

# PARADISE LOST: THE IMPACT OF THE CHANGED COUNTRY CONDITIONS IN POST-SOVIET UKRAINE ON PENDING RELIGIOUS ASYLUM PROCEEDINGS IN THE UNITED STATES

By  
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## I. INTRODUCTION

[1] The United States of America is a melting pot of many nationalities.<sup>1</sup> It remains what many consider the ideal embodiment of freedom and opportunity. Many families and individuals come to America seeking refuge from oppressive governments that would persecute them on one or more grounds. The United States may provide protection from future persecution, provided that the applicant did not participate in the persecution of others, and that the persecution falls within one of the enumerated statutory grounds including race, religion, and membership in a particular organization.<sup>2</sup> Congress has chosen, via legislation, to recognize several statutory

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<sup>1</sup> See generally, e.g., U.S. Bureau of the Census at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> (Dec. 2003) (Last visited 4/9/2005). The Bureau of the Census identifies over thirty-one million foreign-born individuals as of the 2000 census. This constitutes over eleven percent of the entire population of the United States. *Id.*

<sup>2</sup> 8 U.S.C. § 1101(a)(42)(2003). Stating that a refugee is:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act [8 USCS § 1157(e)]) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited,

grounds for granting refugee status and asylum.<sup>3</sup> In non-adversarial proceedings, the government seeks to adjudicate the petitions of refugees.<sup>4</sup> During the course of the proceedings, an alien may form connections, friends, and new family in the United States.<sup>5</sup> These ties to the country can, however, be undone (or at least judicially dismissed) by an event occurring thousands of miles away, in a land that formerly persecuted the would-be asylee.<sup>6</sup> The changed conditions, if determined to be sufficient, in a refugee's home country can lead to their removal back to that country.<sup>7</sup> Sadly, this can often lead to a dramatic worsening of conditions in the life

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assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

*Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 8 C.F.R. 208.9(b)(2004). The purpose of the proceeding is to obtain all the relevant information necessary to make an informed decision with respect to an alien's petition. The applicant may be represented during the proceeding and may present witnesses or other relevant information to its case. The applicant has the choice of a public or non-public interview with the asylum officer. *Id.*

<sup>5</sup> *See generally* *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003); *Krougliak v. INS*, 289 F.3d 457 (7th Cir. 2002). The cases of both Natalia Kharkhan and Valerii Krougliak demonstrate that an alien's life does not freeze with the filing of a petition for asylum. Proceedings take time, frequently several years, and an applicant's life continues. They form new relationships and frequently start new families in the United States. In some cases the decisions of the asylum officer can result in the separation and break-up of families. *Yakimchuck v. INS*, No. 99-1443, 1999 U.S. App. LEXIS 18700 (7th Cir. Aug. 6, 1999). In *Yakimchuck*, the court demonstrated the inequity of modern immigration procedures and stated that the petitioner "will now be separated from members of his family who were granted admission as refugees from the Ukraine under the Lautenberg Amendment." *Id.* at \*7.

<sup>6</sup> *Kharkhan*, 336 F.3d at 604. In both *Krougliak* and *Kharkhan*, the applicants were Greek Catholics who fled the Soviet Union where state-sponsored atheism gave way to religious tolerance with the fall of the old Soviet regime. *Krougliak*, 289 F.3d at 459; *Kharkhan*, 336 F.3d at 603.

<sup>7</sup> *Draganova v. INS*, 82 F.3d 716,722 (7th Cir. 1996); *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991); *see also* 8 C.F.R. § 208.16(b)(2). In *Draganova*, the court indicates that although past discrimination creates a presumption in favor of asylum, the presumption is rebuttable. *Draganova*, 82 F.3d at 722. In *Skalak*, the court held that a Polish refugee persecuted under the communist government, should return as the communist government had fallen. *Skalek*, 944 F.2d at 365. The immigrations regulations state:

of a refugee and, under the current legislation, these conditions are not a protected ground for asylum.<sup>8</sup> In this way the current legislation creates an unfortunate injustice.

[2] This note has eight sections. Section I is this introduction, providing a brief overview of the note and establishing a roadmap for the remaining sections.

[3] Section II defines and explores the process of attaining asylum and refugee status. It also provides a history of the legislation in the United States. After analyzing the role of persecution with respect to the grant of refugee status, Section II explores restriction on removal and the additional burden of proof that is required to attain it. Lastly, Section II examines “changed country conditions.” These changes, despite the evident inequity, can be enough to return an immigrant to their home country.

[4] Section III of this note provides a history of state sponsored atheism and religious persecution in the former Soviet Union. It discusses the Soviet government’s motivations and methods of religious persecution. Section III ends with a focus on persecution of the Catholic Church in the Ukraine and the effects of Ukrainian independence. My goal is to provide some

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The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom. (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country. . . .

8 C.F.R. § 208.16(b)(1).

<sup>8</sup> See Brief for Petitioner at 15, *Kharkhan v. Ashcroft*, 336 F.3d 601 (2003). Kharkhan argued that general poverty, low income, exploitation of women, and a developing white slave market gave her concerns about returning to Ukraine. These concerns alone do not grant asylum.

perspective for readers when they examine claims of religious persecution by former Russian citizens.

[5] Section IV looks at the Lautenberg Amendment and how it affects a Russian refugee's claim of a fear of persecution from their home government.

[6] Section V, studies the new Ukrainian constitution. I specifically examine the "freedom of religion" clause and its guarantee to Ukrainian citizens.

Section VI explores the effect of the "changed conditions" within the Ukraine on some recent asylum cases in the United States. I have chosen cases that focus on a religious minority—Greek Catholics.

[7] Section VII speculates as to what a formerly religiously persecuted individual must prove in order to gain asylum in the United States. The changed conditions in the Ukraine make this a difficult task at best.

[8] Section VIII is the conclusion of this note. In this section, I briefly summarize the note and suggest some possible remedies for the inequity created when the conditions change in a persecuted immigrant's home country and, despite their new ties to the United States, they are subject to removal under the current legislation.

## II. WHO ARE THEY, AND WHAT DO THEY WANT?

[9] The road to asylum can be long and rocky.<sup>9</sup> There are several hurdles that must be overcome for an alien, who has already managed to flee an oppressive home country and wants to remain in the United States.<sup>10</sup> The United States classifies aliens according to what they are seeking and how far they have come in the process of achieving that end.<sup>11</sup> Additionally, immigration law itself contains a host of terminology, much of which lacks a statutory definition.<sup>12</sup> This calls for an examination of some of these terms as well as their legislative history.

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<sup>9</sup> See generally *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003); *Krougliak v. INS*, 289 F.3d 457 (7th Cir. 2002). In *Kharkhan*, the refugee entered the United States legally in 1990 and her appeal was resolved in 2003. *Kharkhan*, 336 F.3d 601. In *Krougliak*, the refugee entered the United States legally in 1991 and his appeal was decided in 2002. *Krougliak*, 289 F.3d 457. These cases are representative of typical asylum proceedings in the United States.

<sup>10</sup> *Kharkhan*, 336 F.3d 601; *Krougliak*, 289 F.3d 457.

<sup>11</sup> 8 U.S.C. § 1101 (2003).

<sup>12</sup> *Id.* The "Definitions" section leaves many terms open to judicial interpretation. For example, "persecution," a keystone in religious asylum applications, is not defined within the statute. The United States Department of State, in its 2002 Report to Congress on the proposed refugee admissions for the fiscal year 2002, notes that:

## A. Asylum

[10] Asylum is a temporary status given to refugees who are physically present in the United States.<sup>13</sup> Asylum is a somewhat sweeter plum than refugee status as it can lead to permanent residency, an ability to work, and the grant of permission for an asylee's immediate family to legally remain in the United States.<sup>14</sup> There are several circumstances that may preclude an alien's eligibility for asylum. One example is the alien's presence in the country for more than one year without a good reason for not previously applying for asylum.<sup>15</sup> Under current statutes, an alien must first establish refugee status to be eligible for asylum. Even with refugee status, the governmental grant of asylum remains discretionary.<sup>16</sup> The Attorney General may deny asylum for several reasons.<sup>17</sup> Asylum generally begins with a formal application to the Attorney

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Persecution is the most difficult element of the refugee definition to analyze and apply. While there is no universally accepted definition of the term "persecution" it normally includes a threat to life or freedom or other serious human rights abuse. Discrimination in the treatment of various groups is not, *per se*, persecution, but an accumulation of discriminatory measures may involve such a significant denial of opportunities to participate in a society that it constitutes a threat to freedom. Economic hardship is not itself a basis for eligibility for refugee status, but persecution may take the form of economic reprisal, such as a denial of the opportunity to work.

U.S. Dept. of State, PROPOSED REFUGEE ADMISSIONS FOR FY 2002 – REPORT TO THE CONGRESS (2001), available at <http://www.state.gov/g/prm/refadm/rls/rpts/7241.htm> (Last visited 4/9/2005).

<sup>13</sup> 8 U.S.C. § 1158 (2003). This statute provides the basic selection system for asylum in the United States and provides that, in general, "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section. . . ." 8 U.S.C. § 1158(a)(1) (2003).

<sup>14</sup> 8 U.S.C. § 1158(c)(1)(2003); INA § 245.

<sup>15</sup> 8 U.S.C. § 1158(a)(2)(B)(2003). Application for asylum must come within one year of arrival in United States unless there exist extraordinary circumstances that prevented such application. *Id.*

<sup>16</sup> See generally 8 U.S.C. § 1158 (2003).

<sup>17</sup> 8 U.S.C. § 1158. For example, the Attorney General may refuse asylum to a refugee who: has firmly resettled in another country before arriving in the United States; incited, assisted, or

General. Then, the potential asylee typically receives a non-adversarial interview prior to the decision of an asylum officer, which may be subject to only a limited review.<sup>18</sup>

## B. Refugees

[11] Prior to 1965, the United States lacked a formal procedure for admission of refugees. Limitation quotas were instituted in 1921 restricting refugee immigration.<sup>19</sup> The breakup and reshaping of the political world following World War II created a host of new refugee problems and the United States responded with the Displaced Persons Act of 1948.<sup>20</sup> In 1950, the United States sought, as part of the International Security Act (hereinafter the 1950 Act), to prevent the deportation of aliens if the Attorney General finds the alien will suffer physical persecution as a result of the deportation.<sup>21</sup> The 1965 amendment to the 1950 Act states:

Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201 (a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are

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otherwise was involved in persecutions based on race, religion, nationality, membership in particular organizations, or political opinions; was convicted of a serious crime; is a danger to the national security; or is inadmissible due to specified terrorist activities. *Id.*

<sup>18</sup> Displaced Persons Act, 8 C.F.R. 208.9 (1948). The asylum officer's decision is based on information elicited at the interview. *Id.* This evidence may be testimony, written evidence, or the application itself. *Id.*

<sup>19</sup> Charles Gordon et al. *Immigration Law and Procedure* § 33.01 (Matthew Bender & Company, Inc.)(2003).

<sup>20</sup> Displaced Persons Act, 62 Stat. 1009 (1948). The act provided, for a limited time, admission for permanent residence to specific persons of certain European countries. *Id.*

<sup>21</sup> International Security Act, 64 Stat. 987 (1950). The act states, "No alien shall be deported under the provisions of the Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." 64 Stat. at 1010 Sec. 23 (amending Sec. 20(a)).

unable or unwilling to return to such country or area on account of race, religion, or political opinion . . .<sup>22</sup>

Later, in 1976, the language regarding these conditional entries was further modified, but the substance did not change.<sup>23</sup> Congress ultimately dealt with the refugee issue in a comprehensive piece of legislation—the Refugee Act of 1980 (hereinafter the 1980 Act).<sup>24</sup> Among other provisions, the 1980 Act provided that: asylees could apply to adjust their status after physically remaining in the United States for one year following a grant of asylum, those who have committed heinous crimes or threaten national security are unable to benefit from the temporary grant of asylum, and that the statute would, for the most part, immediately take effect.<sup>25</sup> The 1980 Act remains the governing Act for the admission of alien refugees into the United States of America and admits tens of thousands of refugees each year.<sup>26</sup>

### C. Persecution (Past and Future)

[12] In some cases, establishing persecution can be a difficult obstacle in the path of refugees seeking asylum.<sup>27</sup> Persecution has no statutory definition, and courts have attached varying meanings to the term. Seemingly, it is a more extreme treatment than mere discrimination or abusive treatment.<sup>28</sup> Additionally, the “well-founded fear” of such persecution is likewise

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<sup>22</sup> 8 U.S.C. § 1153; I.N.A. 203(a)(7)(1965).

<sup>23</sup> 8 U.S.C. § 1153; I.N.A. 203(a)(7)(1976). This statute demonstrates little practical difference from the prior enactment.

<sup>24</sup> Pub. L. No. 96-212, 94 Stat. 102 (1980). The 1980 Act revises the previously existing immigration legislation and attempts to give additional uniformity to immigration proceedings. Available at <http://www.rcf.hhs.gov/programs/orr/policy/plarc2.htm> (Last modified Jan. 5, 2004).

<sup>25</sup> *Id.*

<sup>26</sup> In 1992, the United States had a ceiling of 142,000 immigrants that could enter as refugees. This ceiling has demonstrated a decreasing trend ever since. In 2001, the ceiling was at 80,000.

<sup>27</sup> See generally *Kharkhan*, 336 F.3d 601; *Hray v. Ashcroft*, 74 Fed.Appx. 167 (3rd Cir. 2003). In *Kharkhan*, the court held that the refugee did not suffer persecution despite being unable to practice her religion (Greek Catholic) in Ukraine under Soviet rule. *Kharkhan* 336 F.3d at 605. In *Hray*, the court held that a fear of criminal gangs in Ukraine did not rise to the level of persecution such that it would warrant asylum. *Hray*, 74 Fed.Appx. at 171.

<sup>28</sup> See *Nelson v. INS*, 232 F.3d 258 (1st Cir. 2000). (holding that multiple incidents of solitary confinement in less than three days, though aggravated by abuse, surveillance, threatening calls, stops and searches, and visits to the petitioner’s place of employment did not rise to the level of persecution).

undefined, but the Supreme Court has held that the circumstances must demonstrate that an alien would be “singled out” for persecution.<sup>29</sup> Bad conditions in an alien’s home country are not sufficient to demonstrate a well-founded fear of persecution.<sup>30</sup> Immigration regulations now grant refugee status to those who can demonstrate past persecution in their home country and courts hold that past persecution alone *can* be enough to gain asylum eligibility.<sup>31</sup> If an alien has demonstrated a well-founded fear of future persecution, they may likewise qualify as refugee.<sup>32</sup> Religious persecution is one of the five grounds that can lead to a successful application for asylum.<sup>33</sup> The Seventh Circuit has held that restrictions on the free practice of religion can be sufficient to constitute religious persecution for the purpose of asylum.<sup>34</sup> Additionally, the Lautenberg amendment grants a presumption of a “well-founded fear” to individual practitioners of specific religions within former Soviet states based entirely on their attempted participation in those religions.<sup>35</sup>

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<sup>29</sup> *INS v. Stevic*, 467 U.S. 407 (1984). The United States Supreme Court held that a refugee is required to demonstrate that they will be singled out for persecution and not merely a member of a persecuted group. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Acewicz v. INS*, 984 F.2d 1056, 1062 (9<sup>th</sup> Cir. 1993) (citing *Matter of Chen*, Int. Dec. 3104 at 4 (BIA 1989)). The *Acewicz* court was willing to grant relief under the “*Chen doctrine*,” only if the past persecution was particularly atrocious and deserved humanitarian relief. *Id.* at 1062.

<sup>32</sup> 8 U.S.C. §1101(a)(42)(A)(2003).

<sup>33</sup> *Id.* The other statutorily protected grounds for the granting of refugee status are race, nationality, membership in a particular social group, or political opinion. Additionally, persons forced to undergo certain birth control methods may be granted refugee status. *Id.*

<sup>34</sup> *Bucur v. INS*, 109 F.3d 399 (7<sup>th</sup> Cir. 1997). The court stated that:

There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution. If a government as part of an official campaign against some religious sect closed all the sect's schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think, although we need not decide, a form of religious persecution.

*Id.* at 405.

<sup>35</sup> 8 U.S.C. 1157 note (2003). This section, most often referred to as the Lautenberg Amendment, grants a presumption of fear of future persecution to individuals from former Soviet states who practice, or have attempted to practice one of a few enumerated religions. These groups are identified as specifically targeted, in their home country, for persecution under the old Soviet government. *Id.* See *infra* note 95.



#### **D. Restriction on Removal (Withholding of Deportation)**

[13] Prior to 1996, restriction on removal was called withholding of deportation. Restriction on removal or “withholding of deportation” made its first appearance in the Immigration and Nationality Act of 1952.<sup>36</sup> Applications for restriction on removal are considered in conjunction with asylum applications. A restriction on removal prevents the removal of an alien, despite having failed to gain asylum, where the alien will likely be exposed to persecution in the country to which they would otherwise be removed.<sup>37</sup> Unlike the “well-founded fear” required for asylum status, the alien must establish a “clear probability” that they will be persecuted in their home country. This removes the subjective element of asylum status and relies exclusively on an objective standard.

#### **E. Changed Conditions**

[14] If the conditions change within a refugee’s home country, they may be denied asylum.<sup>38</sup> These conditions frequently develop due to a change in government or military control from one hostile to the refugee to one more tolerant of the alien’s beliefs.<sup>39</sup> Courts hold that the change in conditions must be such that the refugee would no longer fear future persecution.<sup>40</sup> However, asylum may still be granted in the event of egregious past persecution.<sup>41</sup> Immigration authorities frequently rely heavily on State Department reports regarding the conditions in foreign

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<sup>36</sup> Immigration and Nationality Act of 1956, Pub. L. No. 82-414, 66 Stat. 210 (2003). The Immigration and Nationality Act of 1952 is also known as “The McCarran-Walter Act” or simply “The McCarran Act.” *Id.*

<sup>37</sup> Charles Gordon et al. *Immigration Law and Procedure* § 33.06 (Matthew Bender & Company, Inc.) (2003). The refugee will thus be spared persecution, but the bar is set higher in restriction of removal proceedings than in asylum proceedings. The refugee bears a greater burden of proof. *See Id.*

<sup>38</sup> *Id.* at § 33.04. The weakening and fall of the Soviet Union has led to a variety of changed country conditions relating to religious persecution. In some cases religious tolerance has decreased since the fall of the Soviet Union.

<sup>39</sup> *See e.g.*, *Turina v. Ins*, 21 Fed. Appx. 618 (9th Cir. 2001); *Zviagilsky v. INS*, 1999 Colo. J. C.A.R. 2865. Both cases hold that the change of conditions in Ukraine, leading to a greater religious tolerance, is sufficient to overcome a fear of future religious persecution. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See e.g.*, *Matter of Chen*, 20 I. & N. Dec. 16, Immigr. Rep. B1-170 (BIA 1989).

countries.<sup>42</sup> Appellate courts have frequently criticized this practice.<sup>43</sup> Interestingly, a recent State Department Report to the Congress on proposed refugee admissions addressed (at least in passing) a current problem with the aging refugee system.<sup>44</sup>

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<sup>42</sup> See *eg.*, *Guang Ming Chen v. INS*, No. 95-70709, 1996 U.S. App. LEXIS 17096, at \*4-\*5 (9th Cir. June 10, 1996); *Yakimchuck v. INS*, No. 99-1443, 1999 U.S. App. LEXIS 18700 (7th Cir. Aug. 6, 1999).

<sup>43</sup> See *Yakimchuck*, 1999 U.S. App. LEXIS 18700, at \*7-\*9; *Chand v. INS*, 222 F.3d 1066, 1078-79 (9th Cir. 2000); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc); *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998). In *Yakimchuck*, the appellate court cautioned against relying on the United States State Department report when considering the claims of a Ukrainian refugee. It noted that “[t]he advice of the State Department is not binding, either on the [INS] or on the courts; there is perennial concern that the Department soft-pedals human rights violations by countries that the United States wants to have good relations with.” *Yakimchuck*, 1999 U.S. App. LEXIS 18700, at \*9 (citing *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997)).

<sup>44</sup> U.S. Dept. of State, PROPOSED REFUGEE ADMISSIONS FOR FY 2003 – REPORT TO THE CONGRESS (2002), available at <http://www.state.gov/g/prm/refadm/rls/prts/2002/13892.htm> (On file with RJLR).

Finally, as a result of this year's process of reviewing the characteristics and circumstances of refugee populations around the globe, it has become clear that many persons of concern cannot meet U.S. statutory requirements for refugee admission. The current refugee definition is rooted in the 1951 Refugee Convention and requires that applicants establish persecution or a well-founded fear of persecution on account of one of five grounds (race, religion, nationality, membership in a particular social group, or political opinion). This standard, developed in the Cold War era, precludes eligibility for hundreds of thousands of individuals in compelling humanitarian circumstances who did not directly experience persecution or whose fears are not based on one of the five protected grounds. Many of these individuals fled civil disorder or generalized violence and remain in precarious situations without obvious durable solutions. We are already engaged in a review of existing statutory requirements for U.S. refugee admission with a goal of ensuring access to those most in need of humanitarian protection and may need to consider the possibility of legislative changes.

*Id.* This seems to be an open call to Congress to modify the existing refugee admissions policies for humanitarian reasons. This is not surprising when one consider how long these regulations have gone without any real form of legislative modification.

### III. HOW DID WE GET HERE? (A HISTORY OF PERSECUTION IN THE SOVIET UNION)

[15] What would motivate a government to outlaw religion—to persecute believers? Why would the Soviets want to suppress the free practice of religion? Could this policy ever be fully achieved?

#### A. An Atheist State

[16] Upon seizing power in October of 1917, the Bolsheviks, as Marxists, believed that scientific progress, when coupled with socioeconomic change, would lead to the atrophy of religion and benefit the state.<sup>45</sup> They employed wave after wave of persecution to facilitate that end.<sup>46</sup> The church represented a challenge to Lenin's power.<sup>47</sup> Church officials frequently

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<sup>45</sup> DAVID E. POWELL, *ANTIRELIGIOUS PROPAGANDA IN THE SOVIET UNION: A STUDY OF MASS PERSUASION* 3, 14 (The MIT Press 1975). Openly expressing his feelings towards religions, Lenin wrote:

Every religious idea, every idea of God, even flirting with the idea of God, is unutterable vileness . . . vileness of the most dangerous kind, "contagion" of the most abominable kind. Millions of sins, filthy deeds, acts of violence and physical contagions . . . are far less dangerous than the subtle, spiritual idea of a God decked out in the smartest "ideological" costumes. . . . Every defense or justification of the idea of God, even the most refined, the best intentioned, is a justification of reaction.

RELIGION IN THE U.S.S.R. 7 (Robert Conquest ed., 1968) (hereinafter "Conquest").

<sup>46</sup> POWELL, *supra* note 45, at 3; Conquest, *supra* note 45, at 13.

<sup>47</sup> Lenin originally sought to isolate the church from the state. In 1905 he wrote:

The state must not concern itself with religion; religious societies must not be connected with the state power. Everyone should be absolutely free to profess whatever religion he prefers or to recognize no religion. . . . There must be no discrimination whatever in the rights of citizens on religious grounds . . . no state grants must be made to ecclesiastic and religious societies which must become absolutely independent, voluntary associations of like-minded citizens.

RELIGION AND THE SOVIET STATE: A DILEMMA OF POWER 73 (Max Hayward & William C. Fletcher eds., 1969) (Hereinafter Hayward). Lenin modified the first draft of the constitution of the Russian Soviet Republic from reading, "Religion is the private affair of citizens" to a clause assuring the "freedom of religious and anti-religious propaganda." Conquest, *supra* note 45, at 13.

disagreed with the Soviet government.<sup>48</sup> The church also had formidable political and economic powers that obstructed the Bolshevik regime's efforts at restructuring the Russian society.<sup>49</sup> The Soviet government felt that religion "sows illusions . . . and acts as a . . . serious obstacle on the path to social progress."<sup>50</sup> They feared that the devotion to religion distracted workers from their labor and wasted resources.<sup>51</sup> Additionally, religion was thought to promote hostility between different faiths, promote male chauvinism, and endanger the public health.<sup>52</sup> Though all were deemed undesirable, certain religions were more heavily persecuted than others.<sup>53</sup> This was, in part, due to the strategic geographical area occupied by the religious practitioners.<sup>54</sup>

[17] The Leninists employed a variety of methods to suppress and eliminate religion in the Soviet Union.<sup>55</sup> Immediately following the October Revolution, church lands were taken by the government and remaining powers were stripped from church hands and placed under civil authority.<sup>56</sup> All church property, including crosses and icons, became public property and had to

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<sup>48</sup> POWELL, *supra* note 45, at 7. The government often viewed the church's criticisms with contempt. Mikhail Kalinin, the Chairman of the Central Executive Committee of the Soviets, stated that "the heads of the Church have declared civil war against the government . . . there cannot and will not be mercy for those princes of the Church. *Id.* at 25.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.*

<sup>52</sup> Moslem and Jewish faiths were believed to relegate women to an inferior position in both religion and society. *Id.* at 9. Religious activities such as fasting and baptism were considered as hazardous to the health of parishioners. *Id.*

<sup>53</sup> Jews and Catholics were singled out for persecutions because the Soviet government believed the doctrines of these religions were particularly threatening to the security of the Soviet Union. The government also justified the special scrutiny of these religions because their largest concentrations of parishioners were located in strategic regions of the Soviet Union and their practices were considered dangerous to the health of followers. POWELL, *supra* note 45, at 15.

<sup>54</sup> Most Soviet Catholics live along the Western border area of Ukraine. Most Catholics are also members of one of the national minorities. *Id.* at 15-16.

<sup>55</sup> Communists used persecution, accommodation, and often repression during various periods of Russian history as a means of stifling organized religions. *Id.* at 22. The goal, until recently, had remained constant—to achieve an atheistic society. *Id.*

<sup>56</sup> *Id.* at 24. Birth registrations became the responsibility of civil authorities, divorce laws were relaxed, and civil marriage was decreed. Government funds for all religious activity ended. *Id.* The state took control of ecclesiastical seminaries. *Id.* Soon, religious organizations lost

be leased from the government.<sup>57</sup> The government's methods for eradicating the religions were as varied as the religions themselves.<sup>58</sup> Even where rights were protected, favoritism existed towards atheists.<sup>59</sup> The Bolsheviks soon accelerated their plans to force religion into extinction.<sup>60</sup> The church, at times, fought back.<sup>61</sup> By 1922, the government dictated many

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exclusive use of their buildings and churches often became part-time dance and concert halls. POWELL, *supra* note 45, at 25. Legislation was constructed and “the Declaration on the Rights of the Peoples of Russia of 2 November 1917 abolished all religious privileges in the country. A meeting of Sovnarkom on 11 December then transferred all education under church control. . . .” WILLIAM B. HUSBAND, *GODLESS COMMUNISTS: ATHEISM AND SOCIETY IN SOVIET RUSSIA* 46 (Northern Illinois University Press, 2000). The Decree on Freedom of Conscience of January 20, 1918 stripped the church's standing as an institution and drew a bright line between church and state. *Id.* at 47. Church property was seized without compensation. Conquest, *supra* note 45, at 13.

<sup>57</sup> GEORGE L. KLINE, *RELIGIOUS AND ANTI-RELIGIOUS THOUGHT IN RUSSIA 146-47* (University of Chicago Press, 1968). Churches would be required to lease the items back from the state if they wished to use them. *Id.*

<sup>58</sup> The Soviet government used both coercive and persuasive methods to accomplish its atheistic goals. See POWELL, *supra* note 45; see also *infra* note 56. Power over the church was given to the government, which enabled the state to manipulate the religious organizations. HAYWARD, *supra* note 47, at 76.

<sup>59</sup> The Soviet Union's old constitution is evidence of the favoritism:

The Soviet constitution of 1936, promulgated by Stalin . . . underscores the differential treatment accorded believers and non-believers. The former have the “right to worship” and are free to believe in “any god whatever,” while atheists have the “right and every opportunity” to unite for formulating and promulgating anti-religious propaganda.

There is no equality here, even on paper. Believers have the right to believe and to worship but they are denied the right to instruct others and to attempt to persuade others to share their belief. In contrast, non-believers have not only the right to disbelieve but also the right, opportunity, and systematic encouragement of the party and the state to attempt to persuade others to share their atheism. In addition, the massive Soviet apparatus of formal education and of formal and informal indoctrination is used, of course, entirely on the side of the non-believers.

KLINE, *supra* note 57, at 147-48.

<sup>60</sup> POWELL, *supra* note 45, at 25-26. The state stepped up its searches and arrests of clergy members. *Id.* at 25; HUSBAND, *supra* note 56, at 58.

policies of the church and demanded the surrender of church valuables to fund famine relief efforts.<sup>62</sup> The Constitution, which once seemed to protect religious freedom, was amended

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<sup>61</sup> In his pastoral letter of February 1, 1918, Patriarch Tikhon of the Russian Orthodox Church “anathematized the Bolsheviks and called upon ‘faithful children of the Orthodox Church . . . to have nothing in common with these outcasts of the human race.’” POWELL, *supra* note 45, at 24. The priests in various provinces “represented the separation as a complete ban on prayer and worship and attributed it to demonic forces.” HUSBAND, *supra* note 56, at 49.

<sup>62</sup> The church’s refusal to surrender its treasures warranted a governmental seizing of several billion rubles worth of church valuables. POWELL, *supra* note 45, at 27-28. This caused violent clashes and led to the trial and execution of some church officials. *Id.* This was a victory for the Bolsheviks. The church was made to look unsympathetic and greedy in the eyes of a starving people. *Id.* Rumors soon spread that the valuables were not being used for famine relief, but were a payment to Poland for expenses of the Red Army; believers were outraged. HUSBAND, *supra* note 56, at 56. This conflict, between the government and the church, ultimately led to the requirement that freedom of religious worship be restricted to groups which supplied proof of their loyalty to the government. HAYWARD, *supra* note 47, at 83.

further in 1929 in an effort to restrict religion.<sup>63</sup> The 1936 Constitution provided some relief for churches, but the government's official policy was still primarily one of hostility.<sup>64</sup>

[18] German invasion during World War II brought an even more surprising change in Stalin's treatment of religious organizations.<sup>65</sup> The church and state lived, for a time, in harmony.<sup>66</sup> The situation in the Ukraine was somewhat different.<sup>67</sup> Western Ukraine was

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<sup>63</sup> The 1929 amendment deprived churches and individuals of the right to proselytize. POWELL, *supra* note 45, at 30. As religious institutions lost their right to conduct propaganda, it became mandatory for in state institutions. HAYWARD, *supra* note 47, at 78. The government view was that:

[T]he recruitment of new cadres of toilers, especially of children, into the ranks of supporters of religion (which, obviously, can be achieved only by playing on their economic dependence, on inadequate class consciousness, or the absence of elementary scientific education) is without doubt a harmful activity from the viewpoint of the interests of the proletariat and the conscious peasantry. Obviously, this activity can in no way be protected by the law nor come under the notion of "freedom of religious confession." Accordingly, any propaganda or agitation by the adherents of the church and religion (particularly, of a "missionary" kind) cannot be viewed as a lawful activity; on the contrary, it shall be regarded as exceeding the limits of freedom of conscience . . . and as violating the criminal codes.

*Id.* at 78-79. The amendment changed the existing constitution's language to "freedom of religious worship and anti-religious propaganda," thus replacing "freedom of religious and anti-religious propaganda." Conquest, *supra* note 45, at 22. This meant that no more propaganda would be permitted by religious groups. *Id.*

<sup>64</sup> The new constitution did away with the distinctions between working and non-working citizens. This gave clergymen the right to vote as well as a better taxation rate. POWELL, *supra* note 45, at 31. The ban that excluded clergymen's children from institutions was likewise removed. *Id.* All rights of citizenship were given without respect to race, national origin, religious profession, education, etc. Conquest, *supra* note 45, at 27. Stalin felt it was no longer necessary to deprive religious groups of so many rights, as many religious organizations were no longer openly hostile to the Soviet government. JOHN SHELTON CURTISS, *THE RUSSIAN CHURCH AND THE SOVIET STATE* 273 (Little, Brown and Company, 1953).

<sup>65</sup> Stalin sought the support of religious leaders. POWELL, *supra* note 45, at 32. Churches raised money and were outspoken in support against the German invaders. *Id.* Stalin also wanted to improve the West's public opinion of the Soviet Union. *Id.* Metropolitan Sergei proclaimed that the duty to defend the Motherland was the duty of all citizens. Conquest, *supra* note 45, at 34.

<sup>66</sup> POWELL, *supra* note 45, at 32.

primarily Roman Catholic and had closer ties to Europe than Russia.<sup>68</sup> Western border Catholics were often viewed as a security risk.<sup>69</sup> Church officials in the Ukraine were frequently accused of conspiring with the invading German army and working against the Soviet government during World War II.<sup>70</sup> In the years leading up to, and even following Stalin's death, anti-Catholic propaganda proliferated in the Ukraine and throughout the rest of the Soviet Union.<sup>71</sup> Following World War II, the Ukrainian Catholic (formerly Greek Catholic or Uniate) church was banned throughout the Ukraine (as well as Romania and Czechoslovakia) in an effort to integrate the newly acquired areas of Ukraine into the Soviet Union.<sup>72</sup> In 1961, Khrushchev's party began a new program to close churches and to put Catholic priests on trial.<sup>73</sup> The Soviet government

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<sup>67</sup> The anti-Catholic campaign started again with the end of the war. Conquest, *supra* note 45, at 85. By 1946, there were approximately eight hundred Greek Catholic priests in Soviet prisons. *Id.* at 89.

<sup>68</sup> DIMITRI K. SIMES, *AFTER THE COLLAPSE: RUSSIA SEEKS ITS PLACE AS A GREAT POWER* 38 (1999).

<sup>69</sup> POWELL, *supra* note 45, at 15.

<sup>70</sup> They were accused of "aiding in the pacification of the population and even helping to send Soviet citizens to forced labor in Germany." *Id.* at 33. This led to the closure of Catholic and Uniate churches. The Uniate Church was forced to sever its ties with Rome and join the Russian Orthodox Church. *Id.*

<sup>71</sup> Films of the era speak of anti-Catholic sentiment in the mass media. *Id.* at 39. In *Conspiracy of the Doomed* (1950), a Catholic Cardinal directs a gang of murderers, spies, and saboteurs. *Id.* In *Dawn Over the Neman* (1952), Catholic clergymen spread poisoned seeds, set fires, conceal murders in their churches, and help those resisting Soviet "liberation" of Lithuania. POWELL, *supra* note 45, at 39. Following Stalin's death, "[t]he Vatican was termed "the Catholic branch of the [U.S.] State Department," while Pope John XXIII was accused of trying to establish "a kind of spiritual NATO." *Id.*

<sup>72</sup> STEPHEN K. BATALDEN & SANDRA L. BATALDEN, *THE NEWLY INDEPENDENT STATES OF EURASIA: HANDBOOK OF FORMER SOVIET REPUBLICS* 71 (1993). Additional measures encouraged the use of the Russian language in schools and mass media. *Id.* Ukrainian Communist Party members occasionally rose through the ranks of the Communist Party of the Soviet Union (Khrushchev and Brezhnev for example). *Id.* Greek Catholics were also banned in Romania and Czechoslovakia after the war. SABRINA P. RAMET, *NIHIL OBSTAT: RELIGION, POLITICS, AND SOCIAL CHANGE IN EAST-CENTRAL EUROPE AND RUSSIA* 5 (Duke University Press, 1998).

<sup>73</sup> Local control of church affairs was taken from priests, thus enabling the government to intimidate people into closing churches. POWELL, *supra* note 45, at 41. Trials provided a ready source of anti-religious propaganda for the government. Conquest, *supra* note 45, at 95.



interpreted the laws to permit direct interference with religion.<sup>74</sup> Attacks on Greek-Rite Catholics were common throughout the 1980's. An article in *Radyans'ka Ukrayina* in March

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Considerable propaganda was made out of the trial in June, 1962, of two Lithuanian Catholic priests, who were sentenced to eight and four years' imprisonment respectively for 'criminal currency operations and speculation' connected with the building of a new church in Klaipeda. This propaganda began the day before the trial with the publication in *Pravda* of an attack on the defendants under the title of 'Scoundrels in Black Cassocks'.

*Id.*

<sup>74</sup> The laws were drafted so broadly that the state was free to interpret them as they wished and they frequently did. See POWELL *supra* note 45, at 42.

Houses of worship, according to Soviet law, can be closed under any of the following circumstances: (1) if the congregation violates a law; (2) if the congregation violates the agreement governing use of a building; (3) if the lawful instructions of a state organ are not obeyed; (4) if the buildings are to be demolished as part of a program for rebuilding an area; (5) if their age represents a danger to occupants; or (6) if "the need arises to transform a house of prayer because of state or public needs."

*Id.* Criminal statutes were also purposely broad so as to encompass most religious activities. It was illegal to organize any group

. . . whose activity, carried on under the guise of preaching religious beliefs and performing religious ceremonies, is connected with harm to citizens' health, or with any other infringement of the person or right of citizens, or with inducing citizens to refuse social activity or the performance of civic duties, or with drawing minors into such a group. . . .

*Id.* at 43. This could be taken to mean baptisms, fasting, and circumcisions were all criminal offenses as they could be construed as dangerous to a believer's health. *Id.* Many bishops and priests were arrested, exiled, or executed during this period. Hard labor was imposed on those who would teach religion (inspire superstition) to the masses. *Id.* Additionally, all religious organizations were required to register with the government prior to conducting any religious activities. Conquest, *supra* note 45, 20-22. Khrushchev levied taxes of up to eighty-three percent on clergy while the maximum tax on citizens was just thirteen percent. KLINE, *supra* note 57, at 156-157. Churches were condemned. *Id.* at 157. Parishes that shared a priest with another parish were closed. *Id.* at 156. Leases made with German forces during the occupation of World War II, were no longer honored in Ukraine and the churches were then closed. *Id.*

1981 referred to the Ukrainian Catholics as “yellow-and-blue traitors, remnants of the SS, fascist police, UNA bandits and other fascist scum.”<sup>75</sup> However, in the late 1980’s, religious tolerance was extended to non-Russian Orthodox religions (which had been tolerated to some extent for the past eighty years or so due to their cooperation and (at least public) support of the policies of the Soviet government.)<sup>76</sup>

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Priests were also accused of collaborating with the Germans during World War II (twenty years later). *Id.*

<sup>75</sup> RAMET, *supra* note 72, at 250 (quoting *Radyanska Ukrayina* (Kiev), 24 March 1981, p.4, Trans. In Joint Publications Research Service (JPRS), *USSR Report: Political and Sociological Affairs*, 19 August 1981, p.34.

<sup>76</sup> On December 1, 1989, the Ukrainian Catholic Church finally became legalized and Gorbachev assured the Vatican that Greek Catholics would soon achieve full legal status. RAMET, *supra* note 72, at 253. The Greek Catholics had managed to practice underground since approximately 1946. See BATALDEN, *supra* note 72, at 75.

Metropolitan Sergei of Nizhni Novgorod, having petitioned to register the ecclesiastical administration, wrote in 1926 that:

I have the pleasure of informing you that the government has acceded to my request. Having received these rights, we owe obligations to the power from which these rights emanate.

I have likewise taken it upon myself, in the name of our entire Orthodox hierarchy and of our flock, to declare before the Soviet Power our sincere will to be citizens fully respecting the laws of the Soviet Union; to be loyal toward its government; and to hold ourselves absolutely apart from all political parties and enterprises which could harm the Union. . . .

MATTHEW SPINKA, *THE CHURCH IN SOVIET RUSSIA 157-58* (Oxford University Press, 1956) (quoting Letter from Metropolitan Sergei of Nizhni Novgorod to the Bishops, Priests, and Faithful of the Patriarchate of Moscow (May 28/June 10, 1926)).

By adopting and encouraging this loyal attitude and keeping itself separate from politics, the Orthodox Church managed to survive in the particularly hostile environment of the Soviet Union. Metropolitan Sergei demonstrated his loyalty and subservience to the Bolshevik regime in a subsequent letter in which he refers to circumstances that hinder the legalized relation with the Soviet government. *Id.* at 161. He stated that the “activities of the enemies of the Soviet government abroad, among whom were found not only the rank and file of the faithful of [the] church, but [the] leaders as well, and which aroused on the part of the government a just distrust against all Church functionaries. . . .” *Id.* (quoting Declaration of Metropolitan Sergei to the Pastors and the Flock (July 16/29, 1927)). Rather than blame a Marxist government whose primary goal is to achieve nationwide atheism, he chooses to allow the Orthodox Church to

[19] The conflict between religion, with its desire to further moral lessons, and politics, as Russia's source of power, was inevitable.<sup>77</sup> Religious groups seek power to secure protection of their values and beliefs.<sup>78</sup> Non-religious groups act similarly.<sup>79</sup> Through attaining sufficient political power, a religious group can be successful in converting its moral values into law.<sup>80</sup>

## B. Independence

[20] Following the failed coup in Russia, the Ukrainian Supreme Soviet declared the formal independence of the Republic of Ukraine.<sup>81</sup> The referendum on independence was approved by over ninety percent of eligible voters and the Ukraine celebrated its first independence day on December 1, 1991.<sup>82</sup> Ukraine already enjoyed sovereignty following a vote of the Supreme Soviet in July 1990.<sup>83</sup>

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accept the blame for a seemingly slow legitimization in the eyes of the communist authorities. *Id.* at 161-162.

<sup>77</sup> See RAMET, *supra* note 72, at 336-39. The weapons in these conflicts are no longer sword and shield, but rather creative use of the mass media and personal appeals to the Russian people. *Id.* at 339.

<sup>78</sup> *Id.* In religious terms: “[J]ust as Man is said to have been created in God’s image, so too human law (positive law) should be fashioned in the image of divine law.” *Id.*

<sup>79</sup> *Id.* “Among such other organizations with moral agendas one might mention political parties (e.g., communist parties), labor unions, feminist organizations, Nazi front organizations, and groups such as the NAACP, the Boy Scouts of America, the Humane Society, Planned Parenthood, and Hands off Washington (an agency set up to combat homophobia).” *Id.*

<sup>80</sup> See RAMET, *supra* note 72, at 339-40.

<sup>81</sup> See BATALDEN, *supra* note 72, at 71. The timing of the declaration was clearly related to the coup earlier that same week. *Id.* Some commentators feel that a coup would have been more beneficial for Ukraine because, “[i]n Russia, the hard-line leaders of the failed coup against Gorbachev were forced to capitulate to the ascendant Yeltsin, allowing him to clean house and push through a flurry of reforms.” John Moroz Smith, *The Icon and the Tracts: A Restrained Renaissance of Religious Liberty in Ukraine*, 2001 B.Y.U. L. REV. 815, 833. While, in the Ukraine, “the Ukrainian nomenklatura embraced national independence precisely to escape these reformist pressures from Moscow and thus retain their grip.” *Id.*

<sup>82</sup> Nationmaster.com, *Encyclopedia: Politics of Ukraine*, available at <http://www.nationmaster.com/encyclopedia/Politics-of-Ukraine.html> (On file with RJLR).

<sup>83</sup> See BATALDEN, *supra* note 72, at 72.

[21] The Ukraine has an ancient role as a center for the Eastern-rite Christians that can be traced as long ago as the tenth century.<sup>84</sup> Before the declaration of the Ukraine's independence, the Russian Orthodox Church in Moscow controlled nearly all the Eastern-rite religious practice in the Ukraine.<sup>85</sup> Independence severed this control and three distinct branches of Eastern Christianity soon appeared.<sup>86</sup> These new branches on the Ukrainian religious landscape are the former Uniate or Greek Catholic church, now known as the Ukrainian Catholic Church, the Ukrainian Autocephalous Orthodox church (an independent Orthodox church), and the Ukrainian Orthodox branch of the Moscow patriarchate (traditionally known as the Russian Orthodox Church).<sup>87</sup>

[22] The declaration of Ukrainian independence has not settled the religious (or national and cultural) problems in the former Soviet republic.<sup>88</sup> Some feel that there is still substantial religious persecution within the Ukraine.<sup>89</sup> Even within the church itself, there is suspicion of scandal and even murder.<sup>90</sup> Today, the church lacks the capability to provide support of its own

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<sup>84</sup> *Id.* at 75. The conversion of Saint Vladimir (Volodimir) marked the beginning of Ukraine's distinction as a center for Eastern-rite Christianity. *Id.* Having been impressed by the ornamentation of Constantinople's Orthodoxy, Volodimir adopted Orthodox Christianity as the official religion of his empire. SMITH, *supra* note 81, at 818. "After a dramatic procession from the bluffs of his capital, Kiev, down to the riverbank below, Volodimir and his subjects were baptized en masse, by force if necessary." *Id.* This seems to be an ironic beginning for Ukrainian church/state interaction—from government-compelled to government-proscribed religious practice. Today, history may have completed a bit of a circle as, even though religion must be kept out of the public schools, "the Government has attempted to introduce training in 'basic Christian ethics' into schools" and the Ukrainian government celebrates a number of religious holidays. U.S. Dept. of State, UKRAINE: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 (2003) available at <http://www.state.gov/g/drl/rls/irf/2003/24441.htm> (Last visited 4/9/2005). There still exists a serious split in regional and ecclesiastical divisions within Ukraine that will likely continue for some time. See BATALDEN, *supra* note 72, at 75.

<sup>85</sup> *Id.* The church achieved this religious monopoly through its appeasement of the Soviet government. *Id.* While other religions were seen as a challenge to Soviet authority, the Russian Orthodox Church was, for the most part, tolerated (and at times even utilized) by the Soviet government. See also RAMET, *supra* note 76, at 253.

<sup>86</sup> BATALDEN, *supra* note 72, at 75.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 77.

<sup>89</sup> See e.g., *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003); *Krougliak v. INS*, 289 F.3d 457 (7th Cir. 2002) (Petitioners contend that the religious persecution continues within Ukraine).

<sup>90</sup> RAMET, *supra* note 72, at 258. For example,

political objectives through its own membership.<sup>91</sup> These serious conflicts will continue to play out as both the internal and external tensions within the Ukraine move toward an ultimate resolution.<sup>92</sup>

#### IV. THE LAUTENBERG AMMENDMENT: CONGRESS RESPONDS TO RELIGIOUS PERSECUTION IN UKRAINE

[23] In 1989, and each year since, Congress enacted the Lautenberg Amendment.<sup>93</sup> Their motivation behind this amendment was “the growing danger posed to citizens of various categories in the former Soviet republics during and after the collapse of the Soviet Union.”<sup>94</sup> Congress sought to provide humanitarian relief for those suffering from religious persecution. This effectively gives a lesser burden to certain applicants seeking refugee status than to those refugees who are threatened with the possibility of deportation.<sup>95</sup> The amendment states that:

1 (a) In general. In the case of an alien who is within a category of aliens established under subsection (b), the alien may establish, for

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[I]n July 1995 the incumbent patriarch, Volodymyr (Romanyuk) died under suspicious and as yet unclear circumstances. The 69-year-old patriarch had received a telephone call from an unknown person on 14 July and had agreed to meet with that person the following day. He was last seen alive when, in the company of a monk, he left for the meeting. He was later found dead by a passer-by. The monk was never seen again, and the caller has remained unidentified. Although Patriarch Volodymyr had four fractured ribs, the official bulletin attributed his death to a heart attack.

*Id.* (quoting *UNIAR News Agency* (Kiev), 21 July 1995, trans. in *BBC Summary of World Broadcasts*, 24 July 1995; *Deutsche Presse-Agentur* (Hamburg), 18 July 1995, on *Nexis*).

<sup>91</sup> Victor Yelensky, *Religion, Church, and State in the Post-Communist Era: The Case of Ukraine (with Special References to Orthodoxy and Human Rights Issues)*, 2002 B.Y.U. L. Rev 453, 460-461. “On one hand, up to 75% of the Ukrainian population trust the church more than any other social institution. Neither the president, the government, the parliament, nor the army can compete with the church on the subject of trust in public opinion polls.” *Id.* The Ukraine hoped that the “numerous problems, unsolvable by official institutions, would be solved by unofficial institutions.” *Id.*

<sup>92</sup> BATALDEN, *supra* note 72, at 77.

<sup>93</sup> 8 U.S.C. §1157 note (2004).

<sup>94</sup> *Yakimchuck*, 1999 U.S. App. LEXIS 18700, at \*7.

<sup>95</sup> *Id.* at 8.

purposes of admission as a refugee under section 207 of the Immigration and Nationality Act [this section], that the alien has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion by asserting such a fear and asserting a credible basis for concern about the possibility of such persecution.

(b) Establishment of categories.

(1) For purposes of subsection (a), the Attorney General, in consultation with the Secretary of State and the Coordinator for Refugee Affairs, shall establish--

(A) one or more categories of aliens who are or were nationals and residents of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who share common characteristics that identify them as targets of persecution in that state on account of race, religion, nationality, membership in a particular social group, or political opinion,

(B) one or more categories of aliens who are or were nationals and residents of Vietnam, Laos, or Cambodia and who share common characteristics that identify them as targets of persecution in such respective foreign state on such an account; and

(C) one or more categories of aliens who are or were nationals and residents of the Islamic Republic of Iran who, as members of a religious minority in Iran, share common characteristics that identify them as targets of persecution in that state on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2)(A) Aliens who are (or were) nationals and residents of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are Jews or Evangelical Christians shall be deemed a category of alien established under paragraph (1)(A).

(B) Aliens who are (or were) nationals of an independent state of the former Soviet Union or of Estonia, Latvia, or Lithuania and who are current members of, and demonstrate public, active, and continuous participation (or attempted participation) in the religious activities of, the Ukrainian Catholic Church or the

Ukrainian Orthodox Church, shall be deemed a category of alien established under paragraph (1)(A).<sup>96</sup>

Examining the language of the amendment in section 2(B), Ukrainian Catholics are given a legislative grant of a “well-founded fear” of future persecution and the evidentiary burden is lowered for their entry as refugees. The Lautenberg Amendment evinces that an applicant possesses the necessary fear of future persecution and should therefore be granted asylum within the United States.<sup>97</sup> Ultimately, even though a refugee already within the United States, an applicant may be precluded from invoking the explicit language of the Lautenberg Amendment (which serves primarily as an easier standard for achieving refugee status). The asylee may be able to use the Amendment *itself* as evidence demonstrating that he belongs to a recognized persecuted group. Congress’ yearly extension of the amendment further buttresses this claim.

## V. A NEW UKRAINIAN CONSTITUTION WITH A GUARANTEE OF FREEDOM OF RELIGION

[24] In 1988, early in Gorbachev’s administration, the Kremlin loosened its policies regarding its interactions with the Church.<sup>98</sup> By 1989, all religious prisoners and deportees were permitted to return to their homes.<sup>99</sup> In November 1989, the Ukrainian Council for Religious Affairs allowed registration of Ukrainian Catholic congregations.<sup>100</sup> Only a few days following this announcement, the Pope met with President Gorbachev in the Vatican.<sup>101</sup>

[25] By 1991, the Ukraine saw independence on its horizon and the Ukrainian Ministry of Justice began the task of drafting new legislation.<sup>102</sup> In total, there was “a wave of seventy laws

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<sup>96</sup> Foreign Relations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, 103 Stat. 1261 (1989) amended by Pub. L. No. 108-447, 118 Stat. 3139 (2004).

<sup>97</sup> *Yakimchuck*, 1999 U.S. App. LEXIS 18700. The Yakimchuck court held that the BIA should have examined both the unfavorable State Department comments as well as the language of the Lautenberg Amendment as evidence of Congress’ recognition of a specifically persecuted group despite the applicant’s inability to actually use the Lautenberg amendment as direct grounds for precluding his deportation. *Id.*

<sup>98</sup> Victor Yelensky, *Religion, Church, and State in the Post-Communist Era: The Case of Ukraine (with Special References to Orthodoxy and Human Rights Issues)*, 2002 B.Y.U. L. REV. 453, 458.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> John Moroz Smith, *The Icon and the Tracts: A Restrained Renaissance of Religious Liberty in Ukraine*, 2001 B.Y.U. L. REV. 815, 821.

to undo Communism.”<sup>103</sup> The first two laws enacted concerned the right to religious exercise and organization.<sup>104</sup>

[26] In April 1991, the Ukraine adopted the Law on Freedom of Conscience and Religious Organizations.<sup>105</sup> This statute seeks to align Ukrainian policy with international norms and seeks to overcome “the negative consequences of the government’s policy in relation to religion and the church.”<sup>106</sup> There are articles in the law that grant all citizens a right to freedom of conscience, which includes the freedom to adopt, change, and profess one’s own religion or convictions and the right to raise one’s children in a manner consistent with one’s personal religious beliefs.<sup>107</sup> Furthermore, additional regulations govern religious organizations.<sup>108</sup> Religious organizations, according to the statute, must be registered with the state and these organizations can lease, but not own, land.<sup>109</sup> These freedoms were a giant leap forward for religions in the Ukraine. People were now “guaranteed” protection from religious persecution. However, “guaranteed” protections often lack any practical effect.<sup>110</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 827.

<sup>106</sup> Law on Freedom of Conscience and Religious Organizations, No. 25 at 283 (enacted as Statute No. 988-12 (1991))[hereinafter LFRCO].

<sup>107</sup> SMITH, *supra* note 102, at 828.

<sup>108</sup> *Id.* at 827-828. “Churches and religious organizations are separate from the state and state schools; they cannot participate in political parties; and they cannot ‘interfere in the activities of other religious organizations or, in any form, preach enmity, intolerance toward non-believers and believers of other faiths.’” *Id.* (quoting LFRCO, *supra* note 106, art 5).

<sup>109</sup> LFRCO, *supra* note 106, art. 17.

<sup>110</sup> The Soviet constitution purported to protect freedom of religion in Article 52. “Citizens of the USSR are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.” U.S.S.R. Const. of 1977, art. 52. Additionally the constitution states that, “In the USSR, the church is separated from the state, and the school from the church.” *Id.* Not surprisingly, this was rarely challenged by religious adherents. In light of the Soviet constitution, United States citizens were more fortunate with respect to their guaranteed protection under their own constitution. Under the U.S. constitution, actions against the state are quite common.



[27] Finally, in 1996, Ukraine adopted its first constitution, which includes the protection of basic human rights and liberties.<sup>111</sup> Article 2 of the Ukrainian constitution assures Ukrainian citizens that they have the right to seek a remedy for constitutional violations in a court of law.<sup>112</sup> This is certainly a large improvement in the protection of fundamental human rights. The Ukrainian constitution serves as a symbol to the world that Ukraine is finally in harmony with most modernized countries. This harmonization is of great importance with the growing popularity of multi-national unions such as the European Union.

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<sup>111</sup> UKR. CONST. Ch 2. article 24 provides that “Citizens have equal constitutional rights and freedoms and are equal before the law” and that “[t]here shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.” UKR. CONST. ch. 2, art. 24 (1996). Article 35 speaks even more directly to the protection and preservation of religious liberties stating that:

Everyone has the right to freedom of personal philosophy and religion. This right includes the freedom to profess or not to profess any religion, to perform alone or collectively and without constraint religious rites and ceremonial rituals, and to conduct religious activity.

The exercise of this right may be restricted by law only in the interests of protecting public order, the health and morality of the population, or protecting the rights and freedoms of other persons.

The Church and religious organisations in Ukraine are separated from the State, and the school — from the Church. No religion shall be recognised by the State as mandatory.

No one shall be relieved of his or her duties before the State or refuse to perform the laws for reasons of religious beliefs. In the event that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service.

UKR. CONST. ch. 2, art. 35 (1996).

<sup>112</sup> UKR. CONST. ch. 1, art. 8 (1996). This provision gives the constitution strength by assuring that “[t]he Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it” and that “[t]he norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence [sic] of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.” *Id.* Judicial challenges are new to Russian law.

[28] Problems, largely created and unresolved by the Ukrainian constitution, still exist in Ukraine.<sup>113</sup> The return of church property taken during Soviet rule has been particularly slow and problematic for the Ukrainian government.<sup>114</sup> The government has adopted a policy of rotating property between different religious groups, but this is wrought with problems.<sup>115</sup>

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<sup>113</sup> YELENSKY, *supra* note 97, at 487-488. Yelensky points to three particularly troublesome topics:

(a) the multilateral, interchurch conflict that makes the process of harmonizing relations between the churches and the state complicated; (b) the absence of carefully developed mechanisms for the realization of legislation on freedom of conscience . . . and (c) the return of property taken from churches by the Soviet regime and the inefficient executive bodies that prevent the strict implementation of the law in this area.

*Id.*

<sup>114</sup> U.S. Dept. of State, Country Reports on Human Rights Practices – 2003: Ukraine (2003) (stating that “[t]he slow pace of restitution was a reflection, among other things, of the country’s difficult economic situation, which severely limited funds available for the relocation of the occupants of seized religious property.”) *Id.*

<sup>115</sup> *See e.g.*, Ukrainian Parliament Commission for Human Rights, Political Rights And Freedoms: Issues On Compliance And Protection *available at* [http://www.ombudsman.kiev.ua/de\\_05\\_3](http://www.ombudsman.kiev.ua/de_05_3). (citing an appeal from 18 Ukrainian Greek Catholics from the village of Tekucha, Kosiv district, Ivano-Frankivsk oblast) stating:

In our village we have Greek Catholic and Autocephalous communities. There is one church which before 1946 belonged to the Greek Catholics. Now it is being used by the UAOC. By decision of the oblast rada No.170 of September 17, 1999 the UGCC community was granted the right for rotational service in the church that had been Greek Catholic anyway. In compliance with this resolution the community concluded within one month an agreement with the Kosiv district executive committee on November 5, 1991 to use the Church of the Holy Trinity in the village of Tekucha. But until now we are not using the church, because nobody wants to implement the resolution.

All these years we are performing church services in the open air, in rain, snow and cold. The UAOC community does not let us even into the churchyard. We don’t have the opportunity to bury our believers in a Christian way, as we are not let into the church with the deceased. Much as we tried to complain to the district and oblasts authorities, it takes too long to settle our problem, while time is going on. Some people die, others marry, children are born, but where can we perform the services? Our grandparents

[29] The Ukrainian constitution of 1996 demonstrates the government's desire to embrace the changes that started in the late eighties, which were initially dealt with in the Law On Freedom of Conscience and Religious Organizations in 1991, and have continued through today. Unfortunately, for refugees who have not yet acquired asylum, it may also serve as a notice of deportation.

## VI. THE EFFECT OF THE NEW CONDITIONS IN THE UKRAINE ON RECENT ASYLUM CASES

[30] Ukraine's recent adoption of favorable laws protecting religious freedoms has created some serious problems for immigrants seeking asylum in the United States.<sup>116</sup> If the conditions in the immigrant's home country have changed, such that the immigrant would no longer be subjected to religious persecution, he or she may be denied asylum and denied a withholding of deportation.<sup>117</sup> The United States' policy behind this seemingly harsh outcome is evident. Religious asylum is reserved for those refugees who are at risk of immediate persecution if forced to return and remain in the country from which they fled.<sup>118</sup> The United States, as a country whose development relied on the talents of immigrants and refugees, should bear some responsibility to provide refuge and opportunity for the oppressed. In fact, it seems that when most United States citizens are asked their "nationality," they do not answer "American," but rather respond with the country or countries from which most of their ancestors emigrated. The President of the United States recognizes specific groups (religious as well as ethnic) who have been individually targeted for persecution and may grant them refugee status and asylum.<sup>119</sup> However, the United States has limited financial and human resources and, while it does have some greater responsibility to the world at large, it has an additional responsibility to its citizens. Certainly, not every petitioner can receive asylum. There are quotas, set each year by the President and Congress, representing the maximum number of immigrants that may be admitted as refugees from a given geographical area.<sup>120</sup>

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and fathers built that church, and now we are wandering around its fence for eight years already.

*Id.* See also *supra* note 113.

<sup>116</sup> See e.g., *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003); *Krougliak v. INS*, 289 F.3d 457 (7th Cir. 2002); *Yakimchuck*, 1999 U.S. App. LEXIS 18700.

<sup>117</sup> The change in conditions effectively "erases" the "well-founded fear" of future persecution. This would remove the alien from the class of people that Congress intended to protect with refugee status.

<sup>118</sup> See 8 U.S.C. § 1101(a)(42)(2004).

<sup>119</sup> 8 U.S.C. § 1157(a) (2004).

<sup>120</sup> *Id.*

[31] Once the applicant has established that there has been past religious persecution, an evidentiary ping-pong match begins. First the applicant must establish past persecution. This evidence serves as independent grounds for asylum.<sup>121</sup> Then, the INS decides whether there has been a dramatic change in the applicant's home country such that there is no reasonable fear of future persecution should the applicant be returned home.<sup>122</sup> Such a determination would certify

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<sup>121</sup> 8 U.S.C. § 1101(a)(42)(2004).

<sup>122</sup> *See* 8 CFR §208.13 (2005). This statute establishes that an alien may qualify for refugee status:

on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence,

or reject the applicant's presumed "well-founded fear" of persecution. Should the applicant's request be rejected by the INS, the applicant may try one last time to demonstrate that the severity of the past persecution was so severe that it warrants a grant of asylum.<sup>123</sup> The applicant might also try to prove to the immigration officials that there exists a "reasonable possibility that he or she may suffer serious harm if returned to his or her country of origin."<sup>124</sup> It is unclear how influential this last resort option may be.

[32] The United States is thus presented a problem with no easy solution. If the alien is removed back to their home country, assuming that they would not continue to be persecuted or discriminated against for leaving, the United States itself will be responsible for inflicting a severe hardship on the applicant. Congress should create a balancing test to determine whether the United States' interest in removing an alien is greater than the interest in protecting the alien from additional hardships such as those that would follow a deportation.

## VII. WHAT MUST A UKRAINIAN REFUGEE PROVE?

[33] Having fled religious persecution from a former Soviet state, Ukrainian refugees, whose asylum proceedings remain incomplete, will possibly be forced to leave the United States. There seems little hope, when basing their claim on religious persecution grounds, that an applicant for asylum will be permitted to remain in the country. One possibility for the applicant would be to prove some egregious past persecution and that, despite the changed conditions in their home country, their fear of returning is still great enough such that asylum should be granted.<sup>125</sup> This fear can be supported, at least in part, by unfavorable State Department reports on the existing conditions in the home country.<sup>126</sup> Additionally, as the court indicated in *Yakimchuck*, the asylee may convince an adjudicator to use the "extra-record legislative facts" to take judicial notice of Congress' recognition of Ukrainian Catholics as specifically targeted for persecution.<sup>127</sup> If seeking asylum based purely on religious persecution, this rather small possibility (the showing of egregious past persecution) may be a Ukrainian applicant's best and last hope.

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and under all the circumstances, it would be reasonable to expect the applicant to do so.

<sup>123</sup> Charles Gordon et al. *Immigration Law and Procedure* § 33.01 (Matthew Bender & Company, Inc. 2003).

<sup>124</sup> *Id.*

<sup>125</sup> §33.04 C (citing Matter of Chen, 20 I. & N. Dec. 16, 6 Immigr. Rep. B1-170 (BIA 1989)).

<sup>126</sup> See e.g., U.S. Dept. of State, PROPOSED REFUGEE ADMISSIONS FOR FY 2002 – REPORT TO THE CONGRESS (2001); U.S. Dept. of State, UKRAINE: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003 (2003).

<sup>127</sup> *Yakimchuck*, 1999 U.S. App. LEXIS 18700, at \*10.

## VIII. CONCLUSION

[34] Undeniably, the conditions in Ukraine have changed dramatically in recent years. The fall of the Soviet government, the declaration of Ukrainian independence, and the adoption of a new constitution with a “guaranteed” protection of religious freedom have led to positive changes for followers of all religions in the former Soviet Union. Unfortunately, these same positive changes have had a negative impact on the lives of many who fled their former government and came to the United States seeking asylum. Decision-makers should acknowledge this inequity when reviewing these immigration cases. By stressing the public policy set forth in the Lautenberg Amendment, a court could reach a fair decision and still remain within the bounds of traditional immigration procedures. If the courts continue to feel restrained by the “changed conditions” clause, Congress should react by enacting equitable legislation that acknowledges the unusual circumstances created by the breakup of the former Soviet Union and its effect on former Soviet citizens who fled due to religious persecution. A new, renewable, Lautenberg-ish amendment would solve this temporary problem with the current asylum proceedings. Eventually, this problem will likely self-resolve as the backlog of Ukrainian religious asylum proceedings is cleared.