discretionary forms of relief that, while not directly designed to provide protection to aliens who have fled conditions of potential harm, nevertheless provide such protection. (Suspension of Deportation/Cancellation of Removal — discussed below).

5. The following discussion will focus on those forms of Complementary Protection with a lengthy period of application in U.S. law. The recent change to permit adjudication of claims for protection under the Convention Against Torture will be addressed in Heading IV.

B. Parole:

1. The blanket form of relief known as parole was originally designed as a tool through which the Attorney General could allow individual inadmissible aliens into the United States for "emergent reasons or reasons deemed strictly in the public interest." (Section 212(d)(5) of the INA.)

2. The Executive branch increasingly used parole authority to admit large groups of de facto refugees into the United States. For example, President Eisenhower first used parole in this manner to bring nearly 40,000 refugees from the 1956 Hungarian revolution into the United States. Similarly, President Carter used parole authority to admit Cuban "Marielitos" in 1980.

3. When Congress enacted Temporary Protected Status in 1990 (see discussion below), it stated that TPS should be the exclusive means of providing temporary protection to otherwise deportable aliens present in the United States.

4. Parole authority continued to be used to admit de facto refugees into the United States; notably with Haitians in 1992 and Cubans in 1995. Congressional dissatisfaction with this use of parole authority led to a 1996 amendment to section 212(d)(5) to specify that parole may be granted "only on a case by case basis for urgent humanitarian reasons or significant public benefit." This had the effect of curtailing the Executive's authority to use parole as a means of admitting large groups of de facto refugees into the United States.

C. Extended Voluntary Departure

1. Background — Voluntary Departure

a. "Voluntary Departure" (V/D) is a discretionary form of relief, authorized by Congress since 1952, that may be granted by an Immigration Judge in lieu of a formal order of deportation against a deportable alien. (Voluntary Departure also may be granted by the Immigration and Naturalization Service prior to an alien being placed in deportation proceedings.)

b. V/D relief is time-limited, and unless the time period is extended, an alien who fails to depart is subject to an automatic order of deportation. (Currently, the maximum grant is for 120 days.)

2. Extended Voluntary Departure (EVD) — Authority and Justiciability

a. EVD was created by the *Executive Branch* in 1960 to provide a temporary grant of blanket relief for nationals of certain countries who feared returning to their homelands. EVD was justified as an exercise of *prosecutorial discretion* in enforcing the immigration laws.

b. The statutory authority for EVD was unclear. Section 242(b) of the INA provided that the INS could forego instituting deportation proceedings in the case of any alien unwilling to *depart* the United States; it did not expressly provide that the timetable for such departure could be extended so that, in effect, an alien would *not* have to depart. Nevertheless, Congress generally acquiesced in this form of Executive decision-making, particularly because prior to enactment of the Refugee Act of 1980, there existed only limited mechanisms in U.S. law for those fleeing persecution to be granted legal status.

c. The Board of Immigration Appeals, in *Matter of Medina*, 19 I&N Dec. 734, 746 (1988), noted that *voluntary departure* and *extended voluntary departure* are "fundamentally different forms of relief." Under § 242(b), as noted above, is that the alien is *unwilling* and/or *unable* to depart the United States, and is designed to allow the alien to remain indefinitely in the U.S. Thus, the Board held that its jurisdiction (and that of Immigration Judges) to grant *voluntary departure* did not give it jurisdiction over claims to EVD.

d. In *Hotel & Restaurant Employees Union Local 25 v. Smith*, 594 F.Supp 502 (D.D.C. 1984), *aff'd in part, rev'd in part*, 804 F.2d 1256 (DC Cir. 1986), and *reh'g granted and vacated,* 808 F.2d 847 (D.C. Cir. 1987), the Federal courts affirmed the complete discretion of the Attorney General over EVD, and thus rebuffed a claim by certain Salvadorans that the failure to extend EVD to them was unconstitutionally discriminatory.

3. EVD – Application

a. EVD was granted by the Immigration and Naturalization Service, upon recommendation of the State Department, to nationals of 15 countries between 1960 and 1982. Countries whose nationals were granted EVD were either involved in Cold War-related conflicts (e.g. Nicaragua) or afflicted by egregious and systemic violations of human rights (e.g., Uganda and Ethiopia). The countries included: Cuba, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Hungary, Romania, Iran, Nicaragua, Afghanistan, Poland and the Dominican Republic.

b. Congress eventually granted the "durable solution" of permanent resident status to many recipients of EVD: to Cubans in 1966, to Indochinese in 1977, and to nationals of Poland, Ethiopia, and others in 1987. Temporary protection thereby became permanent. However, only Congress has the authority to grant such permanent resident status to persons who do not qualify for asylum or otherwise qualify for permanent residence under standard categories (family-sponsored or employer-sponsored).

c. In the late 1980s, the executive devised the concept of "Deferred Enforced Departure" as a mechanism to give about 80,000 Chinese nationals protection from deportation. In 1992, under the Chinese Students Protection Act, Congress repeated the process mentioned above by granting permanent resident status to those granted DED. Again, this was nationality-specific.

D. Temporary Protected Status (TPS)

1. TPS – Background

a. The uncertain authority and perceived lack of uniformity in granting EVD protection to vulnerable illegal aliens, coupled with the Government's reluctance to deport any significant number of the thousands of Salvadorans who fled civil war conditions in the 1980s, led Congress to enact Temporary Protected Status (TPS) as part of Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649.

b. By providing specific criteria for designation of beneficiaries, and by defining the benefits granted, the enactment of TPS addressed many, though not all, of the deficiencies in the ambiguous EVD program.

c. Codifying the temporary protection practice through TPS enabled Congress to set more specific and consistent standards for the designation of a foreign state and a formal application process for the determination of eligible beneficiaries; moreover the decisions to extend, grant or terminate temporary protected status are subject to public scrutiny.

2. TPS – Standards

a. The statute provides that the Attorney General may designate the nationals of a foreign State who are already present in the U.S. as eligible for TPS under any of the following three conditions:

(1) there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(2) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, and

(a) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(b) the foreign state officially has requested designation under this subparagraph, or

(3) there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interests of the United States.

b. Nationals of a state designated for TPS must have been present in the United States *when the designation was made*, and they must register for TPS benefits during a registration period of not less than 180 days.

c. Beneficiaries must be otherwise admissible to the United States; however, most grounds of inadmissibility may be waived. Certain categories of aliens inadmissible to the United States, including criminals and those who have engaged in persecution, may not receive a waiver and are not eligible for TPS. See 8 C.F.R. § 244.4.

3. TPS – Benefits

a. A person granted TPS cannot be deported during the TPS period. INA § 244(a)(1)(A).

(1) Although TPS is administered solely by the INS, aliens in removal proceedings can raise TPS as a defense to removal if their country has been designated.

(2) Also, if an eligible applicant is in removal proceedings, the INS and the Immigration Judge shall notify him "in a form and language" he understands of the availability of TPS. INA § 244(a)(3). Proceedings most often are "administratively closed" if an eligible person chooses to apply for TPS.

b. A recipient of TPS shall be granted employment authorization during the initial TPS period with the ability to extend. INA § 244(a)(1)(B) and (2).

c. The recipient shall not be detained, except for cases of criminality or danger to society. INA § 244(d)(4).

d. The recipient may travel abroad with permission. INA § 244(f)(3).

e. The recipient may adjust or change immigration status and is considered to be in lawful status for these purposes, as long as the recipient was not out of status prior to his TPS grant. INA § 244(f)(4).

4. TPS – Appellate Review

a. There is no judicial review of any determination with respect to a designation of TPS, nor of a termination or extension of a designation of TPS status. INA §244(b)(5)(A).

b. Administrative review from the denial of TPS status to a particular applicant is available before the Administrative Appeals Unit (a division of the INS, not an Immigration Judge). 8 C.F.R. § 244.10.

5. Countries currently designated. Nationals of these countries are eligible to apply only if they were present in the United States as of the date of designation.

a. Bosnia/Hercegovina
   (1) Designated August 10, 1992
   (2) Application period through August 10, 1993
   (3) Extended through August 10, 2000

b. Burundi
   (1) Designated November 4, 1997
   (2) Application period through November 3, 1998
   (3) Extended through November 2, 2000

c. Guinea-Bissau
   (1) Designated March 11, 1999
   (2) Application period through March 10, 2000

d. Honduras and Nicaragua
   (1) Designated January 5, 1999
   (2) Application period through July 5, 1999; recently extended application period through August 20, 1999

e. Montserrat
   (1) Designated August 28, 1997
   (2) Application period through August 27, 1998
   (3) Extended through August 27, 2000

f. Kosovo
   (1) Designated June 9, 1998
   (2) Application period through June 8, 1999
   (3) Extended through June 8, 2000

g. Sierra Leone
   (1) Designated November 4, 1997
   (2) Application period through November 3, 1998
   (3) Extended through November 2, 2000

h. Somalia
   (1) Designated September 16, 1991
   (2) Application period through September 16, 1992
   (3) Extended through September 17, 2000

i. Sudan
   (1) Designated November 4, 1997
   (2) Application period through November 3, 1998
   (3) Extended through November 2, 2000

6. Countries previously designated

   a. El Salvador
      (1) Designated November 29, 1990
      (2) Terminated June 30, 1992, but DED extended for nationals of El Salvador through December 31, 1994.
      (3) Many El Salvadorans were later granted ability to apply for "suspension of deportation," a discretionary form of relief leading to a grant of permanent resident status (with rights to family unity and to petition for family members abroad) under rules more generous than those generally applicable.

   b. Kuwait
      (1) Designated March 27, 1991
      (2) Terminated March 27, 1992. Kuwaitis were granted DED through December 31, 1993.

   c. Liberia
      (1) Designated March 27, 1991
      (2) Terminated September 28, 1999
      (3) Liberia is the single case in which a period of re-registration was established, bringing forward the date on which applicants had to be present in the U.S. to qualify.

   d. Rwanda
      (1) Designated June 7, 1994
      (2) Terminated December 6, 1997

7. Significant countries not designated
   a. Haiti
   b. Guatemala
   c. Cuba
   d. Ethiopia/Eritrea

E. Safe Haven

1. 1991-1992 Haitian interdiction and refugee screening policy.

a. In 1981, the U.S. entered into agreement with the government of Haiti to permit interdiction and direct repatriation of Haitian nationals fleeing by boat.

(1) Interdiction included a cursory screening to determine if any interdictees deserved refugee protection. The quality of this screening was widely criticized by refugee advocates, leading to changes in screening and protection policy in the 1990s.

(2) A small number of Haitians were paroled into the U.S. during the 1980s as a result of this screening process.

b. In 1991-92, the massive outflow of Haitians after the military coup led to a different policy. Interdicted Haitians were brought to the U.S. naval base in Cuba, and screened to determine if they had a "credible fear" of persecution, defined as having a reasonable possibility of meeting the Convention refugee definition. These "screened-in" Haitians were paroled to the U.S. to apply for asylum.

c. In May 1992, the continued high volume of interdictions led the Bush administration to stop screening and to return interdicted Haitians. An "in-country" refugee adjudication process was established by the U.S. in Port-au-Prince; interdicted and returned Haitians were encouraged to apply there. Hundreds were resettled in U.S. through this program.

2. 1994 "Safe Haven" Policy

a. Interdiction and return policy was again reversed in May 1994, to allow interdicted Haitians to apply for admission as refugees.

b. Number of Haitians fleeing increased. After four weeks of screening interdicted Haitians for admission as refugees, the policy changed, again; Haitians would be offered "safe haven" outside the U.S.

c. Naval base in Guantanamo Bay, Cuba, was principal site for "safe haven." The eligibility screening process was generous.

(1) Brief (20 minute) interviews by INS officers (mix of Asylum and Enforcement officers), with review by senior officers.

(2) "Applicants" for safe haven were asked to state some basis for fearing return to Haiti.

(3) A small number of criminals identified and detained separately for immediate return to Haiti.

(4) Remainder were confined to camps at Guantanamo. Most voluntarily returned after U.S. occupation of Haiti later in 1994; others were involuntarily repatriated in early 1995.

3. "Safe haven" illustrated the basic dilemmas of Complementary Protection.

a. "Broad" vs. "Deep" protection

(1) 1994 program achieved goal of "broad, if not deep" protection. Virtually 100 percent of interdictees were granted protection from compulsory return to Haiti, which was a major goal of entities such as UNHCR. They did not, however, have the opportunity to apply for asylum and permanent resettlement in the U.S., regardless of their individual circumstances.

(2) In contrast, approximately two-thirds of interdictees screened in the 1992 program were returned involuntarily to Haiti at a time when the conditions prompting the exodus (military government) remained in place. Those who were paroled into the U.S. did have access to asylum.

b. Durable solutions: Return vs. Resettlement

(1) The Haitians granted "safe haven" in 1994 uniformly returned to Haiti (most voluntarily).

(2) The 1992 parolees, even those not granted asylum, stayed in U.S. and were eventually granted permanent resident status by legislation passed in 1998.

(3) The ultimate "durable solution" for these two groups, therefore, was determined by when and where they were granted protection.

4. Other examples of "safe haven," resettlement, and repatriation

a. *Cubans*: U.S. detained Cuban interdictees at Guantanamo Bay in 1994-1995. Most were eventually resettled in the U.S. as part of an overall agreement that now permits direct interdiction and return of Cubans. (In-country "refugee" processing available through U.S. interests section in Havana).

b. *Indochinese*: U.S. participated in Comprehensive Plan of Action, which resulted in resettlement of hundreds of thousands of Vietnamese "boat people" and other refugees of 1970s and 1980s era conflicts in Indochina. Scores of thousands also were returned under international guarantees of protection and human rights monitoring. U.S. in-country "refugee" processing also available in Vietnam.

F. "Special" Refugees — Lautenberg Categories and Coercive Family Planning

1. *Lautenberg Amendment:*

a. The U.S. overseas refugee admissions program, which admits approximately 80,000 applicants per year, is not strictly guided by the Convention refugee definition.

b. Under the "Lautenberg Amendment," enacted by Congress in 1989 and extended each year, applicants of particular religions and groups in Eastern Europe and Southeast Asia need only show a "credible basis of concern" relating to discrimination or harm in order to be eligible for refugee resettlement in the U.S.

c. Admissions of individuals in these categories who fall outside the scope of the Convention definition ought to be regarded as a form of Complementary Protection. In such cases, it is Congressional policy-makers, not the Executive, that have defined the scope of such protection.

2. *Coercive Family Planning*

a. Beginning in 1988, the Attorney General directed asylum adjudicators in the Immigration and Naturalization Service to give "careful consideration" to Chinese nationals who refused coercive abortion or sterilization "as a matter of conscience."

b. Interim regulations issued in January 1990 sought to interpret the statutory definition of "refugee" to include claims based on threatened or completed coercive family planning measures (abortion or sterilization). This was followed by an Executive Order of the President, No. 12,711, stating that "enhanced consideration" should be given to such claims.

c. The BIA, however, balked at recognizing such claimants as refugees and granting asylum. In *Matter of Chang*, 20 I&N Dec. 38 (1989), *affirmed by Matter of G-*, 20 I&N Dec. 764 (1995), the Board held that since China's policies regarding family planning constituted laws of general application, the enforcement of those policies did not constitute persecution on account of one of the 5 protected grounds, unless it were established that the enforcement was intended as a specific punishment for a person's religious or political beliefs.

d. High-ranking officials in the INS and at the Justice Department disagreed personally with the BIA's decision, and continued to provide special consideration of such claims, at least in circumstances where Immigration Judges had found the claims to be based on credible evidence.

e. Congress finally stepped in to resolve the issue. Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the statutory definition of "refugee" (section 101(a)(42) of the Act) to state that a person forced to undergo an abortion or sterilization, or who has been persecuted for resisting a policy of coercive family planning, shall be deemed to have been persecuted on account of political opinion.

f. Since this change has been made to the definition of refugee itself, it can be debated whether this amounts to a form of Complementary Protection, or whether it is merely a case of Congress clarifying its intent regarding the proper scope of refugee protection. In fairness, it appears to be a hybrid — Congress has provided protection in this particular circumstance, and has limited grants of asylum on this basis to 1,000 per year (as a means of reducing any magnet effect). Thus, while these claims are adjudicated as asylum claims, the process by which this issue was settled has the earmarks of Complementary Protection.

G. Discretionary Forms of Relief

1. Certain aliens without legal status who can establish long-time continuous residence in the U.S., good moral character, and hardship resulting from removal may be granted relief in the form of "cancellation of removal."

2. The standards for such relief (formerly known as "suspension of deportation") were made more stringent in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as part of a general crackdown on illegal migration.

   a. Required length of residence raised from 7 to 10 years, and significant breaks in residence will disqualify.

   b. Time-in-residence cannot accrue after applicant has been charged and placed in removal proceedings.

   c. No relief available if applicant has committed a crime that would make the applicant deportable.

   d. Hardship must be "exceptional and extremely unusual" in nature, and must be to a qualifying immediate family member who does have legal status in U.S. Hardship to applicant alone is not sufficient.

3. Traditionally, conditions in the country of origin of the type that would give rise to an application for asylum are not considered in the calculation of "hardship." This was, in part, to prevent "suspension of deportation" from becoming a secondary form of relief for failed asylum-seekers.

4. In some cases, however, aliens denied asylum have qualified for this type of relief due to the nature of the equities they have acquired in the U.S.

5. New, more stringent standards will likely diminish the number of such grants and lessen the availability of this relief to be considered as a form of "complementary protection" for long-resident but failed asylum applicants.

6. Somewhat ironically, the stringency of the new standards for Cancellation of Removal led Congress in 1997 and 1998 to grant exceptions to particular nationalities (El Salvadorans, Guatemalans, Nicaraguans, and Haitians), either by granting them direct access to permanent residence, or the opportunity to apply for suspension of deportation under the standards prevailing prior to 1996.

H. Issues Unresolved in U.S. Complementary Protection

1. As this outline demonstrates, the history of Complementary Protection in the U.S. has largely been dominated by Executive branch decisions to grant blanket protection to nationals of certain countries.

2. The uncertain legal basis for such Executive action, coupled with questions of fairness and transparency in the selection of countries eligible for relief, led to the establishment of Temporary Protected Status in 1990. However, prior to this legislation, Congress had ratified several Executive decisions to grant Complementary Protection by giving such beneficiaries permanent status.

3. Under TPS, however, questions of scope still remain.

   a. Absent the most compelling circumstances, the propensity is often to decline to designate countries for TPS, despite the existence of severe internal conditions. This propensity can arise from many concerns: the foreign policy impact of the designation; the hope that conditions may be improved through foreign policy and international channels; the expectation that countries in the specific region will provide protection; and the concern that more routine designations of TPS will create expectations and increase the "magnet effect."

   b. Accordingly, nationals of non-designated countries who, because of their individual circumstances might face a particular threat of the type of harm against which TPS offers protection, cannot avail themselves of that protection.

   c. There is no mechanism in TPS for nationals of non-designated countries to claim individualized relief as a defense in removal proceedings, and there is no independent judicial review of decisions to designate (or not) certain countries. Thus, the scope of protection remains a question of Executive branch policy.

4. Issues relating to "magnet effect" are unresolved.

   a. The TPS statute attempts to prevent a magnet effect by requiring that aliens already be present in the U.S. by a particular date at time of designation.

b. As a result, TPS is not available to residents of designated countries who arrive after the cut-off date, even if conditions worsen in that country, and even if forced return to that country is impracticable.

c. After-arriving aliens from the designated country who are not recognized as asylees must therefore depend on the same type of informal "non-enforcement" mechanisms that were employed *prior* to the enactment of TPS, and which TPS was intended to replace, to be protected against *refoulement*.

d. Also, due to factors mentioned in the following sub-heading, TPS may nevertheless act as a magnet for aliens who flee conditions of harm or danger with the expectation that TPS will be granted at some point in the future.

5. Issues relating to "durable solutions" are unresolved.

a. While the assumption may be that aliens from designated countries can safely return (and will be returned if under orders of deportation) when a designation is allowed to lapse, there is little evidence that such returns take place.

b. For example, when TPS ended for El Salvador, beneficiaries from that country were granted the "older" form of Complementary Protection, DED, for an additional 2-3 years. Eventually, many will be granted permanent resident status by qualifying for suspension of deportation.

c. Some analysts assert that "temporary" protection in most cases is a fiction, and suggest that when the decision is made to grant TPS, it be treated as a decision to increase permanent legal immigration. (This could be accomplished by requiring an offset against legal immigration in other categories.)

6. Perhaps most significantly, and unlike the Refugee Act of 1980, which is closely tied in its definitions and scope of protection to the 1967 Protocol, TPS is a *sui generis* form of relief not arising from or tied to any specific international understandings or agreements. As noted in Hugo Storey's paper, it shares this characteristic with other forms of Complementary Protection.

IV. Perspectives on Justiciability of Claims for Complementary Protection: The Example of the Convention Against Torture.

A. Convention Against Torture — Basic Authorizations

1. The Convention was signed by the United States on April 18, 1988, and ratified by the United States Senate on October 27, 1990.

   a. The Senate ratified with several reservations, understandings, and declarations that speak to the scope and justiciability of claims for protection under the Convention.

   b. One of the most significant of these was that Articles 1 through 16 of the Convention was not "self-executing." This led the Board of Immigration Appeals in 1998 to hold that neither it nor the Immigration Courts have jurisdiction to hear claims for protection under the Convention in the absence of specific legislative and regulatory authority. *Matter of H-M-V-*, Int. Dec. 3365 (BIA 1998).

2. Congress in October 1998 provided that specific authority, directing the Attorney General and the Secretary of State to issue regulations implementing the Convention, subject to the reservations, understandings, and declarations of the Senate when it ratified the Convention. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Division G of Pub. L. No. 105-277, 112 Stat. 2681-761, 822 (Oct. 21, 1998).

3. Interim regulations to implement the Convention were issued on February 19, 1999, effective March 22, 1999. 64 Fed. Reg. 8478.

B. Legal Scope of Protection Under CAT

1. The regulations implementing the CAT have been drawn so as not to expand upon the protections that a literal reading of Article 3 would grant. This is in accord with several directives of Congress.

   a. *Specific Intent:* Regulations require that there be a specific intent to inflict severe pain or suffering, and that acts resulting in unanticipated pain or suffering are not torture. 8 C.F.R. §§ 208.18(a)(1),(5). Consistent with Understanding (1)(a) of U.S. Senate, and with rulings of Committee Against Torture and European Court of Human Rights.

b. *Purposes of Torture*: Regulations require that acts causing severe pain and suffering be inflicted for specific purposes such as to extract information or confession; to punish; or to intimidate. 8 C.F.R. § 208.18(a)(1). This is consistent with the Article 1 definition.

c. *Results of Torture/Mental Pain and Suffering*: The act in question must result in severe pain and suffering. 8 C.F.R. § 208.18(a)(1). Mental pain or suffering may constitute torture if it is prolonged and resulting from either severe physical pain and suffering or administration of mind-altering substances to profoundly disrupt the senses or personality, or threat of imminent death or threatened death of a third person. This implements Senate Understanding (1)(a).

d. *Circumstances of Torture:* Senate Understanding (1)(b) stated that the definition of torture is intended to apply only to acts directed against persons in the offender's custody or physical control. This is implemented at 8 C.F.R. 208.18(a)(6).

e. *Awareness by Official Perpetrator of Torture:* Senate Understanding (1)(d) states that "acquiescence" of public official requires that the official be aware, prior to the activity constituting torture, of such activity and thereafter breaches his legal responsibility to intervene to prevent it. This is implemented at 8 C.F.R. 208.18(a)(7).

f. *Punishment as Lawful Sanctions:* Senate Understanding (1)(c) stated that torture does not include judicially-enforced sanctions, but that State parties cannot, through official authorization of such sanctions, defeat the object and purpose of the Convention. Regulations thus state that lawful sanctions causing pain and suffering do not constitute torture unless they are intended to defeat the purpose of the Convention. 8 C.F.R. 208.18(a)(3).

g. *Lesser forms of "inhuman and degrading treatment" not a basis for protection*: Following Article 16 of the Convention, the regulations specify that forms of inhuman and degrading treatment that do not rise of the level of torture do not provide a basis for protection. See 64 Fed. Reg. 8,478, 8,482 (Feb. 19, 1999). This creates a potential conflict on the question of scope between the U.S., which will limit protection to cases of torture, and European nations that recognize the potentially broader scope of "inhuman and degrading treatment" as a basis for mandatory protection.

2. The level of specificity in these regulations, while not obviating the need for further jurisprudential development, will clearly guide the determinations of Immigration Judges and the BIA and thus determine the direction of U.S. implementation of its obligations under the CAT. This is in contrast to the relatively open-ended statutory directives relating to asylum, in which both administrative and Federal courts have had a more free hand in setting forth basic guidelines and principles.

C. Justiciability of Claims Under the Torture Convention

1. The Attorney General is charged with the authority to remove from the United States aliens who are inadmissible or deportable as defined by the Immigration and Nationality Act (INA). (This does not cover matters of extradition.). The Attorney General has delegated this authority chiefly to the Immigration Judges and the Board of Immigration Appeals.

2. The United States currently implements its obligation of *non-refoulement* under Article 33 of the Refugee Convention through section 241(b)(3) of the INA ("withholding of removal"). This section requires the Attorney General to withhold removal of an alien to a country where it is more likely than not that the alien's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984). In contrast, asylum under section 208 of the INA is a discretionary grant of relief premised on the well-founded fear standard. *See INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987).

3. The regulations provide for two forms of relief to fulfill the non-refoulement obligation of Article 3.

a. Withholding of Removal (8 C.F.R. §208.16(c)).

(1) All other avenues of possible relief from removal, including asylum and withholding of deportation, must be fully adjudicated before consideration of an application for relief under the CAT. Only if other relief is not available will a claim for protection under Article 3 be considered.

(2) In considering any application for relief under the Convention, an Immigration Judge must "first determine whether the alien is more likely than not to be tortured in the country of removal." 8 C.F.R. § 208.16(a)(c)(4). The burden of proof is on the applicant, but if the applicant testifies

credibly, such testimony can be sufficient to carry his evidentiary burden.

(3) An applicant granted this form of relief stands in the same shoes as an applicant granted relief under section 241(b)(3) of the INA (withholding of removal to implement Article 33 of Refugee Convention). There is no attendant grant of permanent resident status, and the applicant cannot be removed to the country in which torture would occur unless his grant of relief is terminated in an administrative proceeding.

b. Deferral of Removal.

(1) If an applicant is statutorily barred from withholding of removal under section 241(b)(3) of the INA for grounds such as being convicted of a particularly serious crime, having engaged in persecution, or constituting a danger to the community or a risk to national security, the applicant may nonetheless be granted a more limited form of relief under the CAT, entitled "deferral of removal." 8 C.F.R. § 208.17(a).

(2) Deferral of removal is a limited form of relief. The applicant granted relief must be informed by the Immigration Judge that removal to his country of nationality shall be deferred only until such time as the deferral is terminated. The Immigration Judge also shall notify the applicant that:

(a) Deferral of removal does not confer upon an alien any lawful or permanent status in the United States.

(b) Deferral of removal will not necessarily result in the alien's release from detention.

(c) Deferral is only effective until terminated.

(d) Deferral is subject to review and termination if the Immigration Judge or the Board determines that it is not likely that the alien would be tortured.

(e) Deferral does not prevent the applicant's removal to a country other than the one in which torture is feared.

4. Meeting the Burden of Proof. In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

   a. Evidence of past torture inflicted upon the applicant;

   b. Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

   c. Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

   d. Other relevant information regarding conditions in the country of removal. 8 C.F.R. § 208.16(c)(3).

5. Appeals.

   a. Appeal of Immigration Judge decisions on CAT relief may be taken by either the applicant or the INS to the BIA as part of review of a final order entered by the IJ, and are subject to the same jurisdictional and procedural rules as other final orders.

   b. An applicant may seek judicial review of an adverse BIA decision denying CAT relief; such appeals are bound by the same statutory conditions applying to other immigration matters. 8 C.F.R. 208.18(e).

D. Perspectives on the Role of Judges in CAT Adjudications

1. Immigration Judges and the BIA (and the Federal courts which review their decisions) play a central role in the U.S. system both in adjudicating individual claims for asylum and Article 33 *non-refoulement*, and (in the case of the BIA and Federal courts) in interpreting and articulating the legal principles that guide all decision-makers in this area.

   a. As noted, the statutes relating to asylum and *non-refoulement* are general in nature; section 208 of the INA, for example, states that the Attorney General may grant asylum to aliens present in the U.S. who meet the statutory definition of "refugee."

b. Such general language has left a wide scope of discretion for judges on questions such as: what constitutes a "well-founded" fear; what level of harm amounts to persecution; whether persecution can be inflicted by non-State agents, and what evidence of motivation is necessary to determine that the persecution has a nexus to one of the five protected grounds.

2. In contrast, Immigration Judges and the BIA have had virtually no role in adjudicating or determining the scope of Complementary Protection.

3. Under the statutes and regulations implementing the Convention Against Torture, judges are given a role that appears similar to that which they possess in asylum adjudications. Claims are determined on an individual basis, with no "blanket" designations of protected countries. However, there are significant differences.

   a. Congress, in ratifying the CAT and in calling for its implementation, expressed in greater detail its understandings regarding the meaning of the Convention; these understandings have been captured in the regulations which, in turn, are binding on Immigration Judges.

   b. Accordingly, the regulations provide a far more detailed template for decision-making, one that sets forth specific standards regarding questions such as the level of harm that constitutes torture, the identity of the party inflicting torture, and the relationship between torture and judicially-sanctioned punishment. Thus, the adjudicatory role, while enhanced, is not equivalent to that exercised in the area of asylum.

4. Other options for implementing the CAT might have been considered.

   a. For example, Immigration Judges might have been authorized to grant withholding of removal (*non-refoulement*) within the context of § 241(b)(3) to those who failed to qualify for such relief because they could not meet the "on account of" standard, but who could nevertheless establish the likelihood that they would be tortured.

      (1) This would have left CAT determinations within the ordinary scope of current determinations in asylum and withholding cases, perhaps without the need for such detailed regulations.

      (2) This approach also would have left in place the exclusion clauses barring serious criminals, persecutors, those who have

engaged in genocide, and threats to national security from gaining protection. As the law and regulations stand, such persons will be eligible for CAT relief.

(3) However, this approach would have been criticized as not fully implementing the mandates of Article 3, which provides no such exclusions from protection, even for serious criminals and persecutors.

b. Another option would have been to grant blanket CAT protection on a country-by-country basis, as in the case of TPS, with designations being made in the case of countries with an established record of the widespread use of torture. Again, this would have been criticized both as granting relief to applicants who may not deserve it, and withholding relief from applicants who do (applicants from countries where torture is not as widespread, but in which they individually would face a real risk of torture).

5. Thus, the Attorney General chose the option of providing a new form of relief to be adjudicated in removal proceedings. Granting such authority to Immigration Judges is supported by the following considerations:

a. Determinations under CAT seem more appropriate for judicial involvement than other forms of Complementary Protection precisely because the standard for obtaining relief is high (as opposed to TPS), and the factual determinations so intricate (similar to asylum).

b. Issues such as specific intent, the purposes of torture, and the likely results of harm that may be inflicted are complex and may best be determined in a quasi-judicial forum.

c. Likewise, the "adversarial" process of such proceedings allows a free flow of evidence tending to establish or diminish the likelihood of torture.

d. Judicial authorities are in the best position to consider whether rulings from other jurisdictions regarding CAT relief are well-reasoned, on point, and ought to be considered in the decision-making process.

6. There are potential downsides, however, to giving such jurisdiction to Immigration Judges.

a. Most applicants who can meet the burden of proving that they are more likely than not to be tortured with the acquiescence of official authorities and under conditions of specific intent are likely to be found eligible for asylum or withholding of removal. Such applicants have a limited need, if any, for the protections of the CAT.

b. Those who will benefit from the Convention will likely, therefore, fall into two categories:

(1) Those with non-meritorious claims who will seek to use claims under the CAT as a means of prolonging their proceedings; and

(2) Those who are ineligible for asylum or withholding of removal due to serious criminal activity or other severe derogatory factors.

c. As a result, an increased adjudicatory burden may be borne for the immediate benefit of applicants who do not present particularly deserving circumstances. While that burden will serve the high purposes that underlie the Convention, it will nevertheless produce further strain in a system already saddled with delays.

7. These concerns may not override the advantages in giving judges jurisdiction over these claims; however, they ought to be considered in deciding whether to expand the jurisdiction to immigration and refugee judges in the realm of Complementary Protection.

8. Since the Convention has been fully in force in the U.S. for less than one year, the full impact cannot yet be determined. In addition, it is too early to tell how the "template" provided by the CAT regulations will be interpreted and applied, and what new issues will emerge.

V. Answering the Critical Questions: The Role of the "Immigration Bench"

A. Scope of Complementary Protection

1. The question of "scope" is really two questions:

a. Who will be protected, or put another way, against what circumstances and levels of risk of harm will protection be offered?

b. What protection will be given; that is, temporary, conditional, or permanent?

2. Pressure to advance the scope of Complementary Protection will come from two sources: those who advocate Complementary Protection as a "break wall" against a further influx of applicants into an already-overburdened asylum process; and those who advocate it as needed protection against potential severe violations of human rights.

3. Immigration and refugee judges can play a useful role in identifying the common ground between these perspectives, and in clarifying the interrelationship between the two aspects of "scope" mentioned above.

4. Judges, for example, cannot be indifferent to questions of inequality of access to schemes of protection, particularly when such inequality arises from social circumstances that are no fault of the potential applicant.

a. Thus, one potential point of common ground may be to ensure that such members of "vulnerable categories" first are able to apply for refugee or asylum status, and second, receive enhanced consideration in cases when return to their home country would place them in positions of severe physical danger or social disenfranchisement.

b. This neither requires expanding the categories of persons recognized as refugees, nor obviates the ongoing discussion and litigation of such claims. *Compare Matter of Shah and Islam* (House of Lords, 1999) with *Matter of R-A-*, Int. Dec. 3403 (BIA 1999). In other words, the difference of opinion on whether such claims ought to be recognized under the Refugee Convention should not foreclose discussion of how such persons may receive complementary forms of protection.

(1) For example, in *Matter of R-A-, supra* at 25, the Board majority that rejected the applicant's claim that the status of being a battered spouse qualified her as a refugee, also suggested that prosecutorial discretion could be exercised not to return the applicant to her home country.

(2) Defining a more formal process for judges to recommend (or grant) deferral of removal to applicants who would face a clear prospect of harm upon return is clearly an appropriate role for immigration and refugee judges.

c. Some will disagree with this proposition, arguing that the availability of such lower-level protection will prevent judges from addressing and expanding relief in "cutting-edge" types of refugee claims.

(1) However, even under a more expansive view of refugee protection, there will continue to be applicants who fail to qualify, but whose circumstances are such that return to their home country will be considered inhumane or impracticable.

(2) In addition, increased consideration of Complementary Protection does not seem to have stifled efforts to bring new types of claims within the scope of the refugee Convention. Novel claims to protection (homosexuals, battered women, those fleeing coercive sterilization or abortion) continue to be pressed, and in many cases recognized.

d. Finally, some are skeptical of Complementary Protection from another standpoint: they see the offer of protection outside the boundaries that have been agreed upon in the Refugee and Torture Convention as evading those boundaries, and leading to a dynamic where limitations built into such agreements will only create agitation for new and broader protection obligations.

e. One way to get past this controversy is to state some fundamental assumptions:

(1) First, a grant of Complementary Protection in a host country should not constitute a barrier to seeking relief under the Refugee convention.

(2) Second, the fact that certain categories of harm are recognized as a basis for granting Complementary Protection should not, by itself, cut off consideration of such categories for protection under the Refugee convention.

(3) Third is the obverse of the second: recognition of such claims for Complementary Protection does not create a presumption that they should be considered as a basis for protection under the Refugee convention.

5. Judges also can play a unique role in defining the categories of individuals most deserving of consideration for Complementary Protection.

a. Judges are most directly aware of the types of claims that present deserving circumstances, but fall outside the definition of "refugee."

b. Judges also are aware of the difficulties of proof or evidence that may arise with certain types of claims, or of other factors that make certain types of claims less deserving than they may originally appear.

6. Specific standards are suitable in defining the scope of protection.

a. General Scope

(1) The Organization of African Unity extends protection to those who have fled "external aggression, occupation, foreign domination, or events seriously disturbing the public order."

(2) While this describes the types of conditions that may give rise to valid claims for Complementary Protection, it fails to specify a critical element: linking specific harm to a specific inability to return.

(3) In this regard, the standard for invoking TPS in the United States might provide a useful example: "an ongoing armed conflict within the state, [due to which] requiring the return of aliens who are nationals of that state . . . would pose a serious threat to their personal safety."

(4) In addition, TPS includes as protective factors earthquakes, floods, droughts, or other natural/environmental disasters, as well as a residual category: extraordinary and temporary conditions that prevent the return of nationals of that state in safety.

b. Exclusion Clauses:

(1) Although the Convention Against Torture includes no exclusion clauses, it is questionable whether forms of Complementary Protection premised on lesser threats of harm should be extended to all applicants, without regard to adverse individual factors.

(2) Thus, it seems appropriate to bar from such relief applicants who have committed serious crimes, have engaged in

persecution, or are otherwise legitimately considered as risks to national safety or security.

7. The TPS standard, however, is designed to be employed in connection with nationality-based, blanket grants of temporary status that are determined by the Executive. Thus, they are guidelines for decisions being made by political officers in the Executive branch. As observed, there always will be a place for such "blanket" determinations, for purposes of foreign policy, immigration control, and administrative efficiency. The guidelines suitable for guiding such decisions may *not* be suitable for guiding case-by-case determinations to be made by immigration and refugee judges.

   a. If Complementary Protection takes the next step, moving to a form of relief available to individuals from any country can apply for as a means of protection against removal, a definition such as that use in TPS will have to be more specific.

   b. In this project, the Convention Against Torture offers a useful example.

      (1) Protection under CAT is linked to specific actions undertaken by specific parties. This has the effect of clearly spelling out who is protected against harm, and who is not. (Compare Article 1 of the CAT with Article 16).

      (2) While the general scope of Complementary Protection presumably would be more broad than under the CAT, it will be important to fashion definitions of similar clarity. For example, not all levels of warfare or civil strife should compel an internationally-based obligation of *non-refoulement*, and not all levels of privation due to vulnerable social status will merit protection.

      (3) To gain widespread acceptance, the focus of Complementary Protection ought to be clear and directed against the most severe circumstances. If definitions are stringent and adhered to, the potential "magnet effect" will be reduced once putative applicants see that this not an open-ended source of relief.

8. In the author's view, defining the scope of Complementary Protection in a clear, specific, and limited manner achieves three objectives:

a. First, it will focus this form of protection where it is most needed: the "vulnerable categories" of de facto refugees for whom removal to their homelands would genuinely constitute an "exceptional and extreme" hardship, beyond that which is normally attendant upon repatriation, even to a country undergoing significant difficulties.

b. Second, adhering to such a strict standard could obviate the need to "close off" eligibility for Complementary Protection at a particular date of entry (such as that under TPS in the U.S.), without producing a magnet effect.

c. Third, Complementary Protection should give priority to the most compelling cases, regardless of the date of their arrival in the host country. Part of the price of assuring that such protection does not become a magnet is that lesser forms of risk or harm will not be considered grounds for protection.

9. Finally, the implementation of the CAT in the United States also offers a useful model for the scope of protection offered. An applicant without claim to legal status receives an order of removal; enforcement of that order, however, is withheld or deferred due to the likelihood of torture. Similarly, applicants for a broader scope of Complementary Protection could be subject to normal proceedings to determine removability, and granted relief as a form of temporary protection against removal.

B. Justiciability: What Is the "Best Practice?"

1. Assumption: Complementary Protection cannot be administered on a "one procedure fits all" basis in host countries.

a. Certain types of claims under the Complementary Protection rubric will be readily amenable to case-by-case judicial adjudication (e.g., protection under the Convention Against Torture), while others may be more readily amenable to blanket temporary protection offered at the executive level (e.g., protection against return to countries engaged in severe civil conflict). (See paragraph 2 below).

b. In addition, certain aspects of Complementary Protection will be implemented outside of our jurisdictions, further curtailing any direct role for judges. (See paragraph 3 below).

c. Discussions such as this can help to identify what types of claims are suitable for the differing arrangements that may arise.

2. "Case-by-Case" vs. "Blanket" Grants of Protection.

a. As discussed previously, relief such as that offered under the Convention Against Torture may best be adjudicated on the same individualized, case-by-case basis offered in asylum proceedings.

(1) In cases where an applicant's burden of proof is high, there is a greater need for fair and transparent procedures to ensure that the applicant is accorded due process in meeting that burden. Otherwise, there could be the appearance of an administrative mind-set to reflexively deny such claims.

(2) Under the CAT, the elements that must be proven to qualify for relief, and the level of proof required, are sufficiently stringent for applicants to deserve a quasi-judicial proceeding.

b. In contrast, relief such as that offered by Temporary Protected Status may adequately be "adjudicated" by a blanket grant of protection to aliens already present in the country.

(1) Where the applicant's burden of proof is low and the "grant rate" very high, there is less concern for an absence of due process.

(2) Under TPS, where the basic eligibility for protection is determined by nationality and date of entry, the current process of application to the INS is sufficient — at least for aliens whose countries have been designated for protection.

(3) In addition, TPS offers a great deal of flexibility in determining when a period of protection should end. If such claims were done case-by-case, and the standard was no more strict than that currently used for TPS decisions, adjudicators would likely never see the end of such cases.

3. Proposals to increase case-by-case adjudication of Complementary Protection claims.

a. Some American commentators (e.g., Martin and Schoenholtz), recommend that interests of protection and immigration control would better be served by a system which adjudicates claims for

temporary or complementary protection on a case-by-case basis, as with asylum.

b. Such proposals are designed to addressed three perceived deficiencies in "blanket protection" models such as TPS.

(1) First, the fact that current benefits are limited only to nationals of designated countries, and the process of designation is not transparent.

(2) Second, the fact that, despite the intention that TPS be the exclusive form of complementary or temporary protection under U.S. law, other forms of protection have arisen to meet human rights or diplomatic exigencies. (This process also is criticized as non-transparent).

(3) Third, the fact that TPS creates a pool of "temporary" refugees with no specific strategy for providing a durable solution of resettlement or repatriation when the period of designation comes to an end. Granting permanent status usually requires an act of Congress, resulting in disparate treatment of different nationalities.

c. The proposal also is designed to address concerns arising out of *"expedited procedures"* currently employed at U.S. ports of entry.

(1) These procedures allow immigration enforcement officers to enter orders of removal in the cases of aliens who arrive with no valid entry documents, or fraudulent entry documents.

(2) All such "arriving aliens" have an opportunity to seek asylum, but must first establish that they have a "credible fear" of persecution. (In practice, this is similar to the "manifestly unfounded" standard employed in Europe — about 80 to 85 percent of claimants are found to have a credible fear and go on to full asylum hearings.)

(3) Martin and Schoenholtz are concerned that such procedures could improperly "screen out" applicants who could benefits from Complementary Protection even if they do not qualify for asylum. Thus, they propose that such arriving aliens be permitted to apply for Complementary Protection as well.

d. Martin and Schoenholtz propose that issues of asylum or temporary protected status be determined on a case-by-case basis as early as possible after entry. Such a process would be more transparent and deserving aliens from any country could seek all of the benefits available under U.S. law. They also propose an "automatic" system to grant permanent status to long-term beneficiaries of temporary protection.

e. The proposal merits consideration, particularly due to its comprehensive scope. However, some questions remain:

(1) Only a small minority of asylum applicants are identified at ports of entry. Most enter surreptitiously or enter on valid temporary visas and overstay, and only then apply for asylum.

(a) As a result, most claims for Complementary Protection would actually be adjudicated as "add-ons" to removal cases once it was determined that the applicant is not eligible for asylum. This would further delay proceedings.

(b) Incentives, such as time deadlines, could be considered to encourage such persons to apply shortly after their entry for asylum or Complementary Protection. But such incentives have proven to be imperfect in getting migrants to promptly apply for asylum.

(2) The heart of the Martin-Schoenholtz proposal — to increase case-by-case adjudication and move away from blanket determinations — could achieve the goal of identifying and "locking in" immigration status in cases of large influxes of migrants that are apprehended at the time of entry. In some cases, however, blanket determinations will be the only viable option from the standpoint of administrative efficiency and resources.

(3) Despite the effort to address issues of return, this proposal (like many others) is more specific with regard to what should be done *for* the applicant in order to ensure access to protection, and far less specific on what should be done *by* the applicant to ensure that the host country's hospitality is not worn out or abused.

(a) This is an endemic problem: Decisions on the types of protections and procedures that will be provided are within the control of the host Government. Decisions to return to the home country, however, are less easily controlled, particularly in open and democratic societies.

(b) Deportation (forced removal) is a critical tool to ensure the integrity of the system, but is difficult to enforce on a universal basis. A policy of return for those not granted protection in the first place, and those whose period of protection has expired, will always depend upon a certain degree of voluntary compliance.

(c) To address this dilemma, proposals for Complementary Protection should consider more concrete measures for the "end game."

i) As discussed above (under "Scope"), this could include "locking in" the status of immigration status of those granted Complementary Protection as soon as possible after their arrival in the host country, with the aim of preventing lengthy procedures prior to removal once the period of protection has ended. Currently in the U.S., this is *not* done in cases of TPS; proceedings are most often closed when TPS is granted, and need to be re-opened, often years later, to determine the issue of removability.

ii) This also could include detention of applicants who are denied both asylum and Complementary Protection and who have no legal immigration status, pending their removal. A system of parole and controlled supervision, similar to that used in the criminal justice system, theoretically could achieve many of the "control" benefits of detention. (Such systems are currently being

designed in the U.S., but have not yet been implemented.)

iii) "Locking in" of status does not mean that an alien loses eligibility to "adjust" status in the case of an intervening event, such as approval of a family-based or employment-based immigrant visa. But since such cases are the exception, not the rule, the benefits of locking in status would seem to outweigh the costs.

4. Notwithstanding any of these concerns, the Martin-Schoenholtz proposal can be a useful point of departure in determining "best practices" for adjudication of claims for Complementary Protection. That task should begin by identifying the fundamental values that such a system should recognize and protect.

a. *Preservation of administrative flexibility.* Even as we discuss proposals that would move away from a system of Complementary Protection that is heavily reliant on ad hoc Executive decisions, we must keep in mind the reality that Governments will always require a significant measure of flexibility and control over the conditions in which newcomers, particularly large influxes, are treated. This does not mean that the search for basic, minimal standards of legal protection and due process should not continue. But the articulation of those standards must respect the legitimate needs of national sovereignties as they balance issues of immigration control, foreign policy, and their international protection obligations.

b. *Transparency.* The immigration bench has an important role to play in ensuring transparency in its own decision-making, and encouraging to the greatest extent possible transparency in decisions made by other Government entities in the realm of protection. Legislation such as TPS in the United States provides a coherent and specific set of criteria for offering such protection, even if the process of designating countries may not be as open as some would like. The goal of perfect transparency will always fall victim to the concerns expressed in point (a) above; but it is nevertheless a worthy goal to champion.

c. *Appropriate use of judicial resources.* The immigration bench also should have significant input regarding how its scarce resources are utilized.

(1) The experience of the Haitian "safe haven" program suggests that where a firm commitment to providing temporary protection has been made in the case of a particular nationality, the need for case-by-case adjudication is minimal, and does not involve the type of complex legal questions that require quasi-judicial proceedings and formal rulings.

(2) On the other hand, if a scheme of temporary protection based on criteria similar to TPS (conditions of warfare, etc.) is made available without limitation of nationality to those who can meet a burden of proof to deserve such protection, a judicial role may be necessary.

d. *Create a mechanism for enforceable orders of removal:*

(1) The U.S. and other countries permit entry of orders of removal by enforcement authorities at the border in certain clearly-identifiable cases. Immigration Judges are not involved in such determinations, although they can be involved in resolving claims to asylum presented by such persons.

(2) Whatever its merits, such a course will not be applicable to all Complementary Protection claimants: issues of removability may be contested or more complex, particularly for those who have already entered the country. Such cases will come into the normal immigration adjudications system.

(3) Without forfeiting the right to contest removal, procedures can be streamlined through the use of stipulated orders of removal, coupled with stipulated grants of Complementary Protection for a defined period.

(4) The right to contest all issues — by the applicant and by the Government — will be preserved. But often, the interests of both parties will be served by negotiated agreement, and adjudicatory resources will be preserved.

e. *Identify cases where a "durable solution" will be necessary:*

(1) Immigration and refugee judges will often be in the best position to see that the likely "end game" for a particular

individual is going to be permanent settlement (whether or not under lawful auspices) in the host country. Such judgments will be informed by past experience with similar claims, knowledge of country conditions, and the likelihood of removal in light of such conditions and diplomatic realities.

(2) Giving authority to judges to render *ad hoc* decisions granting permanent status could be a controversial step. In the U.S., authority of immigration judges to grant discretionary "cancellation of removal" and confer permanent resident status was curtailed (but not eliminated) in 1996.

(3) However, in "immigration countries" with established categories and numerical limits on lawful admissions, much of this controversy could be allayed – if grants of permanent residence made by immigration or refugee judges were "offset" by an equivalent decrease in admissions under the established legal immigration categories. (Another option would be to create a separate category for such admissions.)

(4) Consistent with what has been suggested previously, such authority should be guided by a strict standard of hardship. (The U.S. standard under "Cancellation of Removal" is "exceptional and extremely unusual hardship.") The futility of efforts to repatriate also could be a factor.

(5) Such relief should not be available to those who have committed serious crimes, engaged in persecution, or who otherwise pose a definable risk to national safety or security.

f. *Specificity:* Issues of justiciability and scope are often not easily separable. Claims will be justiciable in an efficient manner only if the scope of protection is clearly defined (both as to what is and what is not included) and realistic limits on delays in adjudication are spelled out and adhered to. Permanent resettlement is not the favored "durable solution" for most of the world's refugees. The provision of Complementary Protection should not undermine that principle by creating a scope of protection far beyond that set forth in the Conventions relating to refugees and torture.

5. Whatever role is assigned to the judiciary, the executive and political branches of government will continue to play a paramount role in the creation and oversight of schemes of Complementary Protection, and most certainly

in the creation of international agreements and understandings. This should be seen less as a problem than as an opportunity. Well-reasoned and practical input from the "immigration bench" can aid a forward-thinking approach by legal and foreign policy authorities.

C. Harmonization: What Can be Achieved?

1. Is there a need for international, minimum standards for Complementary Protection?

a. The very existence of agreements such as Comprehensive Plan of Action (CPA) (Southeast Asia), the burden-sharing for Bosnian and Kosovar refugees, and more generalized statements such as OAU and Cartegena declarations, expresses a recognition of international norms for providing relief outside the scope of the refugee Convention.

b. Elements of such agreements include minimum standards of treatment, access to essentials for daily living, and guarantees of protection upon return. The international community has invested considerable resources in ensuring that these minimal standards are met.

2. What principles should govern the form and contents of further international agreements on the subject? Is such harmonization a viable objective?

a. The IARLJ and its members are well-positioned to identify the types of concerns that ought to be elemental in any scheme of harmonization.

(1) While we are not "on the ground" in countries where these conditions arise, we are clearly well aware of the range of human miseries presented in our cases, and of how those claims fall in (or out of) the current scope of refugee or established humanitarian protections.

(2) Judges also may have a more intuitive sense than they often are given credit for in determining whether the inclusion of certain types of claims will test the boundaries of "compassion fatigue" — although the range of views among judges will vary widely on this question.

(3) Finally, our views would be important regarding the integrity of any adjudicative processes that such complementary protection might entail.

b. Harmonization of complementary protection is a viable objective to the extent that the goals for degree of harmonization are modest.

(1) In light of the foregoing discussion of U.S. developments, it is clear that myriad domestic and foreign policy considerations will always play a key role in the decisions of individual states in this area.

(2) This does not obviate the need, however, for international benchmarks in this area. In the case of the CPA, for example, the existence of international agreements and the work of international human rights monitors made it possible for the U.S. to participate in "durable solutions" that resulted in the resettlement of many refugees, and the compelled return of others.

(3) The goals of harmonization, therefore, should clearly include enabling States to ensure some stability in the burdens they will be asked to carry, and to carry such burdens within the overall purposes of their immigration policies.

c. Among the principles that ought to be considered:

(1) Favoring regional solutions. States may be more willing to undertake new "obligations" within their own regional structures as opposed to more universal frameworks.

(2) Prioritization. Choose the categories of persons most in need of protection and design specific definitions and procedures to cover those persons.

(3) Durable solutions. Regional partners should agree to accept the return of their nationals at an appropriate time in return for asking other countries to offer protection on a temporary basis. Host countries, while secure in their right to seek repatriation once the conditions for granting temporary protection have changed, also should agree to an appropriate level of permanent resettlement, within standards geared toward special claims of hardship.

(4) Procedural standards. Due process does not require that all claims for Complementary Protection be individually adjudicated. Blanket designations are appropriate in certain circumstances. If new obligations of *non-refoulement* are established, however, procedures to allow "defensive" claims for such protection should be secured.

(5) Part of the reason for harmonization is to share the burden more equitably and to be more clear in what is and what is not included in the regime of protection. This may have little direct effect on the decisions of individual migrants, but such policy will support the efforts of member states to harmonize and balance the goals of protection with the goals of immigration enforcement and integrity of existing programs for legal immigration.

3. Will the official system of Complementary Protection encourage people to leave their home countries, and thereby risk undermining the integrity of the Geneva Convention?

a. In the U.S., a frequently-heard refrain is: "there's nothing more permanent than a 'temporary' immigrant." The vagaries of domestic U.S. immigration policy makes it perfectly rational to seek entry, wait out the system, and hope to receive some grant of permanent status in the future. (The 1996 Immigration Act removed many of these incentives from the law, but Congress in 1997 and 1998 ameliorated those restrictive provisions for specific populations.)

b. In addition, as noted previously, the definitional limitations placed into agreements such as the Refugee Convention and the Convention Against Torture should be perceived as having some finality. If, instead, such limitations only prompt a new round of discussion of further *non-refoulement* obligations, these agreements will lose their integrity, and the incentive for State parties to enter into such agreements will be greatly diminished.

c. This is another reason to keep the goals of harmonization of Complementary Protection modest: if maintained at the regional level, with the United Nations seen more as a co-participant than a legislator, these agreements will leave intact the understandings of the prior Conventions.

d. The risk of encouraging flight clearly exists, but if some control mechanisms are utilized, both in defining the scope of protection, and in ensuring that States can enforce orders of removal when conditions warrant, the risk can be diminished. Also, it must be understood that the risk already is present and acted-upon: aliens with no valid claims to refugee status continue to seek illegal entry, and the legal systems of many States are not fully-equipped to handle such cases.

e. Here, it is critical to note that advocating the "justiciability" of such claims should not be perceived as a means to prolong procedures and make it more difficult to enforce removal.

f. A properly-balanced scheme of Complementary Protection, within the framework of an overall protection program of immigration policy and control, may actually shorten the existing procedure employed to distinguish those applicants with a valid need for protection from those whose claims are invalid.

4. Is differentiation of treatment appropriate between Convention refugees and those granted Complementary Protection?

a. The traditional approach in U.S. law to issues of economic support has been more limited than that of some other countries. Certain categories of those seeking asylum or humanitarian relief are granted permission to work (all TPS recipients, for example, receive work authorization). Access to public benefits is far more limited.

b. Rights to family unification (resettlement of family from abroad) is limited to those granted permanent resident status.

c. Is there any justification for differential treatment of such rights, based on the source or type of harm? The answer seems to be "yes."

(1) The question could be put differently — is the basis of the difference in treatment the *source* of persecution the respective claimants have suffered, or rather, a judgment that not all forms of Complementary Protection need be permanent?

(2) What other variables could affect the depth, level, and permanency of protection, in addition to the source of persecution the respective claimants have suffered?

(3) Such differentiation already exists in refugee law: Article 33 imposes no obligation of permanent resettlement. Neither must a discretionary grant of asylum to a refugee be permanent, although it most often is.

d. In the U.S., the traditional dividing lines that must be crossed before one is entitled to family unification and public benefits are permanent residency, and then citizenship. It seems reasonable to continue such distinctions (realizing that different States offer greater or lesser relative social benefits) as a recognition that rights and privileges mature in correlation to the connection between the migrant and the receiving State.

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