CANADA'S PERIODICAL ON REFUGEES

REFUGE

Vol. 7, No. 1 September, 1987

SPECIAL ISSUE

Asylum in North America: Crisis

Displaced Salvadorans in New York

Arthur C. Helton

Several circumstances have combined recently to produce an outflow of Central American and other asylum seekers from areas in and around New York State, and their relocation across the Canadian border in Plattsburgh and Buffalo, New York. Similar relocations are reported in Detroit. Plattsburgh, a small town border town in the Adirondack Mountains, has become a place of refuge for over 270 "bus people" who stopped there on their way to Canada. Most are Salvadorans, but many are Guatemalans, Nicaraguans; Sri Lankans and Somalis are also found in this ever-expanding group.

Late last year, Salvadorans began leaving the United States for Canada in increasing numbers. This was due not only to the now well-documented restrictive asylum approach taken towards Salvadorans by U.S. authorities, but also through the enactment in November, 1986 of immigration control legislation which sanctions employers for hiring undocumented aliens. Previously, in somewhat of an anomaly, undocumented asylum seekers could work without their employers fearing the imposition of penalties for such employment. After the new law was enacted in November, many employers fired aliens in their workforce, even though many had been employed prior to the date of enactment, November 6, 1986, and were covered by a "grandfather clause" that immunized such employment from sanction. The firings occurred even though many of the alien workers were eligible for legalization since they had, in fact, been present in the United States since January 1, 1982. Once fired, however, they were unable to obtain new employment and were started on a downward spiral; they could not even apply for legalization and receive formal authorization to work before May 5, 1987. Faced with destitution, many chose to leave and make their way to Canada.

The increased flight to Canada coincided with increasing concern by the Canadian authorities regarding their asylum policies. In 1985, over 6,000 asylum applications were filed in Canada. In 1986, that number increased to 12,000. During the last week of December that year, 220 Salvadorans and Guatemalans alone filed applications for asylum.

On February 20, 1987, in the face of increasing numbers of arriving Central Americans, the Canadian authorities took several measures to stem the flow. Traditionally, asylum applicants in Canada were granted formal "refugee" status in about 25% of the cases. Now, in addition to ending nationality group safe-haven programs for 18 countries, including El Salvador and Guatemala, the Canadians determined that all asylum seekers arriving at the border would be required to remain in the United States until their cases had been reviewed for the admittance procedure — a six week process. No longer will members of specified nationality groups (such as Salvadorans, Guatemalans, Iranians, Afghans,etc.) be permitted to remain if they are not granted refugee status. According to Canadian authorities, the U.S. immigration authorities have agreed not to deport asylum

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GUEST EDITORIAL

C. Daniel Levy

Pushed by the ravages of war and the activities of paramilitary units, and lured by the illusion of security, Salvadorans have migrated to the United States in large numbers in the recent years. Upon arrival in the United States they have been faced with a surprising official hostility. Hundreds, if not thousands, of Salvadorans have been detained for varying amounts of time at the different detention centers employed by the Immigration service throughout the United States. The conditions at these detention centers varied from unsavory to disastrous. In one detention center, these asylum seekers were forced to stay days on end under the scorching sun of the desert at temperatures exceeding 100 degrees Fahrenheit. In other detention centers they were forbidden to have writing and reading materials. In some processing centers they were not allowed to use telephones to contact relatives or attorneys. Furthermore, constant efforts were made by immigration agents to persuade and cajole refugees to forgo their right to apply for political asylum in the United States and to sign an agreement that they would leave this country voluntarily.

These procedures are intimately related to the legal structure of refugee processing in the United States. Based on the Refugee Act of 1980, the United States has established a twofold system to process refugees. First, there is the overseas processing system where people who satisfy the statutory definition of refugee are processed and given visas to enter the United States as refugees. Second, there is a process whereby people already in the United States can request the status of political asylees if they prove that they satisfy the definition of refugee. The possibility of overseas processing has been virtually nonexistent for Central Americans. In spite of years of civil wars, gross violations of human rights and serious population displacement, no overseas refugee processing program was established for the region.

Consequently, the alternative for Salvadorans has been to enter the United States and request political asylum from inside the country. In the United States, however, the immigration service has the power to arrest individuals who are accused of having violated the immigration laws of this country and detain them pending the deportation hearing unless the individual is able to post a bond to insure his/her appearance at the hearing. So many abuses were committed in the course of arresting and detaining Salvadorans that a nationwide class action was originally filed in 1981 and after massive testimony, closing oral argument was heard on August 31 of this year. Paula Pearlman, one of the attorneys representing the Salvadoran asylum seekers, has contributed one article describing the reasons for this suit, its development and what its expected effect will be.

Refugee status in the United States involves an individual determination that the person asking for that relief fits the statutory definition of 'Refugee.' The method of individual determination is not very appropriate to confront large scale dislocation of populations. For those purposes, the United States Attorney General, under whose authority the Immigration and Naturalization Service runs, has traditionally used its discretion and offered certain nationalities an 'Extended Voluntary Departure' (EVD). Through this process members of those nationalities are allowed to remain in the country until circumstances in their home countries change and allow them to return safely. Efforts to secure EVD for Salvadorans through the Attorney General have failed. Advocates for refugees have then turned to Congress in an effort to influence the passing of legislation designed to achieve what the Attorney general has refused to implement through his discretion. Lauren McMahon details the story and present status of these efforts.

In November 1986, the United States passed legislation adding new provisions to the Immigration Act. These included employer sanctions, increased budget for enforcement and provisions for legalizing some undocumented immigrants. Fearing forced repatriation, many Central Americans sought refuge in Canada. In response to this increased demographic pressure, Canada changed its refugee acceptance practices. Arthur Helton evaluates the effects of these changes on the U.S./New York — Canadian border, while Kathy Alfred describes the reaction of the Central American community in the United States. Through these various articles we hope to provide Canadian readers with a glimpse of the legal structures that rule the lives of the large population of Central American asylum seekers in the United States.

C. Daniel Levy, Esq. National Committee for Immigrants and Refugees

CANADA'S PERIODICAL ON REFUGEES

REFUGE

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Editorial

Editorial titles in *REFUGE*, Volume 6, during the past year chronicled a saga from celebration to crisis. Thus we moved from A Time to Rejoice [Nansen Medal]...Hope for Refugees in 1987? [policy delays]...The Trust of the People of Canada [effects of border closing on Salvadoran and Guatemalan refugees] to Asylum in North America: Crisis. During the past year we have witnessed a distinct resurgence of discriminatory governmental practices in processing inland refugee claimants. All persons fleeing persecution have been assured of their right to asylum by enshrined Conventions of the United Nations High Commission for Refugees. That right is fast being taken away legislatively and administratively by the governments both of Canada and the United States.

This issue of REFUGE brings the reader up to date on these developments.

The editorial staff takes no pride in this exposition. It is a rearward march along a path that leads back to institutional racism. A curious and ironic twist in the course of two countries whose policies of immigration and refuge have marked them as leaders of the West.

We fervently hope that we have not heard the last word. Yet on both sides of the border reasoned and detailed representations have fallen on deaf ears. Peaceful demonstrations have gone unnoticed in the governmental optic. Alternative courses of action seem to be few.

In this issue we highlight the legislative and administrative procedures for information. We intend to keep our readers abreast of developments throughout this year in briefer updates. The causes of involuntary refugee movement resulting in spontaneous asylum requests have not abated. North American governments cannot wish asylum seekers away. Punitive measures merely compound a problem for our countries' long-standing and ineradicable commitment. Advocates will not shrink in asserting rights of those too powerless to help themselves. Their actions will occupy the attention of REFUGE as long as necessary.

C. Michael Lanphier, Editor

EFFECTS OF U.S. AND CANADIAN POLICIES ON LATIN AMERICAN REFUGEES

The effects of the Immigration Reform and Control Act of 1986 (also known as the Simpson-Radino Bill) by the U.S. Congress in October of 1986, and the recent cancellation of the Ministerial Permit Program by the Canadian government has created deep concern and apprehension on the part of the Central American refugee community living in the United States. The Simpson-Radino Bill was enacted under the guise of stemming the flood of illegal migration into the United States by refugees seeking better economic opportunities. A similar rationale was given for the adoption of new immigration measures by the Canadian government which retracted the list of special countries (including El Salvador and Guatemala) to which refugees could not be deported. These new legislative changes could have a devastating impact on the Central American refugee community in North America.

The key provisions of the (U.S.) Simpson-Radino Law that impacts most on Central American refugees are those contained in the legalization and employed sanctions. The legalization program applies to persons who have had illegal status in the U.S. prior to January 1, 1982. These persons must also have maintained continuous unlawful residence in the U.S. since that date and a continuous physical presence.

There are several problems with that program when applied to Central American refugees. The majority of Salvadoran refugees began to flee their country just a few years ago, after the height of the repression and death-squad activity, when the bombings and depopulation of the countryside intensified. Thus, most Salvadoran refugees arrived in the United States after January 1, 1982. They have therefore been disqualified from the amnesty provision in the new Immigration Law. Jos Aguilar, a representative of the Association of Salvadorans and Guatemalans Against Deportations, recently estimated that 80 percent of all Central Americans will not be able to qualify for the amnesty provided in the new law. Those who potentially qualify will face problems of proving their continuous residence, long waiting periods to legalize other immediate family members who do not qualify on their own amnesty, and the fear of being put through deportation proceedings if denied residency.

Another factor which will make it very difficult for Central Americans to qualify for legalization is the requirement that an applicant prove that he/she will not become a public charge. One must show a steady work history. This provision in the law will have the effect of disqualifying many Central American refugees who have sporadic periods of employment, mainly due to the fact that those who applied for asylum systematically have been denied

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applicants waiting across the border (with the exception of criminals) until such time as these cases have been decided.

The confluence of these circumstances has created an increasing displaced Central American population on the Canadian-U.S. border in upstate New York. At the moment, the State government and churches are providing assistance for the Central Americans. However, a crisis is looming. The measures taken by the Canadian government in February are simply the first in a series of steps to implement a restrictive asylum policy in Canada. Legislation has been introduced (C-55) which, *inter-alia* would deny the right to apply for asylum to those who are returnable to a safe third country; e.g., the United States. Salvadorans and Guatemalans in New York, finding themselves already in an alleged "safe third country" (the United States), would face deportation to the home countries from which they originally fled for fear of their lives. They may be among the first victims of increasingly restrictive governmental actions in North America.

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THE MOAKLEY-DeCONCINI BILL

The situation facing refugees in flight from civil strife in El Salvador has changed little since 1983 when legislation was first introduced that would provide Salvadorans limited protection in the U.S. The legal context, however, of conditions facing the undocumented refugee community has changed significantly. Within the past year, the U.S. has experienced dramatic changes in immigration/political asylum law and practice. Recent legislation and litigation have produced new policy responses to a number of relevant issues involving reception of the undocumented asylum seeker in the U.S. Landmark changes in immigration policy include: passage of the Immigration Control and reform Act (IRCA); the decision by the U.S. Supreme Court (in Cardoza-Fonseca) to affirm the more objective "well-founded fear of persecution" asylum standard; the well publicized announcement by Attorney General Meese regarding preferential treatment and protection of Nicaraguans here by granting them rights already due Nicaraguans and others presently in the U.S.; prosecution and conviction of sanctuary workers providing refuge to refugees from El Salvador and Guatemala; expansion of immigration detention sites throughout the U.S. for incarceration of asylum seekers; and completion of two relevant General Accounting Office (GAO) studies regarding a) discrimination against Salvadorans in political asylum adjudication practice, and b) inconclusive analysis of evidence claiming safe return for repatriated Salvadorans. These significant events are exacerbated by proposed changes in Canadian immigration policy

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work authorization by the I.N.S. even though the I.N.S. regulations explicitly state that refugees who present "non-frivolous" applications for political asylum should be granted permission to work.

For the second point, those Central Americans who do not qualify for legalization under the Amnesty Law, will be deeply affected by the employer sanctions, by which employers of "illegal immigrants" and others without work authorization are subjected to fines and penalties. These sanctions will only serve to marginalize many sectors of the Central American immigrant community, lowering their already poor standard of living and increasing employer exploitation. Fear of detection and subsequent deportation will force many refugees to tolerate victimization, exploitation and racism by employers. Refugee organizations are already reporting massive layoffs of workers who are unable to prove that they were authorized to work in the United States even before the imposition of employer sanctions. Many refugees have reported that their wages have already been lowered by employers who are taking advantage of the vulnerability of the workers who do not have work authorization.

The I.N.S. has stated that the "alternative" to legalization for the hundreds of thousands of Central American refugees who do not qualify for legalization continues to be application for political asylum. However, applying for political asylum has not proven to be a viable option for these refugees due to the disproportionate denial rate. Statistics show that from the period 1981 through 1984, more than 32,241 Salvadoran refugees applied for political asylum in the United States. Five hundred and sixty two of those applications were approved, while another 20,833 applicants were denied, an approval rate of less than 3 per cent. The approval rate is even lower for Guatemalan refugees.

In response to the growing concern over the future impact of the new Immigration and Reform Control Act on their lives, many Central American refugees began to flee to Canada in late 1986, presenting themselves at the border where they requested political asylum. Canada, under its Ministerial Permit program in existence at that time, was not deporting Central American refugees and routinely issued ministerial permits to refuge-seekers originating from a list of 18 countries which included El Salvador and Guatemala. Refugees from these countries were allowed to stay in Canada and given work permits while awaiting a determination of their cases. This special program was abruptly ended by the Canadian government on February 20, 1987, in light of the flow of refugees requesting political asylum at Canadian borders at the rate of 1,000 to 1,200 arrivals per week.

The Canadian government has subsequently reiterated its commitment to lend its hand in alleviating the Central American refugee problem by encouraging Central Americans to apply for political asylum outside Canada at the nearest Canadian Consulate. However, Canada has put restrictions on the number of refugees it will sponsor a year. In 1986, the Canadian government only sponsored approximately 3,300 Central American refugees, a very small number considering that since the civil war in El Salvador approximately one fifth of the population was forced to flee the country.

The Canadian government's recent increase of restrictions on access of Central American refugees to Canada, and the U.S.government's attempt to stem the flow of illegal immigration by passing employer sanctions, only shows that these governments are refusing to deal with the root causes of the refugee problems: these are the civil conflict and persecution existing in their Central American countries of origin which cause them to flee.

It is clear that what is needed is a regional response to the growing number of Central Americans who are fleeing their homelands. The United States, along with Mexico, Canada and other countries in the region should commit themselves to the international principle of non-refoulement (no forced) return for Central American refugees. A temporary haven should be granted to these refugees who because of the violence and civil unrest in their homelands cannot safely return. Passage of such proposed legislation as the (U.S.) Moakley-Deconcini refugee protection bill which would grant a temporary suspension to the detention and deportation of Salvadoran refugees in the U.S. would be a step in the right direction toward alleviating the plight of the Central American refugees.

Kathy Alfred has been a Staff Officer at the Los Angeles Center for Law and Justice since 1984.

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that would restrict reception of Salvadoran refugees coming directly from the United States (in particular, new legislation bills C-84 and C-55).

As such policies were lobbied for, voted upon and implemented in Washington, D.C., the United States was experiencing a heavy refugee influx from El Salvador. Mass migration from the region, caused by El Salvador's civil war, has brought hundreds of thousands of undocumented refugees to the U.S.. By 1987, more than 20% of El Salvador's population had become refugees or displaced persons within the country. In addition to United Nations, church, and government refugee camps established in Mexico, Honduras and other Central American countries, great numbers of refugees sought first asylum in the U.S., in Los Angeles, San Francisco, Chicago, New York, Miami, Boston and, perhaps, ironically, in Washington, D.C. where policies restricting refugee protection are formulated.

The above provides a backdrop in discussion of the labored Salvadoran safe haven bill sponsored by Rep. Moakley (D-MA) of the House of Representatives and Senator DeConcini (D-AZ) on the Senate side. In its four year legislative history, the Moakley-DeConcini bill has made limited headway amid a dramatically changing landscape of immigration law. Despite its legacy of testimony covering issues on the root causes of civil strife in Central America and U.S. practice in the region, the Moakley-DeConcini bill has moved slowly in comparison to other initiatives. Progress, however, is on the horizon. On July 28, 1987, the U.S. House of Representatives unanimously passed the Moakley bill (renamed the Central American Studies and Temporary Relief Act of 1987). Later this Fall, the DeConcini bill is expected to reach the Senate floor for a final vote. With significant amendments attached to the bills, the conference committee selected to reconcile the differences between the House and Senate version will play a significant role.

Legislative History

Generated in response to conditions of warfare, human rights abuses and violence in El Salvador, the Moakley-DeConcini (herein referred to as Moakley) bill was initially drafted in support of providing temporary safety for an estimated quarter million refugees in the U.S. Now, four years later, after nearly 70,000 civilians have lost their lives to war in El Salvador, and as hundreds of thousands have become displaced within the region of Honduras, Guatemala, Mexico, Belize, Nicaragua and Costa Rica, more than 500,000 Salvadorans seek safe haven in the U.S. With worsening political and economic conditions and increased destruction of life and property, El Salvador continues to be a country ravaged by a nine year civil war. As other forms of protection are offered to nationalities from countries in similar circumstances, such as Poles, Afghanis, and Ethiopians, Salvadorans still do not receive blanket protection. Political asylum approval rates for Salvadorans are abysmally low. As the subject of a recent GAO study investigating apparent discrimination in adjudication of asylum claims, Salvadoran asylum applicants currently average a less than 3% approval rate, as compared, for example, to an 85% approval rate to date for Nicaraguans.[1] Further, Salvadorans have become the typical detainee in any one of the Immigration Service's many immigration detention centers. These centers, or immigration prisons, incarcerate undocumented persons for lengthy periods for having violated the crime of illegal entry. Salvadorans are routinely detained and deported without benefit of counsel.

In response, after years of denied requests to the U.S. Government to grant Extended Voluntary Departure (E.V.D.) to Salvadorans, refugee advocates turned to sympathetic Congressional members for support. Out of this effort, Representative J.Moakley offered his first House resolution favoring suspension of detention and deportation for Salvadorans in the U.S.

Initially begun as a Sense of Congress Resolution, the Moakley bill was first drafted and passed in 1983 as a non-binding gesture in support of providing temporary safe haven for Salvadoran refugees. Now before the 100th Congress, four years later, the Moakley bill has inched its way closer to final passage.

In brief, the Moakley bill provides for an in-depth GAO study that will investigate and report to Congress on conditions for the displaced within El Salvador and throughout the region. The study will also include an examination and analysis of conditions facing those deported from the U.S. back to El Salvador and Nicaragua. An especially interesting addition to the bill includes a comparative analysis of the treatment and reception of Salvadorans and Nicaraguans in the U.S. vis-a-vis the situation of other nationals in the U.S. who have been granted Extended Voluntary Departure.[2] Special attention will also be paid to the situation of undocumented Salvadorans in the U.S. A suspension of detention and deportation will be granted to Salvadorans lending completion and review of the study. This GAO study will conclude with a Congressional review of the report's findings. Upon review, Congress will implement appropriate steps in accordance with the report's conclusions.

Relatively limited in language the bill has raised relevant issues far and above the few remedies it seeks. With issues pertinent to refugee protection, domestic and foreign policy, discrimination and human rights, the Moakley bill has represented hope and haven to an estimated half million Salvadoran refugees seeking first asylum in the U.S. The language of the bill has changed much over time in incremental concessions to Congressional members seeking to dilute the political issues inherent in the bill. Rarely acknowledged officially, the unspoken subtext of the bill related immigration policy to foreign policy objectives. In essence, recognition of Salvadorans as refugees in the U.S. would directly contradict administration claims that conditions in El Salvador are improving and that President Duarte is in control of the military and paramilitary death squads.

Like most legislation, components of the bill have been criticized by those on both sides of the issues involved. Staunch advocates favoring refugee rights have recently withdrawn support of the bill in rejection of the many concessions added over time; others dub the bill an open door to "economic migrants" and allege that refugees will falsely claim fear of persecution in Central America in order to gain entry to the U.S. Long considered a liberal gesture supported almost exclusively by Democrats, the bill has been transformed year after year in an attempt to capture bipartisan support, A number of incremental changes have fundamentally altered the bill. A major change involves inclusion of Nicaraguans, added to broaden Congressional support. Other changes included restrictive language to limit those who might qualify.

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One such restrictive change added this year, but eliminated by amendment in June 1987, included a registration process that would have required those eligible to sign an affidavit assuring voluntary departure once the temporary protection measures were lifted. This amendment was part of a package passed in the House Rules Committee that effectively brought the bill back to its original intent to protect Salvadoran refugees without extraneous restrictions.

Having passed the most difficult hurdles in various committees, the bill presently awaits a vote on the Senate floor. Optimistic about passage, advocates are currently strategizing the House and Senate versions. Efforts are underway to maintain the integrity of the recently amended and approved House bill.

From a refugee community perspective the bill has been instructive. Throughout the long struggle to see blanket protection for refugee fearing repatriation to El Salvador, we have seen desired protection measures adopted for others such as Poles, Afghanis, Ethiopians, and others. The argument that temporary humanitarian protection has become more of a public relations/political gesture than safe haven at face value is increasingly evident.

Myths, by definition, embellish the hopes and fears of many. In the case of the Moakley bill, the hopes of the refugees provide similar counterpoint to the fears of U.S. officials. Such fears are often based on government-bred myths such as that by providing limited protection to Salvadoran refugees we encourage them to stay in the U.S. and that by staying they will, for example, steal jobs from U.S. citizens. These false and intentionally misleading representations, refuted by a number of economist and researchers, create the effective dividing line between protection and deportation.

Lauren McMahon is the Director of El Rescate, a Central American Refugee Project in Los Angeles.

1. INS statistics, partial FY 1987 October-May.

2. A blanket protection measure that provides for withholding of deportation and work authorization pending review of humanitarian conditions in the home country.

Orantes-Hernandez v. Meese:
LITIGATION TO STOP I.N.S. ABUSE OF SALVADORAN ASYLUM SEEKER

Paula Pearlman

In 1981, every afternoon immigration attorneys in Los Angeles would be found at the downtown (U.S.) Immigration and Naturalization Service (INS) office retracting their Salvadoran clients' "voluntary departure" to stop a deportation to El Salvador. The INS practices in California, along the U.S.-Mexico border and elsewhere in the United States led to the filing of a nation-wide class action suit against INS, *Orantes-Hernandez v. Meese.*[1]

The Orantes case went to trial before Federal District Court Judge David Kenyon in Los Angeles 1985 and was finally concluded in February 1987. More than 75 plaintiffs' witnesses testified in person and 30 by deposition. The government presented approximately 150 witnesses.

Plaintiffs, Salvadorans apprehended by the INS, had been coerced by the INS into signing "voluntary departure" forms to return to El Salvador. They were deprived of access to telephones and counsel. They had not been informed of their right to apply for asylum under the Refugee Act of 1980.[2] The lawsuit was filed to stop the coercive practices of INS, to prevent future abuses and to guarantee that Salvadorans rights be protected.

The plaintiffs and class members of this lawsuit are Salvadorans who fled from the civil war in their homeland, were arrested by INS and are eligible for asylum. Salvadoran class members are represented by a litigation team of public interest lawyers, including those from the Central American Refugee Center (CARACEN), Legal Aid Foundation of Los Angeles, Immigrants' Rights Office, National Center of Immigrants' Rights, American Civil Liberties Union of Southern California and San Fernando Valley Neighbourhood Legal Services.[3] The attorneys worked cooperatively for thousands of hours interviewing and preparing witnesses across the country.

Expert witnesses from Americas Watch, the Lawyers' Committee for Human Rights and the University of Central America in San Salvador, testified in Los Angeles about human rights conditions in El Salvador. Testimony highlighted the lack of a functional judicial system in El Salvador and the failure to prosecute any Salvadoran government officials or security forces for the persecution, including death and torture, of any Salvadoran. Witnesses described the lack of investigatory interest and government intent to pursue human rights abusers in contrast to the situation in Argentina. The U.S. Government's witnesses testified that the monitoring of human rights abuses by the U.S. State Department is based primarily on newspaper accounts in the Salvadoran press. Extensive State Department documentation of abuse by the Salvadoran security forces was withheld from plaintiffs on the basis of the state secrets doctrine.

Salvadorans presented dramatic testimony about their reasons for fleeing El Salvador: escape from death squad members, torture, and unlawful arrest. Perhaps they or their family members had been involved politically in unions, opposition groups, religious and charitable organizations; or perhaps they were merely opposed to one side of the conflict or the other. Their testimony became even more compelling when followed by descriptions of the trauma of apprehension by the U.S. Immigration Service. In one instance, plaintiff Dora Castillo described verbal abuse by the border patrol agents, demands for signatures on paper with no opportunity to read it, and threats that she would never see her children again if she refused to sign her "voluntary departure." She signed. Other Salvadorans testified about being told by the INS that they no option in this country (U.S.) BUT to sign, even after stating that they were afraid to return home.

Judge Kenyon ordered the INS (June 2, 1982) to provide every Salvadoran apprehended in the United States at the border, or in the interior of the U.S. with a notice of rights including the right to apply for asylum, the right to consult with an attorney, the right to a deportation hearing, and the right to sign for voluntary departure.

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Even after the injunction was instituted, there was testimony about continued coercion, harassment and misinforming of Salvadorans by the INS. Salvadorans were told that it was useless to apply for asylum, that they would "rot in detention", and that they would just be deported back to El Salvador anyway.

Testimony has amply detailed the oppressiveness of conditions of detention. The detention centers are located in remote, isolated areas with extreme climates. Immigration attorneys complained about long delays to see clients, the lack of legal materials, libraries, writing materials available to Salvadorans in detention and the failure of the INS to provide an adequate number of telephones. In El Centro, California for example, detainees had to queue up to use a short, stubby 'golf pencil' for two hours. INS detention officers at the Port Isabel Detention Center, Texas, give an orientation for all new detainees. They offer voluntary departure without explaining, and do not describe the right to post bond or advise that an attorney could assist them with deportation proceedings. Coupled with the coercive treatment by INS officers, Salvadorans experience disillusionment and uncertainty. Yet the INS officers have testified that there is nothing wrong with their practices.

While the INS internal policing mechanism is designed to function by INS officers and agents reporting on misconduct observed, subsequent investigation and remedial action, it is remarkable that to date only this investigation (of Mr. Orantes-Hernandez) has been conducted into allegations of abuse, despite the fact that the highest authorities in the Immigration Service testified to their awareness of the abuses and the allegations in that lawsuit. William King, then patrol agent in charge of the El Centro border patrol sector, testified that even after receiving a memo ordering his agents to stop coercing Salvadorans into signing voluntary departures, he did not investigate the allegations of misconduct among his officers.

The traumatic experiences in El Salvador have an obvious and serious impact upon the psychological orientation of many Salvadorans. Dr. Saul Nieford, a clinical psychiatrist and expert on Central American refugees, testified that many are reluctant to reveal to INS agents the varied reasons why they seek refuge in the U.S. They tend to omit rather than exaggerate their own difficult experiences. Salvadorans suffer from "frozen shame" for having survived the ordeal in their country, then fleeing to the U.S. leaving behind loved ones and friends. Consequently, a Salvadoran may not reveal to an INS agent his/her fears of returning. Without an advisal of rights, Salvadorans may even and sign for voluntary departure, despite the fact that they are terrified to return home.

A post trial brief in this case was to be filed in May, followed by oral argument. Plaintiff's attorneys requested that the judge order the immigration service to continue advising Salvadorans of their right to asylum and also prohibit INS coercion, including misinformation in the apprehension, processing and detention of Salvadorans. The court called this case one of the most important law suits in the U.S. because it revealed the involvement of the United States government in El Salvador. The INS has vowed to take the case to the U.S. supreme court if it does not receive a favourable decision. Those concerned about human rights and the protection of legal rights in the United States, and the world at large, have eagerly awaited the court's decision.

[At press date, no decision had been rendered following the completion of the oral argument on August 31, 1987. Ed.]

Paula Pearlman is a Staff Attorney at the San Fernando Valley Neighbourhood Legal Services, Pacoima, California.]

1. 541 F. Supp.351 (1982); originally filed as *Orantes-Hernandez v. Smith,* CV 82-1107-Kn, United States District Court, Central District of California. The Secretary of State was also named a defendant but the cause of action against him was subsequently dismissed.

2. Pub. L.96-212, 94 Stat. 102 (1980) U.S. Congress enacted a comprehensive system for resettlement of and assistance to refugees in the United States. It directed the Attorney General to establish a procedure for an alien physically present in the U.S. to apply for asylum. 8 U.S.C. ½1158(a).

3. Attorneys are Linton Joaquin, Sandra Pettit, Sheila Neville, Charles Wheeler, Mark Rosenbaum, Vera Weisz, and Paula Pearlman, all members of the National Lawyer's Guild.

CHANGE OF LOCATION:

The Refugee Documentation Project (RDP) has moved to Suite 290J, Administrative Studies Building, York University. RDP's data base of over 8,000 research items relating to refugee issues and situations are available in the Resource Centre during the academic year. Please telephone (416) 736-5061, ext. 3639 for further information and schedule.

NEW PUBLICATIONS LIST

UPROOTING, LOSS AND ADAPTATION: The Resettlement of Indochinese Refugee in Canada. August 1987. Kwok B. Chan and Doreen Marie Indra, eds. Published by the Canadian Public Health Association, 1355 Carling Avenue, Suite 210, Ottawa, ON, K1Z 8N8. Price, $12.00. The book brings together papers representing contemporary research on the resettlement in Canada of Vietnamese, Laotian and Kampuchean refugees. It includes an exhaustive bibliographic survey of Canadian research in Indochinese communities and original photographs.

MULTICULTURALISM AND THE CHARTER: A Canadian Legal Perspective. Toronto: Carswell, 1987. Pp 212. Price $48.00. Special papers, some in English and some in French have been collected by The Canadian Human Rights Foundation which recruited a committee of Canada's leading experts on human rights, multiculturalism, and constitutional law.

HUMAN RIGHTS INTERNET DIRECTORY: Eastern Europe and the USSR. Harvard Law School, Pound Hall Room 401, Cambridge, MA 02138, USA. April 1987, pp 304, price $30.00

A Directory of International Migration Study Centers, Research Programs, and Library Resources. Eds. D. Zimmerman, N. Avrin and O.D. Cava. CMS Center for Migration Studies, 209 Flagg Place, Staten Island, NY 10304-1148, USA. Pp 299, indices, price $35.00.

Deterrents and Detention: An Ill Conceived Afterthought

By William Angus and James Hathaway

This is abridged from an article which originally appeared in The Globe and Mail, 25 August, 1987. Reprinted by permission.

In response to the clandestine arrival in Nova Scotia earlier this summer of 174 persons who subsequently claimed refugee status, the Federal Government recalled Parliament two weeks ago to introduce Bill C-84. Styled the Deterrents and Detention Bill, its content is every bit as ominous as its title suggests.

Although one of the Bill's purposes is stated to be to preserve access for genuine refugees, clearly the opposite result is achieved by some of its provisions. In an attempt to prevent abuse of the refugee determination system and to respond to security concerns, the proposed legislation has been drafted in such sweeping language that a number of its clauses are in fairly obvious violation of both international law and the *Canadian Charter of Rights and Freedoms*.

Simply put, the Bill goes too far. In its haste to respond to a perceived crisis, the Government has failed to respect fundamental legal standards.

Determination Procedures

No one disputes the propriety of affording protection to genuine refugees in fear of persecution. How to determine who is a genuine refugee and who is a false claimant, however, has been a vexing problem. From its inception under the new *Immigration Act* in 1978, the refugee determination process has been too slow and complex, with the result that genuine refugees are adversely prejudiced while false claimants abuse the process in the hope of gaining landed immigrant status by one means or another.

After numerous studies and a backlog of claims, Parliament now has new refugee claim procedures before it in Bill C-55. Although many of Bill C-55's provisions are controversial, its passage in a substantially amended form should resolve the pressing concerns associated with determining who is a genuine Convention refugee in a timely fashion. However, Bill C-84 has suddenly emerged as a hastily arranged and ill conceived afterthought which would effectively preclude access to a fair and efficient determination process.

Turning Away of Ships

The proposed scheme would permit the Minister of Employment and Immigration forcibly to turn away ships that are in or approaching Canadian waters if he reasonably believes them to have unauthorized entrants aboard, including refugee claimants. This provision brings back shameful memories of Canada's decision in 1939 to turn away the ship *St. Louis* with its cargo of around 1,000 Jewish refugees, most of whom were forced back to Europe and Hitler's gas chambers. It is a needlessly arbitrary provision which violates international law, and which will not stop the smugglers' traffic in human suffering.

As the United Nations has pointed out to the Canadian Government, there is one fundamental obligation under internation al refugee law that can never be suspended, never be watered down, never be overlooked. That obligation is to hear the claims of persons who arrive at our borders that they would be persecuted if returned to their country of origin. One hundred nations, including Canada, have agreed that if a person can show that she or he faces the prospect of persecution on the ground of race, religion, nationality, social group, or political opinion, that person should be protected from return to his or her country of origin.

The problem with Bill C-84 is that it effectively guts this most basic international obligation by allowing the Minister, acting alone, to decide that a ship should be forced back out to the open seas *without anyone on board having been given the chance to show why he or she deserves to be protected as a refugee by Canada*. Not all claimants will be genuine refugees — international law requires only that those who truly fear persecution be sheltered. If a hearing shows some or all passengers to be abusers or queue-jumpers, they can and should be sent away. Bill C-84, however, would make it impossible to sort out the real refugees from the bogus claimants, and would thus put Canada in breach of international law.

Nor will the turning back of ships stop the problem of smuggling refugee claimants. The owner and captain of the ships receive payment from their passengers up front, and will thus profit whether or not the refugee claimants make it to Canada. Desperate people will continue to be willing to take even a slim chance of reaching freedom. The real risk is that the would-be refugees may be dumped at sea by the frustrated crews of boats that are forced away by Canadian destroyers.

Hear the claims to refugee status quickly yet fairly, protect those who genuinely have reason to fear persecution, and send the abusers away.

Arbitrary Detention

Bill C-84 would introduce detention in situations of questionable identity or suspected security risk. After detention of a person for 7 days by a senior immigration officer, the Minister may issue a certificate without any explanation or justification, requiring detention for a further 21 days. Thereafter, an adjudicator may order the person detained for successive 7 day periods indefinitely.

Particularly offensive in Bill C-84 is the 21 day period of detention under a Minister's certificate, which is not challengeable before an adjudicator. It will undoubtedly provoke many *habeus corpus* attacks based on *Charter* arguments. Under section 9 of the *Charter*, one has the right not to be arbitrarily detained, while section 10 guarantees certain basic rights for everyone detained. Deprivation of personal liberty by the Minister or an immigration officer beholden to the Minister effectively denies the type of independent assessment which could — and should — be provided by a judge.

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Prosecuting the Good Samaritans

Understandably Bill C-84 seeks to penalize the persons who are at the root of the problem of illicit immigration: the smugglers, the unscrupulous consultants, the various middlemen who profit by the abuse of Canadian immigration laws. Unfortunately, though, the Bill as drafted would permit the persons who have organized most of the recent bogus refugee movements to Canada to evade prosecution. On the other hand, its language is so broad as to criminalize persons whose work is generally viewed as humanitarian, not abusive.

Large scale movements of economic migrants posing as refugees are offensive, unfair, and should be stopped. This end could be attained by specifically prosecuting all persons who organize or assist persons to make *fraudulent* refugee claims in Canada. Rather than making it a criminal act to aid the perpetration of a fraud, however, the Government has instead chosen in Bill C-84 simply to make it illegal to assist the entry into Canada of persons *without a valid visa*. This vague approach leads to two kinds of problems.

First, the largest refugee hoaxes to date — those involving the Portuguese, Turks, and Brazilians — would not have been stopped by the proposed law. All of those economic migrants either had valid visas, or arrived from countries which were not subject to a visa requirement. Organizers of these scams would therefore be acting within the scope of the proposed law, and could not be prosecuted. Because the proposal focuses on an irrelevant criterion — the failure to secure a visa, rather than on the real issue of concern — abuse and fraud by economic migrants, it fails to punish the persons who are the real wrongdoers.

Second, and more objectionable, the law would criminalize the work of church and other humanitarian agencies which assist undocumented refugess to apply for status under Canadian law. Most genuine refugees — those for whom persecution is imminent — simply cannot wait in their country of origin while a Canadian consulate processes an application for landing. They fear for their freedom and often their lives, and realize that they must escape at any price. True refugees are thus often compelled to escape surreptitiously, using false passports and travelling by unconventional means and routes.

A variety of Canadian humanitarian organizations has played the invaluable role of assisting genuine refugees to enter Canada, and to apply for recognition under our law. In Bill C-84, such persons motivated by strictly moral or humane concerns without remuneration of any kind can be fined up to $10,000, imprisoned for five years, or both. By failing to distinguish between the crass and self-interested motives of smugglers on the one hand, and the commitment of many Canadian groups to assist the persecuted on the other, the Government has engaged in a form of legislative overkill. Even though these charitable organizations and individuals would not have engaged in any form of fraudulent activity, and indeed would have sought to assist refugees to comply with Canadian law, they face persecution under the provisions of Bill C-84.

Search and Seizure

Again as with arbitrary detention, the law and courts historically have been vigilant to protect individual rights relating to search and seizure by officialdom. Section 8 of the *Charter* expressly provides that everyone has the right to be secure against unreasonable search or seizure.

Bill C-84 contains far reaching search and seizure provisions which go well beyond comparable authority in the criminal law field. In some circumstances, an immigration officer would not even be required to obtain a search warrant. Bill C-84 permits an immigration officer to "break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing" for the purpose of carrying out a search or seizure. If a person challenges the seizure, it is the Minister who initially decides the issue, despite an obvious stake in the result where his departmental officials may have acted wrongly.

Clearly the search and seizure provisions of Bill C-84 need to be subjected to reasonable limitations if they are to survive *Charter* challenges and be consonant with respect for individual rights.

It Goes Too Far

Bill C-84 is a misguided and uninformed response to the legitimate concern of Canadians to ensure that only genuine refugees are protected by Canada. Yes, abuse should be deterred. But abuse can be deterred without violating international law, without infringing our *Charter of Rights and Freedoms*, and without making a mockery of our strong commitment to respect for human rights.

The authors are professors at the Osgoode Hall Law School who specialize in the field of immigration and refugee law.

ACQUISITION AND NETWORKING:

The Refugee Documentation Project (RDP) has co-signed with York University, a contract for the acquisition of UNESCO's sophisticated data base software, CDS/ISIS. The software is currently being adapted for downloading of RDP's data base. RDP is cooperating with the International Network of Researchers in the development of a mutually accessible system of exchange of machine-readable data. We are now equipped with international network facilities through BITNET. Mail may be sent to us by directing it to REFUGEE YORK VM1 on BITNET. We welcome messages which will aid us in developing a global directory.

NEW PUBLICATION:

Oxford University Press, in association with the Refugee Studies Programme, University of Oxford, will commence publication of the *JOURNAL OF REFUGEE STUDIES* March 1988. Subscription rates for Volume One and further information are available from the Refugee Studies Programme, Queen Elizabeth House, University of Oxford, 21, St Giles, Oxford, OX1 3LA, *U.K.* Please note that this announcements is also a first call for papers.

The Humane and Just Alternative for Canada

By James Hathaway

The essence of C-55 ignores the admonition of the Standing Committee that we must be "knowledgeable and sensitive to human rights issues rather than immigration issues. The determination decision is not an immigration matter but instead a decision as to who are Convention refugees in need of Canada's protection." In stark contrast, immigration authorities have spoken of the importance of refugee law reform as a means of "enabling us to continue our strategy of controlled growth in immigration to Canada." By speaking of refugees in the same breath as immigration policy, the department has effectively confused the privilege of immigration with the duty it owes to persons who have a well-founded fear of persecution. C-55 is a departmental bill that flagrantly ignores the will of Parliament. I urge members in the strongest terms to resist this bureaucratic intervention in the democratic process, and to reconsider the recommendations of the Standing Committee, as well as the constructive model proposed this week by the Committee for an Alternative Refugee Determination Process. As a member of that Committee, I would be pleased to answer any questions you may have in regard to the alternative proposal.

While there are numerous aspects of Bill C-55 that are flawed, I would like to focus my remarks this morning on what I think virtually all experts agree are the most distressing aspects of the proposed legislation: the "safe country" and "credible basis" access tests. I do so not because I think that the amendment of these aspects will make the bill good law — it will not be enough — but because it is my sincere hope that if there is not a willingness to make the kind of fundamental changes truly required, then at least the most flagrantly dangerous parts of the bill can be revised.

There are some basic problems inherent in the notion of access tests. The first is that pre-screening is a waste of time. If there is to be careful analysis and conscientious application of the refugee definition, then the time taken for the access hearing will not be any less than what would be required to hear the claim in its entirety. One may as well proceed directly to a hearing, which woud result in a more expeditious procedure for genuine refugees.

If, on the other hand, pre-screening is not to involve careful analysis of the claim, then it is likely to violate international and/or domestic legal standards. This is the route chosen by the drafters of Bill C-55.

Let me deal first with the exclusion of claims made by persons arriving from "safe countries." Because the determination of "safeness" will not be made on the basis of an assessment of the particular circumstances of the claimant, but rather will involve the mechanistic application of a list established by Cabinet, the decision maker is effectively deprived of the discretion to examine the merits of the claim. That is, the proposed legislation, by virtue of its rigid, categorical character, may place particular refugee claimants at significant risk, notwithstanding the relative "safeness" of their country of origin for most other citizens. Too, the "list approach" may result in the rejection of claims during times of rapid and uncertain transitions of power within previously "safe" countries. For example, is Turkey a "safe" country? As a political ally, one might assume "yes." But what of Turkey's policy of removing Iranians to Iran? Would Cabinet be prepared to declare a strategic ally not safe vis à vis Iranians? And if Turkey's policy of removing Iranians were not already in existence, could Cabinet move sufficiently quickly to amend the regulations if that policy were to be implemented tomorrow? Or would the initial numbers in flight from Turkey be deported back to Iran because the pre-screening authority in Canada was bound to apply a list?

In short, the "safe country" principle injects an unnecessary and totally unhelpful political element into the refugee determination process. Either we risk offending other nations by declaring them to be unsafe, or we play politics and turn a blind eye to the real risks faced by refugee claimants in the interest of diplomatic harmony.

Moreover, this kind of rigid, categorical exclusion puts Canada in the position of being unable to guarantee compliance with its international obligation to avert the refoulement of refugees, as there is no means by which the Canadian authorities can ensure that the life or liberty of any particular claimant is not at risk. The Executive Committee of the UNHCR, of which Canada is an active leader, and with which the Refugee Convention obligates us to collaborate, has emphasized that decisions as to the safety of return can only be made on the basis of a careful and individualized assessment of the pertinent facts [see: e.g. Conclusion 30(e)(i) of UNHCREXCOM, 1983].

One final point on the safe country principle: it will not work. As the remarks of Netherlands authorities after the Nova Scotia landing indicate, many "safe countries" are not willing to take back the persons that this bill seeks to exclude. Section 48.1(1)(b) is drafted far too widely, and will result in refugees either being thrown into orbit, or potentially being sent back to the country that has persecuted them, because no one else will admit them. If there is to be a safe country exclusion, it must apply only to persons who have some real attachment to another "safe" state, in the sense that the country will both receive them and allow them to remain. The bill as currently drafted fails to meet this fairly obvious requirement.

On the issue of the "credible basis" exclusion, I would like to make it clear that I support a tough approach to refugee claims that are abusive or fraudulent. As drafted, however, the bill presents two significant problems.

First, it is extremely unclear that the bill affords the claimant any opportunity to adduce evidence of his or her own circumstances at the access hearing. What is very clear, however, is that the adjudicator and Refugee Division member must consider the human rights record of the country from which the applicant fled, and the disposition of refugee claims made by others from that same country. The implication is that the case will not be considered credible if the claimant's country of origin is not a recognized human rights abuser, or if few refugee claims from that country have been recognized to date.

The problem here is similar to that created by the safe country exclusion. Refugee claims *can* legitimately be made in respect of persons from countries that have

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otherwise good human rights records. Moreover, the mere fact that others to date have been unsuccessful cannot legitimately be considered as leading inevitably to the conclusion that any particular case is lacking in credibility. What matters is whether the facts coming forward from the particular claimant are abusive or fraudulent. If they are, then the integrity of the refugee determination system requires that they be fairly but expeditiously removed from Canada.

In 1983, the UNHCR Executive Committee recognized the need to deal expeditiously with manifestly unfounded claims to refugee status. The Committee — including Canada — endorsed the propriety of an expedited procedure for disposing of bogus claims, but emphasized too "the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees." The specific guarantees agreed to include a right of review before removal — a right which is not guaranteed in this bill.

Moreover, a specific definition of a manifestly unfounded claim was established. This includes claims that are either clearly fraudulent, or which are not related to the criteria for the granting of refugee status set out in the Convention. This standard is clear, logical, and is a legally responsible limitation on the right to full procedural protections.

This bill, though, completely ignores this important international standard that Canada helped to create. A new, totally meaningless phrase — "credible basis" — is introduced rather than adhering to the "manifestly unfounded" standard that has a clear meaning in international law. It is a rather bald attempt to exclude the fundamental principle of case by case determination in favor of largely unbridled administrative discretion. The abusers can and should be removed — but this can be done in a legally and morally responsible way.

The above text and proposed amendments were presented to the Legislative Committee on Bill C-55, September 4, 1987.

James C. Hathaway is a professor at Osgoode Hall Law School, York University.

Alternative to Section 48.1
Proposed by Professor James C. Hathaway

48.1 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if

(a) the claimant has been recognized by any country, other than Canada, as a Convention refugee and has been issued a valid and subsisting travel document by that country pursuant to Article 28 of the Convention;

(b) *the claimant has enjoyed the protection of a third country that is a party to the Convention, and would be allowed to return to and remain in that country if removed from Canada;*

(c) the claimant has, since last coming into Canada, been determined

(i) by the Refugee Division, the Federal Court of Appeal or the Supreme Court of Canada not to be a Convention refugee or to have abandoned the claim, or

(ii) by an adjudicator and a member of the Refugee Division as not being eligible to have the claim determined by that Division *because it is manifestly unfounded;*

(d) the claimant has been finally determined under this Act, or determined under the regulations, to be a Convention refugee; or

(e) in the case of a claimant to whom a departure notice has been issued, the claimant has not left Canada or, having left Canada pursuant to that notice, has not been granted lawful permission to be in any other country.

(2) Notwithstanding paragraphs (1)(a) and (b), a person is eligible to have a claim determined by the Refugee Division if *the person claims to have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion in the country that recognized the person as a Convention refugee or in which the person enjoyed protection, and in the opinion of the adjudicator and the member of the Refugee Division considering the claim, the claim is not manifestly unfounded.*

(3) A claimant who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(c), be considered as coming into Canada on that return.

(3.1) *Notwithstanding paragraphs (1)(c), (1)(3) and (3), a person is eligible to have a claim determined by the Refugee Division if the claim is based on facts that arose since the claimant's most recent departure from Canada, and in the opinion of the adjudicator and the member of the Refugee Division considering the claim, the claim is not manifestly unfounded.*

(4) In determining whether a *a claim to be a Convention refugee is manifestly unfounded,* the adjudicator and the member of the Refugee Division shall consider *whether the claim is*

(a) *clearly fraudulent; or*

(b) *not related to the criteria for the granting of refugee status in the Convention.*

LETTER TO THE EDITOR

I would like to express our appreciation for the May 1987 issue of *REFUGE* which focused on refugees in the Horn of Africa. The articles by Woodward and Dines make an important contribution to the understanding of the refugee assistance community in Canada. During the past three years there has been a rising number of requests to sponsor refugees currently in the Sudan, Somalia and Djibouti. Most potential private sponsoring groups have very little understanding of the region and the causes for refugee flows. These short articles provide a good summary.

Within MCC [Mennonite Central Committee, Canada. Ed.] we have been rather slow and selective in responding to privately initiated resettlement requests from refugees in this region. However, we recognize that selected groups have no other option. Unfortunately due to the difficulties of resettlement processing in Somalia, this remains a very modest program. Perhaps more significant in the long term has been the work we have been involved in within the Sudan and Somalia on voluntary repatriation and in providing services to resident refugee populations. In all of this work we have become acutely aware of the devastating effects of the various conflicts in the region on the lives of many of these refugees. I hope that Peter Woodward's article will contribute to a broader understanding amongst Canadians of the role of conflict in the Horn of Africa.

You may be interested to know that there is a project at the Institute of Peace and Conflict Studies, Conrad Grebel College, University of Waterloo called the Horn of Africa Project which focuses specifically on conflicts in this region. This project, which was initially sponsored by the MCC, has as its mandate the promotion of dialogue between the various warring groups. As a secondary objective they are also concerned with helping Canadians understand the conflicts in the region. I am, by copy of this memo, making them aware of the recent edition of *REFUGE*.

Thank you for your continuing good work in putting out *REFUGE* magazine. This is an important source of information for Canadians, particularly at a time when there is little mass media coverage of many of these refugee situations.

Yours sincerely,
C. Stuart Clark, Overseas Services,
Mennonite Central Committee,
Canada
[Dated July 2, 1987]

Legal Perspectives on U.S. Jurisprudence Regarding Central American Refugee Claims

by Carolyn Patty Blum

In the past seven years, thousands of Central American refugees have fled to the United States in search of sanctuary from the terror and brutality in their homelands. Unfortunately, the Immigration and Naturalization Service (INS), which reviews asylum applications, characterizes these refugees as "economic migrants" and consistently denies their claims for protection. As a result, less than 4% of the Salvadoran and less than 1% of the Guatemala applications for asylum in the United States are accepted. The General Accounting Office found that although refugees from four selected countries allege similar experiences of actual persecution (arrest and subsequent torture), only 4% of the Salvadoran applications were granted as compared to 80% of the Polish and 64% of the Iranian applications.

After exhausting all avenues of administrative relief, many refugees seek review in the federal court system, at the United States Circuit Court of Appeals and ultimately at the United States Supreme Court. The circuit courts of appeal, consequently, have reviewed dozens of cases of Central American refugees. Many of their decisions contain significant rulings both in terms of interpretation of refugee law and in its application to the Central American refugee experience. This article discusses some of the most critical decisions and their potential application to assessment of Central American refugee claims in Canada.

The United States, like Canada, is a signator to the United Nations Protocol on the Status of Refugees. The United States also has incorporated the definition of a refugee contained in Article 1 of the United Nations treaty into domestic legislation, the Refugee Act of 1980. Thus, to receive asylum in the United States, as in Canada, a refugee must show he or she has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." However, asylum may be denied as a matter of discretion even if the refugee is eligible under this definition. In addition, the United States statute includes a provision for "withholding of deportation" if the alien's "life or freedom would be threatened" on account of the same five factors. This provision is derived from the United Nations treaty provision, Article 33, of *non-refoulement*.

Two United States Supreme Court decisions have addressed the applicable standards of proof for asylum and withholding of deportation. In *INS v. Stevic* 467 U.S. 407 (1984), the Court held that to prove deportation should be withheld, a refugee must show that it is "more likely than not" that he or she will be persecuted upon return to his or her homeland. In *INS v. Cardoza-Fonseca,* No. 85-782 (March 9, 1987), the Court ruled that an application for asylum is governed by a more generous standard of proof, requiring only that a refugee demonstrate that it is a "reasonable possibility" that he or she will suffer persecution. The Court specifically ruled that the Board of Immigration Appeals and the INS had been applying a too burdensome standard of proof to asylum requests. The Supreme Court's decisions agree with the interpretation of the "well-founded fear of persecution" standard already stated, for the most part, in Canadian jurisprudence and in the Refugee Status Advisory Committee guidelines.

In several other areas, however, the circuit courts of appeals, particularly the United States Court of Appeals for the Ninth Circuit (which includes the Western states where many Central Americans resettle), have articulated other significant legal principles that have important ramifications for the assessment of Central American refugee claims.

1. When asylum applications are based on political opinion, the applicant is not required to demonstrate that he/she actually participated in political activities or held partisan political views.

The traditional view regarding political opinion-based asylum requests requires overt acts of political expression by the applicant. In the Canadian case, *Inzunza Orellana v. MEI,* (1970), 103 D.L.R. (3d) 105 (F.C.A.), the Federal Court of Appeals stated that the perception of the ruling government is the key factor in determining whether persecution on the basis of political opinion is likely. This view has been further emphasized and expanded in a series of U.S. cases.

First, U.S. courts have broadened the definition of what constitutes "political opinion". For example, in *Bolanos-Hernandez v. INS,* 767 F.2d 1277 (9th Cir. 1985), the court ruled that an applicant's choice of political neutrality in the Salvadoran conflict is a manifestation of "political opinion" within the meaning of the statute. In *Del Valle v. INS,* 776 F.2d 1407 (9th Cir. 1985), the court extended this principle to an applicant who refused to participate with a particular side, the death squads, in El Salvador.

In a recent and unusual decision, *Lazo-Majano v. INS,* No. 85-7384 (9th Cir. 1987), the court held that an apolitical woman who was repeatedly raped and brutalized by a Salvadoran Army officer qualified for asylum on account of political opinion. The court ruled that her persecutor's "cynical imputation" to her of a political opinion as a subversive (or his use of the threat of denouncing her as a subversive to terrorize or subjugate her) qualified her for asylum based on political opinion. The court also ruled that the applicant's unwillingness to submit to his sexual demands and brutality and her consequent flight from El Salvador also constituted an overt expression of political opinion that provided an additional legitimate basis for asylum relief.

Second, U.S. courts have accepted the political reality that exists in El Salvador and Guatemala that persecution may occur even in the absence of overt political activity or opinion. For example, in *Hernandez-Ortiz v. INS,* 777 F. 2d 509 (9th Cir. 1985), the court adopted *Orellana*-type reasoning and held that the government's perception of the applicant's views is decisive for political opinion-based asylum requests. The court ruled that when a government acts against an individual or members of a group without legitimate basis, the court will *presume* that the government's actions are politically motivated. The court's decision recognizes that individuals in El Salvador can and do suffer persecution not because

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of anything they have done or an ideology they believe in but because of what the government perceives their views to be. In Ms. Hernandez-Ortiz' case, she alleged fear of persecution because of acts of harrassment and terror that her family members had suffered. Instead of dismissing these incidents as insufficiently related to the individual applicant's claim, the court held that acts against the family were a reasonable basis for her own fear of persecution.

2. Under the proper circumstances, a claim of persecution premised solely on membership in a particular social group can be maintained.

In *Sanchez and Escobar v. INS,* 801 F.2d 1571 (9th Cir. 1986), the circuit court of appeals addressed for the first time the scope of the term "membership in a particular social group." While rejecting the applicants' specific claim that membership in the persecuted social group of young Salvadoran working class men who had not demonstrated loyalty to the government constituted a basis for asylum protection, the court, nonetheless, fashioned a four-part test for asylum relief based on group membership. First, the group must be "cognizable" within the meaning of the statute. Second, the applicants must be members of the group. Third, the group, in fact, must have been targetted for persecution because of group characteristics. Fourth, there must be "special circumstances" warranting that mere membership in a social group is sufficient for asylum eligibility.

The court ruled that a cognizable group does not encompass demographic divisions of the society (as they believed the group in question to be) but must be a "collection of people closely affiliated with each other who are actuated by some common impulse or interest." The court ruled that immediate members of a family was a "prototypical example" of a social group. In reviewing the evidence presented in the case, the court conceded that the social group in question — young males — was "at risk" in El Salvador. However, the court ruled that the evidence was inclusive that age, gender or class background were decisive in the likelihood of persecution. In so ruling, however, the court conceded that "political and social activists and members of organizations directly identified as opposing the government were seriously at risk of violent suppression by the [Salvadoran] government."

3. Administrative standards must recognize that applicants confront inherent difficulties in proving eligibility for asylum

The most fundamental and important principle gleaned from the most recent wave of successful Salvadoran cases is a judicial recognition that asylum applicants face severe problems in proving eligibility. Consequently, recent court decisions have invalidated the excessively high standard of proof that has been imposed by the administrative agency and thereby have created a more realistic standard for appraising Central American refugee claims. For example, in *Bolanos-Hernandez v. INS, supra,* the court emphasized that the requirement for objective evidence (to assure that the fear of persecution has a reasonable basis) cannot be used as a pretext to create "insuperable barriers" to obtaining refugee status. Specifically, the court held that if an applicant's testimony about threats made directly to him is credible, specific, and unrefuted, the statement of the threat itself provides enough "objectivity" to satisfy the burden of proof. No further corroboration should be required. In *Turcios v. INS,* No. 86-7381 (9th Cir. 1987), the court addressed a situation in which the applicant testified that the Salvadoran rebels were seeking him to persecute him, but he had not been directly threatened nor were threatening words told to the third party from whom he had obtained his information. The court held that such evidence was sufficient to qualify for asylum relief. In *Zavala-Bonilla v. INS,* 730 F.2d 564 (9th Cir. 1984), the court emphasized the importance of "general information regarding oppressive conditions [in El Salvador] to support specific information relating to an individual's well-founded fear of persecution." Subsequent cases, including those cited above, referred to the "general" documents on the record to support their rulings that the applicant's fear of possible threat was genuine.

There are many other U.S. decisions concerning the myriad of issues that arise in Central American refugee cases. The United States jurisprudence should be consulted as a significant and important guide to adjudicators and reviewing courts in Canada regarding the assessment of the numerous Central American refugee claims that will soon be pending before the Refugee Status Advisory Committee and eventually, the Immigration Appeals Board and the Federal Court of Appeals.

Carolyn Patty Blum, a lecturer at Boalt Hall School of Law, University of California at Berkeley, has a Ford Foundation grant to study asylum and refugee law in the United States and Canada.

SEMINAR SERIES:

Last year's highly successful Dean's seminar series, "REFUGEES in POLICY and PRACTICE" recommences **October 22nd, 1987** at 2:00 p.m. in the Junior Common Room, MacLaughlin College, York University. The format of the seminars continues to integrate guest speakers from the government, the professions, academia, non-governmental organizations, advocacy groups and refugees themselves. A discussion period follows the presentations. In Part I, "Refugees and the Law, National and International Perspectives", guest speakers include Mr. Raphael Girard, Director, Refugee Policy Division of Employment and Immigration Canada; lawyer Lorne Waldman, member of the Canadian Council for Refugees, and Mr. Guy Goodwin-Gill, Senior Legal Officer, UNHCR Geneva or his representative. All seminars will be held in the Junior Common Room (room 014), McLaughlin College, York University, Toronto. Seminars are open to the public. For more information regarding the series please contact the Refugee Documentation Project, (416) 736-5061, ext. 3639.

Letter of Correction: UNHCR Canada

Fiorella Badiani, UNHCR Representative in Canada, recently responded to the "Report on the Djibouti Refugee Situation" which appeared in *REFUGE*, Vol. 6, No.4, guest edited by Dr. Barbara Harrell-Bond. Ms. Badiani wrote that the UNHCR learned of the existence of the Report on 3 February 1987 and requested time to study it. Subsequently, "The Chairman of the Africa Committee and Deputy Director of the British Refugee Council [BRC] met the UNHCR representative in London on 12 February 1987" for a detailed discussion and a summary note was sent to the BRC on 17 February 1987. Explanations were accepted and both groups agreed that the situation for refugees in Djibouti was a potential cause for concern. Since then the voluntary repatriation operation has continued without significant problems. By 1 July 1987 over 3220 refugees had repatriated and several hundred more had registered to return. Those remaining in Djibouti continue to receive assistance. The Eligibility Commission resumed work late March 1987. Further, the statement in the article that 'a British parliamentary committee proposed to visit Djibouti, but the Government has declined permission, giving the upcoming elections as the reason' is incorrect. The Government welcomed the proposed visit and suggested either March or May, noting that elections were to be held in Djibouti in April. The visit was provisionally schedule for the second half of May, but postponed at the request of the visitors because of the British General Election. The Editor of *REFUGE* has been asked to print a copy of the note to the BRC which summarized the UNHCR's position, as follows. . .

UNHCR Voluntary Repatriation Programme from Djibouti to Ethiopia

The current voluntary repatriation programme, while open to all refugees in Djibouti, is aimed mainly at the rural refugees, who fled the Haraghe region of Ethiopia because of war nearly ten years ago. Refugees are encouraged, not ordered to repatriate. So far, neither refugees nor asylum seekers have been forced to register for repatriation. A UNHCR international staff member witnesses each registration and personally checks that its voluntary character is respected. Thus, at the time of departure, UNHCR is present at the following stages: relief distribution; transfer to railway station; check of returnees prior to departure of convoy; travelling with returnees across the border to the final destination together with UNHCR staff members in Ethiopia. A most significant fact in considering the nature of this repatriation is that many refugees have already returned temporarily to Ethiopia. But a significant factor of repatriation is that many refugees have already returned temporarily to Ethiopia, some on several occasions.

Once in Ethiopia, returnees are assisted and their progress monitored by UNHCR for one year, when it is expected that self-sufficiency would be attained. Refugees and asylum seekers of any ethnic group are encouraged to repatriate.

The following UNHCR figures indicate repatriation status.

Ethnic Group	Total Registered	Total Feb. 10/87	Total Repat/ 1987
Issas	1,729	1,449	340
Amhara	26	20	6
Afar	2	1	1
Oromo	166	152	14
Tigre	16	10	6
Eritreans	2	—	2
Others	46	20	26
	2,047	1,652	395

There has been no special pressure on any specific group such as the Gurguru.

Status of Refugees in Djibouti

Refugee status is not withdrawn from those who refuse to repatriate. The majority of refugees living in Dikhil and Ali Sabieh have no identity cards except their ration card. Since most of them are refugees of nomadic origin who left Ethiopia due to the Ogaden war, asylum was granted following their mass influx and not through an individual eligibility process.

UNCHR recognises that distribution of food has been delayed on occasions because all limited means of support have been mobilized for the organization of convoys. However, we can confirm that refugees and asylum seekers have already received their rations for February 1987.

Situation of Asylum Seekers

It is true that the eligibility procedure has been suspended since 1 September 1986 and that newcomers are not registered. However, they are all provided with assistance (shelter, food and health facilities). Protection and assistance are only given in Dikhil transit Camp due to Djibouti rules (conforming to the Geneva Convention) and Dikhil is the only place where they are allowed to stay; none have been refouled. Outside Dikhil they risk being considered illegal immigrants and thus subject to refoulement. UNHCR has strongly advised asylum seekers to live in Dikhil and avoid staying in Djibouti town illegally.

The UNHCR Representative in Djibouti has never said that asylum seekers from Ethiopia are not genuine cases. However, on the basis of careful assessment and daily contacts with asylum seekers, the Branch Office considers that many of them come to Djibouti only for jobs, scholarships, resettlement or other economic reasons and not because they fear for their safety in Ethiopia. UNHCR staff have never been refused access to camps. We appreciate their anxiety about the future and the UNHCR Branch Office seeks to reassure them through regular meetings. For instance, when informed of a letter in which refugees and asylum seekers threatened suicide, protection officers immediately organized a meeting with signatories in Dikhil. Confidence now appears to be re-established and the situation is being closely monitored.

Concerning the train incident of 20 December 1986 when we understand 5 Ethiopians died (of some 125 illegal immigrants), it has been established by UNHCR that no refugee was on the train. This train must not be confused with the voluntary repatriation convoys organized by UNHCR. In a public statement regretting the incident, the Minister of the Interior made a specific distinction between the operations to return illegal immigrants and

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BOOK REVIEW

PEOPLE IN UPHEAVAL
Scott M. Morgan and Elizabeth Colson, editors
New York: Center for Migration Studies (1987)

This volume of articles is the result of a year-long Anthropology graduate seminar on migration given at the University of California, Berkeley by well-known anthropologists in the field of migration: Elizabeth Colson and George De Vos (psychological anthropology). Colson's "Introduction" previews the papers and organizes the topical material into a perspective in which to view "a major 20th century phenomenon...massive population displacements." It is disappointing that the promised 'global view' excludes articles on Africa and the Middle East, where most of the world's 'people in upheaval' are located. Moreover, the importance of the "undocumented" refugee the world over is not ever mentioned. However, given Colson's quote of Said that "Ours is the age of the refugee, the displaced person, mass migration", perhaps one such volume is insufficient as a "representative" sample of the world's uprooted peoples.

Eight of the ten chapters deal either with Asian ethnocultural groups in the U.S. or Asia, or with American government refugee policy as that concerns the Lao in Southeast Asia. A lone chapter focuses on Mexican American migrants' adjustment in the United States, while another compares the use of local settlement agencies by Soviet Jews and Vietnamese in the San Francisco Bay Area. Commendably, all authors have done participant observation field work for varying periods of time in their areas and some originate from the areas discussed.

A continuous theme throughout the book is that stock categories of 'political refugee', 'economic refugee', 'displaced person' and 'migrant' are, in fact, the very fluid outcome of complex and continuing social and political negotiations, most often not ones controlled by individuals with the affected groups. This is a very important point for policy makers to ponder as increasingly hard lines are being drawn on such distinctions in Canada and elsewhere today. In "International Refugee Policy: Lowland Lao Refugees", e.g., M. Lacey writes about the effect of the ideological battle between the U.S. and Soviet Union on uprooted people. She claims (p.28) that of the more than one million refugees accepted by the U.S. between 1956 and 1979, only 3,000 were from 'non-communist' countries. And, in 1982 the U.S. granted refugee status to 73,522 Southeast Asians but only 579 Latin Americans, despite massive displacements of people in Central America which the U.S. played a considerable role in creating. Similarly, shifting international relations often cause 'political refugees' to be reclassified as 'economic refugees'. Hence, they are eligible for resettlement. Lacey describes what happened to the Lao in Thailand as a result of Washington's desire for closer relations in Vietiane. On the American home front, local host populations may themselves reclassify 'political refugees' as 'economic refugees' when economic recession threatens jobs for indigenous people. This touches on an important subject which is insufficiently developed in the book: in the First and Third World, do already disadvantaged minorities and majority group members disproportionately bear the cost of hosting migrants?

A second theme running through the many case studies in this volume is the interaction of host and newcomers. The article on Tibetan communities in South India, e.g., would be of special interest to many people. D. De Vos describes how Tibetans have opted to take on 'refugee' status, actively maintaining this in exile as a response to policies in their homeland. Indeed, Tibetan exiles strive to keep Tibetan culture and identity alive as their special personal mission (as have Palestinians). The Indian government response to this is to allow Tibetans to have near total cultural and political autonomy within their limited regions — something rarely granted to indigenous Indian minority groups. This theme is also addressed by W. Chao in his article on urban Chinese youths who were sent to the rural hinterlands to be educated by rural peasantry (mid-1950s through to the late 1960s). O. Abdoellah's article on the Indonesian government's programs to resettle Javanese and Balinese in outer "underpopulated" islands gives us a brief description of the effects of these programs on migrants, but mostly ignores the (mainly negative) effects which these programs have had on local peoples. A case in point is the widespread violence resulting from Muslim migrants appropriating land from Melanesian indigenies, and the consequent flight of Melanesians to Papua, New Guinea.

A third theme in this volume of studies relates to national and international agencies who assist refugees in transit camps and in countries where the refugees have settled permanently. S. Gold's article, e.g., compares the different modes of interaction of Soviet Jews and Vietnamese to local social service providers; this article contains insights that would be useful to anyone involved with crosscultural social

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the repatriation operation. He also made available to UNHCR a nominal list of those returned, which was very carefully checked against the lists of refugees and asylum seekers.

The Djibouti Government, as well as UNHCR, is open to discussion with interlocutors and is glad to facilitate visits to see the repatriation operation and the situation of refugees in Djibouti, provided that reasonable notice is given. Similarly, the Ethiopian Government is ready to facilitate visits to see actual return movements and the integration of returnees.

Conclusion

While the current emphasis in Djibouti is certainly on the voluntary repatriation exercise, UNHCR is well aware that there are refugees for whom repatriation is not the solution and therefore they wish to remain in Djibouti. Despite the difficulties, UNHCR will continue to pursue other solutions while discharging its protection responsibilities towards them and asylum seekers.

Fiorella Badiani,
London, England.
7 February 1987

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service delivery. G. Bousquet's article sketchily describes life in an open Hong Kong refugee camp. Here again, more attention could have been given to individual survival strategies and methods of coping with people outside the Jubilee "apartment complex camp." It is unfortunate that Bousquet does not provide comparative data on local peoples. And my own experience in the field tends to confirm that refugees 'survive' more comfortably than do many of the local people. Thus, they are not unambiguously at the 'bottom of the heap.'

A fourth theme, "working out the processes of uprooting and readjustment in the life cycle of resettlement" is addressed by material treating Korean and Mexican immigrants to the U.S. under what are normally considered 'voluntary' migration conditions. In contrast, the mostly involuntary migration of Vietnamese, Iu Mien and Hmong refugees to the U.S. is also described. And here an important issue emerges. When, why and under what conditions do migrants become 'successfully independent' while others do not? What is often attributed to 'culture' as the key to successful integration is critiqued in an excellent article by J. Habarad on the socialization of Lao Iu Mien into prolonged dependency on American government support. L. Shein's article on the Lao Hmong emphasizes the same argument: American society presents people with certain possibilities with which they must cope in terms of their limited resources, their previous experience and culturally-derived values. These two articles are insightful, valuable contributions.

To conclude the book, co-editor Morgan argues that many of the folk critiques against Southern and Eastern European immigrants during the early 20th century are still used today in reference to Asian and other ethnocultural migrants to the United States.

As noted, this book is somewhat uneven in quality and certainly does not provide an overall orientation towards people in upheaval. Further, the complex subject of the inter-relationship between migrants and host peoples is somewhat neglected in this volume — but receives much better attention in Harrell-Bond's Imposing Aid. Nevertheless, I would recommend this book because it uses interesting (if short and largely American-centred) case studies to touch upon many key issues in migration and settlement today.

Doreen Indra is an Assistant Professor in the Department of Anthropology at the University of Lethbridge. She is co-author of CONTINUOUS JOURNEY: A Social History of South Asians in Canada, *and co-editor of the recently published,* UPROOTING, LOSS AND ADAPTATION:Indochinese Refugees in Canada.

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