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Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife

MICHAEL G. HEYMAN*

Viewing the displaced victims of civil strife in El Salvador as a paradigm, this Article examines the predicament of such victims, surveys various solutions purportedly existing under current law, and concludes that the complex mosaic of United States immigration law fails to offer relief or remedy. Moreover, other countries, such as Mexico, do not offer any real assistance. In light of these deficiencies, the Article proposes that current asylum law be amended to redefine "refugee" to include victims of civil strife in order to further humanitarian goals.

INTRODUCTION

The lives and freedom of countless people worldwide are threatened by the devastating consequences of internal civil strife. These unwitting victims, often without allegiances or political affiliations, find themselves caught in the cross-fire of brutal, contending forces. This Article examines their predicament and seeks solutions not to seemingly inevitable conflicts, but to the plight of victims displaced by those conflicts, people forced from their homelands, casting about for a place to live with some measure of safety.

Sovereign states and the international community have been called upon to ameliorate these hardships, both by affording humane legal relief to these victims and by providing habitable refugee facilities. But this is not easily done. Even setting aside the economic difficulties of providing relief on such a massive scale, existing legal doctrines do not comfortably accommodate such persistent calls for aid.

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This Article focuses on the legal doctrine of the United States relating to victims of internal civil strife, highlighting the problems confronted by Salvadorans, a group which has received much attention and which serves as an appropriate paradigm — the Salvadoran situation demonstrates the failure of American law to further humanitarian goals.

This failure of American law may seem odd, for many observers might expect asylum law to provide solutions. That expectation, however, is wrong; it misconceives the prerequisites for relief under this branch of law.¹ Moreover, the suggestion that asylum law be interpreted to embrace those who do not currently fall within it, though laudable, would, if adopted, result in a dramatic and unacceptable distortion of existing law.² That is not to say, however, that these victims should be ignored. Rather, those seeking durable solutions³ must look elsewhere.

This Article explores various solutions. It examines traditional asylum law, noting two principal reasons for its failure to successfully address the plight of victims of civil strife: first, the role played by the United States Department of State in giving advisory opinions on asylum claims, demonstrating the apparently politically skewed nature of these opinions;⁴ and second, the governing asylum statutes

1. American asylum law is embodied in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at Immigration and Nationality Act, §§ 101(a)(42), 207-209, 243(h), 411-414, 8 U.S.C. §§ 1101(a)(42), 1157-1159, 1253(h), 1521-1524 (1982) [hereinafter INA]). These statutes are based on the United Nations Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137 [hereinafter United Nations Convention], and the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

2. Since, as shall be pointed out in greater detail later, the grant of asylum is based on an alien's meeting the statutory definition of "refugee" (*see infra* text accompanying notes 8-17), that term cannot coherently be invoked to cover those who do not meet its essential predicates. Its narrowness, therefore, has produced an understandable frustration both within and without the academic community. Having referred to the victims of natural disasters as well as those fearing persecution after a breakdown of public order in but one sector of a country, one scholar has commented that the "latter categories of refugees would seem to be within the scope of the average person's definition of a refugee. By excluding them, however, the treaty definition has led governments to ignore the plight of many migrants or prospective migrants whom the layperson might expect to be treated as refugees." Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J.L. REF. 165, 169 (1984). Professor Nafziger has urged the "invisible college" of internationalists to look beyond the restrictive confines of treaty law to afford protection for victims of natural and man-made disasters. Professors Perluss and Hartman have pursued his idea of temporary refuge as a possible solution to this vexing problem. *See* Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986).

3. As the term "durable solutions" is used, it means a solution with lasting effects, not one of a limited, temporary nature.

4. One commentator has suggested that the opinions themselves violate the applicants' rights as well as the international obligations of this country. *See* Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 43 MD. L. REV. 91 (1986).

and the case law demonstrating the inherent incapacity of this body of law to correct a myriad of problems. This Article also considers Extended Voluntary Departure (EVD) as another potential form of relief. As shall be elaborated, EVD is an unsatisfactory response to the problem. Since EVD is essentially ungoverned by any legally enacted standards,⁵ it is meted out on a piecemeal basis. And, most important, EVD does not confer a legally enforceable right. Since only the executive branch has the power to invoke this form of relief, it does not exist as a matter of *right*.

This discussion also considers extant and proposed legislation recognizing that, whereas legislation may provide the only satisfactory solution, "sense of Congress" legislation is inherently ineffectual.⁶ In addition, the Moakley-DeConcini Extended Voluntary Departure Bill (Moakley-DeConcini)⁷ is simply too limited to vindicate the humanitarian concerns under discussion.

Ultimately, this Article proposes that Congress amend the Refugee Act of 1980 to redefine "refugee" to include victims of civil strife. The basis for and content of the Refugee Act are considered,

5. In the event of compelling factors such as civil war or catastrophic circumstances, the district director of the INS is authorized to provide this form of protection. The vague statutory authority of the Attorney General to grant EVD lies in INA § 103(a), 8 U.S.C. § 1103(a). The governing "standards" are found in 8 C.F.R. § 242.5 (1986) and in INS OPERATIONS INSTRUCTIONS § 242.10e(3) (1979).

6. For example, in 1981 Congress enacted a statute which only provided guidance that "the administration should . . . review, on a case-by-case basis, petitions for extended voluntary departure made by citizens of El Salvador who claim that they are subject to persecution in their homeland, and should take full account of the civil strife in El Salvador in making decisions . . ." International Security and Development Cooperation Act, Pub. L. No. 97-113, tit. VII, § 731, 95 Stat. 1557 (1981). Attorney General William French Smith did not grant EVD to Salvadorans. In response, Congress enacted as part of the Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1012(b), 97 Stat. 1062 (1983), legislation which again urged the Secretary of State to grant EVD, specifically to Salvadorans. This bill stated:

(b) Therefore, it is the sense of the Congress that —

(1) the Secretary of State should recommend that extended voluntary departure status be granted to aliens —

(a) who are nationals of El Salvador,

(b) who have been in the United States since before January 1, 1983,

(c) who otherwise qualify for voluntary departure (in lieu of deportation) under section 242(b) or 244(e) of the Immigration and Nationality Act (8 U.S.C. 1252(b) and 1254(e)), and

(d) who were not excludable from the United States at the time of their entry on any ground specified in section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)) other than the grounds described in paragraphs (14), (15), (20), (21), (25); and

(2) such status should be granted to those aliens until the situation in El Salvador has changed sufficiently to permit their safely residing in that country.

7. H.R. 822, 99th Cong., 1st Sess. (1985).

and the inability of other countries, such as Mexico, to effectively protect these migrants is analyzed. Finally, this Article will recognize the growing international consensus that the bounds of protection must not be confined by the limitations of conventional asylum law.

ASYLUM LAW IN THE UNITED STATES

The United States has a long and impressive history of providing shelter to the beset and persecuted of the world. The cornerstone of this national commitment is the Refugee Act of 1980,⁸ a statute intended to further the historic "needs of persons subject to persecution in their homelands"⁹ and to give "statutory meaning to our national commitment to human rights and humanitarian concerns."¹⁰ Thus, we have a statute free from political concerns or ethnic bias which expresses our national commitment to these high ideals.¹¹

Under the Refugee Act, the asylum seeker must prove that he satisfies the definition of "refugee" found in section 101(a)(42)(A) of the Immigration and Nationality Act (INA).¹² In turn, it must be demonstrated that harm of a certain severity is threatened,¹³ that it

8. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as Congressional Declaration of Policies and Objectives, INA §§ 411-414, 8 U.S.C. §§ 1521-1524 (1982)).

9. INA § 101, 8 U.S.C. § 1521.

10. S. REP. NO. 256, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141.

11. Our law has not always been so free of political bias. The 1965 revision of the INA provided a special visa category for eastern hemisphere aliens. Under that statute, a special visa was available for those who "because of persecution or fear of persecution on account of race, religion, or political opinion have fled . . . from any Communist or Communist-dominated country or area, or . . . from any country within the general area of the Middle East . . ." INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (repealed by the Refugee Act of 1980). See generally G. LOESCHER & J. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICAN'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986).

12. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). The controlling term, refugee, is defined as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . 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." *Id.* The only difference between "refugee" and "asylee" is that the asylee *applies* from outside of his country of origin, whereas the "refugee" is *admitted* as such. The legal standard is otherwise identical, though the burden of persuasion clearly rests with the asylee to convince an INS District Director or Immigration Judge that asylum status is warranted.

13. See, e.g., *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969):

No doubt 'persecution' is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word 'persecution' ordinarily conveys — the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.

Kovac is cited frequently in both case law and scholarly journals for its treatment of the term persecution. See, e.g., Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327, 347-

is likely to occur,¹⁴ that, subject to narrow exceptions, the home government is responsible,¹⁵ and that the harm is threatened for reasons recognized by the Refugee Act.¹⁶ This last requirement has created the greatest division and ferment, for there would seem to be little difference between suffering arising from one of those five sources and any other source of suffering. The results are the same; the human cost is incalculable. Nevertheless, the last requirement has been the sticking point in the debate over the adequacy of asylum law to protect victims of all types of calamities. And, it is the last requirement as well against which accusations of political bias have been most vocal.¹⁷

The State Department: Asylum Decisions

The number of asylum applications has risen sharply in recent years,¹⁸ imposing a considerable strain upon available resources and personnel. Integral to the asylum adjudication process is the disposition of the claims of human rights denials. The Department of State's Bureau of Human Rights and Humanitarian Affairs (BHRHA) plays a critical role at this juncture.

After an asylum application is submitted, the Immigration and Naturalization Service (INS) seeks an advisory opinion from BHRHA, requiring it to compare the information provided by the applicant with that available to BHRHA to determine if the applicant has met the evidentiary burden. No examination of the applicant is made by the State Department. BHRHA then looks to the "country desks" for the information provided by United States em-

48 (1986).

14. Again, the focus is on the requirement that the asylum seeker have a "well-founded fear of persecution."

15. Generally, the home government must be the persecutor. However, in the event that the government is unable or unwilling to control private acts of persecution, especially those of a large sector of the society, then asylum may properly be granted. *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *In re Tan*, 12 I. & N. Dec. 564, 568 (1967).

16. The persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

17. For a comparative study of practices among countries, see Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984). One of the lessons Professor Aleinikoff points out is the apparent statistical anomaly that applicants from friendly countries, as a group, seem to fare much worse than those from nonfriendly countries. *Id.* at 194-95.

18. See generally *id.*

bassies, and the *Country Reports on Human Rights Practices* for a particular nation. This is customary procedure; no formal procedure exists for processing an application.¹⁹

Two pieces of evidence indicate that BHRHA action is politically motivated: INS statements verify this fact and country-by-country statistics reinforce the conclusion. In a television interview in 1979, for example, the General Counsel of the INS stated, "I don't know of any instances where the State Department has recommended that a person be granted asylum that the Immigration and Naturalization Service has denied it. So the short answer is that we rely upon the State Department."²⁰ More troubling yet, an internal study of INS practices indicates that decisions correlate with foreign policy objectives.²¹ And, not only are BHRHA reports regarded as reliable evidence, but judicial review of these findings is virtually nonexistent.²² The political motive in the decisional process is clear, and judicial

19. See *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F.Supp. 502, 511-12 (D.D.C. 1984) (deposition of Jules Bassin, Office of Asylum Affairs) [hereinafter *Hotel II*]. For further discussion of *Hotel II*, see *infra* notes 90-100 and accompanying text.

For a general description of the BHRHA function, see *Refugee Assistance: Hearing on H.R. 3195 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 55-56 (1983) (statement of Assistant Secretary of State Elliot Abrams).

20. See Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT'L L. 235, 333 (1983). In this seminal work, the author presents vast data detailing the political, inexpert nature of this BHRHA process. See also Preston, *supra* note 4. See generally G. LOESCHER & J. SCANLAN, *supra* note 11.

21. IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 59 (June/December 1982):

In some cases different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not

For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have a 'classic textbook case.' On the other hand, BHRHA sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test

Although the Refugee Act abolished the country of nationality test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding. It is unclear, however, what the statutory basis for such a determination is.

The Commissioner of the INS, Alan Nelson, stated that in "most cases" the INS follows these advisory opinions. See *Hotel II*, 594 F.Supp. 502 (D.D.C. 1984) (deposition of Alan C. Nelson, Commissioner of the INS).

Moreover, the District Director in Florida recently announced, apparently with the approval of the Department of Justice, that aliens fleeing Nicaragua would not have to bear the burden of proving that they would be persecuted. Rather, the INS would have to prove that they would not be persecuted. See Brief of the International Human Rights Law Group and the Washington Lawyers' Committee for Civil Rights Under Law in *INS v. Cardoza-Fonseca*, at 8 n.4.

22. For a representative case on the reliability of these opinions, see *Hosseinmardi v. INS*, 405 F.2d 25, 28 (9th Cir. 1968). For a discussion of the narrow scope of judicial review, see *Chung v. Smith*, 640 F. Supp. 1065, 1070 (S.D.N.Y. 1986).

relief from that is unavailable.

The statistics on country-by-country asylum grants further reinforce the point that BHRHA decisions are politically motivated. Responding to these statistics, Senator Kennedy, quoting from a staff memorandum of the United Nations High Commissioner for Refugees (UNHCR),²³ reported:

The UNHCR should continue to express its concern to the United States government that its apparent failure to grant asylum to any significant number of Salvadorans, coupled with continuing large-scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon adherence to the Protocol.²⁴

The UNHCR was responding to the starkly low grant rate to Salvadorans in the United States, a figure that has hovered between two and three percent for the last few years.²⁵ Thus, statistics produce a healthy skepticism about the objectivity of the asylum application process and cast doubt on it as a viable mechanism for achieving humanitarian goals.

A second, more subtle problem posed by BHRHA decisions is not simply that they are wrong, but that they abuse a basic process right to have decisions made in a principled fashion.²⁶ Since law confers enforceable rights upon people, including the process right to have controversies decided on principle, the integrity of the legal system is impugned by this policy-mongering approach to asylum decisionmaking.²⁷

Worse yet, not only does the result violate legal theory, but it

23. The UNHCR is probably the single most important and active organization for the protection of refugees worldwide. Established in 1950 by the United Nations General Assembly, the UNHCR is to provide protection for refugees and seek durable solutions to their problems. Indeed, the Statute of the Office of the High Commissioner specifies that that office is responsible for "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto . . ." Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(v), 5 U.N. GAOR Supp. (No. 20) para. 8, U.N. Doc. A/1775 (1950).

24. 128 CONG. REC. S827 (daily ed. Feb. 11, 1982) (remarks of Sen. Kennedy, reading UNHCR report dated Sept. 13-18, 1981).

25. Of the 2373 Salvadoran cases decided in fiscal year 1985, 74 applicants (3.1%) were granted asylum. This contrasts sharply with the 24.4% grant rate for all countries, and particularly the 41.8% rate for eastern European communist-dominated countries. See Preston, *supra* note 4, at 120 (an elaborate statistical table).

26. This does not suggest that there is any absolute right to asylum, but that there is an absolute right to have a claim decided consonant with the guiding principles of our legal system. For an important work on the proper role of discretion in the asylum process, see Helton, *The Role of Discretion in Political Asylum*, 22 SAN DIEGO L. REV. 999 (1985).

27. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

founders on a fundamental, animating principle of humanitarian law: nonrefoulement.²⁸ This principle prohibits a state from sending someone to a place where that person's life or freedom would be threatened for a reason recognized by the Refugee Act.²⁹ And, though asylum may be granted in the Attorney General's discretion, nonrefoulement acts as an absolute prohibition against forcible repatriation.

Thus, because of the role of politics in asylum adjudications, the humanitarian concerns under discussion frequently may be overlooked, and indeed may be violated, in the attempt to effectuate other goals. Though this is entirely improper, it is perhaps equally unavoidable so long as the State Department continues to play a role in this arena.³⁰ Yet, even if the State Department was eliminated from the process, asylum law still would fail to fulfill the promise many believe it has. It is inherently incapable of providing solutions for a vast array of cases, especially cases brought by those who are merely the unwitting victims of civil strife and whose fault is simply being in the way when terror is afoot.

Asylum Law: The Failure of Doctrine

The second reason for the failure of asylum law lies not in its implementation, but in its very content. This presents an intractable problem for the asylum seeker, because frequently recitations in the application cannot detail activities of the applicant which make persecution likely, but instead simply indicate that danger is rampant and virtually unavoidable. These applications fail because of the inability of the applicants to demonstrate that they fall within one of the five categories recognized by the Refugee Act³¹ and that the fears expressed result from a reasonable expectation of persecution rather than simply from civil unrest present in the aliens' countries. That someone would experience hardship if forcibly repatriated is not necessary and sufficient for an asylum grant; what must be demonstrated is *why* it will occur, and that *why* must satisfy the requirements of the Refugee Act.

No body of cases more poignantly illustrates this failure of asylum law doctrine than that involving Salvadorans. Despite the demon-

28. This right is guaranteed by the United Nations Convention, *supra* note 1, art. 3, which provides: "No Contracting State shall expel or return ["refouler"] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

29. See *supra* note 12 and accompanying text.

30. See generally Aleinikoff, *supra* note 17; Avery, *supra* note 20.

31. That is, that the persecution would occur on account of the applicant's race, religion, nationality, membership in a particular social group, or expression of political opinion. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

strable reality of the situation in El Salvador, those cases express the traditional view that the applicant must produce evidence indicating that he will be singled out for persecution. It is insufficient that these people may be victimized by their mere status of being in a dangerous place.³² These opinions are not wrong; it is the law itself that leaves courts little alternative but to deny asylum.

*Del Valle v. INS*³³ illuminates this problem of proof. After having presented rather grisly accounts of persecution and threats of persecution, Del Valle claimed that his deliberate choice to remain neutral in the face of contending forces exposed him to persecution. The court agreed, concluding that he had made a "considered choice to take a neutral stance, and, based upon his past persecution, is likely to be persecuted for maintaining his political neutrality if he returns."³⁴ Thus, since he previously had been persecuted for failing to choose sides, he had met the requisite standard of proof.³⁵ But, even though Del Valle won, he did so only at the circuit court level. Moreover, his particularly powerful case was one of uncommon urgency.

What yielded a favorable, albeit judicial, result in *Del Valle* was the link he proved between his political stance, past activity and persecution. Had he not been able to do so, his case, no matter how

32. In fact, the UNHCR Handbook states that "mere membership" in a particular group "will not normally be enough to substantiate a claim to refugee status" except in special circumstances. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS paras. 70, 73, 79 (1979).

This "mere membership" limitation must not be confused with the legal standard for asylum itself, the well-founded fear of persecution. Addressing the relationship between the two, an outstanding authority on refugee law has stated:

Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote 'labour camp' or that people are arrested and detained for an indefinite period on a slightest suspicion of political non-conformity. In such a case it would only be too apparent that anyone who has managed to escape from the country in question will have a 'well-founded fear of being persecuted' upon his eventual return. It cannot — and should not — be required that an applicant shall prove that the police have already knocked on his door.

A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966). Thus, there can easily be circumstances in which group membership itself can be the basis for a valid asylum claim. What must be demonstrated is the danger faced because of membership *qua* membership, as the applicant must prove both a well-founded fear of persecution and that it is likely to occur because of reasons recognized by the United Nations Protocol.

33. 776 F.2d 1407 (9th Cir. 1985).

34. *Id.* at 1414.

35. *Id.* at 1414 n.6.

emotionally compelling, would have resulted in an affirmance of the Board of Immigration Appeals (BIA). To some, this may seem a rather arbitrary basis for decisionmaking, yet it is fully consonant with extant asylum law. Oddly, a trilogy of cases from the Ninth Circuit reinforces this point, even though each afforded relief to the asylum seeker. These cases so distort the notion of "refugee" as to virtually eviscerate its content.

Most noteworthy is *Bolanos-Hernandez v. INS*.³⁶ Having filed applications for asylum and withholding of deportation, Bolanos testified that for two years he had been a member of the Partido Nacional de Reconciliacion, a right-wing political party in El Salvador. In addition, he had been in the army and was a member of the Escolta Milicia, a civilian police force that guarded against guerrilla infiltration for the government. Bolanos believed that because of this latter membership, the guerrillas thought that he would be most useful to them in their plans to infiltrate the government.

Bolanos refused to join the guerrilla organization, and claimed that they threatened him with death if he did not join their forces or leave the country. Since they had killed five of his friends, and possibly his brother, under similar circumstances, he left the country eight days after the threat was made. The government conceded his "desire to remain neutral and not be affiliated with any political group."³⁷

Yet, he lost before the immigration judge and in the BIA. Chiefly, the BIA opined that Bolanos had adopted no "political opinion" that placed him in danger, and thus his situation was indistinguishable from that of any other Salvadoran. The Ninth Circuit Court of Appeals emphatically disagreed.

The court found that Bolanos had not only produced general evidence of violent conditions and terror, but he had coupled that evidence with a specific threat to his life made by the guerrillas.³⁸ It was clearly correct in noting that "[w]hile we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat against a petitioner insufficient because it reflected a general level of violence."³⁹ Indeed, the significance of the threat might well be greater because it was made in a country in which violence was so widespread.

Did Bolanos fear persecution because of his political opinion? The court equated neutrality — regardless of the reasons for the assumption of that neutrality — with political opinion, stating that

36. 767 F.2d 1277 (9th Cir. 1985).

37. *Id.* at 1280.

38. *Id.*

39. *Id.* at 1284-85.

“[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction.”⁴⁰ Indeed, though the government correctly argued that neutrality exists only by virtue of a conscious political decision, the court decidedly rejected that view, stating that

the motive underlying any political choice may, if examined closely, prove to be, in whole or in part non-political. Certainly a political affiliation may be undertaken for non-political as well as political, reasons Similarly, a decision to remain neutral may be made, in whole or in part, for non-political reasons [yet still constitute] a manifestation of political opinion.⁴¹

The court's analysis is mystifying. A choice of a political affiliation, whatever the reasons for the choice, is nevertheless an apparent manifestation of political sentiment. Neutrality, bereft of political motivation, is politically neutral. Thus, absent any indication of the private reasons for the choice to remain neutral, it is politically content-free. Yet the court said that “it is irrelevant why the individual made his choice. It does not matter to the persecutors what the individual's motivation is. They are concerned only with an act that constitutes an overt manifestation of political opinion.”⁴² If political opinion lies not in the motive or in the choice itself, it is difficult to find anything political at all about the conduct.

Transplanted to native soil, this situation may be analogized to the actions of many during the war in Vietnam. Many chose not to serve in the armed forces during that war. In some cases, it no doubt reflected firmly-held convictions about the immorality of war. For others, it may well have represented a protest, through refusal to serve, against a war they felt was entirely unjustified. For still others, it may simply have represented an unwillingness to fight or to postpone career development. Yet, only in the case of this second group can it realistically be said that theirs was political conduct, although there is, perhaps, an inextricable connection between political opinion and moral philosophy in the case of the first group. Similarly, in the context of El Salvador, refusal to join either group, taken alone, is a *non-act*, one entirely devoid of political significance.

By classifying political passivity as political opinion, the court has paved the way for an applicant to garner asylum on the claim that he will be persecuted because he refused to choose sides, rather than having to prove a likelihood of persecution because of political opin-

40. *Id.* at 1286.

41. *Id.* at 1286-87.

42. *Id.* at 1287.

ion. All that remains in the Ninth Circuit is that the applicant prove that threats were made against him and that the potential persecutors knew of his apparent neutrality.

*Argueta v. INS*⁴³ extends this view to cover even the silent adoption of "neutrality." Only at the deportation hearing did Argueta reveal his "political opinion." The court concluded that Argueta's testimony of nonagreement "either with the guerillas or the government"⁴⁴ established his political opinion. The court noted that the immigration judge had apparently misconstrued Argueta's lack of commitment to either side as lack of any political opinion; instead, the court equated a "decision" to remain neutral with an "expression" of political opinion.⁴⁵

This trilogy is completed by *Hernandez-Ortiz v. INS*.⁴⁶ In that case, Judge Reinhardt, who also authored the *Bolanos-Hernandez* decision, conspicuously focused on the perception of the persecutor as controlling, rather than on the views of the applicant, be they private or overtly manifest. After explaining that governments persecute those whose views are apparently dissentient, Judge Reinhardt continued by pointing out that "it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes he does."⁴⁷

The Ninth Circuit has probably incomprehensibly distorted the concept of political opinion. It has become something that may be nonideological and neutral, held for whatever reason (since motivation is irrelevant), and may be expressed in only "silent" conduct, indeed may not be expressed at all. By this thinking, literally anyone — and therefore everyone — possesses political opinion for purposes of the Refugee Act.

Although the State Department probably acts impermissibly in the asylum area, more significantly the definition of "refugee" is simply too restrictive to meet and satisfy the claims of many who are sincere and possibly deserving of relief.⁴⁸ This point is vivified by a recent Ninth Circuit decision, *Sanchez-Trujillo v. INS*.⁴⁹ Petitioners Sanchez and Escobar sought asylum on the ground that as young, urban working class males they fell within the definition of a "particular social group" and thus were deserving of asylum. Yet, despite the fifteen days of hearings, the testimony of thirteen witnesses and

43. 759 F.2d 1395 (9th Cir. 1985).

44. *Id.* at 1397 n.3.

45. *Id.* at 1397.

46. 777 F.2d 509 (9th Cir. 1985).

47. *Id.* at 517.

48. As Professor Nafziger points out, the 1951 United Nations Convention definition of refugee "is clearly inadequate as a comprehensive definition of refugees." Nafziger, *supra* note 2, at 169.

49. 801 F.2d 1571 (9th Cir. 1986).

the production of fifty-one exhibits, the court refused to accept their claim. The court never doubted either the sincerity of petitioners' beliefs or the state of unrest in El Salvador. It simply refused to subsume their case within the definition of "particular social group," perhaps quite properly concluding that asylum law is directed at protecting those who because of disfavored status or conscious activity are targeted for persecution.⁵⁰ Therefore, the practical reality is that if human rights are to be fully addressed, we must look to sources other than the Refugee Act.

EXTENDED VOLUNTARY DEPARTURE

For at least fifty years, since 1936 when France and Great Britain provided refuge to those fleeing the Spanish Civil War, the world community has provided relief to those seeking temporary refuge from internal armed conflict.⁵¹ Indeed, 200,000 refugees entered France alone between 1936 and 1939.⁵² Over the years, literally millions have been protected in Western Europe, Southeast Asia, South Asia, Africa, the Middle East and Latin America.

While the status of those afforded refuge has differed according to prevailing state practice, this protection has not been confined to Convention refugees, that is, those satisfying the United Nations Convention definition of refugee.⁵³ Indeed, the United States Coordinator for Refugee Affairs said that "[d]espite the heavy burden often imposed by enormous numbers of refugees, asylum countries generally have not forcibly repatriated refugees against their will to countries which they have fled."⁵⁴ Moreover, it is clear that the Coordinator's report used the term refugee to include those fleeing armed conflict.⁵⁵ The practice of providing temporary refuge is even found in North America; Canada has adopted a policy of not returning Salvadorans to El Salvador until the crisis subsides.⁵⁶

50. The court reasoned that "such an all-encompassing grouping . . . is not that type of cohesive, homogeneous group to which the term 'particular social group' was intended to apply. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his . . . home country." *Id.* at 1577.

51. See Perluss & Hartman, *supra* note 2, at 559.

52. *Id.* n.32. (citing G. DIRKS, CANADA'S REFUGEE POLICY (1977)).

53. United Nations Convention, *supra* note 1.

54. See REFUGEE AFFAIRS, PROPOSED REFUGEE ADMISSIONS AND ALLOCATIONS FOR FISCAL YEAR 1984, REPORT TO CONGRESS FOR FISCAL YEAR 1984, 99th Cong., 1st Sess. 12 (1985).

55. *Id.* at 11-12.

56. Immigration Manual Guide (Guide de l'Immigration), Ministry of Employ-

Extended Voluntary Departure: The Executive Response

Although the United States has no formalized policy of providing temporary refuge based on any specified criteria, there is a provision in our law for "extended voluntary departure."⁵⁷ This form of "relief" is best thought of as a kind of temporary protection against deportation, an exercise of prosecutorial discretion⁵⁸ not to deport the alien. Its origin lies in section 244(e) of the INA, which gives the Attorney General the discretion to permit an alien to depart voluntarily from the United States if that person has been of "good moral character for at least five years immediately preceding his applica-

ment and Immigration, Canada 1S 26 (ELS), NHQ File 8655-1.

57. See 8 C.F.R. § 242.5(a)(3) (1986); INS OPERATIONS INSTRUCTIONS § 242.10e(3) (1979). Although the federal regulations clearly have the status of law, the internal Operations Instructions are merely codifications of INS practices. Accordingly, they do not confer rights upon parties.

Nevertheless, the practice regarding what has come to be called extended voluntary departure (EVD) is noteworthy. Under this operations instruction,

[a]liens who have been granted asylum or voluntary departure due to temporary inability to return to their home country because of civil war or catastrophic circumstances there, should be advised of their status by letter The letter should state that due to the current situation in their home country, they have been granted a one-year period within which to voluntarily depart the United States; that employment has been authorized; that their file will be reviewed at the end of that year to determine whether a further grant of voluntary departure is indicated; and that if it is determined at any time that conditions have improved in their home country the grant of voluntary departure may be revoked.

INS OPERATIONS INSTRUCTIONS § 242.10e(3).

58. In a wire to all INS field offices dated February 6, 1984, file 242.1-P, the INS distinguished between EVD and extensions of voluntary departure. It read:

Recent inquiries from field offices indicate that some asylum applicants and their attorneys are confusing the terms "extended voluntary departure" (EVD) and "extensions" of "voluntary departure." The purpose of this wire is to remind you of the distinction between these terms.

"EVD" refers to a blanket exercise of prosecutorial discretion to withhold enforced departure for a national group for a limited period of time. "EVD" may only be authorized by the Attorney General usually with the advice of the Secretary of State. While district directors are responsible for implementing the Attorney General's determinations, they have no independent authority to grant such relief.

Extensions of voluntary departure are authorizations by a district director to individual aliens on a case-by-case basis to remain in the United States beyond the departure date initially specified by a district director prior to the commencement of a hearing (8 C.F.R. § 242.5(b) (1986)) or by an immigration judge in conjunction with an order of deportation (8 C.F.R. § 244.2 (1986)).

While the Attorney General's determinations to grant "EVD" are binding as to enforcement actions involving individuals of the specified nationality, both favorable and unfavorable determinations on EVD leave unchanged the availability of discretionary relief for individual aliens under the act and regulations. District directors are reminded that they may grant "extensions" of "voluntary departure" to individual nationals of any country who meet the criteria set forth in 242.5 and 244.1 of the regulations.

61 INTERPRETER RELEASES 103-04 (1984).

tion for voluntary departure⁵⁹ Thus, a blanket grant of extended voluntary departure is the means most frequently used to protect groups of displaced persons, allowing them to remain in the United States until the cessation of hostilities in their homelands. In the last twenty-five years it has been used frequently to protect these groups.⁶⁰

EVD, however, is not the solution to the problem at hand. This is so for several reasons. First, the initial decision to grant EVD is made by the Attorney General, usually after consultation with the State Department. Second, EVD is granted on a piecemeal basis, thus providing relief to certain discrete, identified groups. Third, since the decision to grant such relief is discretionary, no person or group can require that it be granted. Though these points converge, they are still susceptible to separate analysis.

It is pointless to deny that EVD is granted for political as well as humanitarian reasons. Much of the controversy over humanitarian relief is fueled by charges that this country is denying relief to Salvadorans in favor of those from elsewhere, especially communist-dominated countries.⁶¹ Indeed, part of the articulated basis for EVD

59. INA § 244(e), 8 U.S.C. § 1254(e).

60. The following is a list of the exercise of that authority:

Cuba, 1960-1966; Dominican Republic, 1966-1978; Czechoslovakia, 1968-1977; Chile, 1971-1977; Cambodia, 1975-1977; Vietnam, 1975-1977; Laos, 1975-1977; Lebanon, 1976—present; Ethiopia, 1977—present; Uganda, 1978—present; Iran, 1979; Nicaragua, 1979-1980; Afghanistan, 1980—present; and Poland, 1981—present.

See H.R. REP. NO. 1142, 98th Cong., 2d Sess. 4 (1984).

61. That is not to say that other groups, such as Haitians or Guatemalans, do not have legitimate claims. The situation in El Salvador has, however, commanded the attention and response of many. For example, in 1986 the Iowa House approved a resolution asking federal officials not to deport Salvadoran refugees from Iowa until it is safe for them to return home. In addition, *Interpreter Releases* has published many stories in recent years, indicating that various cities had declared themselves sanctuary cities.

Similarly, Governor Anthony Earl of Wisconsin proclaimed Wisconsin a sanctuary for refugees from El Salvador and Guatemala. In a two page proclamation, he condemned the INS for "discriminatory behavior" in denying protection to Central Americans while welcoming others. He urged the INS to "act in a manner worthy of the traditions of justice, freedom and opportunity long upheld by this great nation." *Chicago Sun-Times*, Sept. 21, 1986, at 10, col. 4. The full dimension of this dilemma is revealed by Professor Peter Schuck:

[T]here is no question that the flood of asylum claimants presents extremely difficult problems for immigration law and policy. Most come not from the Soviet bloc but from nations with which the United States has, or until recently had, close political ties. These nations, such as Haiti and El Salvador, would bitterly resent our granting asylum to their citizens.

Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 40 (1984). See generally Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the*

grants consists of the political ramifications of such a grant. In addition to the concern that asylum grants would be an affront to the government of El Salvador, the United States government fears that a grant of EVD would severely exacerbate the already rampant illegal migration of Salvadorans to the United States.

This is clearly evident in congressional testimony given by Assistant Secretary of State Elliot Abrams in 1984. Responding to the point that EVD might create a magnetic effect drawing Salvadorans to the United States, Abrams has stated: "I don't really see how anyone can doubt that a grant of EVD would increase the amount of illegal immigration from El Salvador to the United States."⁶² Assistant Secretary Abrams continued to comment that it is delusory to believe that since EVD is a temporary form of relief, those Salvadorans granted EVD would cheerfully be rounded up to return to El Salvador. After all, he commented, "Who is kidding whom?"⁶³

Even assuming the accuracy of Abrams' factual postulates, his comments may simply be inapposite. He has fixed the problem in a utilitarian calculus, concluding that grants of EVD to Salvadorans would create more problems than they would solve. Yet, as was pointed out regarding the BHRHA opinions, it is improper to consider the effects generated by an asylum recommendation. The same may be true here for EVD. The government's case is stronger, however, for the issue is not the application of existing law to a discrete group, but whether a particular people should be singled out for compassionate treatment. Thus, unless EVD demonstrably exists as a matter of right, denying it violates no legal norm. Accordingly, many have expressed enormous concern over this political component of presumably humanitarian decisionmaking.⁶⁴

United States, 47 U. PITT. L. REV. 295 (1985).

62. *Temporary Suspension of Deportation of Certain Aliens, 1984: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 98th Cong., 2d Sess. 67 (1984) (statement of Assistant Secretary of State Elliot Abrams) [hereinafter *Hearing on H.R. 4447*]:

An intelligent and industrious Salvadoran weighing a decision to try illegal immigration to the United States knows that one of the risks is deportation

If we remove the possibility of deportation, it is simple logic to suggest that the illegal entry becomes a more attractive investment.

[W]hen we are talking about EVD *for the group which is not eligible for asylum*, we are discussing generally whether people who emigrate from El Salvador to the United States illegally should be permitted to reside here. If you say yes to that question, then we do not have an immigration policy with regard to El Salvador. We have abdicated the responsibility to have one.

Id. (emphasis added).

63. *Id.*

64. In the H.R. 4447 hearing, Representative Gejdenson stated that "[EVD] is a humanitarian decision, not a political one." *Hearing on H.R. 4447, supra* note 62, at 49. Echoing that sentiment, Representative Moakley commented that "[t]he issue here is not administration foreign policy toward El Salvador. The issue today is a humanitarian one [W]e are deciding, in light of all the documented human rights violations in El

Recoiling at the treatment of Salvadorans, eighty-nine members of Congress wrote to the Attorney General and the Secretary of State in April 1983 seeking to persuade the Executive to grant EVD to Salvadorans. Several months later, then Attorney General William French Smith sent back a measured response, dealing with all three aspects of EVD.⁶⁵ Having stated his conclusion that "the present circumstances do not warrant a granting of 'extended voluntary departure' to El Salvadorans presently in the United States illegally,"⁶⁶ he indicated not only the basis for this finding, but also the Administration's policy on EVD generally. At that point, he emphasized much of what Assistant Secretary Abrams had stated the following year,⁶⁷ focusing upon the foreign policy implications of such a grant:

Because of the serious foreign and domestic policy ramifications of withholding the expulsion of illegal aliens on nationality-based classifications, grants of such relief have been rare and limited to those cases where, in the judgment of the senior Executive Branch officials responsible for such policy, the best interests of the United States are served by such extraordinary measures.⁶⁸

Of course, this does not explain why the executive branch had declined relief in this case, but Smith continued by pointing out the economic motivations of the Salvadorans generally, the persistent abuses of our borders by Salvadorans, and the "potential inducement to further influxes of illegal immigrants" that would result from such a grant.⁶⁹ Thus, for a variety of reasons, Attorney General Smith and Secretary of State Schultz decided that a grant of EVD to Salvadorans would be politically unwise. The political nature of this form of "relief" makes it an ineffective mechanism for the protection

Salvador, whether it is safe, humane, and just to deport Salvadoran refugees back to their homeland." *Id.* at 10.

65. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION PROCESS AND POLICY* 731-33 (1985) (reprinting letter of Attorney General William French Smith of July 19, 1983).

66. *Id.* The current administration has repeatedly characterized Salvadorans as "economic migrants" rather than bona fide refugees. Attorney General Smith said "[b]oth the number of Salvadoran aliens and past experience suggest the possibility that many such aliens may seek to remain in the United States for economic improvement . . ." *Id.*

During the H.R. 4447 hearing, Assistant Secretary Abrams told a story of a Salvadoran working in Miami he met while on a commercial flight to El Salvador. He apparently told Abrams that he did not fear return to El Salvador, for he was not "involved in politics." *Hearing on H.R. 4447, supra* note 62, at 96. It is this kind of evidence that the Administration has used to buttress its claim that it is unnecessary to grant blanket relief to Salvadorans.

67. See *supra* note 62 and accompanying text.

68. T. ALEINIKOFF & D. MARTIN, *supra* note 65, at 731-33.

69. *Id.*

of human rights.⁷⁰ But that is not its only drawback.

Because EVD is based on current conditions and perceptions of what is politically advisable, it is necessarily granted sparingly and cautiously. Thus, because there have been only fourteen grants in twenty-five years,⁷¹ EVD is not likely to serve all who require relief but either cannot qualify or are deemed not to qualify for asylum or some other form of relief. As Smith pointed out, the decisions are reached on a "situation by situation basis and are not readily susceptible to comparison or generalizations."⁷² This is short-term relief,⁷³ and, unlike a grant of asylum or refugee status, it confers no possibility in itself for further protection and rights in this country.⁷⁴ Nevertheless, aside from the fact that the grant of EVD is discretionary, it cannot provide a solution to the problem.

Indeed, Attorney General Smith noted this discretionary aspect of EVD, carefully couching his letter in language indicating that no controlling criteria exist for such a grant. As has been pointed out elsewhere,⁷⁵ he was no doubt mindful of an extraordinary district court decision and the pending litigation in that case.⁷⁶ Thus, it was transparently clear that the executive was not inclined to give EVD to Salvadorans, and it is similarly clear that EVD has been used in a manner consonant with our foreign policy objectives.⁷⁷

70. The apparent double standard for humanitarian relief is evident also in the Justice Department's new proposed standards for asylum grants to Polish nationals. According to these new proposed standards, those coming from "totalitarian" countries would benefit from a presumption that they have a well-founded fear of persecution for political opinion. Justice Department officials have said that this presumption could be administratively established by the Attorney General, thus not requiring any change in the Refugee Act.

Though Polish nationals in the United States as of July 21, 1984 have been granted EVD until June 30, 1987, asylum confers a recognized statutory status, rather than the limbo status of EVD. Consistent with prior usage, it represents a durable solution, rather than a grant of temporary relief. See 63 INTERPRETER RELEASES 299-300 (1986); 64 INTERPRETER RELEASES 7 (1987).

71. Apparently some confusion exists here, for some sources indicate that EVD has been granted 15 times, though only 14 appear. See T. ALENIKOFF & D. MARTIN, *supra* note 65, at 728.

72. *Id.*

73. That is, there is no guarantee that, once granted, it will last more than a year.

74. Those granted asylum may adjust their status to lawful permanent resident under section 209(b) of the INA. Similarly, those granted refugee status may do the same under section 209(a). Moreover, EVD is an impermanent status; thus it is unclear what other rights are available to its recipients. INA § 209(a), (b), 8 U.S.C. § 1159 (a),(b).

75. T. ALENIKOFF & D. MARTIN, *supra* note 65, at 731.

76. The decision was that in *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 157 (D.D.C. 1983) [hereinafter *Hotel I*].

77. For a list of grants, see *supra* note 60.

Extended Voluntary Departure: The Judicial Response

*Hotel & Restaurant Employees Union, Local 25 v. Smith (Hotel I)*⁷⁸ constituted a direct assault on all claims of executive prerogative asserted by Attorney General Smith and Assistant Secretary Abrams. Plaintiff's complaint was twofold. First, plaintiff maintained that the State Department "routinely recommends against granting asylum to Salvadorans, without regard to the merits of individual asylum claims, by issuing form letters to the INS."⁷⁹ Second, plaintiff claimed that "the denial by the INS of extended voluntary departure to Salvadorans is arbitrary and capricious, violative of the Fifth Amendment, and contrary to the rule-making procedures of 5 U.S.C. § 553[(b) (A)]."⁸⁰

Plaintiff complained that because of these violations, defendants' actions "[injured] it directly by hampering its ability to organize and retain Salvadoran members as well as its efforts to protect the rights of its existing Salvadoran members to be secure in their jobs."⁸¹

Defendants moved to dismiss on grounds that plaintiff lacked standing to maintain the action, that the grant or denial of EVD is a nonjusticiable political question, and that the complaint failed to state a claim upon which relief could be granted. Defendants felt that the delicate, discretionary decision to grant or deny EVD would be impeded, indeed undermined, if courts were permitted to second-guess the executive. Moreover, they argued that such a judicial intrusion could only be inimical to the welfare of Americans and others living abroad. Thus, defendants contended that it was absolutely critical that this country speak with "one voice" in the high-stakes foreign policy area.⁸² Nonetheless, the court denied the motion to dismiss on all grounds.⁸³

Addressing defendants' argument, the court relied on the three-pronged test in *Baker v. Carr*⁸⁴ to decide the political question issue. Most notably, the court asked whether the "resolution of the question turn[s] on standards that defy judicial application or go beyond

78. 563 F. Supp. 157 (D.D.C. 1983).

79. *Id.* at 161.

80. *Id.* at 162.

81. *Id.* at 159. "Plaintiff also alleged that defendants' actions affect its members' associational ties by causing their severance." *Id.*

82. *Id.* at 160-61 (referring to Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss).

83. *Id.* at 159.

84. 369 U.S. 186 (1962).

judicial resources.”⁸⁵ The court first noted that though the judicial standard review of immigration issues is narrow, it does exist under some limited circumstances.⁸⁶

More important, the court declared that it did not lack a standard or the resources to decide the case because “defendants in the past articulated a cognizable standard for the grant of extended voluntary departure to a group of aliens — ‘wide-spread fighting, destruction and breakdown of public services and order’ in the aliens’ country of origin.”⁸⁷ Finding this “standard” to exist, the court had little difficulty deciding that this decision fell within judicial competence.

Even more startling is the court’s conclusion that “prudential considerations do not prohibit judicial *intervention* in this case,” since, among other things, United States credibility abroad could be “*enhanced* rather than diminished by a reversal of the Executive’s decision in this case.”⁸⁸ In this it felt justified, for *Baker v. Carr* itself stated that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”⁸⁹ Based on the State Department’s “standard” for EVD, it is simply astounding that the court deemed this matter to fall within its competence. A more clearly political question could not be imagined. But the case did not end there.

Defendants next filed a motion for summary judgment on both the questions of differential treatment of Salvadorans’ asylum claims and the State Department’s refusal to grant EVD — *Hotel II*. Defendants’ argument on EVD was twofold. First, they claimed that the EVD decision fell within the Attorney General’s absolute discretion on issues of foreign and prosecutorial policy, and accordingly was not the proper object of judicial review under either the Administrative Procedure Act or the Constitution beyond whether the decision was rationally based.⁹⁰ Second, they argued that since EVD is extrastatutory, thereby conferring neither a right nor a privilege upon the claimants, due process considerations did not attach.⁹¹ The

85. *Hotel I*, 563 F. Supp. at 160.

86. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).

87. *Id.* (citing 128 CONG. REC. S831, a letter written by A. Drischler, Acting Assistant Secretary for Congressional Relations, to Senator Edward Kennedy). The letter read in pertinent part:

While fighting in some areas has been severe, El Salvador has not suffered the same level of widespread fighting, destruction and breakdown of public services and order as did for example, Nicaragua, Lebanon or Uganda at the time when voluntary departure was recommended by the Department and granted by INS for nationals of those countries.

Letter of A. Drischler, Acting Assistant Secretary for Congressional Relations, to Senator Edward Kennedy (April 17, 1981), reprinted in 128 CONG. REC. 1702-03 (1982).

88. *Hotel I*, 563 F. Supp. at 161 (emphasis in original).

89. *Id.* (citing *Baker*, 369 U.S. at 212).

90. *Hotel II*, 594 F. Supp. at 504.

91. *Id.*

court agreed on both claims, thus making a radical about-face from its position on the motion to dismiss.⁹²

Initially, the court observed that "EVD is based on the prosecutorial discretion of the Attorney General after consultation or advice received from the State Department . . . and is grounded in the Executive's express and inherent authority in the areas of both foreign and prosecutorial policy."⁹³ This is surely in keeping with the thinking that immigration matters fall within the purview of the executive and, insofar as Congress has acted, it virtually exercises plenary power over matters of national policy.⁹⁴ If, therefore, the Attorney General is to act effectively in an area wholly confined to his discretion, judicial review would seem inappropriate.

Thus, as the court reasoned, "EVD is a tool utilized by the Attorney General . . . to respond to emergency situations which might require broad application of his authority under the Act, and which demand a speedy response."⁹⁵ Moreover, when a matter is committed to the discretion of the executive, judicial review simply must be precluded.⁹⁶ However, the court went beyond this simple observation and focused on the political function of EVD in concluding that its exercise simply must escape judicial review.

The court's holding is in sharp contrast with the earlier decision that the claim was *entirely* justiciable since it did not fall within the political question exception. It found no guiding criteria for the implementation of EVD, concluding that "[i]n the case of EVD, there is indeed 'no law to apply' because of its extra-statutory nature, and these aliens at the case at bar have an adequate remedy in deportation proceedings."⁹⁷ Though the district court in the first instance discerned a standard, this court felt that a standard such as "humanitarian concerns" would be difficult to apply for "[h]umanitarianism is a vague concept, and by its terms overbroad."⁹⁸ For this reason, and because the court felt the executive necessarily has unreviewable discretion in the formulation of foreign policy, the court concluded

92. *Id.* at 505-09. Indeed, the court's very formulation of the issue indicated the likely result. The court noted that "the primary issue is whether there exists any basis for judicial review of the Attorney General's decision regarding blanket EVD status for all the Salvadoran nationals *illegally* in the United States." *Id.* at 506 (emphasis added).

93. *Id.* at 505.

94. *But see* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

95. *Hotel II*, 594 F. Supp. at 506.

96. *Id.*

97. *Id.* at 506-07.

98. *Id.* at 508.

that judicial review was precluded. Accordingly, the substantial victory achieved in *Hotel I* was emphatically reversed in *Hotel II*.⁹⁹

Extended Voluntary Departure: Summary

EVD occupies a strange position as a form of humanitarian relief. First, since its grant represents exercise of political judgment, the decisional process involves an amalgam of humanitarian and political factors. Surely the executive branch is not legally wrong in failing to grant EVD to a particular group. Nevertheless, it *can* be faulted for not fully serving humanitarian goals.

Second, EVD has involved the piecemeal application of an extra-statutory form of relief unguided by any discernible standards. The court in *Hotel II* concluded that with EVD there is “no law to apply.”¹⁰⁰ Moreover, EVD is not law in any conventional sense. It cannot be invoked to secure rights for anyone, and thus lacks a salient attribute of law: it neither creates rights in its claimants nor imposes any duty to grant it — or even act at all — in the executive.

Despite the inadequacy of EVD to promote humanitarian goals, its existence bespeaks a commitment to aid the oppressed even in the absence of any legal right. At the least it stands as precedent for supplying relief for compelling humanitarian reasons. Thus, even though EVD fails to properly address these concerns, its existence indicates our nation’s willingness to provide aid and relief to those to whom the ordinary forms of legal relief are unavailable.¹⁰¹ Though this does not reveal a national adherence to a norm of temporary refuge,¹⁰² it does indicate a commitment to humanitarian values which could become embodied in positive law.

99. That is not to say, however, that the court is wrong. Because EVD has no discernible standard, is extrastatutory in nature, and deals with delicate matters involving the confluence of foreign and domestic policy, arguably it does not fall within the competence of the judiciary to review these kinds of decisions. For an endorsement of this view, see Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 60 (1984).

100. *Hotel II*, 594 F. Supp. at 507.

101. In fact, district directors of the INS have sent form letters designated “ASYLUM DENIAL LETTER FOR EVD ELIGIBLES.” Those letters commence with a paragraph indicating that the alien had filed a request for asylum which was denied. However, they continue:

It has been determined that you are eligible for an extended period in which to depart voluntarily. Due to the current situation in your country, you have been granted permission to remain in the United States until (DATE ESTABLISHED FOR QUALIFYING NATIONALS OF SPECIFIED COUNTRIES.) Your case will be reviewed at that time to determine whether any further extension of voluntary departure should be granted. If it is determined at any time that conditions have improved in your home country, or that you are otherwise ineligible, your permission to remain in the United States may be revoked.

62 INTERPRETER RELEASES 256, 257 (1985).

102. See generally Perluss & Hartman, *supra* note 2.

HUMANITARIAN LAW: RECENT CONGRESSIONAL ACTIVITY

Congress has shown an active awareness of the acute problems faced by Salvadoran migrants. It has twice passed "sense of Congress" legislation asking the executive to grant EVD to Salvadorans.¹⁰³ Further, both houses of Congress have considered bills — that is, Moakley-DeConcini — which would prevent the deportation of Salvadorans and Nicaraguans until a Government Accounting Office (GAO) report indicated that it was safe to do so. Moakley-DeConcini made it through the House Judiciary Committee and the Senate Subcommittee on Immigration and Refugee Policy,¹⁰⁴ as well as through the full House in a recent vote. However, this legislation failed to become part of the newly enacted Immigration Reform and Control Act of 1986 (IRCA).¹⁰⁵

Though an inadequate response to the dilemma, Moakley-DeConcini represents a well-meaning gesture. The Bill would have granted Salvadorans in the United States since November 7, 1985 a stay of deportation for at least one year. During that time, the GAO would investigate and report to Congress on the number of Salvadorans in the United States, the situation in El Salvador, the conditions of displaced Salvadorans in El Salvador, Honduras, Guatemala and Mexico, the situation of Salvadorans returned to El Salvador, and would compare the situation in El Salvador with that in other countries during periods when nationals of those countries have been provided EVD.

Much of this is entirely sensible. Not only would Moakley-DeConcini require an empirical study of conditions in El Salvador, but also in other countries through which Salvadorans often pass in coming to the United States. This study would either destroy or verify the claim that Salvadorans are economic migrants and have deliberately rejected the opportunity to take refuge elsewhere. Indeed, the Administration's position is that the Salvadoran rejection of Mexico or Guatemala as countries of true "first asylum" reveals their economic motive.¹⁰⁶ Moreover, requiring a comparison of the Salvadoran situa-

103. See *supra* note 6 and accompanying text.

104. See *supra* note 7 and accompanying text.

105. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987). See *infra* note 146 and accompanying text.

106. Senator Alan K. Simpson, Chairman of the Senate Subcommittee on Immigration and Refugee Policy, is an outspoken proponent of this position:

Almost all Salvadorans come to the United States by land routes. In doing so, they must cross at least two countries to reach our border. All of them must pass through Mexico and Guatemala, and some also travel through Honduras.

tion with that of recipients of EVD would at least isolate the humanitarian component of their claims and evaluate that against the successful claims of other groups.

Yet, even had Moakley-DeConcini succeeded, and even if this group were temporarily protected from forcible repatriation or deportation elsewhere, the legislation would not be entirely successful in giving expression to our national humanitarian commitment. Moakley-DeConcini could have successfully protected many Salvadorans from potential persecution, but it neglected other groups seeking refuge from internal strife that do not qualify for Convention refugee status. Although humanitarianism was the animating force of this legislation, it assuredly stopped short of providing protection for all who do or may warrant it. It was a stop-gap measure — aimed at one group — neither reaching beyond this conflict nor providing for the future.

IS MEXICO A SAFE HAVEN?

As Senator Simpson's comments indicate,¹⁰⁷ many observers apparently believe that most Salvadorans and others are drawn to the United States not only because it is the sole truly viable alternative, but also for largely economic reasons. In advancing this position, they argue that the refusal of Salvadorans to stop in countries of first asylum exemplifies their economic motives. This argument reveals a failure of its proponents to grasp either the factual circumstances in Central America or the legal difficulties of resettling in those countries. Nevertheless, many proponents issue sanguine proclamations about the availability of safe haven in foreign refugee centers, arguing that "[l]ife in the centers is hard but safe."¹⁰⁸ Most believe that Mexico is a likely safe haven for Salvadorans. That notion, however, does not withstand scrutiny.

Mexico is a signatory to neither the United Nations Convention

Both Mexico and Honduras have allowed 'safe haven' for Salvadorans, and the UNHCR has established a presence in each country. In a legal sense, then, it is these nations that are the country of safe 'first asylum', not the United States.

While it may be true that many Salvadorans left their homeland because they perceived their lives to be in danger, they did not travel 2000 miles through the friendly and accepting country of Mexico because of a continuing threat of personal violence.

Their reasons for traveling on through Mexico are reasonable — to find better employment opportunities or to live with friends or family in the United States — but this is the motivation of most legal and illegal immigrants around the world, not of the true refugees.

Simpson, *We Can't Allow All Salvadorans To Stay*, Washington Post, July 10, 1984, at A13, col. 2.

107. See *supra* note 106.

108. Zall, *Asylum and Sanctuary: The American Dilemma*, 72 A.B.A. J. 67, 69 (1986).

of 1951 nor the subsequent Protocol. Although Mexico has recently cooperated with UNHCR assistance efforts, it is not bound to do so. The UNHCR estimated that the refugee population in Mexico as of December 1985 totaled 175,000.¹⁰⁹ Of those, 120,000 were Salvadorans, but UNHCR provided assistance only to 4000.¹¹⁰ Thus, the argument that Salvadorans are being assisted under the aegis of UNHCR is simply erroneous.

This point is underscored by a GAO report issued several years ago.¹¹¹ Acknowledging the lack of effective assistance provided to refugees in Mexico, the GAO stated:

As a result, these and future Salvadoran refugees can expect little, if any, assistance or economic opportunities in Mexico and many will be forced to seek opportunities elsewhere. U.S. and Mexican officials recognize that the majority of Salvadorans have sought, and continue to seek, such opportunities in the United States.¹¹²

Although this report is somewhat outdated, at the time of presentation the United States was declaring Salvadorans largely economic migrants, and was commenting on the ready availability of safe haven elsewhere. Worse yet, the limited UNHCR funds made assistance somewhat futile, and poor economic conditions in the host countries further hindered any possibility for meaningful assistance.¹¹³ Thus, relief efforts in Mexico were severely limited.

Mexican law and policy also dramatically limit relief efforts.¹¹⁴

109. United Nations High Commissioner for Refugees, 1986 Programme of Assistance to Refugees in Mexico, U.N. Doc. EA/COM. 8/85-86 (1986).

110. *Id.*

111. *Report to the Congress of the United States, Central American Refugees: Regional Conditions and Prospects and Potential Impact on the United States*, GAO/NSIAD-84-106 (1984).

112. *Id.* at 24.

113. The Report continued:

However, UNHCR reports that large numbers of persons they consider to be refugees are not receiving assistance in the region, including thousands of Salvadorans in Mexico, Guatemala, and Nicaragua. Further, the Salvadorans in Honduras are provided only restrictive asylum. Our work also shows that the extent of resettlement opportunities and assistance in the region is currently insufficient due, in part, to the large number of refugees and other migrants, and asylum countries' serious economic difficulties and policies.

Id. at 28.

114. The following discussion is based on an article prepared by Joan Friedland, an American attorney currently doing empirical research in Mexico. See Friedland, *Legal Status of Central Americans Residing in Mexico*, 14 IMMIGRATION NEWSLETTER 6 (1985); J. FRIEDLAND & J. RODRIGUEZ Y RODRIQUEZ, *SEEKING SAFE HAVEN: THE LEGAL SITUATIONS OF CENTRAL AMERICANS IN MEXICO* (U.S.-Mexico Law Institute, University of San Diego in conjunction with the Institute for Legal Research at Universidad Nacional Aut6mina de Mexico 1987).

Refugee status does not exist under Mexican law and, as indicated, Mexico has not subscribed to the international refugee instruments. The Mexican government does permit UNHCR to work within its borders. In 1980 Mexico established the Comision Mexicana de Ayuda a los Refugiados (COMAR). However, COMAR is almost exclusively dedicated to maintaining the UNHCR funded refugee camps in southern Mexico where the Guatemalans reside. These Guatemalans have special visas, though they have not received them as asylees. They are the only group among the Central Americans in Mexico to be given this blanket treatment as de facto refugees.¹¹⁶

Compounding this problem, any foreigner visiting Mexico is required to have a visa, and the grant of that status is discretionary. Under the Mexican Constitution, any foreigner may be required to leave the country without a judicial hearing. These factors, taken in conjunction with Mexico's severe economic crisis and the legal requirement that immigrants cannot displace Mexican workers, make Mexico an unattractive choice for migrants.

Some forms of visas are, nevertheless, available. Refugees in camps in Chiapas have FM-8 visas (border visas), which must be revalidated every ninety days and require that those holding them live within fifty miles of the border and have no status to apply for permanent residence and naturalization.¹¹⁶ Those not living in refugee camps in Chiapas generally cannot obtain any legal status other than an occasional FM-3 (temporary worker) visa. Because foreigners do agricultural work in this area and because it has traditionally been a corridor to the United States, "the Mexican government considers foreigners in the region to be economic migrants."¹¹⁷

Refugees in camps in Campeche and Quintana Roo receive FM-3's, but they can only retain these visas if they work under supervision of COMAR in the authorized camps. Travel elsewhere effectively voids the visas. Moreover, these camps are in the south, and are inhabited almost exclusively by Guatemalans.

Refugees in the central portion of Mexico have three choices. They may apply for political asylum (FM-10), student status (FM-9), or unconditional visitor status permitting the applicant to work (FM-3). None is readily available. Mexican law defines "asylee" so stringently that the applicant must *prove* persecution, not merely the fear of persecution. Thus, only a paltry number of people have garnered asylum in recent years. Indeed, the standard of proof is so

115. *Id.* at 7.

116. See Weber, *The Law of Asylum in the U.S.*, IMMIGRATION & NATIONALITY LAW HANDBOOK 892, 969 (39th Anniversary Symposium, AILA 1985).

117. Friedland, *supra* note 114, at 7. Indeed, the government has recently "stepped up vigilance to stop their movement toward the U.S.-Mexico border." *Id.* at 8.

high that Mexican lawyers refer to it as "la prueba del diablo."¹¹⁸

An applicant for an FM-3 visa must comply with requirements analogous to those for American labor certification,¹¹⁹ including proof of employment, a list of personnel working for the prospective employer, their salaries and nationalities, and documentation establishing the bona fides of the employer and its payment of taxes. Few refugees can meet these requirements.

Finally, student status is achieved upon proof of prospective enrollment, at least at the bachelors level, as well as proof that the student will be able to earn at least 45,000 pesos per month. Since employment is forbidden, this requirement cannot be met except by those who are of some means or who are receiving scholarships.

These facts present a baleful picture. Few resources are available for the protection of refugees; Mexican law and policy severely undermine their prospects for relief. If refugees are to be adequately protected, the United States cannot slough off the responsibility on countries undergoing their own crises. As one commentator has concluded:

Mexico, while on record as welcoming Salvadoran refugees, has had an economy that deteriorated greatly since first offering that haven. Mexican newspapers repeatedly editorialize against the acceptance of Salvadoran refugees. The experience of Salvadorans passing through Mexico in the past few years has been one of hostility, robbery and sometimes violence. One social fact stands out: there exists a regional antipathy against Salvadorans, a population known for its enterprising character.¹²⁰

PROSPECTS FOR CHANGE

Reacting to the inadequacy of current law to protect victims of civil strife, some commentators have called for the creation of a new instrument of humanitarian law, one recognizing the desperate plight of people from countries experiencing internal strife.¹²¹ Indeed, observers have noted that when the breakdown of public order occurs, human rights violations are most rampant and egregious — yet, the victims may not meet the definition of Convention refugee. Despite the appeal for a new instrument, state practice has repeatedly recognized and accommodated these victims.¹²² But, the unreli-

118. *Id.* at 7.

119. See INA § 212(a)(14), 8 U.S.C. § 1182(a)(14); 20 C.F.R. § 656.1 (1986).

120. Kirmeyer, *There's No 'Safe Haven' In El Salvador*, Washington Post, July 14, 1984, at A17, col. 2 (responding to statements of Senator Simpson).

121. See, e.g., Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983).

122. See Perluss & Hartman, *supra* note 2.

ability of voluntary practices, and the concomitant legal uncertainties, call for the convergence of humane practice and statutory law.

A major deterrent force to change is the fear that if "asylum-like" status is bestowed upon those not fitting within the Convention definition, the potential influx of aliens into the United States will reach unmanageable proportions. The rejoinder is twofold: first, new doctrine need not regularize the status of aliens, virtually assuring them of permanent status; second, this country has a de facto policy of protecting just such groups — EVD. "The establishment of statutory authority to grant safe haven would bring extended voluntary departure out of the shadows."¹²³

Others argue that the creation of a new instrument is unnecessary, for state practice has been so consistent that this law already exists. Professors Perluss and Hartman have most persuasively argued that "temporary refuge" exists as a customary norm of international law.¹²⁴ A right, however, is only valuable if it can be effectively vindicated. Thus, despite the brilliance of their exposition, it is somewhat chimerical to believe that such rights will be enforced by our judiciary.¹²⁵

Their thesis is, at the very least, morally compelling, and it is this moral imperative that must inform legislative action. Their work must be analyzed in some detail, for, despite its possible shortcomings, it invaluablely advances the cause of humanitarian law. Simply put, Perluss and Hartman assert that state practice and the activity of international and regional organizations reveal a strong commonality of belief¹²⁶ in a presently existent norm of temporary refuge, one transcending the Convention definition of refugee and reflected in various strands of international and municipal law. The origins of the Perluss and Hartman thesis may be traced to UNHCR activity in 1979 and 1980.

Recognizing the legal problems posed by the massive movement of asylum seekers, the Australian representative to the UNHCR proposed the adoption of the concept of "temporary refuge" to the Executive Committee of the High Commissioner's Programme at the

123. *Hearing on H.R. 3195 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 102-04 (1983) (statement of T. Alexander Aleinikoff, Refugee Assistance), reprinted in T. ALEINIKOFF & D. MARTIN, *supra* note 65, at 739.

124. See generally Perluss & Hartman, *supra* note 2.

125. See Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741 (1985). In commenting on the difficulties of getting state courts to recognize international law, Professor Hartman noted that "[t]he dangers of ignorance, hostility or parochialism today appear to be no greater in state courts than in the federal courts." *Id.* at 748. Perhaps that is so, but perhaps it presents no cause for real elation, either.

126. That is not to say that states have universally subscribed to these views.

1979 and 1980 meetings.¹²⁷ "Temporary refuge" was urged because concepts such as "provisional asylum" only distorted the relief sought. Vital to the proponent was that those fleeing their home countries because of internal strife be afforded the right of non-refoulement in receiving countries consistent with articles 31 and 33 of the United Nations Convention.

Since then, though not using this terminology, the UNHCR has persistently implored the international community to recognize and protect not only Convention refugees, but all displaced persons fleeing internal strife. Thus, in a recent report to the United Nations General Assembly, the High Commissioner stated:

It should be recognized that refugees include not only persons who are outside their countries due to fear of persecution but also persons who have fled their countries due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights. Even though the majority of today's refugees are persons who do not fall within the classical refugee definition in the UNHCR Statute they have, as helpless victims of man-made disasters, come to be recognized as persons of the High Commissioner's concern by successive resolutions of the General Assembly.¹²⁸

Moreover, though this is not treaty law, the UNHCR has noted that nonrefoulement applies to all refugees, "has now come to be characterized as a peremptory norm of international law,"¹²⁹ and should be regarded as a rule of *jus cogens*, an overriding legal principle independent of international instruments.¹³⁰

This thinking is not confined to the lofty pronouncement of the UNHCR. For example, in 1969 the Organization of African Unity (OAU) redefined the term "refugee" consistent with this notion of temporary refugee.¹³¹ Further, there is no indication that the OAU

127. For an account of this fascinating chronology of events, see Martin, *Large Scale Migrations of Asylum Seekers*, 76 AM. J. INT'L L. 598 (1982).

128. Report of the United Nations High Commissioner for Refugees, E/1985/62, para. 10 (1985). This was a preliminary mimeographed edition of the report that was subsequently issued in printed form as an official record of the fortieth session of the General Assembly. Indeed, the printed report vigorously underscored the point, noting that the Universal Declaration of Human Rights — the modern-day Magna Carta — embodies the principle that *everyone* has the right to seek and enjoy in other countries asylum from persecution." Report of the United Nations High Commissioner for Refugees, 40 U.N. GAOR Supp. (no. 12) para. 16, U.N. Doc. A/40/12 (1985) (emphasis in original) [hereinafter UNHCR Report].

129. See UNHCR Report, *supra* note 128, para. 23.

130. *Id.*

131. Organization of African Unity Convention on Refugee Problems in Africa, Sept. 10, 1979, 1001 U.N.T.S. 45, art. 1, para. 2 [hereinafter OAU Convention]. The OAU Convention definition reads:

The term 'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public

intended this definition to confer only temporary protection upon those fleeing crises. Thus, it may *exceed* the current UNHCR recommendations in that it goes beyond the narrow principle of nonrefoulement.

Africa is not alone. Representatives from ten Central American countries met at a colloquium in Cartagena, Colombia, and unanimously approved a definition of refugee similar to that of the OAU. It included those fleeing their home countries because of "generalized violence," "internal conflicts," or for reasons relating to a serious breach of public peace.¹³² This body stressed the importance of recognizing nonrefoulement as a rule of *jus cogens*. Thus, regional organizations have expanded the overnarrow Convention definition of refugee.

Indeed, Professors Perluss and Hartman argue that this norm has been directly incorporated into the municipal law of some states.¹³³ Sweden's Alien Law, for example, recognizes those who are "similar to refugees," and protects them as long as is necessary.¹³⁴

These examples reveal an increasing recognition and espousal of the views expressed by the UNHCR and other major organizations. Temporary refuge, then, may arguably be characterized as an existing norm in customary international law which provides the theoretical basis for the protection of those who can demonstrate the dangers they face in their homelands. This norm, however, must be embodied in the municipal law of the United States, lest it will only represent a hopeful dream for the redress of great hardship. This is so, for the very existence of the norm is not entirely certain and state practice may lack the consistency and prevalence claimed by Perluss and Hartman. Beyond that, even to the extent that practice has endorsed some norm, its character and content may not be entirely clear. State practice, as interpreted, simply may not unequivocally reveal the espousal of a norm of temporary refuge with a fixed content and meaning.

Yet this should encourage, not frustrate, the enactment of protective legislation, for, hopefully, states have responded to the plight of the displaced because it was right to do so, not out of a sense of legal compulsion. It is sheer nonsense to suggest that these victims deserve protection *only after* states have acted almost universally in doing so. That view denies the very existence of an independent norm justifying, if not dictating, a particular course of action, thus presenting the classical "catch" preventing any action at all. Others have acted; the

order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge

132. Cartagena Declaration on Refugees, November 22, 1984, para. 3.

133. See Perluss & Hartman, *supra* note 2, at 576-77.

134. Refugees, April 1985, at 20-22.

United States must join them.¹³⁵

A PROPOSAL FOR CHANGE: REDEFINING "REFUGEE"

This Article has repeatedly stressed the inadequacy of extant United States law to effectively address the plight of those fleeing internal civil strife. For political and purely theoretical reasons, both asylum law and EVD have been poor instruments of humanitarian law. Yet developments within the world community suggest other viable approaches to the problems presented by the mass flight of migrants. Indeed, the concept of temporary refuge or safe haven provides a mid-ground between the notions of illegal alien and Convention refugee. Although this does not afford a durable solution, it could provide an initial necessary measure of protection for these victims.

Skeptics might scoff at the use of the term "humanitarian law," thinking it a somewhat meaningless word, taking on whatever generous meaning one wishes to ascribe to it. But the term has a clear meaning in international parlance, and refers to that body of law that protects people during times of armed conflict.¹³⁶ It is frequently embodied in instruments such as the Geneva Conventions of

135. This situation presents the classical questions implicated by the naturalist-positivist division. Indeed, it harks back to the great question put to Euthyphro by Socrates: "Is what is holy holy because the gods approve it, or do they approve it because it is holy?" The answer was obviously the latter. Moral content exists independent, as here, of the commandment or approval of the sovereign. Plato, *Euthyphro*, in *PLATO ON THE TRIAL AND DEATH OF SOCRATES* (Lane Cooper trans. 1941), reprinted in R. BRANDT, *VALUE AND OBLIGATION: SYSTEMATIC READING IN ETHICS* 306 (1961).

Moreover, it is not difficult to find support in moral philosophy for a duty to aid in the circumstances under discussion. John Rawls posited a natural duty "of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself" J. RAWLS, *A THEORY OF JUSTICE* 114 (1971). Indeed, as Rawls elaborated,

A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective 'natural.' One aim of the law of nations is to assure the recognition of these duties in the conduct of states. This is especially important in constraining the means used in war, assuming that, in certain circumstances anyway, wars of self-defense are justified.

Id. at 115.

136. See generally J. PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1966).

1949¹³⁷ and the Hague Convention of 1907,¹³⁸ and may also be a customary norm of international law.¹³⁹

But even assuming the existence of this norm, what may be done with it? How can it offer protection to victims of internal civil strife? The litigation process should be rejected as a solution because of the unlikelihood of the judiciary recognizing the existence of this norm. In addition, since litigation vindicates individual rights and success depends on the competence of both the court and counsel, overall humanitarian rights would suffer because of these vicissitudes of fortune.

The failure of EVD has been extensively elaborated and bears no reiteration. History clearly demonstrates that the executive branch simply will not make decisions based solely on humanitarian principles. Nonetheless, EVD is one avenue to safe haven. In addition, given the overtaxed enforcement powers of the INS and the comparatively low rate of deportation of Salvadorans,¹⁴⁰ most remain in this country despite the stance of the government. Yet, the failure to provide legal relief cannot be countenanced simply because most manage to avoid deportation. The United States has a de facto policy of safe haven — few of those victims of civil strife here illegally are actually deported. However, Congress must convert this de facto policy into a legal reality.

One possibility is enacting a safe haven statute. A safe haven statute would have the virtue of providing blanket protection to the affected groups. However, for this to occur, some government agency, for example the GAO, must first make the finding that conditions in particular countries warrant the extension of safe haven to their nationals. This could degenerate into a bureaucratic nightmare, one which could seriously thwart the very objectives of such a law. This would not be an insurmountable obstacle, however, for similar find-

137. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *done* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *done* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

138. Hague Convention Respecting the Laws and Customs of War on Land, *done* Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

139. See generally Perluss & Hartman, *supra* note 2, at 601-12.

140. Estimates vary, but perhaps several thousand Salvadorans are deported annually. For example, during 1983, 4802 Salvadorans were deported. Of this number, 1627 departed voluntarily and 3175 were formally deported. See *Hearing on H.R. 4477, supra* note 62, at 96. This is a trifling number when contrasted to the estimates of those residing here illegally, estimates reaching as high as 500,000. However, that does not trivialize the fates met by some of those deported. Again, unfortunately, there is no hard data to rely on, but the very deportation of people to such a climate is anathema.

ings are presently made in determining annual refugee admissions.

Yet, a second problem to the safe haven statute looms large. For a people to effectively receive protection in this country, they must be made *aware* of the protective statute. Since so many aliens have surreptitiously migrated to this country, their presence is unknown. Thus, the government might be incapable of adequately notifying them of their status.¹⁴¹

Finally, political opposition to safe haven legislation might be considerable, as it might be regarded as paving the way for the uncontrolled migration of undocumented aliens to this country. Moreover, as with Moakley-DeConcini, it might be necessary to establish an over-restrictive cut-off date for presence in the United States to allay fears of an unmanageable influx of aliens. Thus, though in principle safe haven legislation might operate in much the same manner as amendments to existing legislation, there are substantial impediments to enacting a significant safe haven statute.

The logical alternative is to amend existing asylum law to provide protection for victims of civil strife. Applications for asylum are filed in many cases to which safe haven more appropriately applies; there is nothing objectionable about requiring that those seeking this status actively and knowingly pursue it. These provisions would frequently apply only at time of deportation. Hence, safe haven would be available to those deserving its protection at the most critical and important time. Such a change in American asylum law would be adequately understood so that people would no longer live in fear of detection.

Central to this proposal to revise American asylum law is a redefinition of the term "refugee." At present, its major defect lies in its narrow scope, providing protection only to those who fear persecution because of political activity or group membership. Surely those people should be protected, but protection should extend also to those who are the victims of civil strife. Thus, section 101(a)(42) of the Refugee Act of 1980 should be amended, adding the following

141. Indeed, although the same claim may be made about EVD, many of those who have received that status have entered this country from abroad, not from contiguous territories. *See supra* note 61 and accompanying text. Thus, to the extent that safe haven applies to those from countries to our south, it might not effectively reach those people for they have frequently entered without inspection and have no status in this country. In fact, the same argument may be made for the amnesty provisions of IRCA § 201(a), 100 Stat. at 3394 (amending/adding INA § 145A), but those differ because amnesty has received enormous national coverage over the last five years. Despite that, rumors abound that perhaps only 10 percent of those eligible for amnesty will actually apply.

section:

(C) the term "refugee" also includes every person who, owing to external aggression, occupation, foreign domination or events seriously disrupting public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge.¹⁴²

That these terms do not lend themselves to ready definition is a virtue rather than a weakness. A more specific definition would have a limiting effect, confining its coverage to the enumerated examples. Here, however, such specificity has been avoided, and the language is sufficiently broad to encompass the myriad cases of those who should be protected. Indeed, this language is no more vague than the term "persecution" itself, and thus imposes no greater burden on those called upon to interpret it.

Opposition to such a measure can be anticipated. This language, however, should pose no serious problems for those seeking refuge or those called upon to make recommendations on their status. In fact, since a finding of refugee status under this provision does not necessarily reflect badly on the countries in question, BHRHA could more candidly and neutrally address the issues at hand. A suggestion that asylum be granted does not involve political "finger pointing." Indeed, the Thirty-fifth Session of the Executive Committee of the High Commissioner's Programme recommended legislation of this sort.¹⁴³

Furthermore, the expanded definition of "refugee" should be applied to govern the President's actions under section 207 of the INA. Although it cannot be expected that entire populations of countries would be admitted on this basis, at least some hardship may be alleviated if those from strife-torn countries are admitted along with conventional refugees.

The nagging fear that our available national resources would be overtaxed by the absorption of these refugees and asylees is somewhat unwarranted. Undoubtedly some would become assimilated into American society regardless of their failure to adjust their status. However, given the purpose of temporary refuge, neither the asylee nor the refugee should have a right to adjustment of status. Adjustment need not flow as a matter of course, but as with the asylee should be granted only if conditions in the home country re-

142. This language is taken from the OAU Convention, *supra* note 131, art. 1, para. 2.

143. Commenting on the undesirable limitation of the United Nations Convention definition of refugee, the committee said: "Many States had amended their legislation to permit such persons to remain on a humanitarian basis until it became possible for them to return to their homes without danger. It was hoped that other countries would adopt measures of this kind." *Report of the Thirty-fifth Session of the Executive Committee of the High Commissioner's Programme*, U.N. Doc. A/AC.96/651, para. 61 (1984).

main unchanged after a year of presence in the United States and if status must be regularized. Thus, section 209(a) of the INA should be amended to provide for adjustment under the same terms and conditions contained in section 209(b), at least as to refugees admitted under this amendment.

Finally, given the centrality of the principle of nonrefoulement to humanitarian law, section 243(h) of the INA should be similarly amended to preclude the forcible repatriation of these refugees.¹⁴⁴ A change in section 243(h) will bring the United States again in line with article 33 of the United Nations Convention: section 243(h) must be changed to place this country in conformity with international law and obligations.

These changes would give effect to the emerging norm of temporary refuge by preventing the return of victims of internal civil strife to dangerous situations, and would effectuate a fundamental goal of relief efforts: voluntary repatriation. By amending current asylum law, the United States could serve the two goals of protecting those requiring asylum and of returning them to their homelands when conditions improve. Indeed, it is most realistic to believe that many aliens truly wish to return home and not live permanently uprooted from their homelands.

CONCLUSION

In their efforts to pass the Immigration Reform and Control Act of 1986, members of Congress had to compromise and make concessions to finally achieve immigration reform after many years of futile effort.¹⁴⁵ One of these concessions was the deletion of Moakley-

144. This change will effectively overturn the decision of *INS v. Stevic*, 467 U.S. 407 (1984). But *Stevic* was incorrectly decided. Since the term "refugee" invokes the legal standard of "well-founded fear of persecution," the substitution of the clear probability standard results in a legislative absurdity. Moreover, the *Stevic* Court misread article 33 of the United Nations Convention and section 243(h) of the INA by focusing on the word "would" in the phrase "would be threatened," thereby neglecting the difference between "threatened" and "persecuted." By equating the two through this misreading, the Court not only distorted the statute but thereby wholly undermined the concept of nonrefoulement.

Further, Congress is not bound by the Supreme Court's interpretation. In fact, section 315(b) of IRCA reverses the result in *INS v. Phinpathya*, 464 U.S. 183 (1984), by providing that the suspension of deportation is not barred by a "brief, casual, and innocent departure from the United States which did not meaningfully interrupt the continuous physical presence" in this country. S. 1200, 99th Cong., 2d Sess. § 315(b), 132 CONG. REC. H. 10089 (daily ed. Oct. 14, 1986).

145. For a general discussion of the Immigration Reform legislation, see Lungren, *The Immigration Reform and Control Act of 1986*, 24 SAN DIEGO L. REV. 277 (1987),

DeConcini. However, two facts make it reasonable to believe that what is posited here is not fanciful. First, Moakley-DeConcini did pass the House, though by the narrowest of margins.¹⁴⁶ Second, the Conference Committee expressed the hope that deportation be suspended on a case-by-case basis for Salvadorans and also "strongly recommended that Congress consider and take up this issue expeditiously . . ."¹⁴⁷ Congress has substantially changed our immigration law, yet the task is not complete. This area of humanitarian law must be transformed to provide statutory relief for the victims of civil strife. Congress can effect these changes. Hopefully, in the near future, it will show the requisite wisdom and humanity.

in this issue.

146. The vote was 199-197.

147. H.R. REP. NO. 1000, 99th Cong., 2d Sess. 98 (1986).