DISPLACED PERSONS: "THE NEW REFUGEES"

I. INTRODUCTION

The Refugee Act of 19801 established a comprehensive statutory scheme to deal with the refugee problem in the United States, replacing a patchwork of legislation promulgated in response to each new refugee crisis.2 Although laudatory in many respects,3 the Refugee Act of 1980 has proven inadequate in the face of mass influxes of refugees seeking asylum.4 Recently, legislation was introduced in Congress which would establish streamlined statutory procedures tailored to accommodate large groups of asylum-seekers.5 Unfortunately, both the Refugee Act of 1980 and the recent

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3 See infra text accompanying notes 102-108.
4 Alan C. Nelson, Commissioner of the Immigration and Naturalization Service (INS), has observed:
   There is a strong consensus of opinion in Congress and in the Administration that
   the present asylum system, which was instituted by the Refugee Act of 1980, has
   been shown to be seriously defective. The defects that have come to light since the
   enactment of the Refugee Act are not the result of any misdrafting, or misdirection;
   they are simply the result of a quantum leap in the number of persons who
   have applied for asylum. At the time of this hearing, there are approximately
   73,000 asylum applications pending before the Immigration and Naturalization
   Service exclusive of those received from Cuban and Haitian boat arrivals. New
   applications are filed at the rate of 2,500 per month.
   Immigration Reform and Control Act of 1982: Joint Hearings Before the Subcomm. on
   Immigration, Refugees, and International Law of the House Comm. on the Judiciary and
   the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary,
   97th Cong., 2d Sess. 395 (1982); see also Asylum Adjudication: Hearings Before the Sub-
   comm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th
   Cong., 1st Sess. 7 (1981)(prepared statement of Doris Meissner, Acting Commissioner, Im-
   migration and Naturalization Service).
5 The most recent legislative proposal introduced in Congress was the Immigration Re-
   1st Sess. (1983)[hereinafter cited as 1983 Reform Act]. The Senate passed an amended ver-
   sion of the 1983 Reform Act on May 18, 1983, by a vote of 77 to 18 with 5 abstentions. 129
   CONG. REc. S6969-70 (daily ed. May 18, 1983). For the text of the amended bill, see id. at
   S6970-86. In the House, the Judiciary, Agriculture, and Education and Labor Committees
   (1983). No action was taken on the House version of the bill during the first session of the
   98th Congress. The Speaker of the House, Thomas P. O'Neill, Jr., explained that he did not
legislative proposals ignore the plight of persons in the United States who are seeking refuge from civil strife within their homeland. Various terms have been used to describe these individuals; in this Paper, they will be called displaced persons. Unlike conventional refugees who are fleeing from an individualized threat of
persecution, displaced persons are escaping widespread conditions of civil violence.  

This distinction between targeted persecution and indiscriminate violence places displaced persons in a dubious position under United States law because they are not included within the statutory definition of refugee.  

In the absence of explicit statutory

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7 For a more detailed discussion of this distinction, see infra notes 50-53 and accompanying text.


(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. Excluded from this definition are persons "who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Id.

Illustrating the limitations of this definition when applied in the context of recent refugee crises, Senator Alan K. Simpson stated:

The statute says "persecution on account of race, religion, nationality, membership in a particular social group or political opinion." That is all it says. So a country can be exceedingly dangerous and perilous for human beings and in no case would that qualify the people leaving that country as refugees under U.S. law. I think that it is very critical to keep this in mind, and each time I hear the phrase "persecution" I am going to refer back to the statute, and hope others will, and read exactly what it says. So it is going to be an interesting few months.

United States as a Country of Mass First Asylum: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 33 (1981) [hereinafter cited as Hearings on Mass Asylum]. In another vivid comment on the language of the definition, Senator Simpson stated that "it really does not say that you can include a person in the definition of refugee who is just scared to death of his country or the turmoil in his country." Id. at 116.

These concerns over the restrictive language of the refugee definition are not abstract; rather, they stem from application of this definition in practice by the State Department. Mr. Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, stated:

There is an insurgency in [El Salvador] which has resulted in civilian deaths . . . as well as deaths of the combatants. It has made people homeless, also. But it is our business to determine whether the individual applicant Salvadoran who is here in the United States illegally and applies for asylum is likely to be subject to persecution or not. And on a case-by-case basis the judgment has been largely, very largely that they are not. . . .

Undoubtedly it is true that El Salvador is for many El Salvadorans a dangerous country to live in. But their situation is not different from that of other El Salvadorans.
guidance, the decision of whether to grant refuge to displaced persons may be reached on the basis of a policy which fails to reflect the humanitarian underpinnings of refugee law. Denial of asylum or temporary refuge may lead to suggestions that the United States is ignoring its international treaty obligations toward refugees.

This Paper will focus upon the position of persons within the United States seeking refuge from civil strife within their country of origin. To place the problem in the appropriate context, the obligations imposed upon the United States by international refugee treaties will be discussed. The evolution of refugee law outside the framework of these instruments will then be examined, particularly insofar as these developments evidence a trend toward extending protection and assistance to displaced persons. For this purpose, the activities of the major international refugee organiza-

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* See Letter from Alvin P. Drieschler, Acting Assistant Secretary for Congressional Relations, State Department, to Senator Edward M. Kennedy (Apr. 17, 1981), reprinted in 128 CONG. REC. S831 (daily ed. Feb. 11, 1982). The State Department refused to grant asylum or voluntary departure status to Salvadorans in lieu of forcible repatriation. The primary reason advanced was that “[w]hile civil strife and violence in El Salvador continue at disturbing levels, conditions there do not, at present, warrant the granting of blanket voluntary departure to Salvadorans in the United States.” Id. This policy has been characterized as “a systematic practice designed to forcibly [sic] return Salvadorans irrespective of the merits of their claims.” Interoffice Memorandum from K. Kalumiya, Legal Officer, to M.P. Mousalli, Director of Protection, UNHCR, Geneva (Oct. 16, 1981), reprinted in 128 CONG. REC. S827 (daily ed. Feb. 11, 1982)[hereinafter cited as UNHCR Memorandum]. See generally Hanson, Behind the Paper Curtain: Asylum Policy Versus Asylum Practice, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978).

10 Asylum is the “protection accorded by a State in its territory or at some other place subject to certain of its organs to an individual who comes to seek it.” 43(II) ANNUAIRE DE DROIT INTERNATIONAL 376 (1950)(translated in A. GRAHL-MADSEN, TERRITORIAL ASYLUM 1 (1980)). Asylum given to persons within a state’s territory is generally referred to as “territorial asylum.” Asylum given in other places, such as on the premises of an embassy, is commonly referred to as “diplomatic asylum.” Id.

11 Temporary refuge is the temporary protection accorded an individual pending arrangements for a durable solution. See Addendum to the Report of the UNHCR, 36 U.N. GAOR Supp. (No. 12A) at 18, U.N. Doc. A/36/12/Add.1 (1981); see also infra notes 76-82 and accompanying text.

12 UNHCR Memorandum, supra note 9, at S831. After an extensive review of the situation of Salvadorans within the United States, representatives of the Office of the United Nations High Commissioner for Refugees (UNHCR) recommended that:

UNHCR continue to express its concern to the U.S. Government that its apparent failure to grant asylum to any significant number of Salvadorans, coupled with continuing large-scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon its adherence to the [1967 Protocol relating to the Status of Refugees].

Id.
tion, the Office of the United Nations High Commissioner for Refugees (UNHCR), and a regional organization, the Organization of African Unity (OAU), will be canvassed in an effort to identify emerging norms in the treatment of displaced persons. The protection accorded displaced persons by United States refugee law will be reviewed against this backdrop; the inquiry will center upon the alternative forms of protection available to displaced persons within the United States. The problem of displaced persons will also be considered in the context of the policies which underlie United States refugee law. Finally, several recommendations for reform of the current law are offered.

II. INTERNATIONAL REFUGEE LAW

A. International Treaties

The 1951 Convention relating to the Status of Refugees (1951 Convention)\(^1\) is the primary source of international obligations toward refugees.\(^4\) The scope of the 1951 Convention is limited: only persons who became refugees due to events occurring before January 1, 1951 are explicitly covered by its provisions.\(^5\) The harsh implications of this dateline became apparent as new refugee crises emerged in Africa during the 1960's which could not be considered as arising from events occurring before 1951, given even a liberal interpretation of the dateline.\(^6\) The dateline also created a dis-

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\(^1\) Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as 1951 Convention].


\(^5\) 1951 Convention, *supra* note 13, art. 1A(2). This dateline was included in the 1951 Convention because the drafters felt that it would be difficult for states to undertake binding commitments toward future refugees. 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 170-71 (1966).

The 1951 Convention also contains an optional geographical limitation: the term “events occurring before 1 January 1951” could mean either (a) “events occurring in Europe before 1 January 1951”; or (b) “events occurring in Europe or elsewhere before 1 January 1951.” 1951 Convention, *supra* note 13, art. 1B(1)(a)-(b).

\(^6\) The drafters were aware that problems might arise as a result of the limitations imposed on the coverage of the 1951 Convention. In a recommendation adopted in the Final Act, the drafters expressed the hope that the 1951 Convention “will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.” Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,
crepancy between the coverage of the 1951 Convention and the personal jurisdiction of the UNHCR, the primary international organ charged with the protection of refugees.\textsuperscript{17} The need to eliminate this jurisdictional gap and to extend the temporal scope of the 1951 Convention led to the adoption of the 1967 Protocol relating to the Status of Refugees (1967 Protocol)\textsuperscript{18} which lifts the dateline and incorporates by reference the remaining provisions of the 1951 Convention.\textsuperscript{19} Although not a party to the 1951 Convention, the United States undertook to apply its substantive provisions by adhering to the 1967 Protocol in 1968.\textsuperscript{20}

The 1951 Convention and the 1967 Protocol seek to ensure the basic rights of refugees within the country of refuge, including matters involving religion,\textsuperscript{21} personal status,\textsuperscript{22} property,\textsuperscript{23} freedom of association,\textsuperscript{24} access to the courts,\textsuperscript{25} employment,\textsuperscript{26} housing,\textsuperscript{27} education,\textsuperscript{28} welfare,\textsuperscript{29} and freedom of movement.\textsuperscript{30} States are urged to admit refugees in a spirit of international cooperation.\textsuperscript{31} How-


\textsuperscript{17} The personal jurisdiction of the UNHCR is not restricted by a dateline. See infra note 58.


\textsuperscript{19} 1967 Protocol, supra note 18, art. I, paras. 1-2. The optional geographical limitation was retained in the 1967 Protocol only for those states which had invoked the restriction when signing the 1951 Convention. \textit{Id.} para. 3.


\textsuperscript{21} 1951 Convention, supra note 13, art. 4.

\textsuperscript{22} \textit{Id.} art. 12.

\textsuperscript{23} \textit{Id.} arts. 13-14.

\textsuperscript{24} \textit{Id.} art. 15.

\textsuperscript{25} \textit{Id.} art. 16.

\textsuperscript{26} \textit{Id.} arts. 17-19.

\textsuperscript{27} \textit{Id.} art. 21.

\textsuperscript{28} \textit{Id.} art. 22.

\textsuperscript{29} \textit{Id.} arts. 23-24.

\textsuperscript{30} \textit{Id.} art. 26.

\textsuperscript{31} See \textit{id.} preamble ("the grant of asylum may place unduly heavy burdens on certain countries, and . . . a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation."); Final Act, supra note 16, Recommendation D, 189 U.N.T.S. at 146, 148 (recommending "that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement").
ever, neither instrument obliges states to admit refugees, thus affirming the traditional notion that the right to asylum inures in favor of the state rather than the individual.\textsuperscript{32} Recent attempts to confer a right to asylum on the individual have weakened, but not displaced, this traditional view.\textsuperscript{38} Although the 1951 Convention and the 1967 Protocol do not create a right to asylum, they impose some limits on the discretion of a state in denying its sanctuary to aliens who are already within the state's borders.\textsuperscript{34} Article 31 prohibits the imposition of penalties for illegal entry on refugees who are coming directly from a country where their life or freedom was threatened, provided they report to the authorities without delay and show good cause for their illegal entry.\textsuperscript{35} Moreover, refugees unlawfully within the country of refuge must be given a reasonable time and all the necessary facilities to obtain admission to another country in the event that their status is not regularized in the country of refuge.\textsuperscript{36} Article 32 prohibits the expulsion of refugees lawfully within a state's territory except for reasons of national security or to preserve public order.\textsuperscript{37} The refugee must be accorded due process of law in any expulsion proceeding, and the refugee must be permitted a hearing and appeal against an order of expulsion.\textsuperscript{38} The principle of non-refoulement, enshrined in article 33,

\begin{itemize}
  \item \textsuperscript{32} A. Grahl-Madsen, \textit{supra} note 10, at 42-43; Morgenstern, \textit{The Right of Asylum}, 26 Brit. Y.B. Int'l L. 327, 335 (1949).
  \item \textsuperscript{33} The original draft of article 14 of the Universal Declaration of Human Rights reads as follows: "Everyone has the right to seek and be granted in other countries asylum from persecution." U.N. Doc. A/C.3/285/Rev.1 (1948). The words "be granted" were replaced by the words "to enjoy" in the final text. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 74 (1948). Thus, the final text of article 14 does not impose an obligation on states to grant asylum; however, it has been noted that "the express recognition of asylum as a human right is important enough." 2 A. Grahl-Madsen, \textit{The Status of Refugees in International Law} 101-02 (1972).
  \item The 1967 United Nations Declaration on Territorial Asylum proclaims in article 3(1) that "no person . . . shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967). This provision does not create a positive duty to grant asylum since the asylum-seeker may be sent to a third country. Weis, \textit{The United Nations Declaration on Territorial Asylum}, 7 Can. Y.B. Int'l L. 92, 142 (1969). Neither of these instruments is of a binding character and, therefore, "the right to gain admission to a country still belongs to the moral sphere." 2 A. Grahl-Madsen, \textit{supra}, at 108; see also M. Garcia-Mora, \textit{International Law and Asylum as a Human Right} 120-44 (1956).
  \item See generally 2 A. Grahl-Madsen, \textit{supra} note 33, at 435-43.
  \item 1951 Convention, \textit{supra} note 13, art. 31(1).
  \item Id. art. 31(2).
  \item Id. art. 32(1).
  \item Id. art. 32(2). The hearing and appeal against an order of expulsion may be denied only
prohibits the expulsion or return (refoulement) of a refugee to a country where his life or freedom would be threatened due to race, religion, social group, or political opinion.\textsuperscript{39} This article applies only to those already within the state’s territory,\textsuperscript{40} and it does not proscribe expulsion to a country where there is no risk of persecution.\textsuperscript{41} The non-refoulement provision protects all refugees, whether lawfully or unlawfully within the country of refuge,\textsuperscript{42} but it does not apply to those who have been convicted of a serious crime or who present a danger to the country’s security.\textsuperscript{43} The applicability of the non-refoulement provision is restricted to persons who are “refugees” under the 1951 Convention and the 1967 Protocol.\textsuperscript{44} These instruments define “refugee” as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former, habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{45}

This definition was formulated by Western countries at the height of the Cold War, a time when refugees came almost exclusively from East European states.\textsuperscript{46} West European states, the countries

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for compelling reasons of national security. The refugee must also be given “a reasonable period within which to seek legal admission into another country.” \textit{Id.} art. 32(3).

\textsuperscript{39} \textit{Id.} art. 33(1). States parties to the 1951 Convention may not make any reservation to this article. \textit{Id.} art. 42.

\textsuperscript{40} 2 A. GRAHL-MADSEN, \textit{supra} note 33, at 94; see also Weis, \textit{Legal Aspects of 1951 Convention}, note 14, at 482. It has been argued that the principle of non-refoulement forbids rejection at the frontier, particularly in light of recent state practice. At present, this interpretation remains persuasive and does not appear to displace the narrower reading of article 33. Cf. Goodwin-Gill, \textit{supra} note 6, at 302-04; S. SINHA, \textit{ASYLUM AND INTERNATIONAL LAW} 111 (1971); 2 A. GRAHL-MADSEN, \textit{supra} note 33, at 94-98.

\textsuperscript{41} Cf. 1951 Convention, \textit{supra} note 13, arts. 31(2), 32(3) (states must allow refugees a reasonable period and all necessary facilities to obtain admission to another country).

\textsuperscript{42} Even if found to be subject to expulsion under article 32, article 33 prohibits expulsion to a place where the refugee will be subject to persecution. See Goodwin-Gill, \textit{supra} note 6, at 300.

\textsuperscript{43} 1951 Convention, \textit{supra} note 13, art. 33(2).

\textsuperscript{44} 2 A. GRAHL-MADSEN, \textit{supra} note 33, at 94.

\textsuperscript{45} 1951 Convention, \textit{supra} note 13, art. 1A(2). For a comprehensive discussion of the various elements of this definition, see 1 A. GRAHL-MADSEN, \textit{supra} note 15, at 142-304.

\textsuperscript{46} Melander, \textit{The Protection of Refugees}, 18 \textit{SCANDINAVIAN STUD. L.} 151, 160 (1974). East European countries were engaged in a boycott of the United Nations at the time this provision was drafted. \textit{Id.}
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of asylum, had no difficulty in classifying these persons as refugees in light of the poor East-West relations prevailing at the time.\(^\text{47}\)

Changes in the nature and causes of refugee movements since the post-war era have revealed the limitations of this definition of refugee.\(^\text{48}\) The definition requires an individualized screening of each applicant for refugee status, erecting a procedural barrier which impedes efforts to extend protection and assistance to large groups of refugees.\(^\text{49}\) The conventional definition of refugee also neglects the dilemma of persons displaced by civil war and natural disasters.\(^\text{50}\) These groups are in a situation analogous to that of persons covered by the 1951 Convention and the 1967 Protocol, yet they cannot ascribe their flight to a fear of persecution "for reasons of race, nationality, membership of a particular social group or political opinion." This limitation on the scope of the conventional definition of refugee is perhaps best explained by the notion that "the bombs will cease falling, the floods will recede, but persecution is implacable."\(^\text{51}\) Thus, displaced persons are denied the pro-

\(^{47}\) Id. at 161.


\(^{49}\) See Sadruddin Aga Khan, Legal Problems Relating to Refugees and Displaced Persons, 149 RECUEIL DES COURS 287, 339-40 (1976); see also infra note 59 (briefly reviewing the elements involved in the screening process).

\(^{50}\) For a review of the treatment accorded victims of natural calamities under United States refugee law, see Parker, Victims of Natural Disasters in U.S. Refugee Law and Policy, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, MICH. Y.B. INT'L LEGAL STUD. 137 (1982).

\(^{51}\) Martin, The Refugee Act of 1980: Its Past and Future, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, MICH. Y.B. INT'L LEGAL STUD. 91, 101 (1982). This idea is consistent with the legal principle upon which the conventional definition of refugee is based. According to this principle, when the normal bond of trust, loyalty, protection, and assistance between an individual and his state has been ruptured by a political controversy, the individual is denied the diplomatic and consular protection which a state normally accords its nationals abroad. I A. GRAHL-MADSEN, supra note 15, at 74-79; Sadruddin Aga Khan, supra note 49, at 329. Thus, the individual needs international protection when he is outside his country of origin. Id. The grounds of persecution enumerated in the conventional definition of refugee are criteria to be used in determining whether the individual stands in need of refugee status and its concomitant protection due to a break in the normal relationship between the individual and his state. In the case of displaced persons, this relationship has not been broken because a political controversy does not exist. Rather, the displaced person is simply temporarily separated from his place of origin by conditions of violence. Although he may temporarily be deprived of the protection normally accorded to him by his state, there is no permanent rupture of the relationship between the displaced person and his state and, thus, there is no need for international protection. It has been observed that:

[s]uch reasoning . . . may be appropriate for the purpose of determining whether an individual should receive an international travel document and should be eligi-
tection of the 1951 Convention and the 1967 Protocol because they are only temporarily uprooted and, when the conflict ceases, will be more likely to return to their place of origin to rebuild their lives.\textsuperscript{52} Added to the logical appeal of this approach is the practical advantage that it offers to states which seek a means of limiting the influx of displaced persons seeking resettlement opportunities.\textsuperscript{53} However, this limited conception of the term "refugee" denies any protection or assistance to displaced persons, even while the bombs are still falling. Inconsistent with the humanitarian underpinnings of refugee law, this result has prompted efforts to create a legal framework designed to overcome the shortcomings of the 1951 Convention and the 1967 Protocol and to allow a more flexible response to modern refugee crises.

B. Evolution of International Refugee Law

1. United Nations High Commissioner for Refugees

The Office of the United Nations High Commissioner for Refugees (UNHCR), established in 1950,\textsuperscript{54} is the primary international organ entrusted with the protection of refugees.\textsuperscript{55} The UNHCR is responsible for providing international protection for refugees and seeking permanent solutions to their problems by means of voluntary repatriation or assimilation within new national communities.\textsuperscript{56} The work of the UNHCR is declared to be of a humanitarian
and entirely non-political character. Under the Statute of the UNHCR (UNHCR Statute), the persons entitled to assistance from the UNHCR are essentially the same as those covered by the 1951 Convention and the 1967 Protocol. Strictly construed, the UNHCR Statute's definition of refugee calls for an individualized determination of eligibility for refugee status based upon an evaluation of the subjective and objective elements necessary to establish a well-founded fear of persecution.

During the past thirty years, the jurisdiction of the UNHCR has been extended in piecemeal fashion beyond the confines of the UNHCR Statute to embrace new categories of refugees. The first home country. Report of the UNHCR, 36 U.N. GAOR Supp. (No. 12) at 12, U.N. Doc. A/36/12 (1981). Assimilation refers to the absorption of refugees by the country of first asylum (local integration) or by another country (resettlement). Sadruddin Aga Khan, supra note 49, at 336.

67 UNHCR Statute, supra note 56, para. 2. In practice, the UNHCR has been obliged to maneuver in the political arena to accomplish its mission; however, emphasis upon the non-political nature of its work insulates the UNHCR from political controversy and explains the unwillingness of the UNHCR to assess blame for refugee flows. See Martin, Large-Scale Migrations of Asylum Seekers, 76 Am. J. Int'l L. 598, 598-99 (1982).

68 Compare UNHCR Statute, supra note 56, para. 6 with 1951 Convention, supra note 13, art. 1 and 1967 Protocol, supra note 18, art. 1, paras. 2-3. The UNHCR Statute establishes two categories of refugees within the competence of the UNHCR. The first category is composed of persons considered to be refugees under previous agreements concluded under the League of Nations or the Constitution of the International Refugee Organization. UNHCR Statute, supra note 56, para. 6A(i). The second category is composed of persons who, as a result of events occurring before January 1, 1951, are outside their country of origin and are unable or unwilling to avail themselves of its protection owing to a well-founded fear of persecution for reasons of race, religion, nationality or political opinion. Id. para. 6A(ii). The UNHCR Statute proceeds to eliminate the dateline with respect to this second category of refugees, creating a definition which is broader than that of the 1951 Convention. Id. para. 6B. For a detailed comparison of the definition set forth in the UNHCR Statute with that contained in the 1951 Convention, see 1 A. Grahl-Madsen, supra note 15, at 103-08, 305-09 (1966).

69 The subjective element requires that the fear be well-founded in the sense that it is sincere and reasonable rather than feigned or imaginary. Melander, supra note 46, at 158. From a logistical standpoint, the need to establish a well-founded fear of persecution on an individualized, subjective basis restricts the UNHCR's ability to aid large groups of refugees. Id. at 161. This is especially the case in developing countries where the lack of administrative machinery renders impracticable a procedure for determining the individual eligibility of large groups of refugees. Sadruddin Aga Khan, supra note 49, at 340; see also infra note 86.

The objective element requires a detached evaluation of the situation in the applicant's home country to establish that there is a plausible danger of persecution. Melander, supra note 46, at 158. See generally 1 A. Grahl-Madsen, supra note 15, at 173-88. The objective element hinders the UNHCR's activities since the evaluation of political conditions in the country of origin may lead to tension between that country and the UNHCR. Melander, supra note 46, at 159.

80 The United Nations General Assembly (General Assembly) and the Economic and So-
step in this direction was the gradual development of the concept of the UNHCR's "good offices," which allowed the UNHCR to assist refugees who were not clearly within the purview of the UNHCR Statute. Initially, the UNHCR was only authorized to lend its "good offices" to designated groups of refugees for the limited purpose of transmitting financial contributions. Subsequent resolutions of the United Nations General Assembly (General Assembly) broadened the notion of the UNHCR's "good offices" by authorizing a wider range of activities on behalf of any group of refugees not within the UNHCR's statutory jurisdiction.

In conventional parlance, the term "good offices" refers to a mode of effecting the pacific settlement of a dispute. A third party offers its "good offices" when it tries to induce the disputing parties to decide the quarrel for themselves; the third-party intermediary's offer of its good offices is not to be regarded as an unfriendly act. The UNHCR developed a "good offices" procedure which incorporates the flexible and nonpartisan attributes of the traditional device. The "good offices" procedure has enabled the UNHCR to depart from the strict terms of the UNHCR Statute in several situations: 1) where groups not clearly within the definition of refugee were in dire need of material assistance; 2) where it was impossible or impolitic to categorize a needy group as refugees because it implied the censure of a powerful government; and 3) where international action of a kind not explicitly authorized to the High Commissioner by his Statute was needed.

Collective determination of eligibility for refugee status was first employed during the 1956 Hungarian crisis when 20,000 Hungarians fled in the wake of Soviet intervention. In an emergency session, the General Assembly adopted a resolution requesting the Secretary-General to call upon the UNHCR "to consult with other appropriate international agencies and interested Governments with a view to making speedy and effective arrangements for emergency assistance to refugees from Hungary." The assistance, which was extended to nearly 180,000 Algerians fleeing the war of liberation in their homeland, was also condoned by the General Assembly, although there was no explicit reference to the UNHCR's "good offices." In 1958, the General Assembly authorized the UNHCR "in respect of refugees who do not come within the competence of the United Nations, to use his offices in the transmission of contributions designed to provide assistance to these refugees."
By 1961, the "good offices" concept was firmly established. It represented a departure from the individualistic concept of refugee embodied in the UNHCR Statute and the 1951 Convention, supplying a flexible legal framework able to accommodate new categories of refugees. Apart from broadening the operative definition of refugee, the "good offices" device allowed the UNHCR to make a group determination of eligibility for aid in cases where the large number of refugees rendered impracticable the establishment of a well-founded fear of persecution on an individual basis as required by the UNHCR Statute. During the 1960's, this collective approach was used extensively in Africa since it enabled the UNHCR to provide timely assistance to large groups of refugees without having to make an assessment of the political conditions prevailing in the country of origin. In 1965, the "good offices" function was integrated into the regular activities of the UNHCR, establishing a unified responsibility for refugees covered by the UNHCR's good offices and those covered under the terms of the UNHCR Statute. The position of African refugees under the aegis of the

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competence of the United Nations".)

In 1961, the General Assembly noted with satisfaction "the efforts made by the High Commissioner in his various fields of activity for groups of refugees for whom he lends his good offices" and requested the UNHCR "to pursue his activities on behalf of the refugees within his mandate or those for whom he extends his good offices." G.A. Res. 1673, 16 U.N. GAOR Supp. (No. 17) at 28, U.N. Doc. A/5100 (1961). This resolution brought the "good offices" concept within the scope of the UNHCR's normal activities. Schnyder, supra note 61, at 435. Also, the resolution represents a departure from earlier resolutions since it does not confine the use of good offices to the transmission of contributions.

64 Melander, supra note 46, at 166.
65 Sadruddin Aga Khan, supra note 49, at 341; Schnyder, supra note 61, at 443.
66 Schnyder, supra note 61, at 443.
67 Although calling for an evaluation of the refugee situation as a whole, the "good offices" concept obviated the need to investigate the cause of flight on a case-by-case basis. See Melander, supra note 46, at 167-68. Thus, the "good offices" procedure enabled the UNHCR to avoid passing judgment on the political conditions in the country of origin. Schnyder, supra note 61, at 440-41.
UNHCR's good offices was enhanced by the adoption of the OAU Refugee Convention (OAU Convention)\(^9\) which included good office refugees within the definition of refugee.\(^7\)

Over the past decade, the General Assembly has continued to expand the authority of the UNHCR with respect to large groups of persons in situations analogous to that of refugees.\(^7\) Numerous resolutions have authorized the UNHCR to provide assistance to displaced persons.\(^2\) In these resolutions, the term “displaced persons” has been used to cover both persons displaced within their own country and persons forced to cross national borders.\(^7\) In the

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\(^7\) For the text of this definition, see infra note 84.

\(^2\) See generally Sadruddin Aga Khan, \textit{supra} note 49, at 342-43.


case of the former group, these resolutions mark an expansion of the UNHCR's competence while, in the case of the latter group, these resolutions reaffirm the authority of the UNHCR already recognized under the "good offices" concept. The General Assembly has recently endorsed the recommendations of the 1979 Arusha Conference on the Situation of Refugees in Africa, with the result that, in Africa, the competence of the UNHCR now formally extends to persons falling within the broader definition of the OAU Convention, that is, to those in refugee-like situations who have been displaced outside their country of origin.

Recently, the UNHCR has devoted increasing attention to the formulation of principles which respond to the problems posed by the mass movement of asylum-seekers. In October 1981, the Executive Committee of the High Commissioner's Programme (Executive Committee) adopted a series of conclusions concerning the protection of asylum-seekers in situations of large-scale influx.

also supra note 6.


76 At its 31st session in 1980, the Executive Committee of the High Commissioner's Programme (Executive Committee) "[d]ecided to request the High Commissioner to convene as soon as possible a representative group of experts to examine temporary refuge in all its aspects within the framework of the problems raised by large-scale influx and to provide the group with all possible solutions." Temporary Refuge, Conclusion 4, 31 Executive Committee, 33 U.N. GAOR Supp. (No. 12A) at 3, U.N. Doc. A/35/12/Add.1 (1980). The Executive Committee "[r]ecognized the need to define the nature, function and implications of the grant of temporary refuge," id. at 17, para. h, and "[c]onsidered that the practice of temporary refuge had not been sufficiently examined and should be further studied, particularly in regard to (i) procedures for the admission of refugees, (ii) their status pending a durable solution, (iii) the implications of temporary refuge for international solidarity, including burden sharing." Id. at 17, para. g.

At the UNHCR's request, a group of government officials and legal scholars met in April 1981 to examine the concept of temporary refuge within the framework of problems raised by the large-scale influx of asylum-seekers. For a summary of this meeting, see Executive Committee, Sub-Committee of the Whole on International Protection, Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, U.N. Doc. EC/SCP/16 and Add.1 (1981). The conclusions of this group were adopted by the Executive Committee at its 32nd session. See infra note 77. For a review of these activities as well as other recent developments concerning the large-scale influx of asylum-seekers, see generally Martin, supra note 57.

the context of these conclusions, asylum-seekers include refugees within the meaning of the 1951 Convention and the 1967 Protocol and persons who, "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of [sic] the whole of their country of origin or nationality are compelled to seek refuge outside that country." Drawing upon the principle of non-refoulement, the Executive Committee recommended that asylum-seekers be admitted to the state in which they seek refuge, even if such admission is on a temporary basis pending arrangements for a durable solution. The Executive Committee also enumerated a set of minimum standards concerning the treatment and protection to be accorded asylum-seekers in the country of refuge. Finally, the importance of international solidarity and burden-sharing was stressed with regard to the attainment of permanent solutions such as voluntary repatriation, settlement in the receiving country, and resettlement in third countries. Although non-binding, these conclusions are significant because they represent the first time that the UNHCR has proffered detailed guidelines for dealing with a mass influx of asylum-seekers. In effect, the Executive Committee has recommended that

(1981)[hereinafter cited as Report of the Executive Committee]. These conclusions are the same as those adopted by the group of experts, see supra note 76, except for two changes: 1) the passages relating to international cooperation and burden-sharing were strengthened and 2) the potent term "asylum" was deleted in favor of the notion of "admission." See Martin, supra note 57, at 607.

78 Report of the Executive Committee, supra note 77, para. 57(2)(I)(1). For the definition of the term "refugee" under the 1951 Convention and the 1967 Protocol, see supra text accompanying note 45. The description of the second category of asylum-seekers is identical to the broad definition of refugee adopted in the OAU Convention. See infra note 84.

79 See supra notes 39-43 and accompanying text.

80 Report of the Executive Committee, supra note 77, para. 57(2)(II)(A). By requiring states to admit asylum-seekers temporarily, the conclusions of the Executive Committee go beyond the principle of non-refoulement which only applies to refugees already within a state's territory. See supra note 40 and accompanying text. General acceptance of this broadened conception of non-refoulement by states does not appear to be imminent. See supra note 40.

81 Report of the Executive Committee, supra note 77, para. 57(2)(II)(B). Some of these standards are drawn from the 1951 Convention and the 1967 Protocol: protection against discrimination based on race, religion, political opinion, nationality, country of origin, or physical incapacity. Other standards are derived from the Universal Declaration of Human Rights, supra note 33: respect for family unity; protection against cruel, inhuman, or degrading treatment; and asylum-seekers should receive the basic necessities of life. Finally, some guidelines are drawn from humane practices in refugee camps: the sending and receiving of mail should be permitted, and efforts should be made to record births, deaths, and marriages. See Martin, supra note 57, at 606-07.

82 Report of the Executive Committee, supra note 77, para. 57(2)(IV).
all asylum-seekers temporarily be entitled to the treatment and protection normally reserved for those who are able to establish refugee status.

2. **Organization of African Unity**

The frequency of internal strife within certain African countries is reflected in a body of regional refugee law particularly responsive to the plight of displaced persons. The OAU Convention\(^3\) defines "refugee" in terms of the realities of the African refugee situation by including those persons compelled to flee across national borders to escape violence within their country.\(^4\) This extension of the definition of refugee beyond the terms of the 1951 Convention and the 1967 Protocol acknowledges that those escaping war or internal conflict are not necessarily fearful of persecution, but may simply be unintended victims of violence.\(^5\) Individualized screening of persons seeking refugee status to establish a subjective fear of targeted persecution is not required under the OAU Convention; instead, this definition contemplates a group determination of ref-

\(^3\) OAU Convention, *supra* note 69.

\(^4\) *Id.* art. I, para. 2. Article I(1) of the OAU Convention essentially repeats the definition of refugee contained in the 1951 Convention and the 1967 Protocol. Article I(2) extends the definition to include displaced persons:

> [t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

\(^5\) 1 L. HOLBORN, *supra* note 61, at 189. The 1951 Convention's definition of refugee, even after the adoption of the 1967 Protocol, was too narrow to encompass the general African refugee situation. Nairobi, *Rights and Obligations of Refugees*, in *AN ANALYZING ACCOUNT*, *supra* note 75, at 102, 107. Over 90% of the refugees in Africa have crossed borders in large numbers; these are primarily rural people who seek safety from dangerous conditions prevailing in their own countries. *Id.* at 103. The OAU definition covers persons displaced by wars of national liberation, internal conflicts in independent countries, and persons from countries under foreign domination. *Id.* at 108. The OAU definition also covers persons fleeing violent conditions which only prevail in part of the country of origin.

It has been noted that the different definitions of the term "refugee" may result in the "emergence in Africa of different classes of refugees—those who qualify for assistance under all the international instruments, and those who only qualify under one—with a consequent confusion and disagreement among states and international agencies regarding to whom to accord which standard of treatment." 1 L. HOLBORN, *supra* note 61, at 190. For example, the statistical information employed by various relief organizations in determining which persons are entitled to assistance may vary significantly because of different definitions of "refugee." Nobel, *Refugees, Law, and Development in Africa*, in *TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES*, MICH. Y.B. INT'L LEGAL STUD. 255, 262-65 (1982). Relief programs have been stalemated because of ignorance or arguments over the number of refugees. *Id.* at 262.
ugee status based on objective criteria: violent conditions which threaten entire populations. Article II of the OAU Convention improves the legal status of persons seeking asylum, especially when read in conjunction with the broad definition of refugee. The cornerstone of this article is a non-refoulement provision which goes beyond the 1951 Convention and the 1967 Protocol by prohibiting both rejection at the border of refugees coming directly from a country where they are endangered and expulsion or return of refugees to states where they may be subject to persecution. A corollary to this progressive formulation of the non-refoulement principle is the notion of burden-sharing. States geographically removed from countries where violations of human rights occur or

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87 OAU Convention, supra note 69, art. II. This article has been characterized as "[t]he most important innovative feature" in the instrument as it represents the first time that an individual's right to asylum in certain circumstances has been recognized in a binding international instrument. I L. Holborn, supra note 61, at 192.

The basic principle of asylum is set forth in article II(1): "Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality." It has been observed that this provision is "recommendatory rather than mandatory" and "the fact that the reception of refugees is made subject to national legislation may constitute a serious limitation." Weis, supra note 86, at 457. However, read as a whole, article II enhances the position of asylum-seekers, Nairobi, supra note 85, at 108, as it urges states to enact national legislation which, at a minimum, reflects the provisions of the OAU Convention. I. Diallo, Les Refugiés en Afrique 124 (1974). For a brief survey of legislation enacted in various African countries, see Nobel, supra note 85, at 267-70.

89 OAU Convention, supra note 69, art. II, para. 3. This non-refoulement provision states:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

This principle of non-refoulement is not synonymous with that of territorial asylum: "for the refugee it means safety in that he may not be forced to remain in or returned to the country where he fears persecution; but he may find himself parcellled away to some third State." S. Aiboni, Protection of Refugees in Africa 71 (1978).

** OAU Convention, supra note 69, art. II, para. 4. The Conference on the Situation of Refugees in Africa, held in Arusha, Tanzania in May 1979, adopted a recommendation which called upon the OAU to strengthen and develop institutional arrangements for burden-sharing and to undertake studies on the problems related to burden-sharing. Recommendation 1, paras. 8-9, reprinted in An Analyzing Account, supra note 75, at 47-48.
where civil disturbance is prevalent are urged to admit refugees, alleviating the burden placed on countries of first asylum. OAU members are also called upon to grant temporary asylum pending arrangements for resettlement in a country able to grant permanent asylum. Finally, the purely humanitarian character of the grant of asylum is underscored.

III. UNITED STATES REFUGEE LAW

A. Historical Background

Prior to the passage of the Refugee Act of 1980, United States refugee programs were conducted on an ad hoc basis. Effective response to refugee crises was hampered by immigration laws which restricted the number of refugees eligible for admission into the United States by means of a national origins quota system.
and, later, by a statutory scheme burdened with ideological and geographical limitations. To circumvent these restrictions, it became necessary to use ad hoc measures to deal with refugee crises. Thus, special legislative enactments of limited duration were necessary during the period after World War II to admit over 600,000 refugees into the United States. Other groups of refugees were admitted under section 212(d)(5) of the Immigration and Nationality Act of 1952 (INA) which authorized the Attorney General to parole aliens into the United States for emergency reasons or for reasons in the public interest. The parole authority was a flexible device which enabled the United States to aid numerous categories of persons in need of assistance. Those individuals who were

tem was repealed by the 1965 legislation. See infra note 95:

The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1101 et seq.), was the first permanent refugee legislation. It repealed the national origins system and substituted a scheme of priorities based on reunification of families and job skills. The 1965 amendments also provided for the conditional entry of refugees who were defined as aliens fleeing persecution in a communist country or a country in the Middle East. After two years in the United States, these persons could adjust their status to become lawful permanent residents. The geographical and ideological restrictions placed on the definition of a refugee prevented any substantial improvement in the refugee admissions policy, resulting in the continued use of ad hoc measures such as the Attorney General's parole power. In the late 1970's, Congress enacted legislation aimed at abolishing the geographical restrictions of the 1965 amendments, creating a single, worldwide system which eliminated distinctions based upon an individual's place of birth. See Immigration and Nationality Act Amendments of 1977, Pub. L. No. 95-412, 92 Stat. 907 (1978); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703.


For a discussion of the parole authority, see generally 1 C. Gordon & H. Rosenfield, supra note 93, § 2.54; Note, Refugees Under United States Immigration Law, 24 Clev. St. L. Rev. 528, 531-39 (1975); Comment, Refugee-Parolee: The Dilemma of the Indochina Refugee, 13 San Diego L. Rev. 175 (1975).

The first large-scale use of the parole authority occurred in 1956 when 32,000 Hungarian refugees fleeing from the Soviet invasion were admitted. From 1960 to 1965, the parole authority was used to admit approximately 20,000 refugees from the Middle East and communist countries. See generally S. Rep. No. 256, 96th Cong., 1st Sess. (1979) (enumera-
brought into the country under the parole authority were not given lawful permanent resident status, but simply temporary refuge. In the 1970's, the parole authority was frequently invoked to admit large numbers of Cubans, Indochinese, and other groups not eligible for admission under United States immigration laws.  

B. Current Status

The Refugee Act of 1980 transformed a confused configuration of domestic refugee law into a more coherent statutory scheme. The purpose of the new legislation was to establish permanent and systematic procedures for the admission of refugees and a comprehensive framework for providing assistance to those refugees who are admitted. An expanded definition of refugee was adopted as well as a mandatory non-refoulement provision in an effort to conform United States law to the 1951 Convention and the 1967 Protocol. An annual admission ceiling for refugees was imposed, and the admissions procedure was revised. New resettlement programs were also introduced.

Under the Refugee Act, the term "refugee" refers to an alien applying for admission to the United States from another country. An alien who is already inside the United States or who is applying for admission at the border is dealt with separately under the asy-
lum provisions of the new legislation. Both refugees and asylum-seekers must meet the same criteria in order to receive sanctuary in the United States, but the distinction between the two groups is more than mere statutory semantics since each group must follow a different procedure in order to gain admission to the United States. In the following sections, United States refugee law will be examined in order to determine the extent to which relief is extended to displaced persons. Displaced persons seeking admission to the United States from another country and those already inside the United States or seeking admission at the border will be treated separately in order to avoid confusion between the refugee admissions procedure and the asylum process.

1. Admission of Refugees and Parole

The Refugee Act limits the annual "normal flow" of refugees into the United States to 50,000 through fiscal year 1982, with later ceilings to be set by the President in consultation with Congress. Additional refugees "of special humanitarian concern" to the United States may be admitted by the President after appropriate consultation with Congress. In emergency situations, the President has the authority to admit refugees above the annual ceiling without consulting Congress for a period not to exceed one year. Refugees who have been physically present in the United States for one year may adjust their status to lawful permanent residence.

To be eligible for admission, an alien must fall within the scope

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110 See 8 U.S.C. § 1158(a) (Supp. V 1981). In the interest of clarity, these aliens will be referred to as asylum-seekers.

111 See id. ("the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee").

112 For a discussion of the refugee admissions procedure, see infra notes 113-15 and accompanying text. For a discussion of the asylum process, see infra notes 153-67 and accompanying text.

113 8 U.S.C. § 1157(a)(1) (Supp. V 1981). After 1982, the number of annual admissions will be determined by the President after appropriate consultation with Congress. Id. § 1157(a)(2). For fiscal year 1983, the annual ceiling was set at 90,000, of which 64,000 were allocated to East Asia; 15,000 to the Soviet Union/Eastern Europe; 6,000 to the Near East/South Asia; 3,000 to Africa; 2,000 to Latin America/Caribbean; and an additional 5,000 for adjustment to permanent residence of aliens who have been granted asylum. Presidential Determination No. 83-2, 47 Fed. Reg. 46,483 (1982).


115 Id. § 1157(b).

116 Id. § 1159.
of the statutory definition of refugee. The Refugee Act significantly broadened the definition by removing previous ideological and geographical restrictions in order to conform to the language of the 1951 Convention and the 1967 Protocol. Under the new definition, an alien must establish “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” The revised definition also allows aliens who are still within their country to acquire refugee status if they are persecuted or have a well-founded fear of persecution and are specifically designated by the President after appropriate consultation with Congress. Although the Refugee Act’s definition is broader than the previous definition, it does not include displaced persons. Displaced persons are fleeing from widespread conditions of civil violence and are not part of a group that is singled out for persecution for any of the reasons enumerated in the statute.

Although ineligible for admission to the United States under the new refugee admission programs, displaced persons may be able to gain temporary admission under the Attorney General’s parole authority. As noted above, the parole power is a discretionary form of relief which has been used in the past to admit large groups of aliens. The Refugee Act narrows the scope of this power: the Attorney General may not parole an alien who is a refugee into the United States unless there are compelling reasons in the public interest which would require that the alien be paroled rather than admitted as a refugee. By requiring an individual determination of eligibility for parole in cases involving aliens who qualify as refugees, Congress sought to prevent the use of the parole power as a means of circumventing the refugee admissions procedure estab-

lished by the Refugee Act.\footnote{125} Congress made it clear, however, that this restriction does not apply to groups of aliens who are not refugees.\footnote{126} Since displaced persons are ineligible for refugee status, they would appear to be unaffected by the limitation imposed on the use of the parole power by the Refugee Act and, therefore, eligible for temporary refuge in the United States under the parole power.

The wide flexibility associated with the parole authority, which allows an alien to receive temporary refuge in the United States for a variety of reasons,\footnote{127} engenders several problems. First, the decision of whether to invoke the parole authority is discretionary and may be unduly influenced by political considerations.\footnote{128} In the past, the Attorney General’s exercise of discretion favored aliens fleeing communist-dominated countries,\footnote{129} which has prompted allegations that the use of the parole authority is based upon political rather than humanitarian considerations.\footnote{130} Second, aliens who have been paroled into the United States do not have any legal residence status and are considered not to have entered the United States for the purposes of the immigration laws.\footnote{131} When the parole is terminated, the parolee acquires the status of an alien seeking admission to the United States at the border and, consequently, his admissibility is determined in exclusion proceedings.\footnote{132}

2. Asylum and Withholding of Deportation

The Refugee Act established a statutory basis for asylum for the first time in the history of United States refugee law.\footnote{133} Under the

\footnote{125} See Review of Refugee Programs, supra note 2, at 42; see also S. Rep. No. 256, supra note 99, at 1.
\footnote{127} See 1 C. Gordon & H. Rosenfield, supra note 93, \S\ 2.54, at 2-369.
\footnote{128} See Hanson, supra note 9, at 127-28.
\footnote{129} See S. Rep. No. 256, supra note 99 (enumeration of cases in which the parole authority has been used).
\footnote{130} See Hanson, supra note 9, at 127-28.
\footnote{131} 8 U.S.C. \S\ 1182(d)(5)(A) (1976 and Supp. V 1981); see also 1 C. Gordon & H. Rosenfield, supra note 93, \S\ 2.54, at 2-368, -373 to -374.
\footnote{133} Prior to 1980, asylum-seekers had been allowed to remain in the United States under a variety of programs, including parole granted by the Attorney General, conditional entry, and regulatory asylum procedures established by the INS. See 1 C. Gordon & H. Rosen-
terms of the new legislation, asylum is a discretionary form of relief available to aliens already inside the United States or seeking entry at a land border or port of entry. An alien may apply for asylum, even if he is within the United States illegally, temporarily, or on parole. To be eligible for asylum, the alien must fall within the scope of the statutory definition of refugee. Asylum is granted in one-year increments, and renewal depends upon prevailing political conditions within the asylee's home country. Aliens granted asylum may apply for adjustment of status to become lawful permanent residents one year subsequent to the grant of asylum; only 5,000 aliens who have been granted asylum may adjust their status each year.

A form of relief closely related to the grant of asylum is the withholding of deportation. The Refugee Act declares that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Prior to 1980, the decision whether to withhold deportation was left to the discretion of the Attorney General, and, consequently, courts were frequently faced with the

FIELD, supra note 93, § 2.24A.


See id.

See id. For the definition of refugee, see supra note 8.


Id.

See Haitian Refugee Center v. Smith, 676 F.2d 1022, 1029 (5th Cir. 1982)(withholding of deportation is "functional equivalent" of asylum). In Matter of Lam, Interim Dec. No. 2857 (Board Immigration App. March 24, 1982), the Board of Immigration Appeals (BIA) noted two differences between the two forms of relief. First, an alien granted asylum may, after one year, apply for adjustment of status, but an alien who has been granted withholding of deportation has no such means of becoming a permanent resident. Id. at 6-7. Second, the concept of firm resettlement is not relevant to applications for withholding of deportation as a grant of that relief bars deportation to only a single country, while firm resettlement is crucial to asylum applications because asylum in the United States will not be granted if an alien has been firmly resettled in a third country. Id. at 6. See also Matter of McMullen, 17 I. & N. Dec. 542, 544 (1980) (emphasizing that asylum is discretionary while withholding of deportation is mandatory under the terms of the Refugee Act).

8 U.S.C. § 1253(h) (Supp. V 1981). The Refugee Act also provides that four categories of aliens may not be granted the relief of withholding of deportation: 1) an alien involved in persecution; 2) an alien convicted of a serious crime constituting a danger to the community; 3) an alien who has committed a serious nonpolitical crime outside of the United States prior to arrival; and 4) an alien who presents a danger to the security of the United States. Id.

Prior to 1980, section 243(h) of the INA provided that:
issue of whether the exercise of this discretion was consistent with the obligations imposed by the non-refoulement provision of the 1967 Protocol.\textsuperscript{143} The Refugee Act purported to resolve this question by removing the Attorney General's discretionary power to withhold deportation in an effort to conform domestic refugee law to the terms of the 1967 Protocol.\textsuperscript{144}

The practical significance of this change may be limited because the Attorney General retains the discretion to determine whether conditions in the alien's homeland warrant the withholding of deportation. Currently, there is a conflict among the circuits concerning the effect of the mandatory language of the new withholding of deportation provision on the Attorney General's power to deport.\textsuperscript{145} The Second and Sixth Circuit Courts of Appeals have held

\textsuperscript{143} Prior to the passage of the Refugee Act of 1980, United States courts consistently refused to interfere with the Attorney General's judgment on the question of whether to withhold deportation. See, e.g., Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961), cert. denied, 366 U.S. 950 (1961). After the accession of the United States to the 1967 Protocol, the Fifth Circuit evidenced a willingness to review the INS findings of fact regarding conditions in the alien's homeland, see Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977), suggesting that the courts had altered their prior posture toward judicial review of INS findings. See Note, Immigration Law—Persecution Claims—The Expanding Scope of Section 243(h) of the Immigration and Nationality Act, 13 Tex. Int'l L.J. 327 (1978). However, the Fifth Circuit declined to decide whether the 1967 Protocol restricts the Attorney General's discretion to refuse to withhold deportation. See Coriolan v. INS, 559 F.2d at 996-97. Another Fifth Circuit case found that the 1967 Protocol had no effect on the administration of United States immigration laws. See Pierre v. United States, 547 F.2d 1281 (5th Cir. 1977), reh'g denied, 551 F.2d 863 (5th Cir. 1977), vacated and remanded for consideration of mootness, 570 F.2d 95 (5th Cir. 1978). In light of these cases, one author has concluded that the 1967 Protocol had little effect on United States immigration law. See Frank, Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States, 11 Int'l L. 291 (1977).


that an alien need not establish a "clear probability" of persecution in his country in order to prevent deportation as required under previous case law. The Third Circuit, however, has maintained that the passage of the Refugee Act had no effect on the alien's evidentiary burden. In a related decision, the Ninth Circuit ruled that courts must apply the "substantial evidence" test instead of the more lenient "abuse-of-discretion" standard when reviewing the fact findings of the Immigration and Naturalization Service (INS) as to the likelihood of persecution.

If the new mandatory withholding of deportation provision is interpreted as lessening the alien's evidentiary burden as well as heightening the standard of judicial review, most asylum-seekers would benefit. For instance, an alien unable to produce evidence which specifically identifies him as a likely victim of persecution if returned to his country may still be able to avoid deportation.

146 Reyes v. INS, 693 F.2d 597 (6th Cir. 1982); Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), cert. granted, 103 U.S. 1249 (1983). Neither the Stevic court nor the Reyes court suggested an alternative standard. Rather, both courts simply noted that deportation must be withheld upon a showing "far short of a clear probability." Reyes, 693 F.2d at 599 (quoting Stevic, 678 F.2d at 409). In Stevic, the court stated that:

It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by the traditional indices of legislative intent, by the Handbook, and by experience.

Stevic, 678 F.2d at 409. The Handbook referred to is the UNHCR's HANDBOOK ON PROCEEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979). The court in Stevic observed that "[s]ince the Handbook was specifically designed to aid governments in interpreting the Protocol . . . and has been subsequently relied upon by the BIA in interpreting the revised [withholding of deportation provision] . . . we accord its view considerable weight." Stevic, 678 F.2d at 409.

147 Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982); see also Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983). The court in Rejaie asserted that Stevic had misinterpreted the legislative history of the Refugee Act. Rejaie, 691 F.2d at 146. According to the Rejaie court, Congress did not intend to alter prior case law which held that the "clear probability" standard and the standard required under the 1967 Protocol were equivalent. Id.

148 McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); accord Reyes v. INS, 693 F.2d 597 (6th Cir. 1982). Prior to McMullen, the alien was required to show an administrative abuse of discretion in order to convince a court to withhold deportation. See, e.g., Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968). To avoid deportation under the new standard, the alien must show a likelihood of persecution if repatriated, and the Attorney General is required to produce substantial evidence to the contrary. The court in McMullen reasoned that this more stringent standard was appropriate in light of the mandatory language of the new withholding of deportation provision. McMullen, 658 F.2d at 1316. This same rationale was used by the Second and Sixth Circuits in relaxing the alien's burden of proof. See supra note 146.

149 See Reyes v. INS, 693 F.2d 597 (6th Cir. 1982). Under the "clear probability" test, the
The more lenient evidentiary burden which the alien is required to meet in a deportation proceeding allows a grant of withholding of deportation on the basis of both general reports concerning conditions in the alien’s homeland as well as letters and affidavits from himself, friends, and relatives.\textsuperscript{150} The situation of displaced persons, however, will not be affected by these developments. Displaced persons may be able to produce reliable evidence documenting a widespread civil war in their country, but, as innocent neutrals, their life or freedom is not threatened for any of the reasons set forth in the statute.\textsuperscript{151} Thus, displaced persons are ineligible for asylum or withholding of deportation because the civil upheaval in their homeland threatens the entire population rather than only a distinct segment.\textsuperscript{152}

Although displaced persons are ineligible for a grant of asylum or withholding of deportation under the substantive provisions of the Refugee Act, they may obtain temporary protection in the United States by taking advantage of the lengthy procedure involved in adjudicating asylum claims.\textsuperscript{153} An alien may raise a claim for asylum before a district director of the INS\textsuperscript{154} and again before

\textsuperscript{150} See Reyes v. INS, 693 F.2d 597 (6th Cir. 1982).

\textsuperscript{151} See supra notes 50-52 and accompanying text.

\textsuperscript{152} See supra note 145, at 1355.

\textsuperscript{153} See S. REP. No. 62, 98th Cong., 1st Sess. 12 (1983). “At the present time aliens not legally entitled to be in this country are able to stay for months or even years, pursuing various stages of appeal. Furthermore, during such delay most are able to move freely in American society, many with work authorization.” Id. See also 129 CONG. REC. S6938-39 (daily ed. May 18, 1983) (docket review of a case in which an alien admitted as a visitor in 1974 has only recently reached a federal court of appeals).

\textsuperscript{154} 8 C.F.R. § 208.1, .3(a) (1983). If an alien is seeking admission to the United States, the application for asylum is filed with the district director of the port of entry. Id. If the alien is already within the United States, the application is filed with the district director having
an immigration judge in an exclusion or deportation proceeding.\textsuperscript{155} If the district director denies the request for asylum, the decision may not be appealed,\textsuperscript{156} and the alien is placed in exclusion or deportation proceedings which are conducted by an immigration judge.\textsuperscript{157} In these proceedings, the alien may renew the request for asylum which is also to be considered a request for withholding of deportation. In the exclusion or deportation proceeding, the alien must present the same type of information to the same judge under the same procedures and, thus, the structure of the asylum hearing and the withholding of deportation hearing is identical.\textsuperscript{158} The decision of the immigration judge is appealable to the Board of Immigration Appeals.\textsuperscript{159} After these administrative remedies have been exhausted, the alien may seek judicial review of the decision.\textsuperscript{160}

Before deciding a claim for asylum brought prior to the initiation of exclusion or deportation proceedings, the INS district director must solicit an advisory opinion from the State Department’s Bureau of Human Rights and Humanitarian Affairs (BHRHA).\textsuperscript{161} In deportation or exclusion proceedings, the immigration judge must also request an advisory opinion.\textsuperscript{162} Although non-binding, this advisory opinion is accorded considerable weight in deciding whether to grant asylum or to withhold deportation.\textsuperscript{163}

\textsuperscript{155} 48 Fed. Reg. 5885 (1983)\textsuperscript{(to be codified at 8 C.F.R. § 208.1). Once exclusion or deportation proceedings have begun, the immigration judge has exclusive jurisdiction over any application for asylum. \textit{Id}. An exclusion proceeding deals with an alien who has not yet entered the United States and who seeks admittance. 1A C. GORDON & H. ROSENFIELD, supra note 93, § 3.18. A deportation proceeding deals with an alien who has entered the United States, but whose right to remain is questioned. \textit{Id}.}

\textsuperscript{156} 8 C.F.R. § 208.8(c) (1983).

\textsuperscript{157} See supra note 155. If the request for asylum is denied by the district director, the alien is placed in exclusion proceedings unless the alien elects to withdraw the application for admission. 8 C.F.R. § 208.8(f)(3) (1983).

\textsuperscript{158} Kurzban, Restructuring the Asylum Process, 19 SAN DIEGO L. REV. 91, 110 (1981); see also Meissner, supra note 5, at 3 (“[i]n practice, this withholding of deportation provision has proved to be confusing in application, as it parallels the asylum provision, is based on the same types of claims to persecution, and yet appears to provide a separate claim to refuge”).

\textsuperscript{159} See 8 C.F.R. §§ 3.1-.8, 242.21 (1983).

\textsuperscript{160} 8 U.S.C. § 1105(a)(9), (b) (1970).

\textsuperscript{161} 8 C.F.R. § 208.7 (1983).

\textsuperscript{162} \textit{Id}. § 208.10(b). The immigration judge is not required to request an advisory opinion if an opinion was received by the district director in connection with an application for asylum unless the immigration judge finds that circumstances have materially changed since the first opinion was issued. \textit{Id}.}

\textsuperscript{163} See Matter of Salim, 18 I. & N. Dec. No. 2922, at 4 n.3 (Sept. 29, 1982) (BHRHA
It entails an assessment of the prevailing political conditions in the applicant's home country in order to determine whether the claim is justified. Although the BHRHA possesses expertise in evaluating conditions around the world, particularly in the field of human rights, it is part of an organ primarily concerned with foreign policy. On occasion, the applicant's native country may view the grant of asylum as an unfriendly act. The political implications of the asylum decision may, therefore, lead the BHRHA to evaluate claims on grounds far removed from the humanitarian considerations embodied in the Refugee Act.

The Immigration Reform and Control Act of 1983 (1983 Reform Act) sought to revise the existing asylum process. During the first session of the 98th Congress, the bill was passed by the Senate but failed to reach the floor of the House for a vote. Prompted by recent mass influxes of asylum-seekers, the proposed legislation would have streamlined the asylum process so that those with valid claims would be heard in a timely fashion, while those with frivolous claims would not be able to resort to procedural delaying tactics. The House and Senate versions of the legislation differed in several respects, but the general structure of the asylum process was similar. The legislation provided for a summary exclusion proceeding without an appeal for undocumented aliens who are not claiming asylum. For all asylum cases, the bill provided extensive administrative consideration. Finally, opportunities for judicial opinion supporting a persecution claim "should be given significant weight, particularly where supporting evidence and testimony supports such a conclusion").

See 1A C. Gordon & H. Rosenfield, supra note 93, § 5.16b, at 5-192 to 5-192.2.

Cf. Paul v. INS, 521 F.2d 194, 199-200 (5th Cir. 1975) (noting that information supplied by the State Department to the INS does not carry a guarantee of reliability since the revelation of the political shortcomings of a friendly nation "is not always compatible with the high duty to maintain advantageous diplomatic relations with nations").

Cf. id.

See Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 482-93 (S.D. Fla. 1980), aff'd as modified sub nom, Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982) (finding State Department information to be unreliable); see generally Hanson, supra note 9.


See supra note 5.


S. 529, supra note 168, §§ 122, 124, 129 Cong. Rec. S6974-76; H.R. 1510, supra note
cial review of administrative decisions would have been limited. Under the summary exclusion provisions of the proposed act, displaced persons would have experienced difficulty in presenting claims for asylum. In addition, the ability of displaced persons to use procedural delays in order to remain in the United States would have been curtailed, particularly by those provisions limiting opportunities for judicial review.

A blanket grant of extended voluntary departure has been the device most frequently used to allow displaced persons to remain in the United States pending cessation of hostilities in their homeland. The district director of the INS is authorized to grant extended voluntary departure in cases where such action is warranted by compelling factors such as civil war or catastrophic circumstances. Extended voluntary departure is normally granted in increments of one year; at the end of this period, the alien's file is reviewed to determine whether a further grant of extended voluntary departure is warranted. The grant of extended voluntary departure may be revoked at any time if it is determined that conditions have improved in the alien's home country. The decision to grant extended voluntary departure is based upon recommendations of the State Department. Recommendations rest upon assessments of the conditions prevailing in the alien's home

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178 Blanket grants of extended voluntary departure have been extended to Ethiopians, Ugandans, Iranians, Nicaraguans, Lebanese, and Poles. REFUGEE POLICY GROUP, POLITICAL ASYLUM: A BACKGROUND PAPER ON CONCEPTS, PROCEDURES AND PROBLEMS 28 (Dec. 1982); Letter from David Crossland, Acting Commissioner of the INS, to Senator Edward M. Kennedy (Apr. 6, 1981), reprinted in 128 CONG. REC. S582 (daily ed. Feb. 11, 1982)[hereinafter cited as INS Letter]. In August 1981, the grant of extended voluntary departure to Ethiopians was withdrawn as conditions were considered to have significantly changed. For a discussion of the controversy surrounding this decision, see Deutsch, The Ethiopian Controversy, AFRICA REP. 49 (May-June 1982). In July 1982, the grant of extended voluntary departure status to Ethiopians was extended for one year. REFUGEE POLICY GROUP, supra, at 29.
177 8 C.F.R. § 242.5 (1983); INS Operating Instructions § 242.10e(3) (1979).
178 INS Operating Instructions § 242.10e(3) (1979).
179 Id.
180 See INS Letter, supra note 176, at S831.
country. Recently, it has been alleged that these assessments lack objectivity and are dominated by foreign policy, rather than humanitarian concerns, resulting in a discriminatory use of extended voluntary departure.

In comparison with asylum and withholding of deportation, extended voluntary departure is a flexible device which permits humanitarian responses to refugee crises. In particular, extended voluntary departure allows the United States to extend protection to displaced persons while avoiding the political implications of asylum or withholding of deportation. However, the flexibility of extended voluntary departure carries a concomitant loss of benefits. Aliens granted extended voluntary departure simply receive

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181 Id.

182 See N.Y. Times, May 31, 1983, at A20, col. 1 (criticizing United States Government policy of granting extended voluntary departure to Poles but not to Salvadorans despite widespread violence in El Salvador); Hearings on Mass Asylum, supra note 8, at 28-29 (statement of Sen. Edward M. Kennedy)(questioning failure of INS to find that conditions in El Salvador warranted the grant of extended voluntary departure in light of statistics which showed that some 17,000 civilians are killed each year, 150,000 Salvadorans are internally displaced, 200,000 Salvadorans are outside their country); see also UNHCR Memorandum, supra note 9; AMERICAN COUNCIL OF VOLUNTARY AGENCIES FOR FOREIGN SERVICE, STATEMENT ON SAFE HAVEN FOR CENTRAL AMERICAN REFUGEES, reprinted in 129 CONG. REC. S8643-44 (daily ed. June 16, 1983)(urging United States Government to adopt a safe haven policy toward Central American refugees, particularly those from El Salvador and Guatemala).

In January 1983, a resolution was introduced in the House of Representatives which expressed:

the sense of the House that the Secretary of State should recommend to the Attorney General that extended voluntary departure status should be granted to aliens who are nationals of El Salvador and that the Attorney General should exercise his discretion and grant such status to such aliens until the situation in El Salvador has changed sufficiently to permit their safely residing in that country.

H.R. Res. 21, 98th Cong., 1st Sess., 129 CONG. REC. E5 (daily ed. Jan. 3, 1983). In introducing this resolution, Representative Weiss emphasized that the resolution simply calls upon the United States to grant Salvadoran refugees temporary shelter which "is in no way a type of amnesty, nor does it replace applications for political asylum. It simply permits refugees from El Salvador to remain temporarily in the United States until the situation in their home country improves sufficiently to allow them to return and reside there safely." Id. This resolution was referred to the House Committee on the Judiciary for consideration. It was included in the version of the 1983 Reform Act adopted by the House Judiciary Committee. See H.R. 1510, supra note 168, § 401, H.R. REP. No. 115, pt. 1, supra note 5, at 30.


184 Id. at 72, 74. But see supra notes 7 and 182 (discussing refusal of United States to grant extended voluntary departure to Salvadorans despite civil war in that country).

an assurance that no order of deportation will be enforced during the prescribed period.\textsuperscript{186} Aliens granted extended voluntary departure are denied travel documents, their work opportunities are limited, and many remain separated from their families.\textsuperscript{187} In effect, the alien is left in a juridical limbo.\textsuperscript{188} Also, extended voluntary departure can further a policy of denying asylum applicants a fair opportunity to prove their status which they have the right to assert.\textsuperscript{189} That is, extended voluntary departure may simply be granted to avoid a politically embarrassing asylum decision without regard to the validity of the applicant's claim.\textsuperscript{190} Conversely, extended voluntary departure may allow applicants with frivolous claims to remain in the country almost indefinitely.\textsuperscript{191}

C.\textsuperspace{2em} Displaced Persons and Refugee Policy

An adequate solution to the problem of displaced persons in the United States calls for a compromise between a traditional humanitarian commitment to the world's homeless and a need to maintain control over refugee admissions.\textsuperscript{192} In recent years, the arrival of large numbers of aliens has forced many to realize that there are limits on the ability of the United States to absorb newcomers.\textsuperscript{193} It may be argued that to extend protection and assistance to displaced persons—a group which, theoretically, could include the entire population of a country experiencing civil upheaval, provided it could reach the United States\textsuperscript{194}—would be to ignore these lim-

\begin{footnotesize}
\textsuperscript{186} 1980 Hearings on U.S. Refugee Programs, supra note 185, at 42.
\textsuperscript{187} Id.
\textsuperscript{188} Scanlan, supra note 183, at 29; see also Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 82 (1979)(statement of Dale Swartz) [hereinafter cited as 1979 Refugee Act Hearings]. The status of "extended voluntary departure' renders a person in the United States 'under color of law."' Id. This means that the alien is eligible for some, but not all, federally funded social services and would be eligible for work authorization where need was demonstrated. Id.
\textsuperscript{189} 1979 Refugee Act Hearings, supra note 188.
\textsuperscript{190} REFUGEE POLICY GROUP, supra note 176, at 29.
\textsuperscript{192} Id. See also Hearings on Mass Asylum, supra note 8, at 70-73 (prepared statement of Senator Huddleston). It has been estimated that the violence in Central America could produce 1.5 to 2 million refugees. Douglas, Congressional Briefing Paper and Talking Points on Refugees and Potential Refugees In and From Central America, reprinted in 129 CONG. REC. S7526-27 (daily ed. May 26, 1983) [hereinafter cited as Congressional Briefing Paper]. It has also been noted that "[a] population influx of this magnitude in a short span of time could produce social difficulties for domestic resettlement programs. Id. at S7527.
\textsuperscript{193} See supra note 152.
\textsuperscript{194} See Letter from Alvin P. Drischler, Acting Assistant Secretary for Congressional Rela-
its. It may also be asserted that many displaced persons could find refuge in other countries and, therefore, that the United States is not a country of first asylum and has no obligation to give them refuge. Another problem which would eventually have to be confronted is the practical difficulty of repatriating displaced persons once the fighting in their homeland has stopped.

To be weighed in the balance against these concerns is the longstanding commitment of the United States to persons in need of protection and assistance. Currently, the United States admits more legal immigrants and refugees for permanent resettlement than the rest of the world combined. From a purely humanitarian perspective, displaced persons are as deserving of protection as many conventional refugees because they are fleeing pervasive conditions of random violence which threaten their lives, not just their freedom. Also, displaced persons seek only temporary refuge until the fighting stops rather than permanent resettlement, which lessens the strain on local communities and resettlement

ations, State Department, to Senator David Durenberger (Apr. 7, 1982), reprinted in 129 Cong. Rec. S6925 (daily ed. May 18, 1983). The State Department has acknowledged that "violence is an enormous problem in El Salvador and that hardly any segment of the population is immune from this threat. The upshot of this is the fear shared by many Salvadorans of a return to their country." At the same time, the State Department has noted:

the majority of Salvadorans in the United States did not depart their country solely to seek safe haven in this country. Most traveled through third countries before entering the United States and many of them entered quite some time ago. Other countries closer to El Salvador—Honduras, for example—have been generous in offering safe haven to Salvadorans who have fled. Thus, the United States is not the only possible refuge, nor can it in most cases be considered the country of first refuge.

See supra note 153 (once admitted to the United States, aliens are able to use procedural delaying tactics to prolong their stay).

See Congressional Research Service, supra note 2, at 3-4.


American Council of Voluntary Agencies for Foreign Service, supra note 182, at S8644. "It is clear . . . that the situations of El Salvador and Guatemala, like so many others in the world, are precisely those which motivate refugee flight. That flight is a natural and predictable response by people to escape crossfire and the danger of pervasive random violence." Id.

Congressional Briefing Paper, supra note 192, at S7526-27 (estimated figures for Central America show that refugees from the widespread violence in that region flee to Honduras, Costa Rica, Mexico, and Nicaragua, as well as the United States).

It should also be noted that, in theory, all persons actively opposed to communist governments could seek asylum in the United States under current asylum law if they could reach the United States. However, it has not been suggested that the criterion of political persecution should be abolished because of this theoretical possibility.
programs. In response to those who argue that, in theory, the entire population of a country engaged in civil war could find refuge in the United States, it may be observed that, in reality, many displaced persons flee to other countries or remain within their own country. Finally, the United States cannot ignore that it has become a country of first asylum for many displaced persons who are seeking to join relatives.

D. Summary and Recommendations

Displaced persons are neither able to enter the United States through the refugee admissions procedure established by the Refugee Act nor are they eligible for asylum or withholding of deportation because of a definition of refugee which is based on the notion of political persecution. It has been suggested that this definition could be modified along the lines of the OAU definition to include persons fleeing civil upheaval in their country. However, expansion of the definition as a means of extending protection to displaced persons would be ill-suited to the overall structure of the United States refugee program and ill-tailored to the particular needs of displaced persons. Aliens admitted to the United States through the refugee admissions program generally become perma-

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800 AMERICAN COUNCIL OF VOLUNTARY AGENCIES FOR FOREIGN SERVICE, supra note 182, at S8644. It has been observed that:

The argument that Central American refugees should stay in Mexico as their first country of asylum is based on the presumption that the refugee knows in advance where one should or should not go. However, the nature of rapid flight precludes such premeditation. It is overwhelmingly the case that those coming have family relatives here in the United States. We cannot deny the logic of people going to where their relatives are, therefore, while supporting other first asylum countries in their efforts to cope with refugees, the United States must recognize that it has also become a country of first asylum. It must thus be prepared to offer protection to those fleeing persecution and civil war as our neighbors are doing both to the south and the north.

Id.

801 See supra notes 117-22, 151-52 and accompanying text.

802 See Fragomen, supra note 48, at 68. Cf. S. Rep. No. 256, supra note 99, at 4. During the drafting of the Refugee Act, language was added to the definition of refugee by the Senate Judiciary Committee to include a person within his country of nationality displaced by military or civil disturbance or uprooted because of arbitrary detention and who is unable to return to his usual place of abode. Id. It was argued that this language created the potential for "long lines of refugee applicants at U.S. posts abroad who are not really refugees." 125 CONG. REC. 37,201 (1979)(statement of Rep. Fascell). This language was later rejected by the Conference Committee in favor of language which restricted internally displaced persons to those specifically designated by the President in consultation with Congress. See H.R. REP. No. 781, supra note 126, at 19.

803 See supra note 116 and accompanying text.
nent residents\textsuperscript{204} and are channeled into permanent resettlement programs.\textsuperscript{205} Many displaced persons might accept an offer of permanent resettlement in the United States, but their most critical need is for temporary protection until hostilities cease in their homeland. Recent mass influxes of refugees have revealed that the ability of domestic communities to absorb large numbers of aliens is limited.\textsuperscript{206} The existing opportunities for permanent resettlement should be reserved for aliens in need of permanent protection rather than for displaced persons. Expansion of the definition of refugee would also be undesirable in the context of asylum and withholding of deportation. Allowing a new category of aliens to become eligible for these forms of relief would create difficulties even under the streamlined asylum process set forth in the 1983 Reform Act.

Parole and extended voluntary departure are the forms of relief currently available to displaced persons under United States refugee law.\textsuperscript{207} They are well-adapted to the needs of displaced persons since they may be used to extend temporary protection to large groups of aliens. However, the decision of whether to parole aliens into the country or to grant extended voluntary departure often rests on political considerations rather than on an objective assessment of the actual conditions from which the displaced persons are fleeing.\textsuperscript{208} Also, displaced persons who are allowed to take temporary refuge in the United States find themselves faced with uncertain legal status and few clearly defined rights.\textsuperscript{209}

Future modification of the parole power and extended voluntary departure could make United States refugee law more responsive to the plight of displaced persons. First, the decision of whether to exercise the parole power or to grant extended voluntary departure should be based on reports solicited from impartial, humanitarian organizations such as the UNHCR in order to insulate the decision from political bias. Second, the alien should be accorded a formal legal status while within the United States. The list of basic rights to be accorded asylum-seekers which has been formulated by the Executive Committee of the UNHCR could provide guidelines in this regard. Third, once the civil conflict has ceased in the alien's
home country, he should be repatriated. Opportunities to apply for asylum should be limited by means of an administrative screening process which prevents applicants with tenuous claims from remaining in the United States. Finally, efforts should be directed toward negotiating burden-sharing agreements with other countries in order to alleviate the burden on domestic programs. These changes would offer greater protection to displaced persons while recognizing that their situation is generally temporary and does not call for permanent resettlement.

IV. Conclusion

Persons forced to flee their homeland due to civil strife have traditionally been denied protection and assistance under international refugee law; refugee status with its attendant benefits was reserved for those able to establish a well-founded fear of deliberate persecution. In recent years, a new legal framework has evolved at both the international and regional levels, reflecting changes in the nature and causes of refugee movements. Uprootedness, not ideology, is the criterion embraced by both the UNHCR and the OAU for the purpose of identifying those in need of protection. Consequently, persons seeking relief from the crossfire of a civil war are no longer at the mercy of technical distinctions divorced from the realities of modern refugee crises. Currently, effort in the international arena is being directed toward developing the concept of temporary refuge. It is hoped that states anxious to avoid the political connotations of asylum might be willing to grant temporary refuge to persons in need of relief. Displaced persons, seeking shelter until the fighting stops, would certainly benefit from acceptance of this emerging concept.

United States refugee law does not reflect these developments. Although an improvement over previous legislation, the Refugee Act fails to address the plight of displaced persons seeking refuge in the United States. Patterned after the language of the 1951 Convention, the 1980 legislation lacks the flexibility needed to cope with recent refugee crises. Even available remedies are often administered on the basis of political considerations, resulting in the further detachment of United States refugee law from its humanitarian underpinnings. Also, the procedural due process which the asylum process accords to those seeking refuge in the United States does not solve the true problem of displaced persons—substantive provisions of the law which reserve protection for those who are fleeing from targeted persecution.
Parole and a grant of extended voluntary departure are the current alternatives to the refugee admissions process, asylum, and withholding of deportation. Future modification of these forms of relief could result in statutory devices which meet the need of displaced persons for temporary protection and avoid placing a greater burden on permanent resettlement programs in the United States. First, the decision of whether to extend relief should be based on objective reports solicited from impartial, humanitarian organizations. Second, the alien should be accorded a formal legal status while within the United States. Finally, burden-sharing agreements should be negotiated with other countries. These changes would enable the United States to both continue a tradition of helping the world’s homeless and maintain necessary limits on the number of aliens allowed to resettle in the United States.

David Hull