

1993

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Recommended Citation

Harris, Elizabeth Kay. "Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label." American University International Law Review 9, no. 1 (1993): 269-307.

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ECONOMIC REFUGEES: UNPROTECTED IN THE UNITED STATES BY VIRTUE OF AN INACCURATE LABEL

Elizabeth Kay Harris*

INTRODUCTION

Since enacting the Immigration and Naturalization Act¹ (INA) in 1952, Congress has made several substantial revisions in immigration, refugee and asylum laws.² Spurred by changes in political situations and economic conditions, Congress has attempted to make the United States a safe haven for people fleeing from political persecution,³ workers demonstrating skills in areas where their labor is in demand,⁴ or refugees with relatives that reside legally in the United States.⁵ For those persons fleeing economic crises,⁶ however, the "golden door" has been

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1. 8 U.S.C. §§ 1101 - 1525 (1988 and Supp. III 1991).

2. See *infra* notes 17, 22-25, and 27-30 (discussing the 1980 Refugee Act, the 1986 Immigration Reform Control Act, and 1990 Immigration Act, respectively).

3. 8 U.S.C. § 1101(a)(42)(A). This section defines the circumstances under which one who is fleeing political persecution in a foreign country is termed a "refugee" and entitled to remain in the United States. *Id.*

4. Immigration Act of 1990, Pub. L. No. 101-649, Sec. 207-8, § 101(a)(15) 104 Stat. 4998, 5023-27 (to be codified as 8 U.S.C. § 1101(a)(15)); 8 U.S.C. § 1101(a)(15)(H)(ii). This statute applies to temporary workers that come to the United States with no intention of leaving their native country permanently. *Id.*

5. 8 U.S.C. § 1101(a)(15). This statute defines categories of aliens that are considered "nonimmigrant aliens" (as opposed to "immigrants") for the purpose of applying the Immigration and Naturalization Act. *Id.* Members of a "nonimmigrant alien's" immediate family are also considered "nonimmigrant aliens". *Id.*

6. These persons will be referred to in this Comment as economic refugees, rather than economic migrants, since in many cases economic refugees ultimately face the same threat faced by political refugees: death or torture by governmental or guerrilla forces in the form of mass terror or starvation. The term "economic migrant" more aptly describes workers who cross borders seasonally with the intention of working temporarily and returning home. The motivation for economic migrants entering

only half-open. Moreover, the United States response to the recent outflow of Haitians from their homeland demonstrates⁸ that the door is closing.⁹ Most economic refugees cannot prove that they are being singled out for persecution,¹⁰ as successful political asylees must.¹¹ They therefore cannot obtain safe haven in the United States under current

the United States is primarily economic, even though political events, as opposed to purely economic factors, may have caused an economic depression in their country. Economic refugees are those whose motivations cannot be defined as political because they are not being persecuted individually, as current legislation requires. 8 U.S.C. § 1101(a)(42). "War refugees" or "civil strife" refugees may well be an appropriate label for these economic refugees.

7. See Laura V. Kwiatkowski, *Economic Refugees: Do They Have A Place Inside the Golden Door?*, 3 CAN.-AM. L.J. 189, 189 (1986) (quoting the 1903 inscription on the Statue of Liberty: "[g]ive me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shores send these, the homeless, tempest-tost to me. I lift my lamp beside the golden door").

8. See *infra* note 85 and accompanying text (discussing the reactions of members of Congress to United States policy toward Haitian refugees).

9. See SIMCOX, *infra* note 22, at 15 (showing that refugee admissions from Latin America decreased steadily from 3,000 in 1975 to 0 in 1987, with worldwide admissions of refugees declining from 146,158 to 12,397). Compare Statement of Alan K. Simpson:

If we in government or politics are not able to bridle our compassion for the less fortunate people of other lands sufficiently to protect the "national interest," then not only will we have failed in our primary official duty, including our duty to the least advantaged in our own nation, but there is a substantial risk that in the long run the American people will be unable or unwilling to respond at all, even when the need is desperate. I refer to this potential unwillingness to respond as "compassion fatigue." The signs are all around us that it is already occurring.

Statement of Alan K. Simpson, U.S. Senator and Chairman of the Judiciary Subcommittee on Immigration and Refugee Policy, *reprinted in* PETER H. KOEHN, *REFUGEES FROM REVOLUTION: U.S. POLICY AND THIRD WORLD MIGRATION* 141 (1990); *with* Richard Rubottom, *Morality and Resettlement* 61, 63, *in* AMERICAN REFUGEE POLICY, (Joseph M. Kitagawa ed., 1984) (asking how countries can have the will and resources to provide for foreign refugees when two-thirds of the world's countries are primarily concerned with the survival of their own nationals, and answering that we must "find the moral strength and commitment to defend great ethical principles").

10. See Immigrant and Naturalization Act, 8 U.S.C. § 1101(a)(42)(A) (requiring refugee applicants to show a well-founded fear of persecution because of race, religion, nationality, group membership, or political activity); see also Kwiatkowski, *supra* note 7, at 300 (stating that the United States employs a policy of "selective admittance," allowing entry only to those persons who "fit the definition").

11. *Id.*

legislation.¹² This end result is unjust because economic refugees face the same possibility of death by governmental mass terror campaigns and starvation due to embargoes or other political tactics as political refugees do.¹³

This Comment focuses on recent events in Haiti, Guatemala, and El Salvador, arguing that flight to the United States is a means of survival, not merely an opportunity to enhance one's lifestyle.¹⁴ Part One examines current immigration and refugee legislation. Part Two discusses events in Haiti, El Salvador and Guatemala and the United States response to the situation in each country. Part Three argues that the United States has failed to address the problem of protecting economic refugees, to acknowledge the reasons underlying economic refugee outflows, or to conform to international standards regarding refugee protection. Part Four offers recommendations for legislative reform, and recommends including economic refugees in the definition of asylum eligibility, or alternatively, for a broader interpretation of "political".

I. UNITED STATES AND INTERNATIONAL REFUGEE LAW

This section looks first at the development of refugee, immigration, and asylum law, and second at international law.

A. DEVELOPMENT OF POLICY

In the Immigration and Naturalization Act (INA) of 1952, Congress established the definition of refugee upon which admission to the United States from foreign countries is still largely based.¹⁵ In the INA, Congress used the same definition of refugees as that adopted by the 1951 United Nations Convention Relating to the Status of Refugees.¹⁶ This definition requires applicants to show that they fled from a Communist or Middle East country in order to qualify for admission as political asylees.¹⁷

12. *Id.*

13. *Id.*

14. See Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 462-4 (1985) (hereinafter *Political Legitimacy*) (examining the legitimacy of economic issues underlying mass population outflows).

15. 8 U.S.C. § 1101(a)(42)(A).

16. *Opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

17. 8 U.S.C. § 1101(a)(42)(A). The current term "refugee" includes: any person outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which

The Refugee Act of 1980¹⁸ broadened the asylum standard from "clear probability" to "well-founded fear" of persecution¹⁹ on five statutorily prescribed bases: race, religion, nationality, group membership, or political activity,²⁰ and thus brought United States policy into line with the 1967 United Nations Protocol Relating to the Status of Refugees.²¹ The 1980 Act also established a consultation process whereby the President and certain members of Congress determine whether humanitarian concerns or national interests justify admitting certain refugees.²²

such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. The statute also allows for admission of certain persons by the President under special circumstances. 8 U.S.C. § 1101(a)(42)(B).

The INA also provided for ad hoc parole authority whereby the Attorney General could extend temporary safe haven to otherwise ineligible persons. Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 922 (1990). This authority was discretionary, and was intended to be used sparingly for individual emergencies. *Id.* at 923. An estimated 1,000 persons enter the United States annually with humanitarian paroles, which are restricted to a minimum amount of time. Dennis Gallagher et al. and the Refugee Policy Group, *Safe Haven: Policy Responses to Refugee-Like Situations* 11 (1987) reprinted in *Temporary Safe Haven for Salvadorans, Hearing Before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary* 100th Cong., 1st Sess. 212, 225 (1987) [Hereinafter Refugee Policy Group Report]. Increasingly, as it was used to admit groups of refugees, Congress perceived the need to create an official refugee program. *Id.*

18. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

19. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102 (codified as 8 U.S.C. § 1101(a)(42)(A)).

20. 8 U.S.C. § 1101(a)(42).

21. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6260, 606 U.N.T.S. 268 [hereinafter the 1967 Protocol]. See also Kwiatkowski, *supra* note 7, at 193-6 (discussing the definition of refugee under the Protocol and the Convention, and United States obligations flowing from the definition).

22. 8 U.S.C. § 1157(a), (e). See also Tyson, *supra* note 17, at 922-25 (examining the Act in detail); Barnaby Zall, *The U.S. Refugee Industry: Doing Well by Doing Good*, in DAVID E. SIMCOX, U.S. IMMIGRATION IN THE 1980S: REAPPRAISAL AND REFORM 258, 259 (1988) (criticizing refugee organizations advocating determinations of humanitarian concerns or national interests that have been spawned by federally supported programs under the 1980 Act).

The next change made by Congress involved the Immigration Reform and Control Act (IRCA) of 1986,²³ which introduced several major revisions in immigration law, such as employer sanctions for anyone knowingly employing illegal aliens,²⁴ prohibitions on discrimination based on national origin or citizenship,²⁵ and a provision granting legal status to certain aliens.²⁶ Congress next passed the Immigration Act of 1990.²⁷ This Act revised worldwide and per country immigration and asylee levels,²⁸ increased border patrols,²⁹ emphasized admission of applicants possessing unique skills,³⁰ and reiterated the Bush Administration's commitment to family reunification.³¹ The 1990 Act

23. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.). Vernon Briggs, a professor of economics at Cornell claimed that the legislators' reasoning behind IRCA was that the actual number of illegal immigrants is not as important as recognizing that the number is substantial and constantly growing. SIMCOX, *supra* note 22, at 25.

24. The Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360-3374 (1986) (to be codified at 8 U.S.C. §1324a(a)(i)) (amended by Pub. L. No. 101-649, 104 Stat. 4978, 5053, (1990)). Such sanctions had been considered as far back as 1952, when Congress finally gave in to Texan farmers who relied on illegal labor, with the Texas Proviso, which stated "... the normal incidents of employment shall not be deemed harboring." SIMCOX, *supra* note 22, at 5. Sanctions were imposed for those knowingly harboring an illegal alien. 8 U.S.C. §1324(a). Congressman Roman Mazzoli (D-KY) said the Proviso was virtually "hanging a 'help wanted' sign at the Border." SIMCOX, *supra* note 22, at 5. Further, the Select Committee on Immigration and Refugee Policy (SCRIP) recommended employer sanctions, accompanied by some type of identification system, in 1981. *Id.* at 11.

25. The Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, § 102, 100 Stat. 3359, 3374-3380 (1986) (to be codified at 8 U.S.C. §1324(b)).

26. The Immigration Control and Reform Act of 1986, Pub. L. No. 99-603, § 201-04, 100 Stat. 3359, 3394-3411 (1986) (to be codified in scattered sections of 8 U.S.C.).

27. Pub. L. No. 101-649, 104 Stat. 4978 (1990)(to be codified in scattered sections of 8 U.S.C.).

28. Immigration Act of 1990, Pub. L. No. 101-649, §§ 102-04, 104 Stat. 4978, 4981-86 (1990)(to be codified in scattered sections of 8 U.S.C.).

29. Immigration Act of 1990, Pub. L. No. 101-649, §§ 541-42, § 280, 104 Stat. 4978, 5057 (1990) (to be codified at 8 U.S.C. § 1330).

30. Immigration Act of 1990, Pub. L. No. 101-649, §§ 207-08, § 101(a)(15), 104 Stat. 4978, 5023-27 (1990)(to be codified at 8 U.S.C. 1101(a)(15)).

31. Immigration Act of 1990, Pub. L. No. 101-649, § 111, § 203, 104 Stat. 4978, 4986-87, (to be codified at 8 U.S.C. § 1153 (1990)).

See Dan Stein, *More Immigrants, Good or Bad?*, GANNET NEWS SERVICE, Dec. 24, 1990 (critizing the family-based policy and stating that the adverse effects of the Act will be felt for years). But see Raul Yzaguirre, *More Immigrants, Good or Bad?*,

also established Temporary Protected Status³² as discussed in Section III (A) below. Furthermore, although the Act increased legal immigration levels by forty percent,³³ it did not address refugee allocations.

B. INTERNATIONAL REFUGEE LAW

A substantial number of international treaties attempt to protect human rights around the world.³⁴ The Universal Declaration of Human Rights states that all people have the right to seek and enjoy asylum in other

GANNET NEWS SERVICE, Dec. 24, 1990 (commending the Bush Administration for enacting "generous, human immigration reform"). A reason behind permitting increased numbers of family members to enter the United States was that such persons bring skills, "benefitting local economies and creating jobs for others through their presence in the workforce." *Id.*

32. Immigration Act of 1990, Pub. L. No. 101-649, §§ 302-03, 104 Stat. 4978, 5030-38 (1990) (to be codified at 8 U.S.C. § 1254a). This provision gives aliens temporary protected status in the United States so that the alien cannot be deported. *Id.* The provision also gives aliens work permits for the period of protected status. *Id.*

33. Immigration Act of 1990, Pub. L. No. 101-649, §§ 101-02, 104 Stat. 4978, 4980-85 (1990) (to be codified at 8 U.S.C. §§ 1151-52). *See also* Stein, *supra* note 31, (reporting that the 1990 Act allows for increased levels of immigration from countries previously sending small numbers of immigrants).

34. *See* Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A(III) U.N. Doc. A/810 (1948) (listing the fundamental rights to be accorded to all people); International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI) 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) *entered into force* March 23, 1976 in accordance with Article 49 (the United States has signed but not ratified this Covenant) (outlining rights to freedom and life, as well as rights in courts of law); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI) 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) *entered into force* Jan. 3, 1976 in accordance with Article 27 (the United States has signed but not ratified this Covenant) (listing limitations on states' authority, as well as the rights of all people to fair and equal wages, education, and a minimum standard of living); Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI) 21 U.N. GAOR, Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) *entered into force* March 23, 1976 (the United States has not signed this Protocol) (furthering the purposes of the Covenant on Civil and Political Rights, particularly with regard to persons claiming to be victims of violations of these rights); International Covenant on Human Rights, *signed* Nov. 22, 1969, OAS Doc. OEA/Ser. L/V/II.65, doc. 6 (1985) *entered into force* July 18, 1978 (the United States has signed but is not a party to this Covenant); *see also* *The Universal Declaration of Human Rights 1948-1988: Human Rights, The United Nations and Amnesty International*, Amnesty International USA (1988) (giving background information on international treaties designed to protect human rights).

countries.³⁵ Countries grant long-term and permanent asylum to refugees as benefits rather than as obligations.³⁶ As a result, there is no guarantee of finding asylum in another country. While the United Nations High Commissioner of Refugees (UNHCR) is responsible for supervising international agreements that protect refugees,³⁷ the granting of asylum is not regulated by international law.³⁸

The Preamble to the 1967 Protocol states that the effectiveness of the measures taken to protect refugees depends on the cooperation between countries and the UNHCR.³⁹ For example, Article 33 of the Protocol forbids the involuntary return, or refoulement, of persons who meet eligibility criteria for refugees.⁴⁰ Furthermore, Article 31 provides that refugees cannot be penalized for illegally entering a country if they have fled from a place "where their life or freedom was threatened."⁴¹ The United States, having ratified the 1967 Protocol, is bound by those terms,⁴² but sidesteps both provisions by limiting its interpretation of refugee.⁴³

II. MAJOR POLITICAL EVENTS IN HAITI, GUATEMALA, AND EL SALVADOR RESULTING IN MASS CIVIL TERROR

Patterns of emigration from Latin American countries over the past few decades show that many people are left with little choice but to leave their countries due to deteriorating domestic conditions and political unrest.⁴⁴ Many people, for example, have fled Haiti, Guatemala, and

35. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, GA Res. 217A(III), U.N. Doc. A/810 (1948), Art. 14, para. 1.

36. DAVID P. FORSYTHE, *THE POLITICS OF INTERNATIONAL LAW: U.S. FOREIGN POLICY RECONSIDERED* 91 (1990).

37. Preamble to the 1967 Protocol, *supra* note 21.

38. FORSYTHE, *supra* note 36, at 91. The United States tends to support the UNHCR's recommendations of grants of asylum as applied in other countries. *Id.* However, when the United States is the country of first asylum, it is more apt to ignore UNHCR policies. *Id.*

39. 1967 Protocol, *supra* note 21.

40. *Id.*

41. *Id.*

42. *Id.*

43. Refugee Policy Group Report, *supra* note 17, at 262.

44. KOEHN, *supra* note 9, at 5. In effect, these people are pushed out of their countries by mass terror of civilians. *Id.* They do not choose to come to the United States merely because of the economic attractiveness of this country. *Id.* These "push"

El Salvador, countries that all share a common history of unequal income distribution, militaristic governments, and years of mass terror directed at civilians.⁴⁵ Such conditions in Haiti precipitated an outpouring of Haitians during the Duvaliers' regimes,⁴⁶ and again after the overthrow of Aristide in September, 1991.⁴⁷ Civil strife in El Salvador dating back to the 1979 coup has led to a mass exodus of Salvadorans to the United States in search of safety.⁴⁸ Similarly, decades of social and political instability in Guatemala have resulted in a continuous stream of refugees to the United States, few of whom qualify for admission under the current legislation.⁴⁹ Such a deluge of emigration dem-

and "pull" factors, which cause people to leave one country and be attracted to another, however, are attributed indiscriminately to both refugees and legal economic migrants alike. *Id.* Indeed, both categories of refugees are "pushed" abroad by forces at home and "pulled" to the United States by its economic attractiveness. *Id.* The "push" factors, however, differ greatly. *Id.* Koehn divides the current South to North population stream into four elements: 1) economic migrants, 2) official refugees, 3) displaced persons, and 4) persons with family members in one of the first three categories. *Id.* at 4.

See LEO R. CHAVEZ, *SHADOWED LIVES, UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY*, 25 (1992) (stating that economic migrants suffer hardship inflicted by weak economies in their home countries and are thus lured to the United States). Usually such persons are from Mexico or other close Central American countries. *Id.* They perform temporary, seasonal work, and return home between harvests. *Id.*; see also Michael J. Heilman, *Asylee and Refugee in AMERICAN REFUGEE POLICY*, *supra* note 9, at 88, 95 (arguing that the terms "refugee" and "economic migrant" are applied to all persons of a given country based on United States perception of that country).

45. See EL SALVADOR: A COUNTRY STUDY 101 (Richard Haggerty ed., 2d ed., 1990) [hereinafter EL SALVADOR] (discussing unequal land distribution and the cost of civil conflict to El Salvador); ROD PRINCE, *HAITI: FAMILY BUSINESS* 22-24 (1985) (examining the increase in inequalities under a series of leaders in Haiti after the withdrawal of United States troops in 1934); SUZANNA JONAS, *THE BATTLE FOR GUATEMALA* 177-180 (1991) (discussing inequalities in wealth and land distribution in Guatemala).

46. BRIAN WEINSTEIN & AARON SEGAL, *HAITI: THE FAILURE OF POLITICS* 123 (1992). Approximately 80,000 Haitians left their homeland between 1972 and 1982. *Id.*

47. See *infra* note 78 and accompanying text (discussing the number of Haitian refugees and the United States response to them).

48. See *infra* note 95 and accompanying text (describing the number of Salvadorans who have fled their homeland).

49. Immigration and Naturalization Act, 8 U.S.C. § 1101a(42)(A); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.) and Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (to be codified in

onstrates that a United States policy providing a safe haven is necessary.

The Governments of Haiti, Guatemala, and El Salvador have engaged in campaigns of mass terror, killing civilians in order to repress suspected opposition or demonstrate force. Since political instability leads directly to economic instability, these governments have accelerated the deterioration of living conditions in their respective countries.⁵⁰ The United States government, however, has been slow to extend offers of safety to these victims,⁵¹ labelling them "economic" refugees and claiming that in seeking to enter this country their foremost concern is to improve their lifestyle.⁵² In fact, these refugees fear just as much for their lives as do the "political" refugees whom the United States protects.⁵³

scattered sections of 8 U.S.C).

50. See EL SALVADOR, *supra* note 45, at 101 (stating that the civil conflict in El Salvador has decreased agricultural production, damaged infrastructure, and diverted funds from economic to military purposes, costing a total of approximately \$1.5 billion).

51. See "Nonimmigrants Admitted by Country of Citizenship and Selected Class of Admission," INS Statistics Div., August, 1992 (showing that between Fiscal years 1989 and 1991, only 380 Salvadorans, 51 Guatemalans, and 20 Haitians were admitted to the United States as refugees).

52. See FORSYTHE, *supra* note 36, at 99 (citing a State Department memorandum from April 1984, stating that Salvadorans are traditionally migratory and emigration from their homeland is not a direct result of the civil war). *But see* LET MY PEOPLE LIVE, FAITH AND STRUGGLE IN CENTRAL AMERICA 79 (Gordon Spykman et al. eds., 1988) (stating that emigration is not desirable for most people because it often requires separation from family and roots, and results in living illegally and unwanted in a foreign country).

53. See Kwaitkowski, *supra* note 7, at 191, n.18 (recounting the fears of a Salvadoran woman: "if people were caught in the village, [the army] would kill them, women and children alike . . . with pregnant women, they would cut open the stomachs and take the babies out") (quoting STUDDS, EL SALVADOR: CENTRAL AMERICA IN THE COLD WAR 149-151 (1981)); Dierdre Kelly, *Guatemala's Refugees: Victims and Shapers of Government Policies*, 7 FLETCHER FORUM 323, 331 (1983) (quoting a survivor of an attack on a rural Indian village in Guatemala: "[t]he war started first with the women in the house. With shooting, pure lead, they killed the poor women. Afterward they burned the house We heard the noise of crying women and children and they said our turn was next"). A survivor of a different attack said, "[t]hey took my husband and they killed my brother on the spot and told us, 'We are going to finish off the Indians.' So we fled. It is not possible to live in Guatemala." *Id.*

A. HAITI

1. Political and Economic Conditions

Haiti has a long history of violence and economic disparity.⁵⁴ When Francois Duvalier took power in 1957,⁵⁵ Haiti was in chaos, allowing him to create a totalitarian regime.⁵⁶ Under the Duvalier regime, which ruled until 1986, civil strife and violence ensued.⁵⁷

Throughout Haitian history the economy has been largely polarized between the wealthy political elite and the poor agricultural workers.⁵⁸ Under the Duvalier regime, this inequity in income distribution became further polarized.⁵⁹ In addition, the secret police, or Tontons Macoutes⁶⁰ tortured, executed, or kidnapped many people, especially those who were politically active, and terrorized others.⁶¹ Jean-Claude

54. JAMES L. BUSEY, *LATIN AMERICAN POLITICAL GUIDE*, 60-62 (19th ed. 1991).

55. *Id.* at 61.

56. MICHEL-ROLPH TROUILLOT, *HAITI: STATE AGAINST NATION* 140 (1990).

57. *Id.* at 152-69. On July 3, 1957, the Military Council ended civil justice with a decree, stating that all crimes would be under the Military Jurisdiction as necessary, and giving the Military Authority the right to search homes at any time. *Id.* at 151. The decree stated: "[e]ven crimes . . . against persons and property do not escape Military Jurisdiction if the Authority deems it necessary. The Military Authority is endowed with the right to search the homes of citizens DAY AND NIGHT . . . In a word, it may take any measure necessary to restore law and order" *Id.* Furthermore, the decree forcibly retired judges from the Court of Appeals and the Supreme Court. *Id.*

58. 58. *See id.* at 151-56. *See also* JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS*, 28 (1987) (stating that the United States occupation of Haiti failed to improve living conditions, exacerbated the inequalities, and subsequently, Haiti's economy was inextricably tied to the United States); Pamela Constable, *Embargo Exacts Toll on Haiti's Squalid Streets*, *BOSTON GLOBE*, Feb. 13, 1992, at 1 (reporting that the embargo enacted after the overthrow of Aristide in September, 1991, has made wealth disparity even more clear, with the elite barely affected by it while most of the population are unable to afford necessities).

59. FERGUSON, *supra* note 58, at 58. The Duvalier regime adopted a repressive policy against the people that held "whoever is not for the state is against it." TROUILLOT, *supra* note 56, at 151. There were "authorities" and "others," the latter realizing their position only after they had been separated out as anti-Duvalierist, or *Kamoken*. *Id.* at 179.

60. *See* FERGUSON, *supra* note 58, at 40-41 (recounting the establishment and the role of the Tontons Macoutes).

61. BUSEY, *supra* note 54, at 61. *See* FERGUSON, *supra* note 58, at 57 (stating

Duvalier, succeeding his father in 1971, had a slightly less oppressive regime;⁶² however, the brutality, although less extreme, still continued.⁶³ Under Jean-Claude, the peasants suffered greater economic hardships than any other class.⁶⁴

In 1990, Jean Bertrand Aristide was elected President.⁶⁵ His overthrow in September 1991, however, resulted in a mass exodus of Haitians who could bear no more violence and poverty.⁶⁶

2. The United States Response to Haiti

Duvalier gained the financial support of the United States⁶⁷ by per-

that Francois Duvalier's reign was "the social and economic ruin of Haiti," with 30,000 to 60,000 people killed and many more exiled or terrorized).

62. Kwiatkowski, *supra* note 7, at 192.

63. See FERGUSON, *supra* note 58, at 71 (outlining Jean-Claude Duvalier's policies, including one that made insulting him or his mother an offense, and the "un-leashing" of the Tontons Macoutes on the people).

64. TROUILLOT, *supra* note 56, at 181. Government spending during Jean-Claude Duvalier's regime reflects the low priority of the peasants' needs. *Id.* at 181-83. Toward the end of Jean-Claude's reign, the government spent only \$3.44 per citizen per year on health and \$3.70 on education. *Id.* at 181. Eighty-seven percent of the children were malnourished, and although there was one doctor for each 8,200 persons, in some areas there were 60,000 persons without a resident doctor. *Id.* at 181-82.

65. BUSEY, *supra* note 54, at 64-65. The overthrow of Jean-Claude Duvalier in February 1986, brought more violence and corruption. *Id.* at 62-63. Violence occurring during the presidential election on November 29, 1987, involving machete-hacking on the streets, caused the election to be cancelled. *Id.* Raised in poverty himself, Aristide has a vast following of peasants and urban poor. Lee Hockstader & Douglas Farah, *United States Presses Haiti's Civilian Leaders to Find Accord*, WASH. POST, July 5, 1992, at A21. During the eight months that he held office he lifted the repression, and very few people left Haiti, showing that even though the poverty was still extreme, the people wanted to remain in their homeland. Kathleen Klarreich, *Haiti's Democracy in Limbo*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 20.

66. See *infra* note 78 and accompanying text (stating that 38,000 Haitians have been interdicted by the United States Coast Guard while attempting to escape conditions in Haiti). Violence has continued in the two years following the overthrow, with the police and military attacking people believed to be pro-Aristide. Klarreich, *supra* note 65, at 20. The Haitian military attacked and arrested people at a Catholic mass and throughout the countryside on June 27, 1993, the day negotiations began in New York for Aristide's return to Haiti. *Id.* See also *Police Disperse Students in Haiti*, WASH. POST, July 16, 1992, at A18 (reporting that the police, supported by the military, fired into a crowd of students and beat passersby during a street demonstration in an attempt to suppress pro-Aristide protests).

67. TROUILLOT, *supra* note 56, at 203. The United States initially did not sup-

suading the United States Government that totalitarianism was Haiti's only protection against communism.⁶⁸ Despite blatant displays of violence by the Duvalier regime, its relations with the United States Government strengthened, with the United States giving substantial aid to the Haitian military.⁶⁹

The favorable attitude of the United States toward the Haitian government, however, did not extend to Haitian people attempting to enter the United States.⁷⁰ Those attempting to enter the United States in the 1970s⁷¹ and 1980s⁷² fared no better than those fleeing the post-September 1991 coup. The Carter and Reagan Administrations, like the Bush and Clinton Administrations, viewed the Haitian refugees as economic migrants.⁷³ In 1981, the Reagan Administration began an interdiction

port Haiti's independence. From the 1800's, the United States attempted to isolate Haiti economically by officially refusing to trade with the country. *Id.* Some merchants, however, did trade with Haiti, earning substantial profits. *Id.* at 53. These merchants supplied nearly 45 percent of Haiti's imports, while buying only 25 percent of its exports. *Id.* This imbalance accounted for nearly 79 percent of Haiti's trade deficit, and the imbalance only increased thereafter. *Id.* In 1862, the United States recognized Haiti because of its need to import cotton. *Id.* Three years later, Haiti's trade deficit with the United States was six times higher than it had been in 1861. *Id.* at 54. Further, the United States could control Haiti's import market because the low production costs and the proximity of the two countries resulted in prices lower than those France or Great Britain could offer. *Id.* The 1915 to 1934 occupation by the United States worsened the economic inequality by increasing the peasants' forced contribution to the state as well as their dependency on a single agricultural product. *Id.* at 16. Simultaneously, the United States centralized the government and "dis-arm[ed] the provinces, both militarily and economically." *Id.*

68. See *id.* at 203. See also FERGUSON, *supra* note 58, at 42-43 (claiming that the success of Haitian governments depends on their relations with the United States, and that the United States looked favorably upon the Duvalier regime).

69. TROUILLOT, *supra* note 56, at 203.

70. See *infra* note 86 and accompanying text (giving examples of the reluctance of United States citizens to admit Haitians into this country).

71. See FERGUSON, *supra* note 58, at 63 (discussing the famine of the 1970s and the flow of Haitians to the United States after 1972).

72. FORSYTHE, *supra* note 36, at 97. Of the 1,661 asylum cases Haitians filed between June 1983 and September 1986, only thirty were granted, an approval rate of 1.8%. *Id.* By contrast, the approval rates for countries with "unfriendly" governments were higher: 60.4% of Iranian asylum cases were granted, 51.0% of Romanian cases, 45.4% of Czechoslovakian cases, and 31.9% of Hungarian cases. *Id.* This trend also indicates that despite the 1980 Refugee Act, the Reagan Administration continued to discriminate on the basis of national origin. Such discrimination violated Article 3 of the 1951 Convention. *Id.* at 98.

73. *Id.* at 95. At the same time, however, the Bush Administration admitted

program⁷⁴ whereby the United States Coast Guard, with the permission of the Duvalier regime,⁷⁵ boarded boats leaving Haiti and returned anyone determined to be an economic migrant.⁷⁶ This practice virtually stopped the flow of refugees.⁷⁷

The outflow of Haitian refugees resumed following September 1991 despite the failure of the United States to provide a safe haven for those fleeing dangerous conditions.⁷⁸ The situation grew worse due to contin-

Cubans as political refugees, indicating the emphasis on anti-communism by giving safe haven primarily to those fleeing communist governments. *Id.* See also WEINSTEIN & SEGAL, *supra* note 46, at 123 (pointing out that under the 1980 Refugee Act, Cubans tended to qualify for asylum while Haitians did not). Elliott Abrams, then the Assistant Secretary of State for Human Rights and Humanitarian Affairs, stated that these Haitians were merely economic migrants attempting to escape from the poverty of their country, and not "victims of persecution" or "voting with their feet." FORSYTHE, *supra* note 36, at 97. In the same document, Abrams stated that "when [a communist] . . . government has destroyed the people's rights and freedoms, and destroyed the economy, people vote with their feet," again pointing up the distinction between "unfriendly" communist governments and "friendly" democratic governments. *Id.* The Clinton Administration also supports former President Bush's Executive Order, and continues to intercept and forcibly return Haitian boatpeople. *Restricting Immigration Won't Solve Poverty Crisis*, TORONTO STAR, June 27, 1993, at D2.

74. Exec. Order No. 12,324, 17 WEEKLY COMP. PRES. DOCS. 1057 (Sept. 29, 1981), *revoked and replaced by* Exec. Order No. 12,807, 28 WEEKLY COMP. PRES. DOCS. 923 (June 1, 1992). Between 1981 and 1985, of the 3,000 Haitians intercepted on the high seas, not one was given asylum or refugee status in the United States. FORSYTHE, *supra* note 36, at 100.

75. *Id.* at 96.

76. *Id.* See FERGUSON, *supra* note 58, at 64 (stating that this policy redefined the traditional refugee policy and led to the distinction between "economic" and "political" refugees). *But see* WEINSTEIN & SEGAL, *supra* note 45, at 123 (claiming that Haitian citizens are subjected to both extreme poverty and "generalized political oppression" which makes it difficult to distinguish between political and economic reasons for leaving).

77. FORSYTHE, *supra* note 36, at 96. Further, because the Haitians attempting to immigrate to the United States could not physically enter the United States, they could not go to court for a review of INS findings, as provided by statute. 8 U.S.C. § 1158(a)(1988).

78. Exec. Order No. 12,807 - Interdiction of Illegal Aliens, 28 WEEKLY COMP. PRES. DOCS. 923 (May 24, 1992). The Coast Guard had intercepted over 34,000 Haitians since the coup. *White House Statement on Haitian Immigrants*, 22 WEEKLY COMP. PRES. DOCS. 924 (June 1, 1992). President Bush stated that "the safety of Haitians is best assured by remaining in their country." *Id.* Eighteen persons had drowned in the previous week. *Id.* See also Ron Howell, *Uprising in Haiti Symied By Fear; But Aristide's Supporters Are Getting Restless*, NEWSDAY, May 31, 1992, at 15 (quoting a Haitian who tried to hang himself after the Coast Guard attempted to

uing civil conflict and debilitating economic conditions.⁷⁹ Moreover, economic conditions become inseparable from political conditions.⁸⁰ Due to mass terror and widespread disruption and unemployment, refugees face daily danger of attack,⁸¹ as well as starvation.⁸²

President Bush's Executive Order No. 12807,⁸³ ordering the forcible return of Haitians without a fair chance to apply for asylum,⁸⁴ met resistance in Congress.⁸⁵ The UNHCR has condemned the policy.⁸⁶ Pres-

return him to Haiti, stating that he preferred to be put to death than return to Haiti). As of February, 1993, over 38,000 Haitians had attempted to flee their country, most of whom were returned by the United States Coast Guard. Pamela Constable, *U.S. Hints at Tougher Sanctions Against Haiti*, [hereinafter *Tougher Sanctions*], BOSTON GLOBE, Feb. 6, 1993, at 1.

79. See 138 CONG. REC. E1,736 (daily ed., June 9, 1992) (Speech of Hon. Vic Fazio) (stating that "military thugs" are in power in Haiti, and the OAS embargo is "choking the life out of the Haitian economy").

80. See Ron Howell, *Battle Weary, U.S. Firms Leave Haiti*, NEWSDAY, March 8, 1992, at 6 (reporting that United States companies are leaving Haiti due to the country's political instability; the departure of one company caused 4,000 Haitians to lose their jobs).

81. 138 CONG. REC. E1,729 (daily ed. June 9, 1992) (statement of Hon. Lucien E. Blackwell). An estimated 2,000 Haitians were killed in the two weeks alone following the coup, and random attacks continue. *Id.* In May 1992, the army attacked students during peaceful demonstrations urging that democracy be restored. *Id.* See also Saul Landau, *U.S.'s Haiti/Cuba Policy Needs to be Squared*, S.F. CHRON., Feb. 11, 1993, at A25 (stating that the Bazin government has caused approximately 3,100 deaths by torturing, assassinating and imprisoning political opponents).

82. See Pamela Constable, *Embargo Exacts Toll on Haiti's Squalid Streets*, BOSTON GLOBE, Feb. 13, 1992, at 1 (stating that many Haitians can no longer afford basic necessities).

83. Executive Order 12807 - Interdiction of Illegal Aliens, 28 WEEKLY COMP. PRES. DOCS. 923 (June 1, 1992).

84. See Jerry Seper, *Haitian Immigrant Study Supports Bush's Policies*, WASH. TIMES, June 27, 1992, at A4 (discussing the interdiction process). Only thirty-five percent of refugees interviewed on the boats have been found to have possible asylum claims. Frank T. Csongos, *U.S. Says Mistreatment of Haitian Returnees Unfounded*, UPI, Feb. 10, 1992 available in LEXIS, Nexis Library, UPI File.

85. See 138 CONG. REC. E1,738 (daily ed. June 9, 1992) (statement of United States Representative Edolphus Towns (NY)) (claiming that the policy is "simply barbaric and inconsistent with what this Nation is supposed to stand for"). Representative Towns went on to state that there is civil strife in Haiti which is causing people to flee. *Id.* He called for a policy of Extended Voluntary Departure (EVD) status for Haitians, if not a fair opportunity to apply for asylum. *Id.* Senator Pell recently argued that the refugee crisis is primarily the result of Haiti's political turmoil and will not be resolved until political order is reestablished." 138 CONG. REC. S7,476 (daily ed. June 3, 1992) (Statement of Senator Pell). He pointed out that although the Unit-

ident Clinton, who denounced President Bush's policy before the election, continues to implement the policy,⁸⁷ which has been declared constitutional by the United States Supreme Court.⁸⁸ The American public has also refused to welcome the Haitians, feeling that because of the recession the United States does not have enough resources to assist refugees.⁸⁹ Critics of the policy complained that the Bush Administration turned the issue into one of immigration, rather than of restoring democracy.⁹⁰ The Clinton Administration attempted to aid in restoring democracy by supporting the July 1993 agreement to reinstall Aristide to pow-

ed States has always drawn poor Haitians hoping to improve their economic standing, it is only since the coup that the number of refugees has increased so greatly. *Id.*

86. See 138 CONG. REC. S7,475 (daily ed. June 3, 1992) (Statement of Senator Pell)(citing the action of the U.N. High Commissioner). *But see* Seper, *supra* note 84, at A4 (reporting that the Federation for American Immigration Reform (FAIR) defended the policy as the sole means of preventing or deterring mass illegal migration); Csongos, *supra* note 83, (recounting the Bush Administration's dismissal of allegations that repatriated boat people were being abused or killed); and *Canadian-Supported Centre for Street Children in Haiti Destroyed by Fire*, CANADA NEWS WIRE, June 18, 1992, available in LEXIS, Nexis Library, Current file (reporting the arson-burning of a children's home and training center in Port au Prince, which left 100 children homeless).

87. See David Broder, *Letter of the Law in Clinton's Haiti Policy*, CHI. TRIB., March 7, 1993, at 3 (stating that President Clinton said he had changed his position because of the number of people who drowned in January 1993 while attempting to come to the United States). However, the Administration has also expressed concern about southern states being inundated by refugees. *Id.* See also Kenneth Freed, *Despite Clinton's Reversal, Many Are Still Intent on Escape*, L.A. TIMES, Jan. 21, 1993, at A4 (claiming that on President Clinton's Inauguration Day, 200 to 250 boats were ready to sail and that 20,000 Haitians planned to leave despite President Clinton's request that they remain in Haiti).

88. See *McNary v. Haitian Centers Council*, 61 U.S.L.W. 4684, 4684 (U.S. June 21, 1993) (holding that the policy of returning Haitians interdicted on the high seas is constitutional).

89. See Frank Pacheco, *Letter to the Editor*, TIME, June 29, 1992, at 19 (stating that the United States is having difficulty taking care of Americans and immigrants, and that the United States is not obligated to solve Haiti's problems). *But see* Barry Cutler, *Letter to the Editor*, TIME, June 29, 1992, at 19 (disapproving of Bush's policy). Anthony Scaduto, *Plea for Asylum; Jesse Jackson, 40 others Arrested in Protest Over Haitian Detainees*, NEWSDAY, March 16, 1993 at 3 (reporting that Jesse Jackson and 40 other people staged a protest in New York City against President Clinton's refusal to release 267 HIV-infected Haitian detainees being held at Guantanamo Bay, Cuba).

90. See Cathy Booth, *Send 'Em Back!*, TIME, June 8, 1992 at 43 (quoting a Carter Administration official who oversaw the 1980 Mariel boat lift).

er.⁹¹ Doing so has proven difficult, as the military leaders have refused to cooperate with the agreement.⁹² The end of October 1993 saw an increase in violence and a worsening of conditions due to embargoes against Haiti.⁹³

As the above discussion illustrates, conditions of physical danger and extreme poverty engendered by political instability and policy in Haiti underscore the weakness and inappropriateness of distinguishing between political and economic refugees.⁹⁴ Continued inaction illustrates that the United States government has failed to address the needs of the Haitian people.

B. EL SALVADOR

1. Political and Economic Conditions

El Salvador was engaged in civil conflict from 1979 to 1991,⁹⁵ during which time many thousands of refugees fled to the United States

91. *Tougher Sanctions*, *supra* note 78, at 1.

92. Douglas Farah, *Elections Sought by Haiti Group*, WASH. POST, Nov. 1, 1993, at A1. In response to the lack of cooperation by military leaders and threats to kill Aristide if he returns, the United States and United Nations have considered establishing a full embargo against Haiti. *Id.* The United Nations imposed an oil and arms embargo in July 1993 in order to pressure the military leaders into allowing Aristide to return. Ben Barber, *Miami's Haitians Live in the Shadow of Tragic Events*, CHRISTIAN SCI. MONITOR, June 29, 1993, at 3. This embargo followed one imposed by the OAS immediately following the September 1991 coup, which crippled the economy. Howell, *supra* note 80, at 6. *See* Constable, *supra* note 82 (discussing the effects of the 1991 embargo, and stating that it has not had any substantial political results).

93. *Id.* at 14.

94. *See Political Legitimacy*, *supra* note 14, at 462-64 (developing a theory of structural economic persecution which implies that refugees from Haiti, El Salvador, and Guatemala should be entitled to asylum).

95. *See* EL SALVADOR, *supra* note 45, at 33-45 (describing the origins and early years of the conflicts). *See also* INTERVENTION ON TRIAL: NEW YORK WAR CRIMES TRIBUNAL ON CENTRAL AMERICA AND THE CARRIBBEAN 4-6 (Paul Ramshaw and Tom Steers, eds., 1987) (accusing the government of conducting a war against much of its own civilian population). *See generally* THE COMMANDANTE SPEAKS, (Courtney E. Prisk, ed., 1991) (recounting the life of a sometime guerrilla leader during the years of strife between the government and rebel forces). Peace Accords between the government and the FLMN were signed in December, 1991; however, in October, 1992, the peace process was in deep crisis and the cease-fire in fragile condition. Douglas Farah, *Crisis Grips Salvadoran Peace Process*, WASH. POST, Oct. 25, 1992, at A29.

and Guatemala.⁹⁶ In the early 1980s, under several different presidents,⁹⁷ government forces killed approximately 750 citizens per month.⁹⁸ The conflict escalated over the years as the Farabundo Marti Front for National Liberation (FLMN) guerrillas struggled to overthrow the government.⁹⁹ The FLMN succeeded in paralyzing transportation routes by bombing bridges and blockading roads, and hindered production by bombing factories and making farming dangerous.¹⁰⁰ Large numbers of civilians were killed in the cross-fire between guerrillas and government forces.¹⁰¹ In the first half of 1988 right-wing death squads killed 39 civilians, and they killed another 55 civilians in the first half of 1989.¹⁰² The Duarte regime tacitly supported these "killing campaigns" in the rural areas of the country by not acting out against them.¹⁰³

In the 1970s, El Salvador was a relatively poor country, and it has continued to grow poorer.¹⁰⁴ The civil conflict, lasting throughout the

96. See *Central American Refugee Settlement OKd*, CHIC. TRIB., Feb. 1, 1991 at 2 (estimating the number of Salvadorans and Guatemalans currently living in the United States who will be affected by a stay of deportation to be as many as 500,000).

97. BUSEY, *supra* note 54, at 21. Jose Napoleon Duarte, leader of El Salvador for most of the era of civil conflict, was elected in 1972, and subsequently beaten by the military and forced into exile in Venezuela. *Id.* He returned in 1979 to co-lead a civilian-military junta, and was made provisional president in December, 1980. *Id.* After losing the 1982 elections, he again became president in 1984. *Id.*

98. Lee Tucker & Daniel Weiser, *Undocumented Salvadorans: Temporary Safe Haven as an Alternative to Deportation*, 3 HARV. HUM. RTS. J. 215, 215 n.4 (1990). A United Nations Truth Commission Report released in March 1993, blames the United States-backed military for the majority of human rights violations during the civil war. Warren Strobel, *Of Rights and Wrongs: Foreign Policy Vow by Clinton Under Scrutiny*, WASH. TIMES, March 16, 1993, at A1.

99. See e.g. J. MICHAEL WALLER, *THE THIRD CURRENT OF REVOLUTION: INSIDE THE 'NORTH AMERICAN FRONT' OF EL SALVADOR'S GUERRILLA WAR 189-97* (1991) (discussing the November 1989 guerrilla offensive and the process leading to it).

100. See BUSEY, *supra* note 54, at 24 (summarizing the effects of violence in El Salvador).

101. Margaret Hartka, *The Role of International Law in Domestic Courts: Will the Legal Procrastination End?*, 14 MD. J. INT'L L. & TRADE 99, 99-100, n.4 (1990).

102. *Id.*

103. See Kwiatkowski, *supra* note 7, at 191 (alleging that the Salvadoran security forces routinely engaged in such campaigns).

104. EL SALVADOR, *supra* note 45, at 101. In the 1970s, El Salvador's per capita income was less than that of South Korea, Malaysia, and Costa Rica, but

1980's, displaced many workers and disrupted employment expansion.¹⁰⁵ High levels of government spending during this period reflected the militaristic leaders' priorities.¹⁰⁶

Salvadorans who live and work in the United States have become the largest source of income for those remaining in El Salvador.¹⁰⁷ This fact probably underlies the widespread belief that the primary motive for immigration from El Salvador is economic.¹⁰⁸ This immigration, however, is also the result of the political situation in El Salvador.¹⁰⁹ Furthermore, Salvadorans have also fled to Honduras and Guatemala, where economies are also weak, which demonstrates that their reasons for

greater than that of Thailand. *Id.* In 1987, the economic output was barely 80 percent of its level nine years earlier. *Id.*

105. *Id.* Between 1978 and 1985, the unemployment rate increased to 33% from 3.1%. *Id.* at 109. This increase would have been higher had not approximately 500,000 Salvadorans fled to the United States. *Id.* Real wages dropped by approximately one-third between 1983 and 1987. *Id.* at 108. The value of agricultural output decreased at a rate of approximately 2.3% per year. *Id.* at 118. However, with the election of President Alfredo Cristiani in 1989, a free market system was adopted which resulted in economic growth of 3.4% and nearly 3.5% in 1990 and 1991 respectively. Tom Welch, *Business Confidence Greater in El Salvador*, 113 BUSINESS AM., 14 (March 23, 1992).

106. EL SALVADOR, *supra* note 45, at 115. Between 1972 and 1986, the military portion of the government budget increased from 6.6% to 28.7%. *Id.* at 115. Including military operating expenditures, total military spending accounted for 47.3% of all governmental outlays in 1986. *Id.* Between 1976 and 1986, spending on education dropped from 21.4% to 14.6% and over 1,000 schools were closed. *Id.* at 116. One estimate placed the total cost of lost agricultural production, destroyed infrastructure, and military spending due to the civil conflict through mid-1987 at nearly \$1.5 billion. *Id.* at 101.

107. Tucker & Weiser, *supra* note 98, at 230, n.39. See Gabriel Escobar, *A River of Green Flows to Salvador*, WASH. POST, Sept. 24, 1992, at A1 (reporting that \$920 million was sent to El Salvador by Salvadorans in the United States in 1991). One Salvadoran money transfer business in Washington, D.C. reported that over \$3 million had been sent to Central and South America during the first six months of 1992, with most of this money going to El Salvador. *Id.* By comparison, the United States provided \$220 million in aid to El Salvador in FY 1992. *Id.*

108. See Kwiatkowski, *supra* note 7, at 191-92 (claiming that the State and Justice Departments view Salvadorans' motives for coming to the United States to be due to hard economic circumstances).

109. See CHAVEZ, *supra* note 44, at 37 (quoting a Salvadoran man living illegally because the United States will not grant him asylum). The man stated that he was unemployed in El Salvador and that because the guerillas wanted him to join them, he had to leave the country with his family. *Id.*

leaving are not simply economic.¹¹⁰

In addition to the civil strife causing many people to leave their homes, the 1986 earthquake, centered in San Salvador, left another 200,000 people homeless.¹¹¹ The United States definition of a refugee does not provide for victims of natural disaster; therefore, such persons must fit into another category to qualify for admission.¹¹²

2. United States Response to El Salvador

The 1979 coup was supported by the United States to prevent El Salvador from "becoming another Nicaragua."¹¹³ Although United States aid was officially aimed at promoting democracy and curtailing violations of human rights, the aid had just the opposite effect. Financial and technical aid provided by the United States federal government significantly enhanced the resources of the armed forces.¹¹⁴ The FLMN responded with violence to counter this aid,¹¹⁵ engaging in sabotage, intimidation, hit and run attacks, and other guerrilla tactics.¹¹⁶

110. Weiser & Tucker, *supra* note 98, at 220.

111. EL SALVADOR, *supra* note 45, at 82. Rebuilding after the earthquake, however, caused a slight growth in the construction industry in 1987. *Id.* at 107.

112. See 8 U.S.C. § 1157(e)(1988) (defining admission of refugees justified by humanitarian concern).

113. EL SALVADOR, *supra* note 45, at xxi. Due to fear that the situation in El Salvador would become similar to that in Nicaragua, the Carter administration offered a greater amount of economic aid to that country than to any other Western Hemisphere nation. *Id.* at 41-42. Between 1980 and 1991, the United States gave El Salvador \$1.1 billion in military aid. Leahy, *Dodd Protest Aid to El Salvador*, GANNETT NEWS SERVICE, Feb. 19, 1992, available in LEXIS, Nexis Library, Gannett News Service File. See also Tucker and Weiser, *supra* note 98, at 218 (discussing United States military and economic aid to El Salvador); Peter S. Michaels, *Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua*, 7 B.C. THIRD WORLD L.J. 223, 232 (1987) (stating that because of the Duarte regime's violations of human rights, the United States should not provide military aid to El Salvador under the Foreign Assistance Act). By contrast, the FMLN obtained most of its money by kidnapping wealthy Salvadorans. WALLER, *supra* note 99, at 107. The FLMN also receives financial support from churches and humanitarian organizations in the United States. *Id.* at 215-16.

114. Cynthia J. Arnson, *Will Justice in El Salvador Be Stillborn?*, L.A. TIMES, July 23, 1992, at 7.

115. WALLER, *supra* note 99, at 10-11.

116. EL SALVADOR, *supra* note 45, at xxi. The guerrillas perceived three "fields of struggle" in El Salvador: (1) the north and east "liberated areas" where they had influence over the population and the government was not yet present, (2) central El

Despite evidence of life-threatening conditions, the United States continues to deny applications for asylum to Salvadorans. Between 1983 and 1990, when the 1990 Immigration Act gave Extended Voluntary Departure (EVD) status to Salvadorans, less than three percent of applications were approved.¹¹⁷ In contrast to the number of approved applications, a recent estimate placed the figure of undocumented Salvadorans in the United States between 500,000 and 850,000.¹¹⁸ In FY 1988-89, the United States deported 3,048 Salvadorans.¹¹⁹ This number was small compared to the number of undocumented Salvadorans living in the United States illegally. Such a discrepancy in the figures indicates that even after being denied admission most Salvadorans will not voluntarily leave.

The 1990 Immigration Act provided temporary protected status (TPS) to Salvadorans.¹²⁰ This provision allowed Salvadorans to register for admission as immigrants between January 1, 1991 and October 31, 1991.¹²¹ Yet despite the signing of peace accords in December, 1991, twelve years of civil upheaval have left El Salvador unable to handle the numbers of Salvadorans who must leave the United States and return to El Salvador under TPS guidelines.¹²²

Salvador, or "disputed areas" where guerrillas lived among the rural villages and government forces lived in the towns, and (3) the cities, where terrorist actions occurred intermittently by rightist and leftist organizations. *Id.* at 90.

117. *Central American Refugee Resettlement OK'd*, CHI. TRIB., February 1, 1991, at 2. A federal district judge, however, recently approved a settlement blocking deportation of nearly 500,000 Salvadorans, allowing them to reopen cases for political asylum. *Id.*

118. Tucker and Weiser, *supra* note 98, at 215 n.5. Undocumented Salvadorans in the United States account for more than ten percent of El Salvador's total population. *Id.*

119. *Id.* n.6.

120. *See infra* note 162 and accompanying text (explaining that TPS allows Salvadorans who were living in the United States at the time TPS was granted to remain there for a specified period).

121. Immigration Act of 1990, § 303(b)(1)(C), Pub. L. No. 101-649, 104 Stat. 4978, 5037, (to be codified at 8 U.S.C. §1254a note (1990)). The amendment changed the registration date from June 30, 1991 to October 31, 1991 by Pub. L. No. 102-65, §1, 105 Stat. 322, 322 (to be codified at 8 U.S.C. 1254a note (1991)).

122. Gagan Nirula, *Hickey Says Salvadorans Need Extension of Immigration Act*, WASH. POST, Mar. 7, 1992, at G11. Cardinal James Hickey advocated an 18-month extension of TPS. *Id.* He claims the country is not yet prepared to provide for the large numbers of Salvadorans who would be forced to return. *Id.* *See also* Patrick J. McDonnell, *Central Americans Pose an Immigration Dilemma*, L.A. TIMES, Feb. 2,

C. GUATEMALA

1. Political and Economic Conditions

As with Haiti and El Salvador, Guatemala's civil conflict developed from extreme disparities in wealth¹²³ and intensified as militaristic governments¹²⁴ engaged in killing to suppress opposition. Violence has become so pervasive that the society has been called a "culture of death."¹²⁵ Beginning in 1954 with the United States-supported overthrow of Jacobo Arbenz Guzman,¹²⁶ Guatemala has suffered from continuous violence and repression.¹²⁷ The violence is aimed primarily and openly at the Indians,¹²⁸ who comprise most of Guatemala's lower

1993, at A1 (quoting a letter sent to the Clinton Administration from Salvadoran expatriates that a massive influx of Salvadorans would have a catastrophic social, economic, and political effect on an already delicate situation).

123. Kelly, *supra* note 53, at 329. Land distribution in Guatemala, as in Haiti and El Salvador, is unequal, and has increasingly been concentrated in fewer hands. *Id.* In 1979, total farmland was owned by only 2.2% of the landowners. *Id.* The majority of the rural population owns plots too small to provide subsistence. *Id.* Ironically, Guatemala has the largest GDP of all the Central American countries. Tom Welch, *Guatemala and the United States: Companions in Democracy and Trade*, BUSINESS AM., March 23, 1992, at 10.

124. See BUSEY, *supra* note 54, at 14-18 (describing the political background and government process in Guatemala). Even under a civilian reformer, Julio Cesar Mendez Montenegro, president from 1966 to 1970, the military still controlled the power, as is evidenced by its counterinsurgency against guerrillas that left 3,000 to 10,000 civilians dead in an effort to end all real and perceived opposition. BEATRIZ MANZ, REFUGEES OF A HIDDEN WAR 13 (1988).

125. See Jeff Silverstein, *Carry on Helping These Kids and You Could End Up Dead*, INDEPENDENT, March 31, 1992, at 18 (quoting Guatemalan President Jorge Serrano). Between 1954 and 1991, 200,000 unarmed citizens were killed or "disappeared" by governmental forces. JONAS, *supra* note 45, at 2.

126. GEORGES A. FAURIOL & EVA LOSER, GUATEMALA'S POLITICAL PUZZLE 32-33 (1988).

127. BUSEY, *supra* note 54, at 17-18. Under General Eugenio Laugerud Garcia, the government repressed citizens involved in popular organizations that pushed for a more democratic system, killing 100 to 200 people per month by 1979. MANZ, *supra* note 124, at 14 (1988). Victims included peasants, students, church activists and leaders of cooperatives, labor, and rural organizations. *Id.*; see also FAURIOL & LOSER, *supra* note 126, at 41-49 (discussing the series of insurgencies between 1960 and 1980 and the lawless society that developed); Kelly, *supra* note 53, at 331 (discussing the government's attempt to eliminate Indian cultures).

128. See Kelly, *supra* note 53, at 331 (reprinting a speech made by Tom Harkin, then-United States House Representative, in which he equated the Guatemalan

class.¹²⁹ Throughout the 1980s, while intellectuals were individually persecuted, Indians in the highlands and northern lowlands were persecuted in groups.¹³⁰

In 1982, the government of Rios Montt began the *fusiles y frijoles* (guns and beans) program.¹³¹ The program offered food and medical care to citizens in exchange for participation in the militia and public works projects.¹³² Under this program, the government required Indians and peasants to kill anyone suspected to be the opposition. Failure to do so meant that the Indians and peasants faced the threat of being killed themselves.¹³³ In 1986, Vinicios Cerezo Arevale became the first civilian president since Julio C. Mendez Montenegro.¹³⁴ Despite Cerezo's election, there was an increase in political assassinations, torture, and death throughout the country from 1989 to 1990.¹³⁵ A United Nations Human Rights Commission reported that "indiscriminate collective executions" in 1990 had left 48 peasants, eleven leaders of the Association of University Students, labor leaders, and others dead.¹³⁶ Another civilian president, Jorge Antonio Serrano Elias held office from 1991-1993,

government's policy with genocide.

129. *Id.* at 326. See JONAS, *supra* note 45, at 104-06 (stating that the vast majority of the Indians comprise the 87 percent of the population living in poverty, and examining ethnic discrimination in Guatemala).

130. MANZ, *supra* note 124, at 145. In 1981, the government launched an 18-month campaign of mass terror against civilians and guerrillas. *Id.* at 17. The EGP guerrillas had a quarter of a million rural peasants, mostly Indian, supporting them, making it "necessary" to destroy entire villages to destroy this support. *Id.* The government wanted to remove present as well as possible future opposition. *Id.* There were three choices for those persecuted: to leave for Mexico, turn themselves in to the military to be placed in a model village, or to remain in Guatemala in areas not yet controlled by the military. *Id.* at 145; see also GUATEMALAN INDIANS AND THE STATE: 1540 TO 1988 252-56 (Carol A. Smith ed., 1990) (discussing the role of the Indians in the war); JONAS, *supra* note 45, at 146-159 (outlining the series of counterinsurgency campaigns in the 1980s).

131. Kelly, *supra* note 53, at 336.

132. *Id.* See also FAURIOL & LOSER, *supra* note 126, at 58-59 (examining the characteristics of the Rios Montt government).

133. MANZ, *supra* note 124, at 337. A refugee from Huehuetenango explained why he had fled: "The army comes to our villages and forces us to go with them to burn and kill people . . . But we are not criminals and we don't want to kill people, so we came here." *Id.*

134. BUSEY, *supra* note 54, at 19.

135. *Id.* at 18.

136. *Id.*

but violence continued,¹³⁷ despite his pledge to put an end to the violence and take command of the army.¹³⁸ After Serrano's attempt in June 1993 to establish a dictatorship, Ramiro de Leon, a human rights lawyer, assumed power¹³⁹ and promised to establish programs to eradicate human rights abuses.¹⁴⁰

In addition to physical danger, Guatemalans face extreme economic hardships that are the result of political instability and terrorist campaigns.¹⁴¹ Currently, less than a fourth of the population lives above the poverty line.¹⁴²

2. United States Response to Guatemala

Guatemala has been called the worst violator of human rights in the Western Hemisphere.¹⁴³ An estimated 20,000 civilians have been killed in the past thirty years.¹⁴⁴ Nevertheless, the United States has been si-

137. *Id.* See also *Guatemala, Where the War Still Looks Cold*, ECONOMIST Feb. 8, 1992, at 36 (discussing the continuation of violence under President Serrano); Silverstein, *supra* note 124, at 18 (reporting on persecution of street children by Guatemalan police).

138. Katherine King, *Guatemala President-Elect Faces Insurgency, Poverty, Army*, REUTERS, Jan. 7, 1991.

139. Special Correspondent, *Guatemala, New Broom, Slow Start*, ECON., June 26, 1993, at 51.

140. *Id.*

141. See JONAS, *supra* note 45, at 95 (stating that years of conflict have worsened the social crisis, causing severe food shortages, decreasing wages, and cutting back in public services because the government diverts funding to the military).

142. See MANZ, *supra* note 124, at 48 (stating that 24.4 percent of the Guatemala population lives above the poverty line); JONAS, *supra* note 45, at 2 (stating that less than 15 percent lives above the poverty line). The unemployment rate is approximately 45 percent, and the minimum wage per day is lower than \$2. John Otis, Proprietary to the United Press International, March 3, 1991. Government restrictions on travel in some areas of the country prevent peasants from going to the hillsides to gather firewood. MANZ, *supra* note 124, at 34. In addition, land has been taken out of production by the government, or transferred from coffee or sugar production to cattle or corn production, which are less labor intensive. *Id.* at 49. Further, civil patrol duty, imposed on all capable men, restricts their ability to work at steady jobs. *Id.* at 78. As a result of these circumstances, the basic needs of 35.7 percent are not met, and 39.9 percent have a "less than minimum diet." *Id.* Eighty-two percent of children under age 5 are malnourished. *Id.*

143. MANZ, *supra* note 124, at 30.

144. JONAS, *supra* note 45, at 2. An estimate 100,000 Guatemalan refugees live in Mexico alone, and another 20,000 are displaced within Guatemala. *Guatemala: Bishop Claims 100,000 Refugees are in Mexico*, INTER PRESS SERVICE, Aug. 9, 1993,

lent on the issue, continuing to support the governments.¹⁴⁵ In 1982, the Reagan Administration resumed military sales to Guatemala¹⁴⁶ which had been suspended under the Carter Administration. This support increased the government's capacity to wage mass violence on civilians¹⁴⁷ and its continuation has therefore been questioned.¹⁴⁸ The United States is reluctant to admit Guatemalans as refugees,¹⁴⁹ based on the belief that Guatemala is a "friendly" country.¹⁵⁰ As with Haitians and Salvadorans, Guatemalans cannot meet the standard of proof required by the current definition of refugee.¹⁵¹

Personal accounts illustrate that Guatemalans live in constant fear inflicted by the government and rebel forces.¹⁵² Yet by refusing to acknowledge that these conditions are the cause of population outflows,

available in LEXIS, Nexis Library, Inter Press Service File.

145. Larry Birns & Suzanne Jonas, *Tie Strings on US Aid to Guatemala*, CHRISTIAN SCI. MON., June 4, 1992 at 18. See also JONAS, *supra* note 45, at 30-34 (stating that United States intervention in support of the Guatemalan government was justified by the need to destroy the threat of Communism).

146. Kelly, *supra* note 53, at 353. This policy ended a five-year embargo on such sales, and followed President Reagan's statement in December 1982 that alleged violations of human rights had given the country a "bum rap." *Id.*

147. *Id.*

148. See S. 1243, 102d Cong., 1st Sess. (1991) (confirming that in 1991 Congress drafted a bill that prohibited all military aid to Guatemala for FY 1992 and 1993 absent proof that the government had ended human rights violations, persecuted police who aided in the murder and disappearance of street children, and moved toward a democratic system).

149. See MANZ, *supra* note 124, at 189 (claiming that a large number of Guatemalans are in fact eligible for asylum but are wrongly denied admission because the standard of proof has been set too high).

150. See *infra* note 167 (discussing foreign policy concerns and the tendency of the United States to ignore human rights violations by governments it considers to be friendly).

151. DEMETRIOS G. PAPADEMETRIOU & MARK J. MILLER, *U.S. Immigration Policy: International Context, Theoretical Parameters, and Research Priorities*, in THE UNAVOIDABLE ISSUE 1, 11 (Demetrios Papademitrou & Mark J. Miller eds., 1983) [hereinafter UNAVOIDABLE ISSUE]. Between October 1992 and March 1993, of 69,932 pending Guatemalan cases and 15,527 new cases, only 44 cases were granted, giving asylum to 67 individuals. INS Statistics Division, August, 1993. Similarly, of 45,227 pending Salvadoran cases and 5,405 new cases, 23 cases were granted, giving asylum to 32 individuals. *Id.* Of 5,632 pending Haitian cases and 4,955 new cases, 143 cases were granted, giving asylum to 174 individuals. *Id.*

152. See *supra* note 54 and accompanying text (quoting survivors of attacks on Guatemalan villages).

the United States denies these refugees safe haven by claiming they do not qualify as "political" refugees, as the current legislation requires.

III. LEGAL ANALYSIS

As set forth in Section I, Congress traditionally focuses on political asylum and immigration concerns, rather than recognizing the conditions that cause most refugee outflows.¹⁵³ As set forth in Section II, conflict between government and insurgent forces makes living in Haiti, El Salvador, and Guatemala physically dangerous for civilians.¹⁵⁴ This section argues that because the United States refuses to acknowledge that people in these countries are being persecuted, albeit indirectly, these refugees are wrongly denied safe haven in the United States.

A. EXTENDED VOLUNTARY DEPARTURE AND TEMPORARY PROTECTED STATUS

For groups of individuals fleeing a given country who fail to meet the usual refugee criteria, Extended Voluntary Departure (EVD)¹⁵⁵ is the closest the Government has come to providing a safe haven.¹⁵⁶ As a discretionary measure, it allows the Attorney General and the State Department¹⁵⁷ to take into account foreign policy issues rather than purely humanitarian concerns.¹⁵⁸ In 1983, the Attorney General and the

153. See *supra* notes 15-33 and accompanying text (discussing the changes in refugee, asylum, and immigration law in Title 8 of the United States Code).

154. See *supra* notes 53, 62, 126 and accompanying text (discussing numbers of civilians killed in Haiti, El Salvador, and Guatemala, and the state of fear in which citizens live).

155. 8 U.S.C. § 1101(a)(42)(A). EVD provides protection from deportation to nationals in the United States from a particular country who have been given EVD status by the Attorney General. *Id.* The determination of whether to grant EVD to people from a given country depends on the level of danger in that country. 127 Cong. Rec. 9507 (1981) (statement of Senator Kennedy).

156. See Pamela M. Martin, Note, *Temporary Protected Status and the Legacy of Santos-Gomez*, 25 GEO. WASH. J. INT'L L. & ECON. 227, 230 (1991) (defining EVD and calling it a "blanket" form of relief).

157. See Refugee Policy Group Report, *supra* note 17, at 232 (reporting that State Department officials first make a determination that the countries of origin are "unstable", "unsettled" or exhibit a pattern of "denial" of rights); see also Martin, *supra* note 156, at 230-31 (examining the origin of EVD and the process for granting EVD indicating that while there is no statute granting EVD authority, it is derived from 8 U.S.C. § 1252(b) and 1254(e)).

158. Refugee Policy Group Report, *supra* note 17, at 234. As a discretionary

State Department refused to grant EVD to Salvadorans despite a letter from eighty-nine members of Congress requesting them to do so.¹⁵⁹ In his refusal, the Attorney General claimed that a grant of EVD would encourage many more Salvadorans to migrate to the United States.¹⁶⁰

Temporary Protected Status (TPS),¹⁶¹ provided to Salvadorans through the 1990 Immigration Act, creates a safe haven for those already present in the United States.¹⁶² Although it improves United States refugee legislation, it nevertheless falls short of providing an adequate remedy for asylum seekers. The Attorney General grants TPS, like

grant, neither individuals nor groups have a right to EVD, and it has generally not been granted to Central Americans living in "friendly" countries. *Id.* Since 1960, sixteen countries have been granted EVD status: Afghanistan, Cambodia, Chile, Cuba, Czechoslovakia, Ethiopia, Hungary, Iran, Laos, Lebanon, Nicaragua, Poland, Rumania, Uganda, Vietnam, and Silva Letterholders (mainly Mexicans). *Temporary Safe Haven for Salvadorans, Hearing before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 56-58 (1987) [hereinafter 1987 Hearings] (statement of Senator Kennedy). *See Id.* at 57-58 (providing, in a table, the dates and conditions of grants). In 1981 a "sense of Congress" measure unsuccessfully urged the Administration to review case-by-case EVD petitions by Salvadorans. Immigration & Nationality Act, Pub. L. No. 97-113, § 731, 95 Stat. 1519, 1557 (1981) (to be codified at 8 U.S.C. § 1157 (Supp. 1992)).

159. Martin, *supra* note 156, at 233-34.

160. Letter from William French Smith, Attorney General, to the U.S. House of Representatives (July 19, 1983), *reprinted in* 1987 Hearings, *supra* note 158, at 45. Mr. Smith explains that there are other alternatives that would provide adequate relief to the Salvadorans, that the United States has a "finite capacity" in terms of social services and law enforcement, and that life threatening risks in El Salvador are decreasing. *Id.* Cf. Hearings 1987, *supra* note 158, at 157 (statement of Roger Conner, Executive Director of Federation for American Immigration Reform) (recommending that Congress remove EVD from United States foreign policy and immigration politics and instead concentrate on long-term solutions to the conflict in Central America).

President Duarte, in fact, supported the proposed grant of EVD to Salvadorans. Letter from President Jose Napoleon Duarte, President of El Salvador, to President Ronald Reagan (April 10, 1987), *reprinted in* 1987 Hearings, *supra* note 158, at 175-177. *See id.* (listing the reasons for El Salvador's inability to accommodate the mass return of Salvadorans from the United States required by the 1986 IRCA).

161. Immigration Act of 1990, Pub. L. No. 101-649, § 302-303, § 244A, 244A(note), 104 Stat. 4978, 5030-38 (1990) (to be codified at 8 U.S.C. §§ 1254a, 1254a(note)).

162. *Id.* Under the TPS provision, Salvadorans may apply for temporary legal status as immigrants, and upon approval receive work permits. *Id.* at § 244 (A)(1)(B), 104 Stat. 5030. However, upon expiration of protected status, they may be deported. *Id.* Supporters of the 1990 legislation claim that TPS essentially codifies EVD. Martin, *supra* note 156, at 248-49.

EVD status, on a discretionary basis as long as allowing such persons to remain does not conflict with United States interests, where ongoing armed strife within a country threatens the safety of persons who would otherwise be returned,¹⁶³ where a natural disaster prevents a country from being able to provide for returning citizens,¹⁶⁴ or where there are extraordinary circumstances in a country.¹⁶⁵ Although the 1980 Refugee Act broadens the asylum standard, it still does not include what the executive and legislative branches label "economic" refugees.¹⁶⁶ Thus, the current legislation fails to offer adequate protection to economic refugees.

B. UNITED STATES FOREIGN POLICY AND REFUGEE ISSUES

The refugee problem and United States foreign policy interests, although linked, often conflict.¹⁶⁷ As United States involvement in El

163. Immigration Act of 1990, Pub. L. No. 101-649, § 302, §244A(b)(1)(A) 104 Stat. 4978, 5031 (1990). See also *U.S. Refugee Programs for 1992: Annual Consultations, Hearing before the Senate Committee on the Judiciary*, 102d Cong., 1st Sess. 66, 68 (1991) [hereinafter 1991 *Hearings*] (testimony of Gene McNary, Commissioner, INS) (discussing the effects of TPS and the 1990 Act).

164. Immigration Act of 1990, Pub. L. No. 101-649, § 302, §244A(b)(1)(B) 104 Stat. 4978, 5031 (1990).

165. Immigration Act of 1990, Pub. L. No. 101-649, § 302, § 244A(b)(1)(C) 104 Stat. 4978, 5031 (1990).

166. See Kwiatkowski, *supra* note 7, at 201-04 (arguing that these refugees are victims of both intolerable economic situations and political oppression, thus suggesting a new category of refugees be proposed that would cover such cases).

167. See Al Kamen, *Cold War Consensus on Refugee Aid Ebbing Despite Relentless Need*, WASH. POST, July 20, 1992, at A8 (focusing on the potential of increasing conflict over refugee policy in the post Cold War era). The goals of foreign policy and humanitarianism are linked when the Government offers refuge to Cubans or others fleeing communist governments, but clash when prospective refugees attempt to leave "friendly" governments. *Id.* However, even under the 1965 Act, the two hemispheres are treated differently, with applicants from the western hemisphere granted visas on a first-come, first-serve basis and eastern hemisphere applicants subjected to a category preference system and a limitation on the number of visas per country. THE UNAVOIDABLE ISSUE, *supra* note 151, at 14. See also John R. Silber, *Closing Remarks*, in AMERICAN REFUGEE POLICY, *supra* note 9, at 52, 53 (contending that any United States responsibility for the world-wide refugee problem stems from failure to link foreign policy and refugee issues); see also Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States* 47 U. PITT. L. REV. 295, 315 (1985) (stating that a person attempting to leave a Marxist-Leninist government is much more likely to be admitted as a refugee than someone attempting to leave an authoritarian, non-Marxist government).

Salvador and Guatemala demonstrates, military aid is not likely to resolve civil conflict quickly but rather permits it to escalate, increasing refugee outflows.¹⁶⁸ Thus, not only are these refugees unable to find safety in this country, but they must also endure more intense strife in their homelands.¹⁶⁹

The 1980 Refugee Act further entwined the refugee and foreign policy issues by requiring an examination of the political effects refugee resettlement has on national interests and foreign policy considerations.¹⁷⁰ By linking the two issues, the Act obscures the idea of "humanitarian concern".¹⁷¹ While the international nature of refugee issues will inevitably involve foreign policy concerns, the focus must remain on the welfare of the refugee.

C. UNITED STATES NONCOMPLIANCE WITH INTERNATIONAL STANDARDS

The United States has been particularly lax in signing and ratifying international treaties aimed at protecting human rights¹⁷² and meeting standards set by the UNHCR.¹⁷³ The mass refoulement of Haitians rep-

168. See *supra* notes 113 and 144 and accompanying text (discussing United States aid sent to El Salvador and Guatemala).

169. See *supra* notes 113 - 115 and accompanying text (examining escalation of violence in El Salvador as a result of United States aid to the military); see also WALLER, *supra* note 99, at 11 (showing that United States economic and military aid has increased the government's capacity to wage war); KOEHN, *supra* note 9, at 403 (suggesting that the United States create and support policies that deter "mass expulsions," block attainment of weapons from other countries, and promote economic programs aiming at ameliorating the disparities in the distribution of wealth); Sidney Weintraub, *Treating the Causes: Illegal Immigration and United States Foreign Economic Policy in THE UNAVOIDABLE ISSUE*, *supra* note 151, at 192-202 (1983) (examining United States trade policies regarding the role they can play in affecting emigration incentives).

170. See Tahl Tyson, *supra* note 17, at 933 (calling foreign policy an inherent part of the 1980 Refugee Act).

171. Cf. *id.* at 934-35 (recommending procedural changes that would ensure necessary safeguards of humanitarian issues through foreign policy).

172. See Elizabeth Hull, *The Rights of Aliens: National and International Issues*, in *THE UNAVOIDABLE ISSUE*, *supra* note 151, at 237-38 (calling it "lamentable" that the United States will not relinquish any sovereignty by signing binding human rights agreements).

173. See Refugee Policy Group Report, *supra* note 17, at 249 (referring to Senator Kennedy's criticism of the government's handling of Salvadoran asylum seekers); MANZ, *supra* note 124, at 176 (stating that the UNHCR suggested that the Unit-

resents a blatant disregard for a UNHCR policy¹⁷⁴ which allowed for *prima facie* group determinations and a broadened definition of refugee in cases of mass migrations.¹⁷⁵ The Bush Administration could have dealt with the Haitian crisis by applying this policy at the outset of the 1991 crisis.¹⁷⁶

ed States policy toward Salvadorans who reach United States borders may violate the obligations imposed by the 1967 Protocol); *see also* INTERVENTION ON TRIAL, *supra* note 95, at 61 (stating that the Reagan Administration violated obligations under the 1967 Protocol by forcibly repatriating "refugees of civil disorder").

174. U.N. Doc. A/AC 96/601 para 57(2)II,A at 16 (1981). The UNHCR Executive Committee in October, 1981, after Reagan had begun a policy of intercepting and returning Haitians, adopted *inter alia* two measures that called for at least temporary protection of refugees and non-refoulement in cases of mass migration. *Id.* First, the committee held that in such situations, asylum seekers should be admitted to the state in which they initially seek refuge, and if that state is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection. *Id.* Secondly, the committee held that the fundamental principle of non-refoulement must be scrupulously observed. *Id.* In 1978, Amnesty International recommended that the United States should not continue to deport Haitians without full assurance that imprisonment or persecution would not result. Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 482 (S.D. Fla. 1980), *overruled on other grounds* by Jean v. Nelson, 727 F. 2d 957 (11th Cir. 1992).

However, even when the Haitian Government gave such assurances, they were not always carried out. *Id.* *See also* Haitian Refugee Ctr. v. Baker, 949 F.2d 1109, 1112 (11th Cir. 1991) (Hatchett, J., dissenting) *reh'g denied*, 954 F.2d 731 (11th Cir. 1992), *cert. denied*, U.S. , 112 S.Ct. 1245 (1992) (asserting that although the United States promised the international community that it would not refoul refugees at the border, it nevertheless goes into international waters to prevent the refugees from reaching the border, making "a sham of our international treaty obligations . . .").

175. Refugee Policy Group Report, *supra* note 17, at 263. The *prima facie* concept was applied to respond to events in Africa in the 1950s and 1960s, but since then, it has been used in many other areas. *Id.* Absent contradicting evidence, the group determination considers all members of the group refugees. *Id.* at 264.

176. *See* White House Statement on Haitian Migrants, *supra* note 78, at 924 (adopting the interdiction policy on the premise that the number of Haitian migrants created a "dangerous and unmanageable" situation). The refugee crises arose because the asylum application processing facilities were filled to capacity, and the President urged Haitians to remain in Haiti and apply at the Embassy in Port-au-Prince. *Id.* Using UNHCR guidelines, the United States could have avoided this backlog by making a *prima facie* determination that all of these "migrants" were, in fact, refugees. The UNHCR Handbook on Procedure states that:

[w]hile refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations, the need to

D. REFUGEE ISSUES IN FEDERAL COURTS

As past decisions illustrate, courts have been reluctant to expand the traditional interpretation and intent of refugee and immigration legislation.¹⁷⁷ Cases often deal with either INS regulations and procedures¹⁷⁸ or the two tests that have been established to determine eligibility for political asylum: clear probability of persecution,¹⁷⁹ and well-founded fear of persecution.¹⁸⁰

provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to the so called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* . . . as a refugee.

U.N.H.C.R., HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, para. 4, U.N. Doc. HCR/ID/4/ Eng. Rev. 1 (1979) reprinted in Refugee Policy Group Report, *supra* note 17, at 264.

177. See *Political Legitimacy*, *supra* note 14, at 468-71 (concluding that the judicial branch rather than the political branch should make decisions regarding the political conditions of foreign nations).

178. See *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 358-59 (C.D. Cal. 1982), *later proceeding sub nom.* *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (finding that INS officials had coerced a number of Salvadoran applicants into signing voluntary departure agreements without properly notifying them of their right to apply for political asylum); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980) (*overruled on other grounds* by *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984)) (discussing the parameters of legal INS action and granting declaratory and injunctive relief to Haitians who claimed the INS had discriminated against them on the basis of their race); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1497 (C.D. Cal. 1988), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (stating that Salvadorans are susceptible to pressure by INS officials, since they have already suffered persecution from guerrillas, and are aware that the United States provides assistance to the Salvadoran government); *Haitian Refugee Ctr. v. Baker* 953 F.2d 1498, 1502 (S.D. Fla. 1992) (examining the INS procedure for interviewing Haitians upon being intercepted by the Coast Guard, and listing the questions interviewers must ask); *Haitian Refugee Center v. Baker*, 949 F.2d 1109 (11th Cir. 1991), *reh'g denied*, 954 F.2d 731 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1073 (1992) (holding that the 1967 Protocol did not give any rights to Haitians who had not entered United States territory).

179. See *INS v. Stevic*, 467 U.S. 407, 420-30 (1984) (applying the clear probability test as it was in conformity with the intent of the 1980 Refugee Act and the 1967 Protocol requirements).

180. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (holding that only a well-founded fear of persecution is needed to meet asylum requirements thus broad-

In 1981, the District Court for the Southern District of Florida in *Haitian Refugee Center v. Civiletti*,¹⁸¹ undertook an extensive look into the conditions of life in Haiti, the reasons for refugee flight, and the asylum process.¹⁸² The court recognized that the State Department's classifying the Haitians as economic refugees was the result of a social or cultural gap,¹⁸³ and concluded that the State Department Study Team's investigation of the conditions should be granted "little weight."¹⁸⁴

ening the interpretation of both the 1967 Protocol and 8 C.F.R. § 208(a)). The Ninth Circuit has overturned a number of BIA denials of asylum by applying a more liberal standard of political opinion. Mark M. Hager, *In the Wake of Cardoza-Fonseca: Doctrinal Puzzles in Asylum Law*, 1 B.U. PUB. INT. L.J. 119, 134-140 (1991); See *Desir v. Ilchert*, 840 F.2d 723, 727-30 (9th Cir. 1988) (overturning the BIA's denial of asylum where a Haitian had been seized and beaten by the Tontons Macoutes several times after he refused to pay them bribes, and holding that in the Haitian culture such refusal was considered politically subversive activity and thus qualified as persecution based on political opinion); see *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286-87 (9th Cir. 1984) (overruling a BIA decision and granting asylum to a Salvadoran who fled after refusing to join a guerrilla unit was held to be a demonstration of his political opinion, and thus qualified him for asylum under 8 U.S.C. § 1101(A)(42)). But see *Pierre v. Rivkind*, 825 F.2d 1501, 1506 (11th Cir. 1987) (reversing the District Court's finding of persecution where a Haitian had been harassed and threatened by the Tontons Macoutes over the use of the family rule).

181. 503 F. Supp. 442, 475 (S.D. Fla. 1980), *overruled on other grounds by Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984).

182. *Id.* at 475-76. The judge stated that an asylum claim cannot be "examined without an understanding of the conditions in the applicant's homeland." *Id.* On appeal, the government argued that the District Court had erred in entering findings of fact on conditions of life in Haiti due to lack of relevancy, and had overstepped its authority in examining issues that are solely the responsibility of the executive branch. *HRC v. Smith*, 676 F.2d 1023, 1042 (5th Cir. 1982), *aff'd sub nom. HRC v. Meese*, 791 F.2d 1489 (11th Cir. 1986). But see *INS v. Elias-Zacarias*, U.S. , 112 S.Ct. 812, 816 (1992) (tightening the definition of "well-founded fear of persecution" by denying asylum to a Guatemalan civilian whose refusal to give in to guerrilla coercion, causing him to fear for the safety of his family, was found not to constitute a political opinion).

183. *Civiletti*, 503 F. Supp. at 492.

184. *Id.* at 493. The State Department's Study Team believed the Haitian's reasons for fleeing were purely economic because they told the researchers that they wanted to find a job in this country. *Id.* at 492. Research suggests, however, that such a response may have been given in an effort to satisfy what the refugees believed the Team wanted to hear, and the response which they believed would conform to both the cultural ideal of the United States and Haiti. *Id.* In order to ascertain an accurate response, the questions should have been worded so as to compensate for social and cultural influences. *Id.* See also Martin, *supra* note 156, at 243-46 (discuss-

Despite decades of evidence of suppression and terrorism in Haiti, on June 21, 1993, the United States Supreme Court ruled that the policy of intercepting refugees at sea and returning them to Haiti was permissible.¹⁸⁵ The Second Circuit had held that returning the Haitians violated § 243(h)(i) of INS regulations, which states that the United States cannot return aliens to their persecutors even if such action is not taken within its territory.¹⁸⁶ The new ruling further closes the door to refugees and ensures that attempts at illegal entry will increase.

Once refugees arrive illegally in the United States, new problems develop. Cases such as *Plyler v. Doe*,¹⁸⁷ for example, address the is-

ing the outcome of *In re Santos-Gomez* and the effect it should have on other refugees). In *In re Santos-Gomez*, File No. A29 564 781 (Aug. 24, 1990) (unpublished decision), a United States immigration judge held that customary international law prohibited the deportation of a Salvadoran family who had fled civil strife. *Id.* The judge ruled that INS could send the family to another country not suffering from civil conflict and who would be willing to accept the refugees. *Id.* While the case departed from the traditional requirement of showing individual persecution, it did not provide an unconditional safe haven. *Id.*

185. *Sales v. Haitian Centers Council*, 61 U.S.L.W. 4684, 4684 (U.S. June 21, 1993). Justice Blackmun alone dissented, stating that the law was clear that "vulnerable refugees shall not be returned." *Id.* at 4686. This decision reversed the Second Circuit's holding in July 1992 that the Executive Order authorizing the forcible return of Haitians intercepted at sea violated the INA. *McNary v. Haitian Centers Council*, 969 F.2d 1350, 1367-68 (2d Cir. 1992). The District Court had earlier denied an injunction, although it examined conditions in Haiti and acknowledged that thousands of people were in danger. *Haitian Centers Council v. McNary*, 789 F. Supp. 541, 543-45 (E.D.N.Y. 1992). The District Court relied on *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1992), which held that Article 33 of the 1951 Convention and 1967 Protocol are non self-executing, relieving the United States of a duty to withhold the deportation of refugees to their homelands. *Id.*

Harold Koh, a professor at Yale Law School and lead counsel for the Haitians, commented that the United States policy on returning Haitians to their prosecutors is morally reprehensible. Shari Rudavsky, *Court Lets U.S. Return Haitians*, WASH. POST, Aug. 2, 1992, at A24; see also Broder, *supra* note 87, at 3 (recounting President Clinton's former statements in favor of the Second Circuit decision and contrasting this with his current support of former President Bush's arguments against admitting the Haitians).

186. *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1367 (2d Cir. 1992). The Second Circuit further held in March 1993 that the Clinton Administration must provide improved medical care to HIV-infected Haitians being detained at Guantanamo Bay. Deborah Sontag, *Judge Orders Better Care for Haitians with Aids*, N.Y. TIMES, March 27, 1993, at 9. Many of these refugees had permission to enter the United States but were detained after they or their relatives tested positive for HIV. *Id.*

187. 457 U.S. 202 (1982).

sues of education and the availability of other public services for refugees, or undocumented aliens, living in the United States.¹⁸³

While the courts have extended these rights to refugees, many remain largely unprotected. In order to effectively help more refugees once they arrive in the United States, reform must come through legislation rather than judicial rulemaking.

E. REPATRIATION AND RESETTLEMENT

Another way the United States deals with refugees is to return as many refugee seekers as possible to their homeland.¹⁸⁷ While such repatriation is required only where it is certain that repatriated persons will not be endangered, surveys and personal interviews reveal that the United States has returned persons even though harm was likely to occur.¹⁹⁰

188. *Id. Plyler* prohibited Texas from denying undocumented children of school age free public education, thereby extending Equal Protection privileges at least in regards to education. *Id. See Bertrand*, 684 F.2d at 218-19 (holding that aliens in the United States were not protected by the provisions of the 1967 Protocol because Congress did not implement them through legislation); *See also* Manuel Garcia Y. Griego, *The Rights of Undocumented Mexicans in the United States after Plyler v. Doe: A Sketch of Moral and Legal Issues*, 15 J.L. & EDUC. 57, 81-82 (1986) (discussing the future of United States obligations toward undocumented persons and holding that if fairness governs, then the stance should be one in which immigrants are considered independent of their immigration status); Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability"*, 15 J. L. & EDUC. 19, 33 (1986) (examining residency requirements among states and problems posed by their conflicts with federal immigration law); Michael A. Olivas, *"Breaking the Law" On Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 822 (1991) (discussing the lack of access to health care and counseling for children in INS detention camps along the U.S.-Mexican border).

189. Kamen, *supra* note 167, at A8. From late 1989 through 1990, nearly 50,000 documented refugees from Latin America were voluntarily repatriated from refugee camps in the region through United States and UNHCR commissions. Report by the U.S. Coordinator for Refugee Affairs, in 1991 *Hearings, supra* note 163, at 109, 125. The UNHCR follows this policy as well, recently proclaiming in 1992 that it would become involved in the repatriation efforts that have taken place over the past ten years. Kamen, *supra* note 167, at A8. United States and international officials thought that with the collapse of communism, millions of refugees from Afghanistan, Cambodia, and the Horn of Africa would be repatriated. *Id.* However, new refugees, such as the Haitians, have replaced Cold War refugees. *Id.*

190. *See Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 475 (S.D. Fla. 1980) (stating that the treatment persons who are repatriated receive is part of a

Resettlement programs, whereby agencies help refugees settle into communities in the United States or other countries,¹⁹¹ are offered by the United States to a limited number of refugees who apply before they leave their homeland.¹⁹² Those who qualify receive the same rights and advantages political asylees enjoy, as well as training courses and other benefits.¹⁹³

system of oppression in which prisoners are victims of torture and the Tontons Macoutes are the law enforcers). The Duvalierists consider persons who flee Haiti to be opponents, traitors, or spies, and question, imprison or persecute these Haitians upon their return. *Id.* at 478. One of the plaintiffs testified that while some returnees are not arrested immediately, a few days later they vanish. *Id.* at 481. Those Haitians that are not arrested continually live with the threat that the Macoutes will prey on them. *Id.* at 482. See also Father Henry Atkins, Jr., *The Policy of Displacement and the Flight of Refugees in INTERVENTION ON TRIAL*, *supra* note 95, at 24, 25 (stating that in the 1980s the United States deported nearly 800 Salvadorans and Guatemalans per month, and that a number of these refugees were captured at the San Salvador airport, or arrested once they arrived back in their villages, only to be tortured or killed). But see Seper, *supra* note 84 (reporting that FAIR concluded after a five-day study in Haiti that there is little evidence that repatriated Haitians are oppressed on account of their status).

191. 8 U.S.C. §§ 1521-1522 (1992).

192. KOEHN, *supra* note 9, at A8. United States spending on refugee resettlement has continually declined, from \$900 million in 1981 to \$410 million in 1992, and a request for only \$227 million in the 1993 budget. *Id.* However, the need for resettlement has not correspondingly declined. *Id.* Over 1.8 million persons became legal residents in 1991, a nineteen percent increase over 1990, and the largest number in the nation's history. Jerry Seper, *1986 Amnesty Law Cited in Immigration Increase*, WASH. TIMES, June 10, 1992, at A7. This increase was largely due to the 1986 IRCA, which allowed illegal aliens in the United States to apply for temporary resident status and later become permanent residents. *Id.* Volunteer agencies active in resettlement recommended a FY 1992 admissions level of 6,500 for the Latin American region, comprised of 5,000 spaces for Cubans and 1,500 for other refugees. *Comments and Recommendations of the Voluntary Agencies Active in Refugee Resettlement*, reprinted in *1991 Hearings*, *supra* note 163, at 161, 175. They expressed disappointment over the government's failure to adequately address resettlement needs of non-Cubans from Latin America. *Id.* The Bush Administration, by contrast, proposed a FY 1992 ceiling of 3,000 for the region, stating that conditions in those countries had improved over the past year. *Report to the Congress on Proposed Refugee Admissions for FY 1992*, The U.S. Coordinator for Refugee Affairs, reprinted in *1991 Hearings*, *supra* note 163, at 109, 126. The report claimed that admissions for non-Cubans were expected to be approximately 100 in FY 1991, and inconsequential in 1992. *Id.* at 126. See also UNHCR Activities Financed by Voluntary Funds: Report for 1990-91 and Proposed Programs and Budget for 1992, U.N. Doc. A/AC.96/774 (part IV) p. 32-37 (giving the numbers of Latin American refugees repatriated and dollar amounts of aid given for various programs).

193. KOEHN, *supra* note 9, at 237. Volunteer agencies give training courses spe-

Neither of these methods however, address the needs of a substantial number of refugees. In many cases, repatriation is dangerous or infeasible, and most refugees are unable to apply for resettlement status before they are forced to flee.

F. EFFECTS OF CURRENT LEGISLATION

Once denied legal admission to the United States, most refugees do not return home. Rather, they remain in the United States as undocumented persons.¹⁹⁴ This status results in the illegal restriction of the rights of undocumented aliens.¹⁹⁵ Forced to obtain jobs illegally, undocumented aliens endure workplace conditions violative of health and safety codes and minimum wage rates.¹⁹⁶ Furthermore, constant fear of apprehension restricts undocumented refugees in their daily activities.¹⁹⁷

Despite the enforcement of sanctions,¹⁹⁸ employers continue to hire

cifically designed for refugees before they arrive in the United States. *Id.* Additionally, the United States pays their transportation costs. *Id.* Once in the United States, they become eligible not only for economic and medical programs, but also federally sponsored state and local programs that are similarly offered to United States citizens. *Id.* In comparison, political asylees receive more advantages than persons granted the status of Extended Voluntary Departure (EVD), in that they are given work permits, certain economic and medical assistance lasting twelve months, and language and other educational programs. *Id.* See also Report by the U.S. Coordinator for Refugee Affairs, *supra* note 189, at 132 (discussing new eligibility criteria and strategies).

194. CHAVEZ, *supra* note 44, at 156. While it is difficult to track undocumented aliens, the number of persons registering for legal immigrant status under the 1986 IRCA gives an indication of the number: between 1988, the first year illegal aliens were able to register under the program, and 1990, 147,383 Salvadorans, 59,863 Guatemalans, and 47,311 Haitians were given immigrant status. Immigrants Admitted by Country of Birth and Major Category of Admission, FY 1988, 1990, and 1991, INS Statistics Div., 1992.

195. MANZ, *supra* note 124, at 190. For example, undocumented persons are not entitled to Miranda rights when they are apprehended by the INS. Elizabeth Hull, *The Rights of Aliens: National and International Issues*, in UNAVOIDABLE ISSUES, *supra* note 151, at 227.

196. MANZ, *supra* note 124, at 190.

197. CHAVEZ, *supra* note 44, at 157. A refugee in San Diego stated that it was not good to stray from the camps. *Id.* The woman said she felt afraid. *Id.* The INS routinely stops and interrogates people they suspect to be illegal aliens. *Id.* at 161. See *INS v. Delgado*, 466 U.S. 210 (1984) (holding that random interrogations by INS agents of employees at factories are constitutional under the Fourth Amendment).

198. 8 U.S.C. § 1324a(a)(1) (1988), amended by Pub. L. No. 101-649, 104 Stat. 4978, 5053, (1990). See also 1991 Hearings, *supra* note 163, at 220 (stating that IRCA compounded the difficulty of being an undocumented person, and questioning

illegal and undocumented refugees.¹⁹⁹ Such persons usually work for lower wages than American citizens, and accept jobs that Americans refuse. These workers are generally viewed by employers as dependable and hardworking.²⁰⁰ In addition to falling outside the the scope of protection afforded by laws designed to end the exploitation of labor, undocumented refugees cannot participate in many tax-supported programs.²⁰¹ Although recent court decisions, most notably *Plyer v. Doe*,²⁰² have extended access to education, access to health care and housing continues to be limited by federal, state, and local programs.²⁰³

IV. RECOMMENDATIONS

Some scholars²⁰⁴ and legislators believe that the 1990 Immigration Act and its grant of TPS to Salvadorans has solved many of the refugee problems, as it gives Salvadorans already in the United States legal status, albeit temporary. However, the current legislation fails to extend protection to refugees presently in need of assistance, and does not extend safe haven to refugees from future civil conflicts.²⁰⁵ The Act also fails to protect Salvadorans who arrived in this country after Sep-

the fairness of the effects of IRCA falling equally on all aliens despite their reasons for leaving their homeland).

199. See CHAVEZ, *supra* note 44, at 19 (reporting that because the 1986 IRCA required workers to have documentation, a market in forged security cards and immigration cards has developed).

200. *Id.*

201. *Id.*

202. 457 U.S. 202 (1982)

203. CHAVEZ, *supra* note 44, at 19. See Olivas, *supra* note 185, at 821-26 (discussing the living conditions in INS detention camps in southern United States).

204. Martin, *supra* note 156, at 254 (concluding that the 1990 Act is a "long-awaited piece of legislation" addressing safe haven).

205. See 1991 *Hearings*, *supra* note 163, at 103-04 (letter to the President from the Senate Committee on the Judiciary, Oct. 1, 1991) (recommending that the 1,000 unallocated spaces in the 1992 admissions proposal be saved for refugees "at risk" as determined by the UNHCR). The letter recognizes that some refugees must be moved quickly, and that the United States does "not always respond well to individual refugees in need of urgent protection." *Id.* Reserving room for such refugees would permit this country to provide more adequate assistance. *Id.* However, the actual number of Haitians intercepted between October and June is estimated at 34,000. *White House Statement on Haitian Immigrants*, *supra* note 78, at 924. In the face of such numbers, an allocation of 1,000 does not go far. State representatives of Central America have broadened the definition of refugee through the Declaration of Cartagena on Refugees, Nov. 22, 1984, Inter-Amer. C.H.R. O.A.S. Doc. OEA/ser. GCP/CAJP - 563/85 (1985).

tember 19, 1990, as well as those who were deported during the 1980s because they failed to meet refugee criteria.

As TPS has never been awarded to Guatemalans, they receive no benefit from this legislation. Further, the Act fails to protect Haitians currently attempting to obtain refugee status in the United States, since they must be in the country when TPS is granted. If the Attorney General decides to award TPS to Haitian nationals, such status will only benefit those who manage to enter the United States surreptitiously. With the mass interception of Haitians by the Coast Guard, the number of refugees receiving TPS will be lower than that of the Salvadorans who were not subject to an interdiction program.

As recent events illustrate, neither the executive,²⁰⁶ the legislative,²⁰⁷ nor the judiciary branches have taken effective steps to aid these new refugees. In order to achieve long-term, effective protective measures, the United States should broaden the definition of refugee to include persons fleeing from mass terror. The United States must, however, retain some control over the number of refugees and immigrants it protects, lest it drains its capacity and resources.²⁰⁸ Indeed, a device to keep the numbers as low as possible while still fulfilling humanitarian goals would have to accompany such legislation.²⁰⁹ However, as point-

206. See *supra* notes 74 and 83 and accompanying text (discussing the interdiction programs of 1981 and 1992).

207. See H.R. 5360, 102d Cong., 2d Sess. (1992) (reaffirming United States obligations under the 1967 Protocol and 1951 Convention prohibiting the return of refugees outside United States boundaries or "within the territorial waters of another country" without first determining refugee status); Compare S. 2246, 102d Cong., 2d Sess. (1992) (proposing that Haitians under United States control not be returned involuntarily until 180 days after enactment of the bill or 5 days after completion of a study on the treatment of Haitians who were repatriated, and urging the President to work with the UNHCR and OAS to convene a conference to resolve the crisis) with H.R. 3844, 102d Cong., 2d Sess. (1992) (mirroring S. 2246 and adding "Sense of Congress" statements urging the President to act quickly and appropriately).

208. See Hull, *supra* note 195, at 215, 238 (concluding that countries have the right to close their borders for any reason, whether compelling or not, and referring to John S. Mills' tenet that an overpopulated country "will upset the ideal"); see also Roger Conner, *Updating the Golden Rule for the Global Village, in AMERICAN REFUGEE POLICY*, *supra* note 9, at 47 (stating that allowing the United States to exceed its capacity now will force a "lower quality of life" on future generations, but that, problematically, the capacity of the United States has not yet been determined).

209. See 8 U.S.C. § 1157(a) (1988) (setting a ceiling, adjusted annually, on refugee admissions); see also 8 U.S.C. § 1157(b) (1988) (allowing the President to admit, after determining through "appropriate consultation" that an "unforeseen emergency" exists, or admission is justified by humanitarian concerns). Such persons may

ed out in Section III (F) of this Comment, a large number of refugees remain in the United States anyway, demonstrating that the issue of ceilings and quotas is merely academic. Acknowledging the presence of undocumented persons and allowing them legal status would enable them to participate and contribute to society, thereby improving access to health, safety, and educational benefits.

Real reform may require an overall change in priority to reconcile the reality of United States resource limitations with an obligation to offer safe haven to those in life-threatening situations. Moreover, it may be possible now to depart from policies giving priority to persons fleeing Communist governments, and instead admit Guatemalans, Haitians, and Salvadorans based on "special humanitarian concern."

The definition of political refugee should be broadened to include individuals and groups fleeing dangerous conditions who cannot meet the criteria for persecution under its current interpretation.²¹⁰ This would not only appropriately address problems facing "economic" refugees and allow them safe haven, but would align U.S. standards with international law.²¹¹ As this Comment demonstrates, the label "economic" refugee is inaccurate in many instances. While refugees are usually unable to prove individual persecution based on their activities, governments have been or currently are engaged in activities that result in mass persecutions of civilians. These groups need to be protected just as much as the individual who can prove political persecution.

CONCLUSION

The United States must redefine the term "refugee," or broaden the current interpretation of "political" refugee to include those fleeing countries plagued by mass terror. By failing to extend protection to "economic" refugees, Congress leaves them at great risk and fails to meet

by statute stay for 12 months. 8 U.S.C. § 1157(b)(3) (1988).

210. KOEHN, *supra* note 9, at 410. See also WEINSTEIN & SEGAL, *supra* note 46, at 126 (arguing that the definition of refugee must be reached by including facts of the refugee's political life as well as the realization that the refugee faces persecution by authorities regardless of whether the refugee has opposed the regime); Refugee Policy Group Report, *supra* note 17, (stating that reasons for fleeing a country or not wanting to return are more complex than those provided for in the statutory definition, and that while many persons might not have a "well-founded fear of persecution", they do have a "well-founded fear of injury, deprivation of human rights, and even death").

211. KOEHN, *supra* note 9, at 410.

international standards. Until Congress recognizes that economic migrants are in fact refugees from economic crises incurred by political events, and thus are nearly indistinguishable from "political" refugees, it cannot begin to create protective, long-term policies that meet international standards and address the actual problems.