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Executive Summary

In 2013, the Center for Migration Studies of New York (CMS) initiated a project to bring concentrated academic and policy attention to the US refugee protection system, broadly understood to encompass refugees, asylum seekers, and refugee-like populations in need of protection. The initiative gave rise to a series of papers published in 2014 and 2015, which CMS is releasing as a special collection in its Journal on Migration and Human Security on the 35th anniversary of the Refugee Act of 1980. This introductory essay situates the papers in the collection within a broader discussion of state compliance with international law, impediments to protection, US protection programs, vulnerable populations, and due process concerns. The essay sets forth extensive policy recommendations to strengthen the system drawn from the papers, legislative proposals, and other sources.

Introduction

The Refugee Act of 1980 represented a high water mark in US refugee law and policy, and in the United States’ history as a haven for the persecuted and dispossessed. The Act sought to harmonize US law with the 1951 United Nations (UN) Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. It sought to “revise and regularize” US refugee admission procedures, gave birth to the US refugee resettlement program, and directed that a “procedure” be established for noncitizens “physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum.”

Over the last 35 years, the United States has resettled nearly three million refugees, provided political asylum to more than 400,000 persons, and extended different forms of temporary protection to hundreds of thousands of persons at any one time (DHS 2014b, 39-43; INS 2002, 96; Bergeron 2014, S107-10). Over the same period, however, the United States created a massive immigration enforcement and homeland security infrastructure, which
has had a deleterious effect on the protection of refugees, asylum seekers, and refugee-like populations. In 1980, the budget of the Immigration and Naturalization Service (INS) was $349.1 million (roughly $1 billion in 2015 dollars) (DOJ 2002, 106). By 2014, funding for Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) equaled a combined $18 billion (DHS 2014a, 49-50, 64), a figure which does not include the cost of providing immigration benefits (as INS did) and which excludes the substantial immigration enforcement spending by other federal agencies. Restrictive legislation, jurisprudence, and enforcement practices have also eroded US refugee protections. Among other challenges:

- US interdiction and interception policies, post-9/11 immigration-related security measures, and the expedited removal process have denied access to protection to massive numbers of refugees and others fleeing desperate situations, have returned many to perilous situations, and have delayed the protection of others;
- Due process deficiencies, evidentiary barriers, and the widespread use of immigrant detention have prevented a substantial percentage of bona fide asylum seekers from pursuing and prevailing in their claims; and
- US temporary protection programs, particularly for desperate non-refugees seeking admission, have proven to be limited, inflexible, and inadequate.

In 2013, the Center for Migration Studies of New York (CMS) initiated a project to bring concentrated academic and policy attention to the US refugee protection system, with the goal of strengthening and revitalizing this traditional pillar of US foreign policy, humanitarian programs, and the global refugee protection system. To that end, CMS established and convened a working group consisting of experts from the academic, research, public policy, governmental, and nongovernmental communities. In June 2014, it hosted a symposium on the US refugee protection system. The event and working group meetings gave rise to a series of papers, published in the 2014 and 2015 volumes of the Journal on Migration and Human Security (JMHS), which CMS is releasing as a special JMHS collection to commemorate the 35th anniversary of passage of the Refugee Act of 1980.

This introductory essay is divided into four parts. Section I provides an overview of the papers in the collection. Section II describes the challenge of state compliance with the Refugee Convention and Protocol. It argues for a greater commitment to refugee protection based on state interest, human need, developments in international law, and promising new protection strategies. Section III describes: barriers to accessing protection in the United States; the continuum of US protection programs; the needs and treatment of the stateless, noncitizens in crisis situations, Mexican asylum seekers, and migrant children from Mexico and the Central America’s Northern Triangle states; and cross-cutting due process issues. This section also highlights policy recommendations drawn from the papers, legislative proposals, scholarship, and human rights reporting. Section IV argues that the success of US refugee protection policies depends on their incorporation within a broader set of diplomatic, economic development, rule of law, and human security commitments.

I. Papers in the Collection

Mark R. von Sternberg opens the collection with an analysis of the US refugee protection
system from the perspective of international law. In examining US migrant interdiction, repatriation, and pre-screening programs, von Sternberg argues that the responsibility not to *refole* is triggered “whenever the nation exercises power, whether that be on the high sea or through some pre-screening device” (von Sternberg 2014, S76). Moreover, *non-refoulement* places on states the subsidiary obligation to determine if a noncitizen may be persecuted, tortured, or severely harmed if returned (ibid., S54), regardless of whether or not he or she requests asylum or another form of protection. Von Sternberg also examines and critiques the US asylum system and temporary protection programs.

Anastasia Brown and Todd Scribner analyze the US refugee resettlement program, explaining how a public-private partnership that assisted in the resettlement of hundreds of thousands of displaced persons following World War II laid the groundwork for the Refugee Act of 1980 and the US refugee resettlement program. Since 1980, the United States has resettled nearly three million refugees and the “lives saved as a consequence” demonstrate the program’s success (Brown and Scribner 2014, S84). Nevertheless, federal backing for resettlement has decreased over the years, placing participating states, localities, and nongovernmental organizations (NGOs) under increasing strain and eroding public support for the program. The program’s core integration strategy—self-sufficiency through early employment—fails to meet the needs of growing numbers of refugees, and coordination and information sharing between federal, state, and NGO partner agencies has been far from optimal.

Claire Bergeron and Donald Kerwin offer complementary papers on US temporary protection programs. Bergeron assesses the temporary protected status (TPS) program which, notwithstanding its name, has been used to provide long-term protection to hundreds of thousands of noncitizens from nations that have suffered from armed conflict, natural disaster, and other extraordinary conditions. Bergeron argues that extended TPS designations run contrary to congressional intent, lock beneficiaries into a “legal limbo,” and impede their integration.

Kerwin examines US temporary protection programs more broadly, including humanitarian parole, “T” non-immigrant visas for survivors of human trafficking, and “U” non-immigrant visas for survivors of crime who assist law enforcement officials. He maintains that the most glaring deficiency in the US refugee protection system is its inability to admit sufficient numbers of imperiled non-refugees from abroad. Kerwin finds that temporary protection programs can, at their best, provide haven to endangered persons while states and NGOs work with affected populations to create durable solutions for beneficiaries. However, US temporary protection programs rest primarily on executive discretion, fail to cover numerous at-risk populations, and do not typically lead to permanent status or other durable solutions.

Maryellen Fullerton examines the problem of statelessness, particularly in regard to claims to political asylum. She describes the causes of statelessness, offers a taxonomy of stateless populations, and finds that the absence of state protection and avenues to legal status

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5 Article 33 of the Refugee Convention prohibits contracting states from expelling or returning a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion,” with an exception for refugees who constitute a danger to security of the country or community.
condemns stateless persons to a precarious existence in host states and prevents them from securing legal residency elsewhere (Fullerton 2014, S156-59). The paper reviews two US federal appeals court decisions, the Seventh Circuit’s 2010 decision in *Haile v. Holder*, an asylum case involving a young man rendered stateless by the Ethiopian government’s denationalization of ethnic Eritreans, and the Sixth Circuit’s 2011 decision in *Stserba v. Holder*, an asylum claim by a woman who became stateless when the Soviet Union collapsed and one of its successor nations, Estonia, enacted a citizenship law that included a language requirement.

Sanjula Weerasinghe and Abbie Taylor, with Sarah Drury, Pitchaya Indravudh, Aaron Gregg, and John Flanagan, examine noncitizens caught in situations of violence, armed conflict, war, natural and man-made disaster, technological hazards, and other crises. The authors find that in these circumstances noncitizens tend “to fall through the cracks because of failure to understand and/or take account of the unique challenges they face, and because extant frameworks and mechanisms insufficiently articulate the responsibilities of different actors” (Weerasinghe et al. 2015, S179). The paper culls best practices regarding the treatment of noncitizens from five sets of crises in 2011 and 2012: the Libyan uprising that led to Muammar Gaddafi’s overthrow; the Tohoku earthquake, tsunami, and Fukushima nuclear accident in Japan; Hurricane Sandy in the Northeastern United States; flooding in Thailand; and the disastrous conflict in Syria.

J. Anna Cabot explores the anomaly of low US approval rates of Mexican asylum claims, despite an epidemic of violence in Mexico. She examines obstacles encountered by Mexican and other asylum seekers along the US-Mexico border, including the requirement that claims be considered in adversarial removal proceedings, narrow legal standards, the excessive use of detention, evidentiary burdens, extra-legal actions by border officials, and immigration judges who often rely on their own “incomplete or inaccurate” knowledge about country conditions in Mexico to deny claims (Cabot 2014, S219).

Elizabeth Carlson and Anna Gallagher review the situation of child migrants who are fleeing gang-based violence in Mexico, Honduras, Guatemala, and El Salvador. They report that US deportation policies, Central American government *mano dura* strategies, and shifting international drug trafficking routes have helped to build and strengthen transnational criminal enterprises (Carlson and Gallagher 2015, S227-28). The authors highlight the role of gang recruitment and violence in child migration, as well as aggressive law enforcement tactics that treat even children without gang affiliation as suspected gang members. Domestic violence, extreme poverty, and single-parent households increase the vulnerability of children to gang predation. Yet despite high levels of violence—the Northern Triangle states of Central America, particularly refugee sending communities, have the world’s highest homicide rates outside war zones (ibid., S228-29)—immigration judges have been reluctant to recognize asylum claims involving gang-related violence and persecution.

Katharine Donato and Blake Sisk review data from the Mexican and Latin American Migration Projects* to find that the migration of unaccompanied minors to the United States

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6 591 F. 3d 572 (7th Cir. 2010).
7 646 F. 3d 964 (6th Cir. 2011).
8 The Mexican Migration Project (MMP) and Latin American Migration Project (LAMP) are
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from Mexico, Guatemala, El Salvador, Costa Rica, and Nicaragua is strongly linked to parents’ unauthorized entry, period of entry, and US immigration history. Thus, the authors ultimately attribute the increase in child migration to US reliance on Mexican and Central American laborers.

Melanie Nezer examines recent legislative developments regarding the US refugee protection system. While Congress has not passed significant legislation related to the asylum process in more than a decade, it has considered two sweeping bills that would have substantially strengthened the US system. Moreover, in a rare example of bi-partisan consensus, it passed legislation to increase admissions of Iraqi and Afghan refugees who assisted US troops, to facilitate refugee processing of religious minorities from Iran and the former Soviet Union, and to provide the executive with greater authority to exempt select refugees, asylum seekers, and asylees from the broad terrorism-related grounds of inadmissibility (TRIG). The paper offers a valuable summary and side-by-side comparison of the refugee and asylum provisions in five bills introduced in the 113th Congress (Nezer 2014, S296).

II. The International Refugee Protection System and the Challenge of Commitment

At this writing, 145 states have acceded to the 1951 Refugee Convention, 146 states to the 1967 Refugee Protocol, 157 states to the 1984 Convention against Torture (CAT), 194 states to the 1989 Convention on the Rights of the Child, 86 states to the 1954 Convention Relating to the Status of Stateless Persons, and 63 states to the 1961 Convention on the Reduction of Statelessness. The responsibilities set forth in these pillars of public international law, particularly the right to non-refoulement, should long since have been incorporated into state law and practice. Yet compliance with the Refugee Convention and Protocol has been begrudging, half-hearted, and tepid at best.

Twenty-five years ago, David Martin argued that the “relatively progressive character of international law” was “an accidental and ironic byproduct … of decades of governmental hypocrisy” (1989, 552). “[I]n one of history’s more pleasing ironies,” he wrote, human rights pronouncements and soft law in the form of “resolutions, recommendations, declarations, conclusions, or accords” proliferated between 1945 and the 1970s precisely because states had no intention of honoring them and did not expect them “to have any real” prospective impact (552-53). Yet to the chagrin of state officials, non-binding language helped to legitimize the growing role of the UN, inter-governmental organizations and NGOs in areas that had formerly been the exclusive province of states (558). Human rights multidisciplinary research efforts based at Princeton University and the University of Guadalajara which have compiled publically accessible data on international migration and immigration to the United States since 1982 and 1998, respectively.

organizations, in particular, assumed the role of magnifying this “hortatory” language in domestic political debates and pressuring states to give it effect (560). In response, states did not so much renounce their past pronouncements, as develop ingenious ways to “evade” their force (559).

While states have created asylum regimes for noncitizens that they could not block from entering, they have resisted extending non-refoulement to persons who would be in mere “danger” in their countries of origin, refusing “to open their borders … to so extensive a category of claimants” (Martin 1989, 567). Fears of uncontrolled migration, social disorder, and open-ended commitments often underlie state resistance to refugee protection policies.10 States have been especially wary of “institutionalized schemes that would commit them to take a proportion of future flows of unknown frequency and magnitude” (Suhrke 1998, 397).11

In the early 1980s, Western governments began to adopt policies and enforcement strategies “to discourage asylum seeking and to contain asylum seekers in territories proximate to their home countries” (Helton 2000, 68). Favored strategies have included:

- interdiction and interception;
- carrier sanctions;
- stringent visa requirements;
- designation of rights-free regions, “non-territory” and “international zones”;
- denial of entry at borders;
- safe third-country requirements;
- detention;
- accelerated consideration of asylum claims;
- narrow interpretations of refugee and asylum standards; and
- failure to permit appeals of rejected claims (Helton 2000, 68; Hathaway and Gammeltoft-Hansen 2014, 6-7).

Detention centers have become a centerpiece of this system. Refugee destination states “have successfully diffused detention practices to a large number of states on their peripheries, helping to establish an archipelago of emerging detention regimes that literally span the globe” (Flynn 2014, 190).

The US response to large-scale refugee movements, whether of Central American children or desperate Haitian migrants, has become formulaic. The political branches of the US government brand the “waves,” “flow,” or “surge” a national crisis (rather than a human crisis), agree in principle on the need to address “root causes,” and resort to default strategies like containment, interception, repatriation, border enforcement, and detention-to-deter. Since 9/11, these tactics have increasingly been justified on national security grounds (Ginsburg 2010; Kerwin 2005a). States and supranational entities also characterize them as

10 McAdam (2005) states that in Europe, “there is a deep-seated fear that whole populations will flee on the basis of generalized violations if subsidiary protection status does not require individual harm to be demonstrated.”

11 Suhrke (1998) posits that states would be more likely to agree to responsibility sharing if they could quantify their commitment and had “some assurance that they could control events that produce refugees” (402).
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anti-smuggling or anti-trafficking imperatives (Hathaway and Gammeltoft-Hansen 2014, 6-7; Flynn 2014, 176-78). In addition, states regularly combine rationales by raising the specter that hardened terrorists will use smugglers—and endure life-threatening journeys by land or sea—to facilitate their travel (Kanter 2015; Kerwin 2005a). Most recently, Mexican and Central American interception, border enforcement, and anti-smuggling initiatives have been central to the US response to the increased migration of children and families from these nations to the United States (GAO 2015, 9-12; White House 2014b).

Developed states resort to a variety of mechanisms to enlist and “engag[e] the sovereignty” of developing states in carrying out these strategies. These mechanisms include diplomacy, financial incentives, the “provision of equipment, machinery, or training,” deployment of their own officials, joint or shared enforcement, direct migration control, and the use of regional entities like Frontex to intercept migrants (Hathaway and Gammeltoft-Hansen 2014, 9-10). Because this menu of responses has become so entrenched, some have predicted that state protection will “continue to wither” and desperate people will increasingly turn to alternative networks and processes for protection, rather than continuing to rely “forlornly on states” (Van Hear 2012, 10).

In these circumstances, the question becomes how to strengthen the refugee protection system, given the lack of good faith compliance with its core principles. Several factors argue for a stronger commitment to refugee protection. First, some commentators have argued for a robust commitment to protection based on developed states’ interest in:

- the promotion of a “stable and moral world, one in which peace and respect for human rights are pervasive and firmly rooted” (Helton 2002, 120);
- engagement in a “system that systematizes humanitarian benevolence” (Hathaway and Gammeltoft-Hansen 2014, 4); or
- avoidance of the threat to the global economy, security, and stability if developing states—which host 86 percent (10.1 million) of the world’s refugees (UNHCR 2014a, 17)—are provoked to abandon this regime by insufficient burden-sharing by developed states (Hathaway and Gammeltoft-Hansen 2014, 4-5).

Second, most states recognize a responsibility to safeguard the rights of their own citizens and, in limited circumstances, the citizens of other states. Although not honored in the Syrian civil war, accompanying regional conflict, or elsewhere, the “responsibility to protect” enunciated by the International Commission on Protection and State Sovereignty represents an acknowledgment of the interdependence of states and that a state’s legitimacy turns, in part, on its commitment to human rights. By this understanding, states that mistreat or “threaten their citizens defy their own purpose” (Shacknove 1985, 279). More broadly, states pervert the concept of sovereignty when they use it as “a weapon to abet violations of the human rights” (Helton 2002, 133). If “refugeehood” can be conceived as a

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12 But see Suhrke 1998. Suhrke questions whether developing states would become less generous if developed states established more restrictive resettlement and asylum policies. Suhrke posits that collective action might occur “along restrictive lines,” result in “downward harmonization” of standards and practices, and lead to “a burden-shift” to less developed states and further restrictions on refugees (403, 412-13).

13 See Cohen 2014. Governments bear “primary responsibility” for their displaced citizens. However, when they cannot or will not assume this responsibility, international humanitarian organizations can offer their assistance and states cannot arbitrarily reject this offer (13).
“form of unprotected statelessness” (Shacknove 1985, 283), then states—individually and collectively—bear the responsibility to prevent and eliminate it.

Third, a commitment to refugee protection enhances state authority and influence and, for this reason, should be attractive to states. Successful, signature responses to refugee crises following World War II and the Vietnam War (Suhrke 1998, 404, 413) allowed states to achieve their goals and fulfill their core responsibilities, which they could not have done unilaterally. In addition, states have not been forced to ratify the Refugee Convention and Protocol and “no international or supranational body is vested with the power to enforce the right of non-refoulement; it is a matter of sovereign state control” (Bhabha 1998, 705).

Fourth, new strategic approaches to protection may lead to better outcomes and, thus, potentially to greater state support. In the past, refugee protection initiatives often failed due to “a lack of consultation with, and participation by, the affected people” and due to “disparagement of local knowledge and culture on the part of policymakers and planners” (Oliver-Smith and de Sherbinin 2014, 23). By contrast, a human rights approach to protection “respects the choices of refugees and displaced persons,” not just because this is “the right approach, rooted as it is in notions of dignity and human rights,” but because “it is the most effective and workable approach” (Helton 2002, 198). Such an approach does not focus solely “on the expected result, but also on the road that will lead to processes that will generate the result” and recognizes “the individual as a right bearer with justified claims against the state” and the state as “a duty bearer with the responsibility to promote, respect, protect and fulfill its human rights obligations” (Abramovich, Ceriani Cernadas, and Morlachetti 2011, 10).

Fifth, there is an emerging consensus, strongly advanced in the UN High Level Dialogue on International Migration and Development, that rights-respecting migration policies can benefit not just migrants, but sending and receiving states as well (UN 2006, ¶ 66, 77). Most recently, T. Alexander Aleinikoff proposed a “paradigm slide” from a humanitarian approach to protracted refugee situations, to one that builds on the self-reliance and agency of refugees, prioritizes the development of host communities, and would presumably be more acceptable to host states (Aleinikoff 2015, 4, 8). The UN High Commissioner for Refugees (UNHCR) has also attempted to appeal to the interest of developed states in migration control in order to induce their support for refugee protection in developing states (Betts 2009, 171). In particular, UNHCR has used the prospect of development assistance to influence hosting states to improve and expand refugee protection and integration initiatives (ibid.).

In the final analysis, however, recognition of the vast humanitarian need, coupled with a core commitment to human dignity and solidarity, represents the best hope for expanded

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14 Cf. Bhabha 1998. By way of analogy, the phenomenon of globalization is often seen to have “irrevocably weakened” the nation-state. However, the opposite may be closer to the truth: the expansion of free market economies seems to have enhanced the role and influence of nation-states. In the European Union, states have upheld veto power over legislation vital to member states, reserved for state control areas of state competence, and resisted policies that conflict with national goals (701).

15 See also Black and Collyer 2014. Because migrants are in the best position to decide whether or not to migrate, “the policy goals should be to avoid situations in which people are unable to move when they want to, not to promote policy that encourages them to move when they may not want to, and up-to-date information allowing them to make an informed choice” (55).
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engagement on refugee protection. In 2012, the International Federation of Red Cross and Red Crescent Societies (IFRC) estimated that more than 70 million people had been “displaced by conflict, political upheaval, violence and disasters … climate change and development projects” and other events beyond their control, with most in situations of protracted or permanent displacement (IFRC 2012, 9, 14-15).16 By the end of 2013, there were 51.2 million persons who had been forcibly displaced by “persecution, conflict, generalized violence, or human rights violations,” including 16.7 million refugees, 33.3 million internally displaced persons (the highest number ever recorded), 10 million stateless persons, and 1.2 million with pending asylum applications (UNHCR 2014a, 5,23).

Asylum applications in industrialized nations have risen substantially in recent years. UNHCR estimates that new applications for 866,000 individuals were submitted in 44 industrialized nations in 2014, with increases from 369,300 to 714,300 between 2012 and 2014 in European Union (EU) member states and from 98,900 to 134,600 in the United States and Canada (UNHCR 2015, 8). For the second consecutive year, Germany received the most new claims (from 41,330 in 2010 to 173,070 in 2014), followed by the United States (from 49,310 in 2010 to 121,160 in 2014).17 Syrians represented the largest number of new applicants (149,641), followed by Iraqis (68,719), Afghans (59,472), Serbs and Kosovars (55,668), Eritreans (48,402), and Pakistanis (26,332) (ibid., 23). Behind these figures stand millions of individuals whose lives and well-being depend on generous and well-coordinated refugee protection policies.

III. The US Refugee Protection System: Challenges and Recommendations for Reform

This section falls into four, overlapping parts. The first part examines barriers to access to protection in the United States. It covers migrant interdiction, security-related immigration measures, expedited removal, the US-Canada safe third-country agreement, and immigrant detention. The second analyzes the continuum of US refugee protection programs, starting with refugee resettlement and ending with temporary protection programs. The third explores the needs and treatment of the stateless, immigrants in crisis situations, and migrant children from Mexico and Central America. The fourth covers due process issues, including legal representation, insufficient immigration court resources, and the competency and professionalism of immigration judges and immigration officials.

The proposed reforms set forth in this section draw heavily on Nezer’s summary of relevant legislative developments in the 113th Congress and from the sweeping refugee protection proposals in the Refugee Protection Act of 2013 and the Border Security, Economic Opportunity, and Immigration Modernization Act, the comprehensive reform bill which the Senate passed in June 2013.18

16 There were an estimated 232 million international migrants in 2013, with 136 million in developed regions and 96 million in developing regions (UNDP 2013).
17 US affirmative asylum claims often include more than one person, but DHS reports on the number of claims, not individuals. Thus, UNHCR counts 1.393 individuals for each asylum claim submitted to DHS (UNHCR 2015, 5).
1. Barriers to Access to Protection

A. Interdiction at Sea
In its widely-criticized 1993 decision in Sale v. Haitian Centers Council, in the US Supreme Court held that US policy of intercepting Haitians in international waters and returning them to Haiti without a protection interview did not offend the statutory “withholding of removal” standard or the Refugee Convention. The decision’s real-world progeny has been characterized as the “shout test.” Without being informed of their right to request protection, interdicted Haitians must gain the attention of US officials on crowded ships and communicate that they are fearful of returning to Haiti in order to be permitted to speak to a “protection screening officer.” The Coast Guard transfers Haitians deemed to have a “credible fear” to Guantánamo Naval Base for an interview by US Citizenship and Immigration Services (USCIS) of DHS. USCIS can, in turn, refer refugees to the Department of State (DOS) for resettlement to a third country, although this seldom occurs (Kerwin 2012, 22). The United States employs different processes for interdicted persons from different nations like Cuba and China (Flynn 2014, 179-180; Kerwin 2012, 22).

Policy Proposals
Von Sternberg contends that the Sale decision created a legal “black hole” and violates the prohibition against refoulement. He maintains that Sale should be repealed by statute, and that Congress should clarify that “jurisdiction exists whenever the nation exercises power in fact, whether that locus be on the high seas or through some pre-screening device” (ibid., S76). He also argues that Sale should be revisited in light of the Supreme Court’s 2008 decision in Boumediene v. Bush. In Boumediene, the court held that the United States exercised “plenary control, or practical sovereignty” over Guantánamo Naval Base in Cuba and there was “no jurisdictional bar” to the federal court’s consideration of a habeas petition filed by enemy combatants.

The Refugee Protection Act of 2013 would have prohibited US officials from returning “any alien interdicted or otherwise encountered in international waters or United States waters who expressed a fear of return to his or her country of departure, origin, or last habitual residence” until the person had received a confidential interview by an asylum officer to determine if he or she had a well-founded fear of persecution on an enumerated ground or would have been subject to torture. A refugee who met this threshold test would have “an opportunity to seek protection” in a country in which he or she “has family ties or

20 The UNHCR’s Executive Committee sharply disagreed with the Sale decision, concluding that non-refoulement did not “imply any territorial restriction” and that “the international refugee regime would be rendered ineffective” if states failed to adhere to this obligation. UNHCR, Executive Committee, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, UN Doc. EC/50/SC/CRP.17, 9 June 2000, para. 23.
21 Nearly one-half of the 247,555 migrants interdicted by the US Coast Guard between 1982 and 2014 have been Haitians, followed by Cuban, Dominican, and Chinese nationals (USCG 2015).
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other ties” that would “facilitate resettlement” or in the nation that would “best facilitate” resettlement, including the United States.24

US-supported interception, border enforcement, and detention programs in Mexico and Central America have not been as well-documented as Coast Guard interdictions, US airport pre-screening programs, and other initiatives designed to extend US borders outward and to create an “outer ring” of border security. Nor do US agencies directly administer interception and detention programs in Mexico and Central America. However, the United States bears responsibility to ensure that intercepted migrants are screened for fear of persecution, torture and harm when it funds and otherwise exercises its power to prevent refugees and refugee-like populations from reaching its territory.

B. Security-Related Barriers to Protection

Since the terrorist attacks of September 11, 2001, there has been strong, bipartisan consensus on the need to safeguard the immigration system.25 Yet immigration-related security measures have also prevented refugees and refugee-like persons from accessing protection. Post-9/11 immigration-related security measures have included more in-person interviews for visa applicants, expanded pre-travel authorization processes, biometric screening, secure passports, and better information sharing between US law enforcement and intelligence agencies and with other nations (Ginsburg 2010).

The USA PATRIOT Act of 200126 and the REAL ID Act of 200527 significantly expanded the terrorism-related inadmissibility grounds (TRIG). Under current law, a noncitizen is inadmissible if he or she committed an act that he or she “knows, or reasonably should know, affords material support” for the commission of a “terrorist activity,” to a person who has committed or plans to commit terrorist activity, or to a “terrorist organization.”28 The law broadly defines the terms “material support,” “terrorist organization,” and “terrorist activity.”29

Under this system, pro-democracy groups and groups that opposed repressive regimes have paradoxically been treated as “undesignated” Tier III terrorist organizations,30 and “material support” has included assistance provided under threat of death. As a result, the

24 See also Acer and Magner 2014. Congress could also “require the administration … to allow individuals interdicted in US or international waters potential access to US asylum procedures” through the expedited removal process” (474).
25 The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3409 (2013) would have prohibited refugee admission until all security, law enforcement and other grounds of inadmissibility had been determined.
29 INA §212(a)(3)(B).
30 INA §212(a)(3)(B) (vi)(III). A “tier III” terrorist organization consists of a group of “two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” terrorist activity.
TRIG are “far more expansive than the grounds for exclusion or the exceptions to the non-refoulement obligation contemplated by the Refugee Convention” (Acer and Magner 2014, 454, 56), and have led to protracted delays and denials in tens of thousands of refugee and asylum cases (HRF 2009, 23-8; Kerwin 2012, 15-6).

In February 2014, DHS issued notice that it would exempt from the material support inadmissibility grounds certain noncitizens that provided: (1) “insignificant material support”\(^{31}\) and (2) “limited material support”\(^{32}\) to Tier III organizations, members of such organizations, or individuals they knew or should have known had committed or planned to commit terrorist activity. On May 8, 2015, USCIS issued policy memoranda to guide the exercise of the exemption authority set forth in these notices\(^{33}\).

**Policy Proposals**

Congress and the administration should comprehensively review US immigration-related security measures in order to assess their effect on persons at risk of persecution, torture or other severe harm, and to develop policies and procedures to identify and protect such persons.

The Refugee Protection Act of 2013 would have defined “terrorist activity” and “material support” more narrowly than current law, and would have excluded activity committed under duress from the terrorism definition.\(^{34}\) It would also have made an exception for persons who could demonstrate that they did not know and should not reasonably have known that the Tier III organization to which they belonged was, in fact, a terrorist organization.\(^{35}\) The Act would also have narrowed the definition of “material support” to “support that is significant and of a kind directly relevant to terrorist activity.”\(^{36}\) These reforms merit support.

**C. Expedited Removal**

Since passage of The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), asylum seekers stopped at or near the border without proper documents have been subject to a system of expedited removal and mandatory detention.\(^{37}\) The reach of the expedited removal system has been extended several times since its inception: the process now applies to those entering by sea and those arrested within 100 miles of US land and coastal borders. More than one million migrants have been removed through this process.
since 1997. In recent years, expedited removals have increased as a percentage of total removals and of arrests at or near the border (Kerwin 2012, 19-20). Between fiscal years (FY) 2011 and 2013, the number and percentage of expedited removals rose from 122,236 (31.6 percent of all removals), to 193,032 (44 percent) (Simanski 2014, 5).

**Figure 1. US Total Removals and Expedited Removals, FY 2000-2013**

![Graph showing US Total Removals and Expedited Removals, FY 2000-2013](image)


Between FY 2010 and FY 2012, the percentage of persons subject to expedited removal that expressed a fear of persecution and received a credible fear interview ranged from 7 to 9 percent.38 This figure jumped to 15 percent in FY 2013. The increase in credible fear interviews and the release from detention of persons found to possess a credible fear have been criticized as a source of abuse of the US asylum system.39 In fact the expedited removal process is “replete with hurdles” and difficult for asylum seekers to negotiate (Campos and Friedland 2014, 4).

To be able to pursue a claim, an asylum seeker must first have the wherewithal, confidence, and knowledge to express a fear of persecution or to request asylum from an immigration officer.40 Many asylum seekers cannot communicate their fear of persecution or need for asylum. Some do not understand this requirement or speak a language understood by

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40 INA § 235(b)(1)(A)(i).
immigration officials. Others fear or distrust government officials. In addition, immigration officials often fail to inform persons facing expedited removal that US law protects certain persons at risk of persecution, torture or harm, and they fail to ask questions that would elicit their fears and concerns (Pistone and Hoeffner 2006, 176, 178-79).

Some immigration officials discourage asylum seekers from pursuing claims and encourage them to withdraw their applications for admission by threatening them with incarceration, unspecified “trouble” and separation from their families, or by telling them that “the United States is full,” or offering other fatuous rationales (Cabot 2014, S212-13; USCIRF 2005b, 23-4). Even persons who express a fear of return are denied admission at high rates (USCIRF 2005b, 20-4). Human Rights Watch reported that relatively low rates of Honduran, Guatemalan, El Salvadoran, and Mexican border crossers advanced to credible fear interviews in FY 2011 and 2012 (HRW 2014, 21-3). Yet many deported Central Americans fear violence and specific threats which might have made them eligible for asylum in the United States (ibid., 15-19).

An asylum seeker who surmounts these hurdles is entitled to an interview by a USCIS asylum officer to determine if he or she has a “credible fear” of persecution. An asylum seeker can appeal a negative credible fear determination to an immigration judge within seven days. Otherwise, he or she will be expeditiously removed. If deemed to have a credible fear, an asylum seeker can apply for asylum in immigration court.

As discussed in Section III(1)(E) below, asylum seekers in expedited removal face mandatory detention until they establish a “credible fear.” DHS’s Office of Inspector General (OIG) has recently reported that certain Border Patrol sectors also refer asylum seekers for criminal prosecution under Operation Streamline, prior to allowing them to access the credible fear and asylum adjudication processes. OIG discovered this practice in two of four Border Patrol sectors that it examined in which this program operates. In these sectors, after asylum seekers are prosecuted and serve their sentences, they are again required to express a fear of persecution or to request asylum in order to receive a credible fear screening (DHS-OIG 2015, 16-17). In addition, Border Patrol officials incorrectly stated that immigration judges could vacate the criminal convictions of persons subsequently granted asylum (ibid., 17).

The prosecution of asylum seekers violates Article 31(1) of the Refugee Convention, which provides that contracting states “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened … enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Criminal prosecution for illegal entry constitutes precisely such a penalty. This practice also undermines the right to seek asylum, makes it more difficult to sustain a claim, punishes asylum seekers for fleeing in the only way open to them in
many cases (without travel documents), and ensures that asylees will begin their lives in
the United States with a criminal record (Kerwin 2005a, 756).

**Policy Proposals**

To increase the fairness and efficiency of the asylum process and to reduce immigration
court backlogs, both the Refugee Protection Act of 2013 and the Border Security, Economic
Opportunity, and Immigration Modernization Act would have given USCIS asylum
officers the option to grant asylum to persons they screen for “credible fear” or to refer such
persons to immigration court for removal proceedings.45 The Administrative Conference of
the United States recommended that asylum officers be further vested with the authority
to grant parole to persons they believe to have a well-founded fear of persecution or fear
of torture, and to recommend their release from detention (ACUS 2012, 15). Parole allows
noncitizens to enter the United States for limited periods “on a case-by-case basis for
urgent humanitarian reasons or significant public benefit,” but does not lead to a permanent
status.46

In response to the practice of select Border Patrol sectors to refer asylum seekers for
criminal prosecution prior to the credible fear interview, OIG recommended that the Chief
of the Border Patrol develop guidance regarding persons who “express a fear of persecution
or return … at any time during their Border Patrol processing for Streamline” (ibid., 17).
However, this decision should not lie with the Border Patrol. Given that the Border Patrol’s
practice in different sectors violates the Refugee Convention and eviscerates the asylum
process, the DHS secretary and attorney general should issue a joint directive that clarifies
that asylum seekers in expedited removal should in all cases be afforded a credible fear
interview and, if successful, should have their asylum claims adjudicated. Only if their
claims are denied should they be referred, if at all, for criminal prosecution.

**D. Safe Third-Country Agreement**

In December 2002, the United States and Canada entered a safe third-country agreement,
which requires asylum seekers to seek protection in whichever nation they reach first,
with exceptions for: (1) unaccompanied minors; (2) persons with family members in the
receiving country who have been accepted as refugees, have a pending refugee claim, or
have lawful status; and (3) persons who arrived with a validly issued visa or other valid
admission document, or for whom no visa was required to enter.47

At their worst, safe third-country agreements deny protection to refugees who are shuttled
from one country to another without having their claims considered (von Sternberg 2014,
S58-61). The US-Canada agreement guarantees the consideration of an asylum claim, but

45 The Refugee Protection Act of 2013, S. 645, 113th Cong. § 8 (2013); Border Security, Economic
Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3404 (2013). See also, Acer and
Magner 2014. Acer and Magner propose that all initial asylum claims, including those arising as a defense
to removal, be adjudicated by the asylum corps (478).
46 INA § 212(d)(5)(A).
safe-third.asp.
denies an asylum seeker the ability to decide in which of the two states to exercise the right to seek protection. An asylum seeker may, for example, wish to pass through the United States and seek asylum in Canada, given its more generous standards related to gang-related violence and gender-based claims, but they cannot do so.

Policy Proposals

Von Sternberg proposes that the US-Canada agreement be amended to permit “onward travel and admission to the country of destination” for those who have not filed asylum applications in the safe country of first presence, provided “the jurisprudence of the country of destination provides a significantly more favorable framework” or return would raise concerns over possible non-refoulement (von Sternberg 2014, S77). However, because the agreement applies only to asylum seekers who present themselves at a port of entry, it also incentivizes illegal migration and smuggling and, thus, places asylum seekers in harm’s way (Kerwin 2012, 27-8, von Sternberg 2014, S60). In addition, it “lacks any discernible security rationale” (Kerwin 2005a, 757). For all of these reasons, it should be repealed.

E. Immigrant Detention

The detention of asylum seekers violates international law, increases the difficulty of securing legal representation, and causes many to abandon their claims (USCCB-MRS and CMS 2015, 171-74). Detention also “concentrates” asylum seekers and their families in border communities, often away from family and support services (Cabot 2014, S214). Asylum seekers subject to expedited removal must be detained prior to a “credible fear” determination. While they can be released after establishing a “credible fear,” this often does not occur. In its most recent report on the detention of asylum seekers, ICE reported that nearly one-half of the 29,035 asylum seekers who met the credible fear standard in FY 2009 and FY 2010 remained in detention (DHS 2012, 4).

Despite an immigration court docket that expedites adjudication of detainee removal proceedings, the removal adjudication process and, thus, the detention of persons seeking asylum and related forms of protection can be attenuated. Persons who express a fear of violence to border officials, but who have received a removal order or previously been removed, must demonstrate a “reasonable fear” of persecution or torture in order to be referred to an immigration court for consideration of withholding of removal. Absent exceptional circumstances, reasonable fear determinations must be conducted within 10 days of referral to an asylum officer. However, they take substantially longer to schedule and additional time from the interview to service of the decision (Cabot 2014, S214-15). Thus, many persons in this situation spend prolonged periods in detention.

Although UNHCR detention guidelines provide that detention “should be a measure of last resort, with liberty being the default position” (UNHCR 2012, 14), the number of persons to pass through the US immigrant detention system each year has reached staggering levels

49 8 CFR §208.31(c) and (e).
50 8 CFR § 208.31(b).
The US Refugee Protection System

(Figure 2). This trend has been exacerbated by the Obama administration’s decision to build massive new family detention centers along the US-Mexico border (USCCB-MRS and CMS 2015, 164). Yet the purpose of detention—to ensure court appearances—can be accomplished through far less costly and more humane supervised release programs (ibid., 186-89).

**Figure 2. Annual US Detention Population, FY 2002-2013**

![Graph showing annual US detention population from FY 2002 to FY 2013](image)


**Policy Proposals**

The Refugee Protection Act of 2013 would have reduced the detention of asylum seekers through a “secure alternatives program,” designed to prevent flight and ensure court appearances.51 The Border Security, Economic Opportunity, and Immigration Modernization Act would likewise have created a secure alternatives program characterized by “appearance assistance services” and “community-based supervision programs.”52 These proposals deserve broad support.

The Department of Justice (DOJ) and DHS should also, by regulation, establish custody hearings for arriving asylum seekers (Acer and Magner 2014, 471). In addition, DOJ’s

Executive Office for Immigration Review (EOIR), which oversees the immigration court system, should expedite court hearings at the request of asylum seekers who wish to petition to bring at-risk family members to the United States (ibid., 482).

The Refugee Act of 2013 provided that asylum seekers found to have a credible fear would be released within seven days, unless DHS could demonstrate that they posed a risk to the public or a flight risk.\textsuperscript{53} Similarly, Cabot proposes that release should be the “norm” for asylum seekers who have established a credible fear and that negative custody decisions in these circumstances should be subject to judicial review (Cabot 2014, S214).

\textbf{2. US Refugee Protection Programs}

\textbf{A. The Refugee Resettlement System}

Since passage of the Refugee Act of 1980, the United States has resettled nearly three million refugees, making this program one of the largest and most successful humanitarian endeavors in US history (Brown and Scribner 2014, S84). The United States resettles more refugees than all other developed nations combined. Between 2009 and 2013, it accepted more than 70 percent of UNHCR-submitted refugees for resettlement throughout the world (UNHCR 2014c, 61).

The US refugee definition tracks the Convention definition.\textsuperscript{54} To qualify, a person must be outside his or her country of nationality or, if without a nationality, outside of the country of last habitual residence, and be “unable or unwilling to return to” and “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.”\textsuperscript{55} The law also provides for recognition of “in-country” refugees in certain circumstances.\textsuperscript{56}

The resettlement process begins each year when the president, after consulting with Congress, establishes an admissions ceiling and allocates resettlement numbers. Between FY 2004 and FY 2015, admission ceilings have ranged from 70,000 to 80,000, with actual admissions numbering between 41,223 and 74,654 (Bruno 2015, 3).\textsuperscript{57} Refugees must be screened and admitted on an individual basis. However, Congress has also passed and regularly renewed legislation, called the Lautenberg Amendment, which creates a presumption of refugee status for religious minorities and other historically persecuted groups from certain nations (Nezer 2014, S283; Kerwin 2014, S130).\textsuperscript{58}

\textsuperscript{53} The Refugee Protection Act of 2013, S. 645, 113th Cong. § 8 (2013); see also, von Sternberg 2014. The detention of asylum seekers deemed to have a “credible fear” does not guard against “spurious applications” or further any other “valid public interest” (342).
\textsuperscript{54} The International Federation of the Red Cross reports that refugees represent less than one-fourth of the global population of persons displaced by violence, conflict, development projects, natural disasters, and technological hazards (IFRC 2012, 14-7).
\textsuperscript{55} INA §101(a)(42).
\textsuperscript{56} Id.
\textsuperscript{57} The United States admitted nearly 70,000 refugees in both FY 2013 and FY 2014 (Bruno 2015, 3).
Figure 3. Total US Refugee Arrivals, FY 1980-2014

Sources: Bruno 2015; DHS 2014b.
The US Refugee Admissions Program (USRAP) depends on multiple institutional actors which have distinct roles and priorities (USCIS 2013; Kerwin 2012, 6-8). UNHCR assesses refugee claims and refers persons for resettlement. The Population, Refugees and Migration (PRM) division of DOS proposes admissions ceilings and priorities, and contracts with nongovernmental Resettlement Support Centers to screen persons for admission and prepare cases for review. USCIS reviews refugee applications for eligibility and admissibility, interviews applicants, and coordinates background checks, which are conducted by DOS, the Federal Bureau of Investigation, and the Central Intelligence Agency. CBP agents screen refugees for admission at ports of entry. The International Organization for Migration organizes refugee travel, which is funded through loans from PRM. The US Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) coordinates domestic resettlement services.

PRM enters “cooperative agreements” with national voluntary agencies (volags) and provides reception and placement funding to cover housing, food, and other settlement costs during the refugees’ first 30 to 90 days in the nation (GAO 2012, 7). ORR provides refugee cash assistance (RCA), refugee medical assistance (RMA), and social service funding through state refugee coordinators (ibid., 8). National volags have extensive networks of community-based affiliates, which provide resettlement assistance to refugees and interface with state refugee coordinators and other stakeholders on placement plans.

Not surprisingly for such a hydra-headed system, the resettlement process has long been burdened by poor coordination and a lack of inter-agency information sharing, which negatively affects planning, placement decisions, and provision of support services to refugees with special needs and vulnerabilities (Brown and Scriber 2014, S96-97). Often, for example, resettlement agencies do not learn about the mental health needs of refugees until they arrive (ibid., S96). Information sharing has also been deficient regarding persons who have been abused by members of their own communities (ibid., S97). The Refugee Act of 1980 called for a presidentially appointed US coordinator for refugee affairs, with the rank of ambassador at large, to develop refugee policy, coordinate admission and resettlement programs, and serve as a liaison to foreign governments, US government stakeholders, and participating NGOs. However, this position was never created.

In addition, some of the participating agencies in the resettlement process have goals which, in practice, can conflict. ORR seeks to promote “self-sufficiency and integration,” for example, while PRM seeks to resettle the most vulnerable refugees, which are not necessarily those with the best prospects for integration (ibid., S89). Furthermore, the refugee resettlement program’s “almost singular emphasis” on the goal of self-sufficiency through early employment can limit the ability of some refugees to adapt to their new communities, lead to their under-employment, and prevent them from securing the training, skills, credentials, and services that might improve their long-term prospects (GAO 2012, 29; Brown and Scribner 2014, S88). In recent years, refugee admissions have been provision has been repeatedly amended, typically to extend its expiration date and to modify the groups subject to its protection.

59 In January 2010, PRM doubled the reception and placement grant to $1,800 per refugee.
more diverse and included persons with substantial educational, employment, linguistic, health, and mental health challenges (GAO 2012, 6). Refugees with special needs and vulnerabilities often find it particularly difficult to achieve self-sufficiency through early employment (Brown and Scribner, S89).

The process of screening and resettling refugees can take two years or more (ibid., S97-98). Although necessary, security and health screening can substantially delay resettlement, particularly because the timing and periods of validity of screenings do not align and “by the time later checks are concluded, the first checks have [often] expired and must be redone” (Nezer 2014, S284). During this attenuated process, refugees and their family members must subsist in camps and urban settings, and are often at great risk. Delays also diminish their life prospects.

The federal government fails to share information with resettlement agencies in a timely manner on persons in the resettlement pipeline. As it stands, resettlement agencies must respond to a request for proposals by the end of June each year, before the president consults with Congress on admissions or sets a ceiling on admissions and allocations, leaving agencies without crucial information on refugees who may be resettled (Brown and Scribner 2014, S97-98).

Insufficient consultation by volags with state and local stakeholders on refugee placement decisions and community capacity has contributed to a political and public backlash against the program in some communities (GAO 2012, 12-17). Poor economic conditions have led some communities to request diminished numbers of refugees or even moratoriums on resettlement (ibid., 24).

However, the main challenge and source of tension for non-federal stakeholders in USRAP has been the federal government’s diminishing financial commitment to the program (Brown and Scribner 2014, S92-94; US Senate Committee on Foreign Relations 2010). A survey of 59 resettlement cases in 2008 by Lutheran Immigration and Refugee Service (LIRS) found that federal funding covered 39 percent of the cost of required services during the crucial first 90 days of resettlement (LIRS 2009, 9). In addition, resettlement agencies must accommodate the variance and unpredictability of government funding and meet new requirements set forth in cooperative agreements, including those more fittingly performed by the federal government like convening quarterly meetings with states and localities on refugee placement and other issues (Brown and Scribner 2014, S93-94).

States and localities have endured similar pressures. In 1980, the federal government fully reimbursed states for social assistance benefits provided to refugees during their first 36 months in the country, and provided refugee cash assistance and refugee medical assistance over the same period. By 1991, the federal government had reduced the period of RCA and RMA benefits to eight months (Nezer 2014, S293), based on concerns that the program appeared to be a form of welfare, rather than “transitional assistance” (Brown and Scibner 2014, S90-91). By October 1990, the federal government stopped covering the state share (for refugees) of Aid to Families with Dependent Children, Medicaid, and Supplemental Security Income (SSI) (ibid., S91).

The ORR funding formula to states is based on the number of arrivals within the previous 36 months who live in the state at the beginning of the year. This formula short-changes
communities that are experiencing spikes in resettlement (ibid., S97). Furthermore, federal funding “does not necessarily follow” refugees to their new communities (GAO 2012, 21), which creates a burden on communities with large numbers of secondary refugee migrants. ORR has traditionally tracked secondary migration of refugees through state reporting of refugee applications for services, a method that produces incomplete and inaccurate information (Brown and Scribner 2014, S95).

Protracted refugee situations, defined as situations in which refugees have been displaced for at least five years and have no immediate prospects for a durable solution, represent one of the greatest failures of the international refugee protection system (UNHCR ExCom 2009, preamble). An estimated two-thirds of the world’s refugees meet these criteria (Milner and Loescher 2011), undermining the exercise of many of the rights set forth in the Refugee Convention.\(^{61}\)

Persons who have languished for years in camps may no longer be able to sustain a refugee claim. In other cases, the US government may decide that members of groups of particular humanitarian concern or otherwise of special interest should be admitted as refugees because of the history of discrimination and persecution against them.

Family reunification is a fundamental right and often an essential ingredient in refugee integration. Yet the refugee resettlement system separates families and defines family more narrowly than many refugees do (Nezer 2014, S282). Among other impediments to family unity:

- The children of a refugee’s spouse or the refugee’s grandchildren do not qualify for derivate status, preventing them from joining their parents and grandparents in the United States.
- If a refugee dies in the United States, his or her step-children and grandchildren may never be able to immigrate.
- A child in the care of a refugee who has been separated from his or her biological or adoptive parents, and does not otherwise qualify for admission, cannot be resettled with the refugee, even if it would be in his or her best interest.
- A refugee or asylee must petition for a qualifying family member to join him or her within two years of admission or the grant of asylum.
- It takes several months (five months at this writing) for USCIS to adjudicate applications for admission of family members who are seeking to join the refugee.

Finally, refugees must petition to become lawful permanent residents (LPRs) in the United States. The Senate-passed version of the Refugee Act of 1980 provided that refugees entering the United States under normal procedures would be admitted as LPRs.\(^{62}\) However, the House-Senate conferees replaced this provision with one permitting adjustment to LPR status after one-year. Under current law, refugees whose admission has not been terminated, who have been physically present for “at least one year,” and who have not acquired LPR status, must “at the end of such period” apply for adjustment to LPR status.\(^{63}\)

\(^{61}\) These include the right to work and freedom of movement within the host state and travel outside it (Refugee Convention, Articles 17, 26-28).


\(^{63}\) INA § 209(a).
Policy Proposals

To respond to the problem of poor coordination and insufficient information sharing among USRAP’s constituent agencies, Brown and Scribner propose that:

- the president appoint, after appropriate consultation with Congress, a coordinator for refugee affairs;
- UNHCR’s “referral for resettlement” analysis include information on torture, sexual, and physical abuse;
- DOS share arrival projections with ORR in a more timely manner, and ORR “better align its funding mechanisms with the needs of communities that have to respond to influxes of new refugees”;
- USCIS share information with resettlement agencies far earlier in the process on persons who may be resettled in the upcoming year; and
- the refugee program address obstacles to employment through better pre-arrival orientation programs (Brown and Scribner 2014, S89, S96-98).

To address the need for better consultation with state and local stakeholders, the US Government Accountability Office (GAO) recommended that PRM offer greater guidance on this priority to volags and state refugee coordinators, and that DOS and HHS identify and disseminate “promising practices” for engaging local communities on refugee placement, local capacity, and other issues (GAO 2012, 38).

To address concerns related refugee integration, the Refugee Protection Act of 2013 provided that the comptroller general should undertake a study on the effectiveness of the resettlement program, how ORR defines self-sufficiency, its success in assisting refugees to become self-sufficient, an analysis of unmet program needs, the funding levels necessary to meet unmet needs, and recommended statutory changes. The study’s findings would presumably lead to a broader conceptual and strategic approach to the integration and well-being of refugees or, at least, towards persons with special needs, vulnerabilities, and challenges. Similarly, GAO recommended that HHS review ORR’s performance measures, with the goal of affording service providers greater flexibility and incentives “to focus on longer term goals, including integration, independence from any government services, and career advancement” (ibid., 39).

To address the need for better data on secondary refugee migration, Brown and Scribner propose that ORR and resettlement agencies explore the feasibility of tracking secondary migration through the repayment of refugee travel loans to resettlement agencies (Brown and Scribner 2014, S95), which could ultimately lead to a more equitable distribution of resettlement resources. To address funding deficiencies created by spikes in settlement (GAO 2012, 15), ORR should fund states to assist refugees based on past and projected numbers of refugees, rather than based solely on past admission levels. In addition, GAO recommended that an emergency fund be created to identify and assist communities with large numbers of secondary refugee migrants (ibid., 29).

To provide the authority and flexibility to admit members of priority groups who do not consistently meet the refugee standard, the Refugee Protection Act of 2013 would

have given the president authority, after appropriate consultation, to designate groups for admission “whose resettlement is justified by humanitarian concerns or is otherwise in the national interest.” These groups must have shared “common characteristics that identify them as targets of persecution” or “other serious harm” or have shared a “common need for resettlement due to a specific vulnerability.” The Border Security, Economic Opportunity, and Immigration Modernization Act included a parallel provision.

To strengthen families, promote family unification, and increase the efficiency of the resettlement process, the Refugee Protection Act of 2013 would have:

- treated the children of a refugee’s or asylee’s spouse or child as derivative beneficiaries;
- allowed a child who has been separated from his or her parents and is living under the care of a refugee to be resettled with the refugee if it is in his or her best interests; and
- required DHS to adjudicate refugee and asylee family reunification applications for spouses and minor children abroad within 90 days.

To facilitate integration and promote efficiency, the Refugee Protection Act of 2013 would have allowed refugees to file for adjustment to LPR status three months before becoming eligible to adjust. It would also have extended SSI eligibility to refugees and trafficking victims from seven to 10 years. The Border Security, Economic Opportunity, and Immigration Modernization Act would have waived the English language and civics requirement to naturalize for certain elderly and disabled refugees.

**B. In-Country Refugee Processing**

In-country refugee processing presents conceptual and practical difficulties because, by definition, refugees fear persecution in their countries of nationality or last habitual residence. In addition, past US in-country refugee processing programs have not included sufficient safeguards for applicants (Frelick 2003). In-country processing can also be used to dissuade refugees from fleeing their home communities and to supplant refugee screening in third countries.

At the same time, the flight of migrant children from Central America, the murder of untold numbers of migrants in transit in Mexico, and the continued high incidence of US-Mexico
border crossing deaths have highlighted the potential risks of international migration. They have also illustrated that for some refugees, in-country processing is a safer and better option than irregular migration.

In December 2014, the Obama administration announced the launch of a modest in-country refugee/parole screening program for certain El Salvadoran, Guatemalan, and Honduran children. The program permits lawfully present US residents to apply “to bring their children to the United States as refugees” and it allows children found ineligible for refugee admission but at risk of harm to “be considered for parole on a case-by-case basis” (DOS 2014).

Likewise, the presidential determination on refugee admissions for 2015 provided that Honduran, Guatemalan, and El Salvadoran nationals, among others, “may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence” (White House 2014a).

**Recommendation**

In-country refugee processing should be carried out with strict safeguards designed to protect confidentiality and as a complement to a robust and well-resourced system of third-country refugee screening and processing. In addition, these programs should be regularly monitored and evaluated to ensure that they meet these conditions. The use of parole to admit non-refugees who are at risk of substantial harm should be expanded.

**C. Political Asylum and Related Forms of Protection**

The United States uses the nomenclature of asylum to describe the assessment and adjudication of refugee claims within its borders. USCIS asylum officers consider claims presented “affirmatively”; that is, by persons who are not in removal proceedings. If denied by an asylum officer, affirmative applicants who lack legal status can seek asylum “defensively” in removal proceedings. Since 1980, the United States has granted asylum to more than 400,000 persons (see Table 1).

To secure asylum, applicants must satisfy the refugee definition and meet other criteria. Withholding of removal, a related form of protection, can be awarded to persons whose “life or freedom would be threatened” due to their race, religion, nationality, membership in a particular social group, or political opinion. Withholding can also be granted if it

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73 See also Humble 2014. Intensive border security alone argues for a greater commitment to “a functioning and effective method for migrants to apply for refugee status prior to reaching their desired destination country” (57).
74 INA §101(a)(42). Asylum seekers cannot have persecuted others, been convicted of a “particularly serious crime,” constitute a danger, have committed a “serious non-political crime outside the United States,” endanger US security, be subject to terrorism-related grounds of inadmissibility or removal, or have been firmly resettled in another nation prior to arrival. INA § 208(b)(2).
75 INA §241(b)(3)(A). Withholding claims cannot be: (1) denied in the discretion of an immigration judge; (2) barred based on failure to meet the one-year asylum filing rule; or (3) denied based on the applicant’s firm resettlement in a third country. However, withholding is not available to a person who has persecuted others; been convicted of a “particularly serious” crime and is danger to the community; has committed a serious nonpolitical crime before arriving; or who constitutes a security risk. INA § 241(b)(3)(B).
Table 1. Asylum Grants, FY 1980-2013

<table>
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<tr>
<th>Fiscal Year</th>
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Note: *Totals do not reflect asylum granted defensively from FY 1980-1989.
Sources: EOIR data on file with author; INS 2002; DHS 2014b.
The US Refugee Protection System

is more likely than not that an applicant would be tortured in the proposed country of removal.⁷⁶ A person found eligible for protection based on the likelihood of torture who is nonetheless denied withholding, can be granted deferral of removal.⁷⁷

In FY 2014, immigration judges received 41,920 asylum cases, completing 36,614 of them, counting withdrawn and abandoned claims (EOIR 2015, J2). Of cases decided on the merits, immigration judges granted asylum in 8,775 cases and denied asylum in 9,222 cases (EOIR 2015, K1). USCIS does not consistently report on affirmative asylum filings and its annual statistical report is published later than EOIR statistical reports. In FY 2013, the most recent year reported on by USCIS, the asylum corps granted asylum in 15,266 affirmative cases (Martin and Yankay 2014, 6).

In FY 2014, the grant rate by immigration judges of asylum cases first considered “affirmatively” (by asylum officers) was 75 percent and of purely defensive claims was 28 percent (EOIR 2015, K3). In FY 2014, immigration courts approved 1,463 withholding of removal claims or 12 percent of the cases in which withholding was sought, not counting cases in which both asylum and withholding were granted (ibid., K5). Immigration courts granted asylum, withholding, or both in 56 percent of the cases in which these claims were made (ibid., K6). They also entertained 26,394 claims under the Convention against Torture, granting withholding in 415 cases and deferral from removal in 121 cases (ibid., M1).⁷⁸

Between 2010 and 2014, only Germany exceeded the United States in new asylum seekers (434,300 claims compared to 403,300), among 44 industrialized nations (UNHCR 2015, 13). However, the United States ranks substantially lower in asylum seekers per 100,000 inhabitants (at 1.3), falling below Sweden (24.4 per 100,000), Malta (17.5), Luxembourg (12.6), Switzerland and Montenegro (12.3 each), and Germany (5.3) (ibid.).

The US asylum system has long been diminished by procedural bars to asylum, due process deficiencies, and the liberal use of detention. Since passage of IIRIRA, asylum seekers have been required to file their claims within one year of entry, with narrow exceptions based on “extraordinary circumstances” that account for a late-filed claim and “changed circumstances” that “materially affect” asylum eligibility.⁷⁹ According to one study, more than 30 percent of the affirmative asylum cases filed between April 16, 1998 and June 8, 2009 failed to meet the one-year deadline (Schrag et al. 2010, 688).⁸⁰ This figure does not include the (unknown) number of asylum seekers who have been discouraged from filing after they missed the deadline.

EOIR does not report on claims barred due to the one-year deadline (ibid., 768-69). However, a report by the US Government Accountability Office (GAO) concluded that meeting the filing requirement increased the likelihood of prevailing in an asylum claim in

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⁷⁶ 8 CFR § 208.16 (c) (2).
⁷⁷ 8 CFR § 208.17 (a) and (b).
⁷⁸ The low number of reported approvals of Convention Against Torture (CAT) withholding and deferral of removal claims may be due to the facts that: (1) immigration judges that grant political asylum do not decide upon parallel CAT claims in many cases; and (2) EOIR does not report on CAT grants of withholding or deferral of removal in cases in which asylum has also been granted.
⁷⁹ INA § 208(a)(2)(B) and (D).
⁸⁰ See also HRF 2010, 7.
immigration court by 40 percent in cases first considered affirmatively by USCIS and 30 percent in defensive claims (GAO 2008, 30). Another study found that 19 percent of 3,472 asylum cases appealed to the Board of Immigration Appeals (BIA) between 2005 and 2008 failed to meet the filing deadline (NIJC, HRF and CIR 2010, 6-7). Long delays in non-detained court cases can push asylum seekers beyond the one-year filing deadline through no fault of their own (Cabot 2014, S217).

The one-year filing deadline has not improved the government’s ability to detect and prevent fraudulent claims (Acer and Magner 2013, 449). Nor has it led to fewer meretricious claims. As proof, applicants who fail to meet the filing deadline but qualify for an exception have prevailed in their claims at roughly the same rate of those who meet the deadline (Schrag et al. 2010, 745-46). The deadline has, however, barred consideration of an extraordinarily high percentage of asylum claims and has diverted scarce asylum officer and immigrant judge resources from consideration of the merits of claims (Acer and Magner 2014, 449-50).

The Refugee Convention and Protocol require that refugees be afforded “the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment to work.”81 Employment is also key to the exercise of other guaranteed rights. Yet US asylum seekers must wait 150 days after they have submitted an asylum application to apply for employment authorization, and USCIS has an additional 30 days to grant or deny the employment application.82 In addition, accrual of time toward the 150-day period can be stopped for any “delay requested or caused by the applicant,”83 and these delays occur in the vast majority of cases (HRW and CSJ 2013, 18). As an example of the potential impact of these measures, non-detained asylum seekers must wait up to four years for their initial master calendar hearing in immigration court in El Paso, at which point they can request asylum, and begin the long count-down toward employment authorization (Cabot 2014, S219).

US asylum applicants must establish that race, religion, nationality, social group membership, or political opinion “was and will be at least one central reason” for their persecution.84 In addition, immigration judges may require them to secure corroborating evidence of “otherwise credible testimony, unless they do not have “and cannot reasonably obtain” it.85 Because persecutors often hide their activities, it can be difficult for asylum seekers to establish the persecutor’s motive, to collect corroborating evidence (particularly for those who fled hurriedly), or to demonstrate past persecution.

Under its 1985 decision in Matter of Acosta, the BIA defined a “social group” as one whose members “share a common, immutable characteristic” that they “either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”86 In 2008, the BIA narrowed this definition to require the “social visibility” of persecuted groups.87 The Seventh Circuit Court of Appeals criticized this standard on

81 Refugee Convention, Article 17(1).
82 8 CFR § 208.7(a)(1) and (2).
83 8 CFR § 208.7(a)(2).
84 INA § 208(b)(1)(B)(i).
85 INA § 208(b)(1)(B)(ii).
the grounds that members of persecuted groups often do no look different from others and “take pains to avoid being socially visible.” Cabot recounts an asylum claim, for example, of an informant to the US Drug Enforcement Administration, whose claim was rejected because informants (for understandable reasons) hide their identities and are not socially visible (Cabot 2014, S216). Asylum seekers with gender-based claims would also struggle to meet the social visibility requirement (Acer and Magner 2014, 458).

In 2004, the BIA replaced “social visibility” with the term “social distinction,” in order to clarify that “visibility” or “distinction” did not require that a social group be literally or physically seen by the society at large, but must instead be perceived to be a discrete group. The “social visibility” and “social distinction” requirements have been adopted by several circuit courts of appeal, with the exception of the Third and Seventh Circuits. As it stands, applicants for asylum or withholding of removal on account of membership in a social group must demonstrate that the group is composed of members “who share a common immutable characteristic,” which is “defined with particularity,” and “socially distinct within the society in question.”

Finally, asylum claims can be impeached by trial counsel and denied on credibility grounds by immigration judges due to discrepancies between the applicant’s earlier statements to immigration officials and their court testimony (USCIRF 2005b, 67-70). These discrepancies may be caused by the confusion, caution, or fear of asylum seekers, or they may result from poor training, insufficient interpretation, or the time pressure on immigration officials. A comprehensive study of the expedited removal process by the US Commission on International Religious Freedom found that immigration officials in secondary inspection often:

- failed to inform applicants regarding the possibility of protection;
- failed to “elicit information” about possible asylum claims;
- failed to refer applicants who expressed fear to credible fear interviews;
- allowed applicants to sign their sworn statement without reviewing it;
- included in the applicant’s statement “assertions” which they never made; and
- failed to include in “completed forms … important information communicated by the applicant.” (Pistone and Hoeffner 2006, 175-76).

**Policy Proposals**

The one-year filing deadline has barred a high volume of meritorious claims, has created extraordinary inefficiencies, and has not diminished fraudulent or meretricious claims. For these reasons, the Refugee Protection Act of 2013 and the Border Security, Economic Opportunity, and Immigration Modernization Act would have eliminated the one-year deadline and allowed asylum seekers whose claims had been barred by the filing deadline but who had been granted withholding of removal to move to re-open their cases over a two-year period. (BIA 2008); Matter of E-A-G-, 24 I&N Dec. 591, 595-596 (BIA 2008).

88 Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
91 The Refugee Protection Act of 2013, S. 645, 113th Cong. § 3 (2013); Border Security, Economic
To address delays in employment authorization and related difficulties, the Border Security, Economic Opportunity, and Immigration Modernization Act would have provided employment authorization to asylum seekers 180 days after they filed an asylum application, irrespective of delays in the adjudication process caused by the asylum seeker.92 Similarly, the Administrative Conference of the United States recommended that asylum and withholding of removal applicants should “presumptively qualify” for employment authorization 150 days after filing an asylum application (ACUS 2012, 13). While these reforms would have reduced delays in securing authorization to work in most cases, they would not have allowed asylum seekers to sustain themselves and their families in the six months after they applied for asylum. Thus, von Sternberg proposes that USCIS should provide employment authorization upon the filing of a non-frivolous asylum application (von Sternberg 2014, S77).

The Refugee Protection Act of 2013 would have addressed the difficulties in establishing persecutors’ motives by requiring asylum seekers to demonstrate that race, religion, nationality, membership in a social group, or political opinion is “a factor in the applicant’s persecution or fear of persecution.”93 It would have addressed problems related to corroboration of testimony by allowing the applicant to meet his or her burden of proof through “[d]irect or circumstantial evidence, including evidence that the State is unable to protect the applicant or that the State legal or social norms tolerate such persecution against persons like the applicant.”94

The Refugee Protection Act of 2013 would also have eliminated the social visibility or distinction requirement by codifying the Acosta standard, and defining “social group” to include “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it.”95

Finally, to create a more accurate and complete record in asylum cases and to avoid unfounded, negative credibility determinations, Cabot proposes that interpreter services be provided for initial interviews of asylum seekers and verbatim transcripts of interviews be provided to immigration judges (Cabot 2014, S211-12). Similarly, the secondary inspection interviews of persons in expedited removal should be videotaped (Pistone and Hoeffner 2006, 203).

D. Temporary Protection

Temporary protection programs for refugee-like populations have received little attention since the establishment of the TPS program by the Immigration Act of 1990.96 However, TPS and other temporary programs protect hundreds of thousands of persons each year

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94 Id.
The US Refugee Protection System

and, given the narrow eligibility criteria for refugee admissions and asylum, are essential to a seamless and comprehensive system of protection.

DHS can provide TPS to groups from states that are experiencing armed conflict, natural disaster, and other extraordinary conditions which make it unsafe to return. TPS affords legal status and work authorization for six to 18 months, with the possibility of extensions if the conditions leading to the group designation persist. Extensions have been granted liberally since the program’s inception, even in cases in which the conditions giving rise to the designation no longer obtain. Recent statistics indicate that more than 340,000 persons hold TPS status (Bergeron 2014, S107). Von Sternberg asserts that TPS “approaches the ideal of protection based on humanitarian need” set forth in the UN Guidelines on Internal Displacement (von Sternberg 2014, S74). However, TPS does not:

- allow individuals to assert claims to protection unless they belong to a designated group;
- lead to LPR status for individual beneficiaries;
- constitute an admission or parole, according to DOJ, which would allow beneficiaries to adjust to LPR status, although the Sixth Circuit Court of Appeals has rejected the DOJ’s interpretation of the law (Bergeron 2014, S113);
- treat recipients like refugees or asylees for the purposes of public benefit eligibility;
- apply to persons from designated states who enter the United States following the designated cut-off date, even family members of beneficiaries or those who have fled desperate situations; or
- allow beneficiaries to petition for the admission of close family members.

By way of comparison, the EU sought to harmonize the laws of member states and set forth minimum standards related to refugee protection in its 2004 Qualification Directive, which was recast in 2011. In doing so, it created a category of persons “eligible for subsidiary protection,” defined as non-refugee third-country nationals or stateless persons who if returned to their countries of origin or of former habitual residence (for stateless persons), “would face a real risk of suffering serious harm.” The directive limits “serious

97 INA § 244(b)(1).
98 INA § 244(b)(3)(C).
100 In addition, Congress cannot extend LPR status to designated groups without a supermajority vote of the Senate. INA §244(h)(2).
102 EU 2011, Article 2(f).
harm” to the “death penalty or execution”; “torture or inhuman or degrading treatment or punishment”; or a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

Member states must issue residence permits to subsidiary protection beneficiaries and their family members for at least one year and renewals for two years absent “compelling reasons of national security or public order.”

Beyond TPS, the executive branch (DHS) can also exercise its discretion not to remove persons who would face violence, persecution, or extreme privation if returned to their home countries. The exercise of discretion has been formalized through programs like deferred enforced departure (DED) and deferred action (DA) which immunize certain noncitizens from removal for temporary periods and provide them with employment authorization and other benefits.

While DHS enjoys some discretion in how it provides temporary protection to persons in the United States, “parole” is the only available vehicle to admit non-refugees in substantial need of protection. Prior to the Refugee Act of 1980, the United States used parole to admit large numbers of de facto refugees and persons fleeing refugee-like situations. The Refugee Act limited the use of parole to the admission of individuals and established a presumption against granting parole to refugees. At present, “humanitarian parole” is used sparingly and rarely as a protection vehicle. Nor do the relevant regulations single out refugees or persons in refugee-like situations for consideration for parole.

**Policy Proposals**

Bergeron presents several possible administrative and legislative fixes that would further the goal of providing TPS for temporary periods to members of groups that do not meet the refugee definition, while also ensuring that long-term residents can integrate into the United States. She concludes that the best way to reconcile these twin goals would be to allow persons who have held TPS status for more than 10 years to adjust to LPR status, while pursuing the repatriation of shorter-term TPS beneficiaries whose status has ended. To provide permanent status to long-term beneficiaries of US temporary protection programs (including TPS), Congress could also pass legislation to:

- advance the INA’s “registry” date to January 1, 1999, which would allow temporary protection recipients and others who arrived prior to this date to apply for LPR status;
- establish a legalization program that would credit years in receipt of temporary

103 EU 2011, Article 15.
104 EU 2011, Article 24(2).
105 As the United States debates the use of executive action to immunize unauthorized immigrants from possible removal, it is instructive to remember that concerns over the attorney general’s admission of refugee-like groups through his parole authority contributed to passage of the Refugee Act of 1980.
106 8 CFR 212.5 (b).
107 INA §249. Registry provides LPR status to long-term residents who entered the United States prior to a legislatively established, cut-off date (currently January 1, 1972), have lived continuously in the United States in the interim, and meet other requirements.
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protection toward the time required to “earn” legalization; and
• allow such persons to apply affirmatively for “cancellation of removal” (which affords LPR status) after 10 years (Kerwin 2014, S146-47).

To lay the foundation for the voluntary return of short-term TPS beneficiaries, the United States should prioritize the reconstruction, economic development, and establishment of the rule of law in TPS-designated states (ibid., S144-45).

DHS should also create a more inclusive TPS determination process by hosting quarterly public hearings on conditions in TPS-designated nations and in nations that might be eligible for a designation (ibid., S147). In addition, it should “re-designate” more states for TPS, rather than simply extending TPS for already designated groups. The former option would have the effect of extending TPS to persons from re-designated states who have fled dangerous conditions and entered the United States between the initial designation and re-designation periods (ibid., S147-48).

Kerwin contends that the limited ability of the United States to admit non-refugees from abroad who are in desperate need of protection represents the most glaring deficiency in the US refugee protection system (ibid., S143-44). He proposes that Congress create a non-immigrant protection visa for noncitizens that are at substantial risk of persecution, danger or harm in their home or host nations. In addition, he argues that DHS should expand its use of parole in such cases (ibid.).

Because the number of approved “U” non-immigrant visas has exceeded the 10,000 cap for several consecutive years, the Border Security, Economic Opportunity, and Immigration Modernization Act would have increased the annual limit of “U” visas to 18,000 and required DHS to grant employment authorization to “U” and “T” (trafficking) non-immigrant visa applicants on the date of the application’s approval or, if earlier, 180 days after submission.108

3. Vulnerable Populations

A. The Stateless

The Refugee Convention was created in response to the plight of displaced and stateless persons following World War II. Yet the US refugee protection system—though firmly rooted in the Refugee Convention and Protocol through the Refugee Act of 1980—does not provide a discrete path to legal status for stateless persons.

Persons become stateless in three primary ways. First, they lose and then fail to obtain citizenship in cases of state succession (UNHCR 2012, 13). Second, they belong to groups targeted by discriminatory laws and policies like those, for example, that prevent mothers from passing on citizenship to their children, selectively deny birthright citizenship, or refuse to issue documents that would allow members of disfavored groups to establish citizenship (ibid., 14). Third, they fall through the gaps in legal systems, including gaps

created by “incompatibilities between the laws of States recognizing citizenship primarily through blood relationship (jus sanguinis) and those recognizing citizenship through birth in the country (jus soli)” (ibid.).

Fullerton decries the lack of good estimates of the US stateless population and of “reliable information on the countries from which they came, the circumstances through which they became stateless, or any protection alternatives which they may be able to pursue” (Fullerton 2014, S171). She characterizes statelessness as an example of a protection and an information gap. Despite the absence of legislation and the paucity of jurisprudence related to the stateless, she finds that persons who become stateless through denationalization decrees fit more easily into the US refugee paradigm and may be presumed to have experienced past persecution. Persons who become stateless due to the dissolution of states and discriminatory legislation in successor states may “warrant a rebuttable presumption on the need for protection” (ibid., S170).

Stateless persons come to the attention of US immigration authorities, if at all, in two primary ways. Several hundred stateless persons each year make asylum claims. Others do not seek asylum, but cannot be removed because no nation will recognize them or accept their return (UNHCR 2012, 22-3). By statute, DHS must remove noncitizens within 90 days following receipt of a removal order, but “shall not” release those who are inadmissible or deportable on criminal or national security grounds. In 2001, the US Supreme Court interpreted this provision to prevent indefinite detention, holding that six months after a removal order becomes final, the burden shifts to the government to show there is a “significant likelihood of removal in the reasonably foreseeable future.” As a result, DHS must release most persons who have been ordered removed and whom it cannot repatriate, including the stateless. In the case of both refugee and non-refugee stateless persons, however, US law offers no discrete path to legal status.

**Policy Proposals**

Fullerton proposes that the federal government convene a task force to report on the size and composition of the US stateless population and the need for legislative, regulatory, and policy guidance concerning statelessness claims (Fullerton 2014, S170).

The Refugee Protection Act of 2013 would have allowed the DHS secretary, in consultation with the secretary of state, to designate specific groups as stateless and to provide conditional lawful status to *de jure* stateless persons who are otherwise inadmissible or deportable, albeit not those inadmissible on criminal or security grounds. After five years, persons in conditional lawful status would have been permitted to apply for LPR status. The Border Security, Economic Opportunity, and Immigration Modernization Act would have allowed stateless persons to adjust to LPR status one year after securing conditional lawful status.

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**B. Crisis Migrants**

The plight of noncitizens in crisis situations has received substantial attention in recent years through the UN High Level Dialogue on International Migration and Development and the state-led Migrants in Countries in Crisis (MICIC) initiative.\textsuperscript{114} Weerasinghe et al. analyze the response to noncitizens in five crises in 2011 and 2012,\textsuperscript{115} identifying several problems with government responses toward noncitizens in these situations, including:

- communication of information on the crisis in modes and languages that do not reach noncitizens;
- laws and policies that impede access to relief and development services and otherwise do not account for the needs of noncitizens;
- difficulties in accessing relief services given the location of noncitizens, lack of translation services, and onerous documentation requirements;
- lack of consideration of noncitizens in disaster management laws, planning, and response;
- rogue authorities, militias, criminal enterprises, and other private actors that seek to exploit noncitizens;
- border restrictions that prevent noncitizens from migrating to safety;
- scapegoating and targeting of noncitizens for violence, arrest, and detention; and
- the inability, negligence, or refusal of countries of origin to protect their citizens abroad by neglecting to issue them travel documents or provide them with access to embassy personnel (Weerasinghe et al. 2015, S179-80, S190).

The paper also provides a taxonomy of particularly vulnerable groups in crisis situations, including persons without status, domestic workers, refugees, asylum seekers, stateless persons, and detainees. Hundreds of thousands of Palestinian refugees, for example, have been displaced in Syria, and trapped in conflict zones, most unable to flee to neighboring countries. Jordan has denied entry to Palestinians who possess only Syrian travel documents since early 2013 (Weerasinghe et al. 2015, S189).

**Policy Proposals**

Weerasinghe et al. also offer recommendations to countries of origin and destination which respond to the problems that their paper identifies. In particular, they propose that states:

- suspend immigration enforcement in the aftermath of a crisis;
- provide assistance to survivors without reference to immigration status;
- communicate emergency and relief information in multiple languages and through means that will reach noncitizens;

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\textsuperscript{114} The MCIC seeks to improve the capacity of states and diverse stakeholders to address the often unique challenges and hardships faced by migrants in situations of crisis and to develop non-binding voluntary guidelines to enhance protection and assistance to noncitizens in these circumstances (Weerasinghe et al. 2015, S179, S197).

\textsuperscript{115} These crises were the Libyan uprising that led to Muammar Gaddafi’s overthrow; the Tohoku earthquake, tsunami, and Fukushima nuclear accident in Japan; Hurricane Sandy in the Northeastern United States; flooding in Thailand; and the barbaric conflict in Syria.
facilitate departure in the aftermath of crises and expedite re-entry by rapidly processing visa and return applications;

- target relief to noncitizens;
- intervene to address the particular needs of their citizens in crisis situations, including by seeking external assistance; and
- legalize migrant workers and create channels to allow (other) noncitizens to return safely to their countries of origin (ibid., S196-97).

C. Child Migrants from Mexico and Central America

Between FY 2011 and FY 2014, the number of unaccompanied alien children (UAC) arrested by US border officials rose from 16,056 to 68,541 (UNHCR 2014b, 16; CBP 2015). Arrivals of UAC from Mexico were consistently high throughout this period (CBP 2015). However, UAC migration increased dramatically between FY 2009 and FY 2014 from El Salvador (1,221 to 16,404), Guatemala (1,115 to 17,057), and Honduras (968 to 18,244) (CBP 2015). In addition, these figures fail to reflect the full extent of child migration from the Northern Triangle nations because some UAC were arrested in transit to the United States, others eluded arrest by US border officials, and a large number of young children arrived with a parent, typically their mothers. Between FY 2013 and FY 2014, the number of persons arrested in family units rose from 14,855 to 68,445, with 34,495 in FY 2014 coming from Honduras alone (CBP 2015).

UAC and families do not migrate only to the United States. In fact, the number of US asylum claims filed by Central Americans from the Northern Triangle states has been “low in relation to the apparent scale of internal displacement” (Cantor 2014, 27). Individuals and families initially search for “nearby support networks; thereafter there is some internal displacement to other areas more distant from the place of origin; and finally in some cases borders are crossed” (CIDEHUM and UNHCR 2012, 15).

Gang-related violence constitutes a pervasive threat for children. Central American gangs have roughly 70,000 members and there are 4.5 million unregistered firearms in the region, the “vast majority trafficked from North America” (CIDEHUM and UNHCR 2012, 11, note 3). Organized crime, which is concentrated in border areas and urban centers, has caused “a weakening of State structures,” with negative consequences for the ability of Central American states to protect their citizens (ibid., 13). Gangs target socially marginalized persons and those who have resisted their activities, including young men and boys who refuse recruitment, young women and adolescent girls who refuse sexual demands and enlistment, and business owners who do not meet extortion and other demands (UNHCR 2014b, 96). The national and international protection response to organized crime in the Northern Triangle states has been ineffective (CIDEHUM and UNHCR 2012, 6).

Gang recruitment and violence drive child migration from Northern Triangle states and Mexico (CIDEHUM and UNHCR 2012, 19, 22, 25; Albuja 2014, 27; Carlson and Gallagher 2015, S228-29). Yet despite the world’s highest homicide rates outside war zones, Honduran, Salvadoran, and Guatemalan gang-related asylum claims have faced
numerous hurdles in immigration courts. Courts generally hold that gangs are motivated by the desire to increase membership and secure wealth and power, rather than by the victim’s political opinions, social group, or religious convictions. Thus, claims “predicated exclusively on resistance to gang recruitment or refusal to join a gang” almost always fail (Carlson and Gallagher 2015, S241-42). However, claims based on membership in a family whose members have been persecuted often succeed, as do claims of former gang members (ibid.).

The consequences of a negative asylum determination for unaccompanied children and young mothers with children can be severe. UAC who are deported after emigrating “in search of their parents” and female heads of households with young children are among the “most vulnerable” groups to gang predation (CIDEHUM and UNHCR 2012, 29).

Some members of Congress attributed the increase in child migration to the United States over the last five years to the Trafficking Victims Reauthorization Act of 2008 (TVPRA), and argued that fast-track removal processes should be applied to children from Central America. The TVPRA requires UAC to be screened to determine if they have been victims of trafficking or have a credible fear of persecution. However, it treats unaccompanied children from contiguous and non-contiguous states differently. Children from Mexico and Canada are screened by border officials and, if found not to fear persecution or not to have been victims of trafficking, face an expedited process of removal via “withdrawal” of their applications. Children from non-contiguous states are placed in normal removal proceedings, hardly lenient treatment.

As Carlson and Gallagher point out, US asylum and immigration law generally treat children like adults; the “best interests” standard does not apply, with an exception for unaccompanied children in ORR custody who must be “placed in the least restrictive setting that is in the best interest of the child.”

Policy Proposals

The dramatic rise in arrivals of Central American youth in 2014 and the consistently high numbers of Mexican youth migrating to the United States in recent years illustrate the overriding need to address the structural causes of forced migration through social reform, economic development, rule of law initiatives, and humanitarian programs. In response to a culture of impunity, there is an acute need to create strong legal institutions and to promote the rule of law (CIDEHUM and UNHCR 2012, 15). High rates of child migration also illustrate the need for immigration reform that permits the reunification of children with their long-term US resident parents. Donato and Sisk find that the migration of children is strongly connected to the migration history of their parents and, in particular, the separation of children from their US resident parents (Donato and Sisk 2015).

Carlson and Gallagher oppose changes in the law that would apply the fast-track removal process to unaccompanied children from non-contiguous states. They query whether

117 “Best interests” is a subjective standard—for which there is no one definition—relied upon in making decisions regarding a child’s well-being, typically involving custody, living arrangements, and other important issues. Best interest processes prioritize the child’s participation and perspective.
118 8 USC §232(c)(2).
immigration officials can fairly and competently screen children from contiguous states (Mexico) to determine if they have been trafficked or fear persecution. In addition, they propose that CBP officials—unarmed and in civilian clothes—should “be paired with child welfare experts or NGO personnel” during screening (Carlson and Gallagher 2015, S246). In the alternative, they argue that USCIS asylum officers should conduct this screening. They also argue that the “best interest of the child standard” should be incorporated into all decision-making related to children.

The Border Security, Economic Opportunity, and Immigration Modernization Act would have required that consideration be given to the “best interests” of the child in decisions related to the repatriation of parents or their referral for prosecution, and on detention decisions related to parents and primary caregivers.119

4. Due Process Issues

A. Legal Representation

US removal proceedings can be difficult to negotiate without legal representation for even the most informed and sophisticated noncitizens and particularly for asylum seekers. Yet 45 percent of persons whose cases were completed by an immigration judge in FY 2014 lacked legal representation (EOIR 2015, F1). As Table 2 reveals, representation rates of detained and non-detained persons vary significantly. Between FY 2010 and FY 2014, the rates of represented non-detainees ranged from 70 to 78 percent. In contrast, representation rates of detainees increased from 14 percent in FY 2010 to 27 percent in FY 2013 and FY 2014. However, the actual number of represented detainees fell substantially from FY 2011 to FY 2014, which can be attributed (in part) to the diminishing numbers of detainees that receive a hearing before an immigration judge.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Represented</th>
<th>Unrepresented</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Detained</td>
<td>Non-Detained</td>
</tr>
<tr>
<td>2010</td>
<td>16,469</td>
<td>70,046</td>
</tr>
<tr>
<td>2011</td>
<td>19,561</td>
<td>69,721</td>
</tr>
<tr>
<td>2012</td>
<td>18,542</td>
<td>75,607</td>
</tr>
<tr>
<td>2013</td>
<td>17,089</td>
<td>84,651</td>
</tr>
<tr>
<td>2014</td>
<td>16,308</td>
<td>75,896</td>
</tr>
</tbody>
</table>

Source: EOIR data on file with author.

Detention and the resulting inability to work also decreases the likelihood that asylum seekers can secure legal representation, which negatively affects their ability to present their claims and to obtain asylum (Kerwin 2005b; Katzmann 2008; Ramji-Nogales, 119 Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 1115, 3803 (2013).
Schoenholtz, and Schrag 2009). Legal representation, on the other hand, has the potential to contribute substantially to the efficiency of immigration court proceedings, ensure better prepared cases, and save court and detention costs (Montgomery 2014).

**Policy Proposals**

The Refugee Protection Act of 2013 would have given the attorney general (or his or her designee) the authority to appoint counsel in removal proceedings “if the fair resolution or effective adjudication of the proceedings would be served by appointment of counsel.”\(^{120}\) It would also have expanded government-funded legal orientation programs for detainees.\(^{121}\) The Border Security, Economic Opportunity, and Immigration Modernization Act would have required that legal orientation programs be provided to all detainees within five days of being taken into custody; would have allowed immigration judges to appoint counsel in removal proceedings at the government’s expense; and would have mandated appointment of counsel to UACs, persons with serious mental disabilities, and the particularly vulnerable “in order to ensure fair resolution and efficient adjudication.”\(^{122}\)

Carlson and Gallagher also argue for court appointed counsel and expansion of federally-funded legal orientation programs due to the complexity of US immigration law and procedure and the immense stakes for children and families facing removal. The Border Security, Economic Opportunity, and Immigration Modernization Act would also have allowed applicants at overseas refugee interviews to be represented, at no expense to the government, by attorneys, or federally-accredited representatives.\(^{123}\)

**B. Insufficient Court and Adjudicatory Resources**

For many years, EOIR’s relatively modest funding levels—$312 million in FY 2014 and $347 million in FY 2015 (DOJ 2015)—have been totally insufficient to meet the demands of the large, complex caseload generated by the US immigration enforcement system whose two largest enforcement agencies alone receive in excess of $18 billion annually (DHS 2014a, 7). EOIR’s 260 immigration judges cannot keep pace with incoming cases, much less make headway against a backlog of 449,001 cases as of June 2015, which had been pending an average of 612 days (TRAC 2015).\(^{124}\)

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121 Id. § 10.
123 Id. § 3408.
124 In FY 2014, immigration courts received 306,045 “court matters,” including cases, bond determinations, and motions to reopen, reconsider and re-calendar, and completed 248,078 (EOIR 2015, A1-A2).
These delays prolong the separation of asylum seekers from their family members, who remain abroad often at great risk (HRF 2015). They also make it more difficult to corroborate claims, secure counsel, and (thus) prevail in asylum claims (ibid.). Furthermore, they create a perverse incentive for asylum seekers to remain in detention because of the expedited court docket for detainees (ibid.). Carlson and Gallagher describe the desperate need for additional resources to USCIS and to EOIR for adjudication of asylum claims.

While immigration court delays are more widely recognized, applications to the USCIS asylum office can take up to two years in some cases (Carlson and Gallagher 2015, S246). As of March 2014, the affirmative asylum backlog had increased to 45,193 due, in part, to “deployment of asylum officers to the under-resourced” and growing number of credible fear and reasonable fear interviews (HRF 2014).

**Policy Proposals**

In a comprehensive 2010 report on the removal adjudication system, the American Bar Association (ABA) Commission on Immigration characterized the immigration court system as “underfunded and understaffed in all areas” and called for “more immigration judges, law clerks and other support staff” (ABA 2010, 2-36). Compared to Social Security Administration administrative law judges that are expected to issue 500 to 700 “legally sufficient” decisions per year, immigration judges are responsible for more than 1,000 decisions annually (ibid., 2-37). The ABA recommended that Congress appropriate funding for an additional 100 immigration judges, as well as at least one law clerk per judge, over a three-to-four-year period (ibid., 2-38).

EOIR’s FY 2016 budget request would substantially increase funding for immigration judges and related staff. It provides for an additional 55 immigration judges and an increase in funding from $347 to $482 million (DOJ 2015). After years of underfunding, neglect,
and weathering various internal and external crises, EOIR will need further increases in immigration judges and related staff over several years. Human Rights First, for example, has called for an additional 275 to 300 immigration judge teams over the next three years (HRF 2015). Congress should also substantially increase funding to USCIS for more asylum officers in order to reduce delays in the adjudication of affirmative claims.

C. Competence and Professionalism of Immigration Officials and Adjudicators

The literature on refugee protection is rife with reports of federal officials who erroneously deny protection due to the misuse of their positions, inadequate training, or incompetence. Immigration officials at the US-Mexico border, for example, often try to dissuade persons from seeking asylum or mischaracterize their statements (Pistone and Hoeffner 2006, 182-83; USCIRF 2005b, 15-20), leading immigration judges to deny their asylum claims on credibility grounds (Cabot 2014, S211-12, S217-19; USCIRF 2005a, 57). Immigration judges who live and work on the US-Mexico border often rely on their own “passing” and incomplete knowledge of conditions in Mexico to impeach and deny asylum claims (Cabot 2014, S219). Some immigration judges also reject Mexican claims under the Convention against Torture in the mistaken belief that public officials cannot “acquiesce” to torture if some government officials oppose or seek to prevent torture, while others perpetrate it (ibid., S216).

Carlson and Gallagher also fault CBP for providing insufficient screening of Mexican children at the border and a presumption by CBP officers of the “absence of a protection need” (Carlson and Gallagher 2015, S233).

Policy Proposals

To address these problems, Cabot proposes that immigration judges “be deliberately and thoughtfully educated” on country conditions “so that incomplete and inaccurate information … is not the context for their decision making” (Cabot 2014, S219). Carlson and Gallagher also argue for greater training and oversight of immigration judges and border officials.

IV. Conclusion

The papers in this collection examine the legal, policy, and programmatic infrastructure of the US refugee protection system, which has extended protection—on a permanent, indefinite, and temporary basis—to several million persons since passage of the Refugee Act of 1980. They set forth policy proposals that address egregious problems in the law, its interpretation, and its implementation, including the denial of access to US territory to persons at risk of persecution and torture, procedural bars to protection, security-related

125 These problems are not exclusive to the United States. Other states and international institutions have been slow to address the protection gaps created by organized criminal predation (CIDEHUM and UNHCR 2012, 27).
126 8 CFR § 208.18(a)(1).
measures that negatively affect victims of violence and terrorism, and the nation’s limited ability to admit imperiled non-refugees.

In passing the Refugee Act of 1980, Congress recognized “the historic policy of the United States to respond to the urgent needs of persons subject to persecution” through humanitarian assistance, resettlement, and voluntary return,127 and encouraged all nations to assist in pursuing these ends “to the fullest extent possible.”128 The United States should renew its commitment to these goals by, in part, adopting the reforms proposed in this collection.

Over the last 35 years, it has also become increasingly evident that the United States should invest more heavily in the prevention of forced displacement, assistance to refugees and refugee-like populations in their host communities, initiatives to maximize the contributions of refugees in their communities of origin and destination, and the creation of conditions that permit their voluntary return. To accomplish these goals, the constituent parts of the US refugee protection system must better integrate with each other; yawning gaps in protection must be filled; the system’s work must be embedded within a larger set of diplomatic, economic development, rule of law and human security strategies; and the United States must effectively engage other states, regional bodies, and international institutions. And all of this work must be founded “on notions of human security and dignity” (Helton 2000, 83), and build on the agency, aspirations, and rights of those at the heart of this phenomenon.

128 Id.
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The US Refugee Protection System


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http://dx.doi.org/10.1093/jrs/11.4.396


Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection

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Executive Summary

Both geographic and normative constraints restrict access to surrogate international human rights protection for those seeking a haven from serious human rights abuses. Primary among territorial restrictions has been the fall-out from the US Supreme Court’s decision in Sale v. Haitian Council Centers in which the court explicitly ruled that nothing in US statutory law, or in the 1951 Convention on Refugees or its 1967 Protocol, precluded the interdiction of Haitian refugees in international waters and their return to the country of origin without an effective interview on their protection claims. This ruling is in transparent contradiction to the general international law norm of non-refoulement according to modern scholarship and emerging case law. This paper concludes that Sale should be overturned by statute as should related pre-screening practices. A new standard of “jurisdiction” should be adopted which does not depend on territorial access to a signatory state but on whether the state is exercising power in fact. Similar concerns exist with respect to safe third country agreements which often offend the international customary right of the asylum seeker to choose where his or her claim will be filed. This paper argues that the right of choice should be recognized and onward travel and admission to the country of destination allowed. This result is especially called for where return of the alien by the country of first contact raises serious concerns under the law of non-refoulement. Imbalances noted in this paper include those generated by the new terrorism related grounds of inadmissibility in the United States and the summary denial of children’s asylum claims flowing from gang violence.

Other questions are raised in this paper concerning work authorization and detention of asylum seekers. Access to an employment authorization
document for those filing colorable claims should be recognized by statute to render US practice consistent with that of most other states. Release from detention, on the other hand, for asylum seekers has now been broadly recognized by the US Department of Homeland Security where the asylum seeker’s identity can be ascertained and the claim is non-frivolous in nature. This approach is largely consistent with international law, although there have been unnecessary delays in implementing it.

On the substantive law, the international customary norm of non-refoulement has been expanded considerably through the development of opinio juris by scholars and the practice of states. This paper traces efforts in Europe to develop a law of temporary refuge for those fleeing civil war situations characterized by humanitarian law violations. Similarly, case law under the European Convention of Human Rights has now come to focus on the harm the claimant would suffer as the result of conditions in the country of origin without identifying an explicit agent of serious harm. Related to these developments has been the notion of complementary protection under which relief can be conferred where the alien would suffer serious harm upon return to the home state but not for a Convention reason. These approaches have now received approval in the European Union Asylum Qualification Directive so that international protection may now be conferred either because the alien would suffer serious harm on account of the intensity of human rights violations taking place in the country of origin, or those conditions, taken in conjunction with the claimant’s personal situation, support a finding that the claimant would be impacted. This paper argues that this latter standard has now been made a part of the customary norm of non-refoulement and that it should be recognized by statute as a basis for non-return and coupled with status where the new standard can be met. Such a measure would help restore the nation’s commitment to human rights and humanitarian concerns.

**Introduction**

Several major problems face the individual in need of international human rights protection. The first of these is whether he or she can access some state system wherein the claimant can be granted relief. Another is whether that state system will recognize the claimant as a “refugee” or as someone upon whom it can confer some form of surrogate international human rights protection. This paper attempts to discuss two major areas of concern which affect the dilemma of refugee flight and the search for durable solutions.

The first of these is examination of the procedural bars to seeking asylum and other forms of refugee protection as manifested in interdiction on the high seas and safe third country agreements (together with other ancillary restrictions on refugees including detention and filing requirements). The second entails a review of state substantive standards governing eligibility for protection and the conformity of those standards (or the lack thereof) to the international norm of non-refoulement. Primarily, the paper will look to United States
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practices in relationship to international requirements as a template for purposes of developing its comparative model.

Part A: Geographic Scope of the Law of Non-Refoulement

I. Prefatory Remarks

Whatever broad discretion the sovereign may have over migration in general, that discretion is sharply delimitied in the crucial area of human displacement and the related phenomenon of forced migration. For here, the sovereign’s power clashes with treaty law and with the international customary norm of *non-refoulement*. Under customary law as codified in Article 33 of the Refugee Convention of 1951, a refugee may not be returned to the frontiers of a state wherein her life or freedom would be threatened by reason of race, religion, nationality, membership in a social group or political opinion.\(^1\) Similarly, customary law and Article 3 of the Convention Against Torture also preclude the return of any person to a state wherein there are good reasons to believe that that individual would be subject to torture.\(^2\)

A question of some immediacy, therefore, is: when does the obligation to refrain from *refoulement* crystallize? There is some dispute about this as the *Sale* case (discussed below) attests. The most encompassing (and, in this author’s consideration, the correct) view is that advanced by Guy Goodwin-Gill: state responsibility is engaged wherever state action takes place and irrespective of physical location. Hence,

“[t]he principle of *non-refoulement* has crystallized into a rule of customary law, the core element of which is prohibition of return *in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the [customary] rule are determined by [its] essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border or through its agents outside territorial jurisdiction.” (Goodwin-Gill 1996, 143) [emphasis in original]

A more conservative view is that the obligation of *non-refoulement* becomes engaged when a noncitizen reaches an international frontier. Under this view, “[t]oday, there appears to be ample support for the conclusion that Article 33(1) is applicable to rejection at the frontier of a potential host State” (Noll 2005, 542, 549). Non-rejection, in turn, however, implies limited admission, at least for the purpose of determining whether the noncitizen

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1. Convention Relating to the Status of Refugees, signed 28 July 1951, entered into force 22 April, 1954, 189 UNTS 150, art. 33(1). On the customary law aspects of the treaty provision, see generally Goodwin-Gill and McAdam 2007. The bar is both a rule of customary law and a rule of *jus cogens*, thus enjoying universality and non-derogability. See generally, Parker and Neylon 1989. In this respect, *jus cogens* describes norms which have risen to the apex of international customary law so that they are said to have acquired the features of universality and non-derogability. *Id*.

is a refugee (or reasonably fears the imposition of torture), and so for ascertaining the full scope of the host state’s obligations vis-à-vis the individual under consideration.\(^3\)

What does *non-refoulement* as a threshold matter require? Under *non-refoulement*, states have a responsibility (a) to avoid returning aliens to a state wherein it is reasonably clear that the alien will be persecuted or tortured; and (b) to avoid sending the alien to a state which does not itself observe the norm of *non-refoulement* (Noll 2005, 549). As a subsidiary obligation of these two major injunctions, states also have a responsibility to refrain from sending an alien who presents himself at the border anywhere before conducting an interview as to whether the alien has a prospect of persecution or torture.\(^4\) A state which summarily returns an alien to any state under the circumstances described above engages in the prohibited activity of “rejection at the frontier.”

### II. Interdiction at Sea and In-Country Processing by Officers of the Asylum State

With respect to interdiction at sea, it was long believed that the practice of “picking up” asylum seekers at sea and returning them to their home states without a hearing was patently illegal under general international law. At a minimum, it was maintained, such individuals were required to receive a hearing on persecution and torture (a “screening interview”) before being forcibly repatriated. Indeed, prior to a mass influx of Haitians resulting from the overthrow of President Jean Bertrand Aristide in the early nineties, it had been the practice of US cutters patrolling the Caribbean to provide such interviews (Goodwin-Gill and McAdam 2007, 146-50).

In 1993, however, the US Supreme Court issued its decision in *Sale v. Haitian Centers Council, Inc.*\(^6\) In that case, the court upheld the current interdiction policy in which the Coast Guard, feeling that it would have to admit substantial numbers of Haitians to US territory if the interviews were to be continued, resolved to repatriate fleeing Haitians without any dialogue with them as to what would happen once they were forced back. Looking at this practice, the court reasoned that the term “return” in the statute, like the

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3. Perhaps the most interesting evidence of this principle can be found in the United Nations High Commissioner for Refugees (UNHCR) Executive Conclusion XXXII, *Protection of Asylum Seekers in Situations of Large-Scale Influx*. According to the UNHCR Conclusion, arriving asylum seekers are to be admitted to the country in which they first seek refuge. If that state is unable to admit them on a durable basis, it should admit them on a temporary basis and given the following protections. Such asylum seekers (1) should not be penalized nor have their movements restricted solely on the ground that their presence in the country is considered unlawful; (2) should enjoy the full enjoyment of civil rights guaranteed under the Universal Declaration of Human Rights; and (3) should receive all the necessities of life. In all cases, the norm of *non-refoulement* and the bar against rejection at the frontier “must be scrupulously observed.” UNHCR Executive Committee of the High Commissioner’s Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 21 October 1981, No. 22 (XXXII), available at: http://www.refworld.org/docid/3ae68c6e10.html.


5. *Id.*

The word “*refouler*” in Article 33 of the Convention, was the practical equivalent of the term “deport.” Accordingly, a state was precluded from returning aliens in such circumstances *only where* the alien had in actual fact presented herself at the frontiers of a signatory state. It was only in the context of removal from the territory of the “refouling” state that the bar against *refoulement* could come into effect.

The criticism of the US Supreme Court as the result of this ruling was considerable. One celebrated editorial by Goodwin-Gill, appearing in the *International Journal of Refugee Law*, noted that the only legal effect of the court’s decision was that it had added itself to the list of violators (1993, 461). The majority’s misunderstanding of the French verb *refouler* (which means to “drive back” in English) was complete and unqualified. What is of moment under international law was not the place the asylum seeker was being driven from (here the high seas), but rather where he or she was being driven to (in many instances, relatively certain persecution). As noted previously, the Refugee Convention must be interpreted so as to give effect to its overriding objective, i.e., to prevent refugees from being exposed to persecution. It is difficult if not impossible to reconcile this purpose with the interpretation given by the US Supreme Court to the scope of Article 33 in the *Sale* case.

On May 20, 2004, the Inter-American Commission on Human Rights ruled that Haitians interdicted on the high seas by the United States were entitled to fair hearings on their claim to refugee status, concluding that this was a protected right under the American Declaration on the Rights and Duties of Man. The commission also directed the US government to provide reports on Haitian asylum seekers interdicted in international waters, which are to include the number of those interdicted who have made refugee claims and the conditions under which those claims were heard.

The damage done by the *Sale* decision is difficult to assess. One of its chief effects was to create a legal “black hole” with respect to interdiction on the high seas where there was, according to the court, no law, and hence refugees could have no rights. The vestiges of *Sale* are still being clung to by major jurisdictions such as Australia which continues to participate in interdiction and removal programs (McAdam 2013, 435). What remains of interest, however, is that the court would not repeat with Guantanamo detainees the mistake it had made in *Sale*: in the *Boumediene* case the court ruled that the writ of *habeas corpus* extended to those detained on the Guantanamo naval base, rejecting arguments that federal courts lacked jurisdiction because US territorial sovereignty was not involved.

In *Boumediene*, the court arguably overturned the two principal barriers affecting noncitizens seeking relief in US courts: alienage and extraterritoriality. It had long been accepted in US jurisprudence that *habeas* jurisdiction would not extend to aliens seeking to invoke US constitutional protections in an extraterritorial setting (Legomsky and Rodriguez 2009, 169-71).

The court had originally rejected these restrictions in *Rasul v. Bush*, with respect to

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8 *Id.*
statutory habeas. By the time Boumediene was decided, however, the habeas statute had been modified so as to preclude jurisdiction over the Guantanamo detainees in US district courts. Relying on constitutional habeas, therefore, Boumediene enshrines the essential principle spawned in Rasul: the US has retained “practical sovereignty” over Guantanamo by virtue of its de facto control there and its exercise of actual power over all matters having to do with the naval base.11

Following Rasul, the Boumediene court determined, in effect, that the issue of jurisdiction should be based on a practical inquiry into whether the United States was exercising unrestricted power over the Guantanamo base rather than a formal inquiry into territorial sovereignty.

Sonia Farber has explained how this essentially new judicial outlook affects refugees, both those detained at Guantanamo and those found in other extraterritorial settings (2010). Primarily she explores the situation of refugees detained at Guantanamo, but explains that the court’s decision should extend to other refugees as well. Her examination of the issues illustrates convincingly how the court has now effectively abandoned the “legal black hole” theory it had pursued in Sale pursuant to which refugees have no extraterritorial rights because there is no substantive law to which they can turn for protection.

A related practice is “pre-clearance.” Pre-clearance has been adopted by certain states in an effort to block asylum seekers attempting to leave a country of claimed persecution from accessing the territory of the former. In Regina (ex Parte European Roma Rights Center) v. Immigration Officer at Prague Airport and Another,12 the House of Lords was asked to review a practice under which British officials temporarily stationed at Prague Airport denied access to UK-bound aircraft (and thus to Britain) of Czech members of the Roma ethnic group where it was the purpose of the latter to seek asylum in the United Kingdom.

The Lords were careful to distinguish the Regina case from Sale. In this case, the individual seeking protection had not reached an international frontier, the threshold requirement for those who would meet the Convention refugee definition. The term non-refoulement can have no logical application, the Lords ruled, if the asylum seeker remains inside the country of claimed persecution for, in that instance, there is nowhere to return him to; unfortunate though his plight may be, the putative refugee remains inside the country wherein his human rights are being abused. The Lords notwithstanding struck down the arrangement based on application of Article 14 of European Convention on Human Rights (ECHR) (precluding discrimination): by targeting only Roma for removal from UK-bound flights, Great Britain had violated the affected passengers’ right to equal treatment under the ECHR.

A compelling brief submitted by the United Nations High Commissioner for Human Rights (UNHCR) takes issue with the conclusion that refugee law was not implicated by the pre-clearing practice.13 The UNHCR position is that a state which obstructs the passage

11 During oral argument in Rasul, this principle was best illustrated by the revelation that an envelope would not get off the base unless it had a US stamp on it. The Rasul court turned for its approach to some very pedigreed jurisprudence established through Lord Mansfield’s rulings to the effect that the writ follows dominion or power exercised by the crown outside of the realm. Rasul, citing King v. Cowle, 2 Burr 85497 Eng. Rep. 587 (K.B. 1759); Ex parte Muwenya [1960] 1 Q.B. 241 (C.A.), through Lord Evershed).
13 UNHCR, R (ex Parte European Human Rights Center et al.) v. Immigration Officer at Prague Airport
of refugees must do so within the law. In this respect, “pre-clearance” within the state of claimed persecution is the practical equivalent of “rejection at the frontier.” As noted by the US delegate to the 1951 Plenipotentiary Conference, Louis Henkin, rejection at the frontier can take a variety of forms, including closing the border. The practical consequence of what was done at the Prague Airport was to close the UK border to Roma asylum seekers.14

The result contended for in the UNHCR Brief has obvious parallels in the position of Goodwin-Gill set forth earlier that the state may act through its agents outside its territorial jurisdiction and that this is enough to engage state responsibility. Apart from this, states may not exercise such rights as they do have in bad faith. Such exercise would be tantamount to an abus de droit. The UNHCR position is not to the effect that UK officials must admit every Czech national who presents herself for admission; rather, examination must be made to determine whether the applicant is a refugee, and, if so, admission must be permitted on a temporary basis.15

In Hirsi v. Italy, the European Court of Human Rights adopted legal positions which were comparable to those the UNHCR had been advancing in the Prague Airport case and which had been articulated earlier by Goodwin-Gill in his editorial on Sale.16 In Hirsi, the court was asked to resolve Italy’s removal of Somali and Eritrean refugees to Libya without any kind of examination with respect to the latter’s well-founded fear of persecution or other significant harm. The Strasbourg Court held that this practice violated both the non-refoulement provisions of Article 3 of the ECHR and constituted a collective expulsion in contravention of Article 4 of protocol 4 to the ECHR.

On the violation of Article 3, the court found that it would not measure whether the state engaged in returning the refugees to Libya had territorial jurisdiction over them, as had the Supreme Court in Sale. Rather, it examined whether Italy exercised power in fact over the claimants in determining if the norm of non-refoulement had been violated.17 On the collective expulsion violation, the court adopted an argument which had been put forward in the Prague Airport case. The court ruled that collectively removing these claimants to Libya without an interview would frustrate the fundamental aim of the treaty by precluding them altogether from reaching a forum where they could apply for some form of surrogate international human rights protection.18 Although neither the 1951 Refugee Convention, nor the ECHR guarantee a refugee claimant a forum in which to advance his or her application, these instruments contemplate that at some juncture such a forum must exist for the right to non-refoulement to be meaningful. Adopting procedural mechanisms which would effectively preempt the right of non-return violates the instruments in the same way that rejecting the claimant at the border would.
The Hirsi case is illustrative of modern trends in a number of respects. In the first place, it recognizes the existence under customary law of a norm of both direct and indirect non-refoulement (i.e., return to Libya where inhuman treatment might be imposed, plus the risk that Libya, through its own violation of the norm of non-refoulement, would return refugees to Eritrea and Somalia where they would incur risk of persecution). In addition, and of equal importance, it was of no moment for the tribunal that those being returned by Italy to Libya had not requested asylum or any other form of surrogate international human rights protection. It was not, the court ruled, for the returnees to advance their claims for protection; it was for the repatriating state to determine whether any of those it was sending back would be subject to cruel, inhuman or degrading treatment upon return.19

III. Burden Sharing and “Safe” Third Country Agreements

“Safe third country agreements” now constitute one of the most effective barriers to international human rights protection today. Such agreements are fundamentally undesirable in principle in that they offend the received doctrine that the asylum seeker should have his or her choice as to where to file. This principle obtains in part because of the differing positions of states on the application of international criteria to international protection claims.20 UNHCR has provided guidance with respect to where an asylum seeker should apply for refuge. UNHCR has determined:

[A]n examination of the internationally accepted principles relating to asylum reveals that none of them suggest —much less prescribe—that the right to seek asylum has to be exercised in any particular country, or that a person who has been forced to escape his country to save his life or freedom would forfeit his right to seek asylum if he does not exercise it in the first country whose territory he has entered.21

Despite this clear statement of policy, it remains the continuing trend to restrict the asylum seeker’s options, such as in the case of the US-Canada Safe Third Country Agreement, which is discussed in detail below. UNHCR has spoken out specifically on the international law implications of the US-Canada Agreement. Among other things, it has remarked that any agreement should reflect the principle that the wishes of the asylum seeker as to which state to seek refuge in should be taken into account “as far as possible.” UNHCR also has maintained that asylum should not be denied on the sole ground that it could have been sought in another state.22 UNHCR observes that there are broad bars existing under both Canadian and US refugee law, noting that some of these may be inconsistent with

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19 See generally, den Heijer 2013.
20 In further support of the asylum seeker’s right to choose where to file, see, Hathaway 1991. See also, Goodwin-Gill and McAdam 2007, 394-95, for an overview of differences of views and policies under modern law. Broadly, the safe third country concept is one which permits states to send asylum seekers to third countries with which the applicant has some connection making it reasonable for him or her to go there, and where the applicant can receive refugee protection consistent with the 1951 Convention and not otherwise be subject to direct or indirect refoulement. Id.
international standards. An asylum seeker may be denied protection in one jurisdiction but not in another. Such an imbalance in outcomes should, in principle, be avoided.23

Prototypes of the “safe third country” agreement which reflect a lack of political will to provide international human rights protection where it is needed are the Schengen24 and Dublin25 Conventions. Historically, these treaties required that an asylum seeker virtually apply in the first signatory state into which he or she came into contact. Subsequent movement to another signatory state would entail the refugee’s being returned to the country “of first presence” for determination of his or her refugee status claim. This regime was later supplemented by a Resolution on a Harmonized Approach to Safe Third Countries which provided that once an asylum seeker presented a claim for international protection in a signatory state, an initial decision had to be made as to whether there was a safe host country outside the European Union (EU) to which the noncitizen could be sent before any determination was made on whether another state within the EU has jurisdiction to hear the application (Achermann and Gattiker 1995, 22-23). If such a “safe” country existed, the alien was to be sent there. If it did not, the asylum seeker would be transferred to the country of first presence within the EU which would, once again, make a fresh determination as to whether a “safe” host country existed outside the EU before it would entertain the claim. The Dublin Convention has now been effectively superseded by two EU regulations which have been styled as “Dublin II.”26 Dublin II does make some improvements. However, Dublin II remains, for the most part, a restatement of the old convention-based regime under which the country of first presence remains the state responsible for adjudicating the application for international protection (Goodwin-Gill and McAdam 2007, 400-02).

Safe third country options are extremely controversial and, in the opinion of many scholars, derogate in practice from the protections of the 1951 Convention (Hathaway 2005, 324-32; see also Borchelt 2002; Dunstan 1995) Among other things, such agreements clearly promote the “refugee in orbit” syndrome which has raised such concern among refugee scholars and which frustrates the rational planning of any transnational system of burden sharing under which refugee rights are to be taken seriously. Under the “refugee in orbit” syndrome, a refugee claimant is returned to another state where he or she is deemed to have a prior presence and which in turn declines jurisdiction either because there is another country of first presence or because of a need to re-adjudicate the safe host country issue.27

The recent US-Canada Safe Third Country Agreement avoids this dangerous pitfall, but it clearly presents other dangers.28 Among other things, the agreement (which was

23 Id.
25 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One Member State of the European Communities, June 15, 1990, 30 I.L.M. 427 [Dublin Convention].
27 Id.
28 Agreement between the Government of the United States and the Government of Canada for Cooperation
implemented in 2005) provides that individuals who present themselves for admission at a land border port of entry, or who are being removed from the territory of one signatory state into the territory of another, will be returned to the country of first presence for adjudication of their refugee claims.²⁹ The agreement thus does not (as is commonly believed) preclude “double filing,” since an asylum seeker could file in one jurisdiction and then enter without inspection into the territory of another and file a second time. This aspect of the agreement has been strongly criticized since it would seem to promote smuggling and disorder at the border, one of the principal goals which it was entered into to avoid.³⁰

Concerns about enforcement of the treaty on the Canadian side flow from the United States’ continuing use of the death penalty and excessive reliance on “Terrorist Related Grounds of Inadmissibility” in determining eligibility for refugee-type relief. As is well-documented, the United States’ use of its “material support” provisions preclude from asylum or withholding claimants who have been coerced into supporting questionable organizations thereby eliminating any consideration of individual responsibility in applying this already excessively broad terrorism-related preclusion (Settlage 2012, 142).³¹

In the related area of the “persecutor bar,” for instance, the UNHCR has crafted an exception which would eliminate from the bar individuals who are coerced into administering serious harm provided that the harm they fear is imminent and greater than the harm they would inflict. ³² The exception is tailored, in other words, to reach those cases which have intrinsic merit and would avoid the truly harsh consequences of applying the bars indiscriminately to those asylum seekers who may constitute a security risk for the host state and those who do not.³³ Adopting the proposed test of UNHCR to those charged under the “terrorism”


²⁹ Id.


³¹ The “Terrorism Related Grounds of Inadmissibility,” or TRIG, include the bar to asylum existing for those who provide “material support” to a “terrorist organization.” See, 8 USC § 1158 (b)(2)(A)(v) and 8 USC § 1182(a)(3)(B)(i)(VI). Section 208(b)(2)(A)(v) precludes from asylum individuals who have engaged in “terrorist activity.” “Terrorist activity,” in turn, is defined to include the commission of any act which the agent knows or should know “affords material support [to an individual or terrorist organization] including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification weapons (including chemical, chemical, biological or radiological weapons), explosives or training […].” “Terrorist organization” is defined in section 212(a)(3)(B)(vi) as one designated as such by statute, [Tier I] as one designated as a “terrorist organization” by the Department of State by regulation [Tier II], and finally as any organization of two or more persons which has engaged in prohibited “terrorist activities.” See, 8 USC § 1182(a)(3)(B)(vi).

³² For a restatement of the customary international law test, see Hathaway 1991, 218. The test has been approved and is in effect in Canada. Ramirez v. M.E.I., (1992), 135 N.R. 390 (F. C.A.). See also, Negusie v. Holder, 555 US 511 (2009), in which the Supreme Court rejected the Board’s previous application of the persecutor bar on the ground that the agency was looking at the wrong statute as authority for its view that the existence of “coercion” was extraneous to a finding on whether the bar applied. Although Negusie was decided in 2009, no ensuing decision of the Board has yet been made.

³³ For an excellent discussion of the security-related provisions of Article 9 of the Refugee Convention [giving states the right to adopt provisional measures towards individuals who constitute risks to national security], see Hathaway 1991, 263-66. Hathaway recommends an especially restrictive interpretation of Article 9 in light of its potentially preclusive nature.
bars would avoid criticisms of the statute as presently interpreted to the effect that, by not individualizing the cases which are before them, agencies and courts have departed from the obvious intent and purpose of the Refugee Convention and Protocol that the threats to the security of the host state be actual, and not presumed.

The most egregious feature of “safe” third country agreements, however, is that they completely eliminate any choice of forum on the part of the asylum seeker, thereby subverting the refugee’s freedom to determine where to file, which is a right recognized under international law. Usually cited as a virtue of the “system,” this component constitutes a potentially fatal weakness. Some jurisdictions are simply more liberal than others with respect to specific types of claims. It is now broadly recognized, for instance, that Canada has remained the advance party with respect to a number of types of claims, notable among them asylum applications arising out of civil war scenarios, those based on draft resistance or desertion, and gender-based claims predicated on domestic violence.34

Moreover, the United States has recently announced, through its Board of Immigration Appeals (BIA), a firm stance against asylum cases brought by children seeking to avoid involvement with criminal gangs. As discussed below, Canada has adopted a policy of allowing such claims in appropriate, if limited, circumstances.35 Should not the asylum seeker’s choice of forum be honored in such instance? It is one thing to adopt a controversial position against certain types of cases based on largely ideological grounds. It is another thing entirely to impose that result on the international system by preventing refugee claimants from reaching a jurisdiction wherein their claims can be heard within a favorable framework of decision. Such results should be eschewed by signatory states rather than be encouraged by them. And the policy against “forum shopping” should be subject to an appropriate exception recognizing in the asylum seeker the right to access a more sympathetic forum. This should particularly be the case where return of the asylum seeker to the home state would raise grave issues under the law of non-refoulement.

**IV. The One-Year Filing Deadline and Limits on Employment Authorization**

Under the Immigration and Nationality Act (INA), as amended in 1996, asylum seekers are not eligible if they apply for relief more than one year after their arrival in the United States. Over an 11-year period ending in June 2009, this measure affected more than 30 percent of affirmative asylum seekers; i.e., those who filed for asylum with the Department of Homeland Security (DHS), as opposed to seeking asylum in removal proceedings before an immigration judge (Schrag et al. 2010, 688). As has been widely noted, many asylum seekers do not speak English, making preparation of a pro se claim a virtual impossibility. The usual preoccupations of those seeking protection is to secure the aid of friends and family members who can give the alien shelter and otherwise provide the necessities of life. Access to a professional is difficult at best, and the pro bono publico bar is presently overwhelmed with cases making representation even more difficult (Legomsky and Rodriguez 2009, 1045-46).

34 See, for example, von Sternberg 2002, 254-98 and authorities cited therein.
35 See, Section B.IV, infra.
DHS justifies this restriction by insisting that the one-year filing deadline applies to asylum only, and not to the other mandatory relief provided under international law, i.e., withholding of removal under INA section 241(b)(3) [the relief provided for under Article 33 of the 1951 Convention] and relief under Article 3 of the Convention Against Torture. While this is formally true, asylum is the only remedy which provides the asylum seeker with an immediately available durable remedy, i.e., local integration. Denying that remedy under international law and policy must be supported by a valid state interest. Such an interest cannot be identified: there is simply no governmental concern which is addressed by forcing asylum seekers to file within a particular time period (see Pistone 1996, 95). On the other hand, there is considerable prejudice to the asylum seeker by imposing such a restraint.

All asylum seekers in the United States are subject to the employment authorization rules which prescribe that “work permission” cannot be granted until the application has been pending for at least 150 days. An application which has been pending without adjudication for over 180 days will confer automatic work authorization. These new rules, however, foreclose asylum seekers to the US job market while their claims are pending and thus make it potentially impossible to advance a claim. The deleterious effects of the employment authorization regime include “more homelessness, psychological deterioration, stress, illegal work, exploitation and begging” (Legomsky and Rodriguez 2009, 1060). The practice is made all the more offensive in that most other jurisdictions allow asylum seekers to work while their claims are pending (ibid.).

V. Expedited Removal and Detention

Expedited removal was introduced into US law in the 1996 “reform” legislation. In broad outline, those who arrive with false documents or no documents are to be summarily removed without a hearing. If the alien makes any one of three representations (i.e., that she wishes to apply for asylum, that she fears persecution, or that she has “concerns” about return), she is to be placed in a “credible fear” interview. In that interview, she must show a “significant possibility” that she could make out a developed asylum claim, or she will be...
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... returned forthwith to the country of embarkation. During the pendency of that interview, the asylum seeker is to be detained. The statute says nothing about detention after the asylum seeker is found to have a “credible fear.”

The statute and the implementing regulations provide that the following four classes are subject to expedited removal:

- aliens who present themselves at a US port of entry as “arriving aliens” (although that term is nowhere defined in the statute);
- aliens arriving by sea;
- noncitizens who are physically present in the United States without having been admitted or paroled who are (1) encountered by DHS within 100 miles of the Canadian or Mexican border, and (2) cannot establish to the satisfaction of DHS that they have been within the United States for more than 14 days;
- aliens who are subject to the US-Canada “Safe Third Country Agreement.”

Procedural protections are significantly lacking in this process. Threshold questions continue to exist with respect to what happens at the encounter between immigration inspectors and persons potentially subject to expedited removal. In this first meaningful interview with DHS, the alien must make one of the three representations which are set out above (see Ramji 2001, 117). To what degree is there effective communication between DHS frontline officers and otherwise qualifying asylum seekers (due to the absence of translators or other causes)? To what extent are those with a fear of persecution being returned at this stage without any kind of meaningful interview and, thus, in contravention of customary international law? An environment of comparative secrecy has historically surrounded the inspection process (see Legomsky and Rodriguez 2009, 1052-56). Moreover, even when the alien succeeds in having herself made the subject of a “credible fear” interview by an asylum officer, an immigration judge has only limited review over this determination “within seven days.” These and other features of the law have given rise to the possibility that the United States may well be violating the law of non-refoulement without such violations being documented.

Questions about the credible fear process as a whole are particularly relevant now that the BIA has announced its controversial policy (noted above) of disfavoring asylum claims brought largely by children seeking to avoid recruitment into criminal gangs and fearing personal violence by these gangs as a result. The Asylum Officer’s Training Manual specifically adds Matter of M-E-V-G- and Matter of W-G-R- to the considerations which an asylum officer must take into account in determining whether a credible fear of persecution has been...

40 INA § 235(b)(1)(B)(i).
41 INA § 235(b)(1)(B)(iii)(IV).
42 INA § 235(b)(1)(A)(i) and (iii); 8 CFR § 235.3(b)(1).
43 8 CFR § 235.3(b)(1).
44 67 FR 68924 (Nov. 13, 2002).
45 69 FR 4887 (August 11, 2004).
46 69 FR 69479 (Nov. 29, 2004).
established. These cases add a “social distinction” and a “particularity” requirement to the now widely accepted Acosta test for social group (immutability, fundamental beliefs, or past associations which have become immutable through the passage of time). In so doing, these cases threaten to frustrate the natural evolution of asylum law through development of the social group ground which, according to classical refugee scholarship, remains open-ended. The specific nature of this threat flows from the nature of the social group ground itself which has been repeatedly held to provide the most accessible framework wherein the Convention refugee definition can evolve by recognizing new developments in human rights and humanitarian law, and by taking account of fresh patterns of discrimination which could not have been anticipated at the time the Convention was drafted.

Shutting down this evolutionary process through the credible fear interview poses risks of considerable magnitude. For it is through “new” types of cases that the future growth of the law can crystallize. Negative results, taking place at the credible fear stage, effectively cauterize this process, leaving the potential development of the jurisprudence in a conceptual “black hole.” The fact that this cauterization will take place without any effective review process, and without a decisional record of any kind, makes this development a particularly deleterious one, and one which is particularly damaging to the public interest.

A second level of concern relates to the continuing detention of asylum seekers after they have met the “significant possibility” standard. “Expedited removal” was an attempted codification of international customary law relating to the filing of “frivolous” asylum claims (see Kerwin 2001, 3). States are permitted to return aliens summarily where they put forward asylum claims which are utterly baseless or which are false (i.e., are “manifestly unfounded or abusive”). Where an alien meets the “credible fear” standard, however, such concerns should receive less deference. Detention which goes beyond the state’s interest in guarding itself against spurious applications can no longer be defended as supported by a valid public interest: the state’s justification in continuing detention becomes more questionable (see Goodwil-Gill 2003, 185).

The views of Goodwin-Gill largely parallel those of UNHCR. As concerns Article 31(1), prosecuting asylum seekers for presenting false documents or otherwise penalizing illegal entrants “without regard to the circumstances of flight in individual cases” as well as the refusal to consider their refugee claims, constitutes a violation of the Convention and of general international law (Goodwin-Gill 2003, 218). With respect to Article 31(2), the detention of asylum seekers is an exceptional measure and recourse should be had to it only in the circumstances “permitted by law.” A balancing of interests is required in this process. States should always apply the “least restrictive alternative,” and less burdensome measures (such as “reporting and residence requirements, guarantors, bail, and the use of open centers”) usually are available. Detention should never last beyond the period needed to satisfy the criteria relative to identity and well-founded fear and never should be used to deter asylum seekers from advancing their claims (ibid., 231).

52 INA § 235(b)(1)(B).
In 2005, the US Commission on International Religious Freedom (USCIRF) issued a significant report under the International Religious Freedom Act which responded to specific congressional concerns regarding alleged irregularities which had arisen during the course of the expedited removal process (USCIRF 2005). Among other things, the report contains the following conclusions:

- There existed a wide divergence of release rates between jurisdictions.
- Asylum seekers were often incarcerated in extremely harsh and inhuman conditions, and sometimes interred with common criminals.
- A significant proportion of aliens (15 percent) who had made one of the required representations (wish to apply for asylum, fear of persecution, or concern regarding return) were nonetheless being returned by immigration officers without undergoing a credible fear interview.
- The rate of finding “no credible fear” by asylum officers with respect to those interviewed was extremely low (about one percent). However, with respect to review by immigration judges: about 25 percent of those found to have a “credible fear” who were represented by counsel in immigration court prevailed in their asylum claims, while only about two percent of those who were not so represented were successful (Kuck 2005, 239).

These findings go far to support the views of critics of congressional policy to the effect that, in their administration of the law, DHS has produced serious gaps in protection. Two years after the adoption of expedited removal, USCIRF issued a subsequent report concluding that, although the shortcomings of the system had not been adequately addressed, the program was still being expanded (USCIRF 2007).

Mindful of these considerations, DHS in 2010 adopted a more progressive parole policy with respect to detained persons under the expedited removal regime. Basically, US Immigration and Customs Enforcement set forth criteria for parole which would be governing under the following circumstances:

(i) the respondent has passed the credible fear examination so that it is clear that a significant possibility exists that he or she could advance a mature asylum claim if given the opportunity to do so; and

(ii) satisfactory evidence exists as to the respondent’s identity.53

Despite these advances, Human Rights First has noted that the reforms in practice are not advancing with adequate speed and are not reaching a sufficient number of applicants.54

In response to the situation in the United States and elsewhere, UNHCR adopted new Guidelines on Detention in 2012 making clear that indefinite and mandatory forms of


detention violate general international law. In connection with the asylum process proper, the guidelines mandate that detention may be used only to secure the identity of the asylum seeker, and to assure that the resulting claim is not manifestly unfounded or abusive. Detention may also be utilized in the asylum context to assure public safety and health standards, but any such restrictions must be proportional to the interests which they serve. Beyond these broad public purposes, special measures must be adopted to assure that the rights of vulnerable classes are respected, including lesbian and gay applicants, women and children and children with disabilities, with a search for alternatives to detention being actively considered (UNHCR 2012).

**Part B: Substantive Scope of the Norm of Non-Refoulement**

**I. Prefatory Remarks**

There are inherent limitations to the relief provided by protection against persecution and torture, and the effort of international law to deal with these limitations is reserved for the later sections. For the moment, it is essential to remark that scholars are divided on whether non-refoulement, as a customary norm, is limited thematically to the persecution and torture scenarios, or whether the law of non-return may be more encompassing. There has been considerable commentary (and some case law) to the effect that states are under a customary law injunction to refrain from returning noncitizens to countries which are affected by full-blown civil war.55 This development has been largely the product of expanding interpretations of the customary law of non-refoulement. There may well be other contexts in which the bar is applicable, including those in which the noncitizen will be returned to conditions threatening his or her right to life.56

Some writers have seen in this form of temporary protection an emerging, albeit truncated, right to asylum.57 Recent developments within the UNHCR support an extension of this temporary right to those intercepted by a state or states on the high seas. It now seems clear that the norm of non-refoulement, with its corresponding right to temporary admission, will influence the developing law of territorial asylum. Emanations from the underlying right of non-refoulement are effectively restraining state action in the immigration field so as to provide the affirmative, or positive, side of the “dialectic” which is presently informing international human rights protection.

**II. The Customary Norm of Non-Refoulement**

Several sources are consulted here with respect to modern scholarly views of non-refoulement, after which there will be an effort to place these in the context of modern practice. The most recent study of non-refoulement is the highly influential article written

55 For a dispute among scholars on this issue, see Goodwin-Gill 1986, 897; Perluss and Hartman 1986, 551. For a contrary view, see Hailbronner 1986, 857.
56 See, for example, § IV.A, infra.
57 See, for example, Helton 2003, 162-66 (referring to the right to temporary admission as provisional asylum).
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by Elihu Lauterpacht and Daniel Bethlehem (2003, 87). The article draws upon some of the jurisprudence which is analyzed in this study, and it concludes that the customary norm of non-refoulement includes a bar against return in whatever form under circumstances where the alien would be exposed to:

- a threat of persecution;
- a real risk of torture, inhuman or degrading treatment or punishment;
- a threat to life, physical integrity or liberty (ibid., 150).

Thus while the Convention itself bars both torture and “cruel, inhuman and degrading treatment,” Article 3 protection (the non-refoulement clause) extends only to those individuals who can demonstrate that they are likely to be tortured (Rosati 1997, 1777). Despite this limitation, there is a growing consensus that the customary law of non-refoulement, in its present form, extends to cruel, inhuman or degrading treatment as well as to torture (Lauterpacht and Bethlehem 2003, 87). The distinction between torture on the one hand, and cruel, inhuman and degrading treatment on the other, is coming to produce dramatic differences in result, as is evidenced by the adjudications of the European Court of Human Rights at Strasbourg. In any case, it would appear that return to the “death penalty syndrome” meets the normative requirement for non-refoulement.

Among the areas which have been developed by the Strasbourg Court has been the question of protection for those who would be returned to conditions of ongoing civil conflict. The Strasbourg Court has ruled in this respect that, where the intensity of violence in the home state is such that it must have an impact on any individual living there, Article 3 relief is appropriate.98

III. Competing Models of International Protection

Two representative models which offer absolute protection based on a showing of objective displacement are the Organization of African Unity (OAU) Convention and the Cartegena Declaration. These instruments enlarge considerably the concept of “refugee.” The OAU Convention,59 for instance, expands the refugee definition to include (besides those who would otherwise be covered under Article 1A(2) of the 1951 Convention) individuals who have been displaced by “external aggression, occupation, foreign domination or events seriously disturbing public order.”60

The Cartagena Declaration,61 built upon the OAU’s philosophy to provide protection from objective conditions (such as generalized violence or mass violations of human rights) which proved threatening to social existence in general.62 These two instruments constitute unambiguous improvements over the Refugee Convention where large numbers

59 See, for example, Convention Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S. 14691, entered into force June 20, 1974 [OAU Convention].
60 Id., art. II(2).
62 Id., art. III(3).
of refugees are seeking conditions of safety in the host state. During time of mass influx, the OAU Convention and the Cartegena Declaration would permit group admissions based on a form of common victimization rather than the highly individualized and difficult to administer well-founded fear test.63

The essential model of protection advanced through this approach (i.e., human rights violations leading to flight irrespective of targeting based on a policy of discrimination) eventually gained acceptance as customary international law. In the wake of the Yugoslavian War of 1991-1994, certain European states (most notably Germany) found that they were confronted by mass influxes which were extremely difficult to process under the individualized machinery of the 1951 Convention. These states accordingly implemented what became later known as the customary norm of “temporary refuge.” Temporary refuge is now recommended by the UNHCR as providing a flexible form of protection.64 Those covered by the customary norm would include persons who fled from areas affected by violence and those who, by reason of their personal situation, are presumed to be in need of protection.65

Temporary refuge clearly provides for an expedited method of protection and avoids the prolonged factual determinations inherent in refugee status proceedings. Group determinations are based on easily verifiable conditions in the home state (e.g., mass violations of human rights flowing from acts of ethnic cleansing, etc.). And there is no need on the part of those seeking protection to show that they have a well-founded fear of persecution.66 All of these protection regimes have common characteristics. The chief benefit is the continuing right of non-refoulement, the right not to be returned to conditions in which human rights are not being maintained to an acceptably minimal level. On the other hand, each of these regimes is temporary in nature: the alien can be returned when the conditions giving rise to flight have subsided. Hence these regimes do not follow the North American and European model of permanent asylum.

63 Group determinations are permissible under the 1951 Convention, but are hardly ever resorted to. See, UNHCR, Handbook on the Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to Refugees ¶ 44 (Geneva 1992). Apart from these treaty-based regimes, the UN General Assembly has expanded UNHCR’s mandate from time to time to include largely undefined categories of persons whom the World Organization deems worthy of international protection. Accordingly, the commissioner’s competence has been broadened to include the following: “refugees and displaced persons of man-made disasters”; “refugees and displaced persons of concern to the Office of the High Commissioner”; “refugees and externally displaced persons”; and “refugees and other persons to whom the High Commissioner’s Office is called upon to provide assistance and protection.” In interpreting these terms, UNHCR has historically turned to the refugee definitions set forth in the Cartegena Declaration and the OAU Convention. UN General Assembly, Note on International Protection, 7 September 1994, A/AC.96/830, ¶ 32, available at: http://www.refworld.org/docid/3f0a935f2.html.


65 Id., ¶ 47.

66 Id., ¶ 46.
IV. Exceptional Leave to Remain,” Article 15(c) of the Qualification Directive, and Canada’s New Consolidated Grounds Approach to International Protection

“Exceptional leave to remain” has long played a role in European asylum systems. It remains as one of the most widely used methods within the EU to obtain protection where the Convention refugee definition cannot be satisfied. Relief under state provisions relating to “subsidiary protection” strongly track state responsibility under Article 3 of the ECHR, in the sense that the criteria to be met have generally been similar. Several significant differences have characterized treatment under “exceptional leave to remain” on the one hand, and Article 3 relief on the other: (1) relief under Article 3 confers only the right to non-refoulement while “exceptional leave to remain” has usually bestowed status on the noncitizen; (2) “exceptional leave to remain” falls subject to the Refugee Convention’s exclusion grounds, while Article 3 relief does not.

“Exceptional leave to remain” has also been subject to state discretion, and criteria supporting relief have varied from one state system to another (McAdam 2005, 562). In 2004, the EU announced a Qualification Directive which would at least set down minimum standards for obtaining relief on a humanitarian basis. The directive indicates that it applies to any noncitizen with respect to whom there are “substantial grounds” for believing that the person would, upon return, face a “real risk of suffering serious harm” as defined in Article 15. Article 15 establishes what “serious harm” means:

- death penalty or execution;
- torture or inhuman or degrading treatment or punishment of the applicant in the country of origin; or
- serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (ibid., 469-93).

The first clause is an apparent effort to codify the jurisprudence of the Soering decision in which the ECHR determined that it would violate Article 3 of ECHR for a state to return an individual to face capital punishment in the United States under specified circumstances. The dispute over the death penalty will undoubtedly continue to mark this striking difference between the manner in which the EU (joined by Canada) on the one

67 For an excellent study on the potential reach of “subsidiary” or “complementary” relief, see, McAdam 2007, 462.
68 Article 3 of the European Convention on Fundamental Rights and Freedoms precludes repatriation to a country wherein the alien will be subject to torture or to inhuman or degrading treatment or punishment. There exists a close correlation between “cruel and unusual treatment or punishment” on the one hand, and “inhuman or degrading treatment” on the other. See generally, Immigration and Refugee Board of Canada Paper on Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Risk to Life or Risk of Cruel and Unusual Treatment or Punishment, 2002, § 4.5.1 and 4.5.1.1. available at: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ProtectLifVie.aspx#s1.
69 For an excellent review of the new directive, see, McAdam 2005, 462.
hand, and the United States on the other, treat torture relief. How this conflict will finally be resolved unquestionably depends of how general international law comes ultimately to treat imposition of the death penalty. Importantly, for purposes of resolution of this question, a number of significant universal and regional instruments enjoin abolition of the death penalty altogether. Among these instruments are Optional Protocol Number 2 to the International Covenant on Civil and Political Rights (with a limited exception for war crimes);\textsuperscript{72} Protocol Number 6 to the ECHR;\textsuperscript{73} and a Protocol to the American Convention on Human Rights to Abolish the Death Penalty.\textsuperscript{74} Apart from the above, state practice is clearly moving away from the death penalty as a legitimate sanction for violations of municipal law (Steiner and Alston 1996, 807-09).

The second clause appears to be a specific reference to ECHR Article 3 jurisprudence, and would seem to incorporate case law of the Strasbourg Court (McAdam 2005, 478-79). Finally, the third clause is the one which would appear to go beyond the existing case law in covering those who objectively would be threatened with indiscriminate violence upon return. This clause has obvious potential to address the situation of civil war victims who have legitimate claims to protection even though they cannot show individual targeting. Nonetheless, it would appear from a reading of the entire text of the directive that such was not the intent of the directive since:

> Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm. (ibid., 481, quoting Directive Recital 26)

As one excellent review of the directive notes this recital gives rise to substantial problems. It suggests, among other things, that the violence supporting a claim must be more than random. This reading, however, would cause the recital to clash with the text of Article 15’s definition of “serious harm” (ibid., 481-82).

A recent case which has revolutionized the law in this area is \textit{Elgafaji v. Staatssecretaris van Justitie},\textsuperscript{75} where the European Court of Justice (ECJ) ruled on the substantive standard which had to be met in order for the claimant to receive relief under Article 15(c). The claimant was an Iraqi national whose father had worked for British security services. The ECJ ruled that a claimant under Article 15(c) was not obligated to show that he would be targeted by virtue of his personal circumstances. Rather, in a decision which was largely followed by the Strasbourg tribunal in \textit{Sufi and Elmi}, when determining the scope of Article 3 of ECHR, the court determined that a claimant could be granted relief by demonstrating that the level of violence in the relevant country or region was such that any individual facing such conditions would fall subject to the threat contained in Article 15(c). In sketching the methodology it would follow, the ECJ determined that the claimant’s individual circumstances and the intensity of the violence in the country of origin were

\textsuperscript{73} Available at: http://www.mfa.gov.tr/grupe/ed/eda/pro6.htm.
\textsuperscript{74} Available at: http://world.policy.org/americas/dp/achr-dp.html.
\textsuperscript{75} Case C-465/07 (Court of Justice of the European Union, Grand Chamber, 17 February 2009), ECR [2009] 1-921. Two recent pieces explaining the decision in the context of United States and world developments are the following: Fullerton 2013 and Lambert 2013.
coefficients of each other. Hence: (a) the higher the level of internal violence the claimant was able to show, the lower would be her burden to make out an individualized risk; and conversely (b) the greater the claimant’s individual risk by virtue of special circumstances, the lower the level of internal violence which must be shown.76

This paper argues that the rulings in both Sufi and Elmi and in Elgafaji represent customary international law.77 Together, they reflect a growing trend in the formation of opinio juris pursuant to which the tribunal looks to, not whether there is an agent in the country of proposed deportation who will target the claimant for serious harm, but rather whether the “refouling” state is under an obligation to refrain from acts which will “expose” the claimant to torture or to cruel, inhuman and/or degrading treatment. Where the claimant satisfies his or her burden of proof concerning the “certainty of risk” (whether by virtue of the exceptionally high level of violence prevailing in the relevant state or region, by virtue of the claimant’s personal situation, or through a combination of the two), the normative standard should be considered to have been met.

The ruling in Sufi and Elmi, predicated on the high level of violence in the state of proposed deportation, supported a grant of non-refoulement under Article 3 of ECHR. Article 3 rulings have always served as strong evidence of the emergence of a rule of customary law (Lauterpacht and Bethlehem 2003, 159). The decision in Elgafaji, on the other hand, providing for non-return based on a high level of violence in the state or region, on the claimant’s personal situation, or on some combination thereof, serves mainly as a methodological support to the strong normative result shared by the Strasbourg Court and by the ECJ. Indeed, in Sufi and Elmi, the European Court of Human Rights (ECtHR) acknowledged the strong relationship between Article 3 of ECHR and Article 15c of the European Qualification Directive, noting that the two provisions offered “comparable forms of relief.”

Hélène Lambert has described how the decision in Elmi and Sufi had been preceded by a number of ECtHR cases holding that individuals might be exposed to serious harm by virtue of their position standing alone (e.g., members of minority clans in Somalia) (Lambert 2013, 229). Lambert also notes the humanitarian plight often occasioned by acts of violence arising from civil strife (homelessness, famine, disease) and remarks that protection against these developments may well fall within the ambit of the two provisions.78 Taken together with the irreducible ethical underpinnings of the normative

76 Elgafaji, supra. In the United States, practitioners began to advance that the customary law of non-refoulement precluded return of noncitizens to States which were engulfed in seismic civil conflicts characterized by violations of the laws of war. This theory was rejected in two major decisions, one by the Board of Immigration Appeals, and one by the Ninth Circuit. Matter of Medina, 19 I&N Dec. 734 (BIA 1988); Echeveria Hernandez v. INS, 923 F.2d 688 (9th Cir. 1991). This paper submits that Elgafaji contemplates a different situation, and where the individual can show, either because of the intensity of the violence, or because the claimant would be affected because of his or her personal situation, the standard of the customary norm has been met.

77 The analysis here builds on the customary right to non-refoulement as opposed to the right which exists, for instance, under the Convention against Torture and under regional treaties such as Article 3 of the European Convention on Human Rights. There exists substantial overlap between these three forms of relief. For an explanation of these remedies in modern practice, see Lauterpacht and Bethlehem 2003, 158.

78 See Meron 1989, 87 proposing consideration of the fundamental ethical character of, a norm in determining its customary law character. Meron was discussing the Nicaragua Judgment, 1986 International
rule itself (protection against certain risk based on objective conditions), it is submitted that both *Sufi and Elmi* and *Elgafaji* represent independent but highly inter-related rules of general international customary law.

Canadian law has adopted the substance of this new standard in the reforms which parliament passed in 2002. Canada’s new Immigration and Refugee Protection Act (IRPA)\(^79\) enlarges considerably the grounds upon which international human rights protection may be sought in Canada. Presently, protected status can be conferred based upon any one of the following showings:

- the individual fears persecution based on a Convention refugee ground;\(^80\)
- the individual is in danger of torture;\(^81\) or
- there is a risk to the individual’s life, or a risk of cruel and unusual treatment or punishment.\(^82\)

The last two grounds have now been substantially developed in two position papers prepared by Canada’s Immigration and Refugee Board (IRB).\(^83\) Both papers are extensive and will not be analyzed in detail here. However, it is important to note that the bases for relief covered by Canada’s new statute and in the IRB papers track both the predicates for humanitarian leave to remain and, to a large degree, the scope of *non-refoulement* as a customary norm developed by Lauterpacht and Bethlehem. The passages which follow will lay significant stress on the first of these papers (*Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*) to ascertain the meaning of the very central terms which are used in the new provisions and which the papers seek to define.\(^84\)

**The IRB Paper on Risk to Life or Risk of Cruel and Unusual Treatment or Punishment**

Court of Justice 14, which looked to the public declarations of states as evidence of *opinio juris* rather than to the practice of states. *Sufi and Elmi* (as well as *Elgafaji*) are thus related to that broader range of decisions initiated by *D- v. the United Kingdom*, No. 146/1996/767/964, European Court of Human Rights, Given at Strasbourg, May 2, 1997, prohibiting as a violation of ECHR Article 3 the return of an alien to St. Kitts where such *refoulement* would entail an agonizing death from AIDS due to the absence of adequate medical resources in the country of origin.

80 *Id.*, § 96.
81 *Id.*, § 97(1)(a).
82 *Id.*, § 97(1)(b).
83 Immigration and Refugee Board Legal Services Division, Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Danger of Torture (May 15, 2002); Immigration and Refugee Board Legal Services Division, Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment (May 15, 2002) [Hereinafter IRB Paper on *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (May 15, 2002)].
84 At the outset, it is necessary to observe that neither form of relief is the product of Canada’s direct obligation under an international treaty. IRPA § 97(1)(a) and § 97(1)(b) are statutory creations which borrow from treaty law, international customary law, and sometimes from Canadian domestic law. Accordingly, the bars to refugee status [Articles 1F(a), (b) and (c)], which would not preclude relief under CAT (nor under ECHR Article 3) do preclude relief under IRPA § 97(1)(a) and § 97(1)(b). Accordingly, those who have committed crimes against humanity, war crimes or crimes against the peace are not eligible to apply, as are those who have committed serious non-political crimes or acts contrary to the purposes and principles of the UN.
(2002) looks both to Canadian jurisprudence and to international adjudications for guidance in determining what kinds of harm are protected against. Principal among these determinations have been the rulings of the ECtHR at Strasbourg. Under the accepted standard, there is no requirement that the harm feared be connected to a protected ground. Accordingly, threats based on personal vendettas or retaliation over private loss may satisfy the new test (although there must, naturally, be a showing that there is an absence of state protection). And, the claimant need not demonstrate that the threat is directed at him or her personally, only to a group to which the claimant belongs. Nonetheless, victims of “random violence” do not qualify unless they can show that the risk to which they are exposed is greater than that faced by other citizens of their homeland generally. The position paper thus invites an analysis which would conform to that adopted by the ECJ, i.e., one in which the intensity of the violence is balanced against the individualized threat to the applicant.85

An important feature of section 97 of the IRPA jurisprudence is its ability to reach situations in which classical refugee doctrine has proven largely ineffective. An example of this case law (referred to briefly before) is the situation of individuals largely situated in Latin America who have been targeted by criminal gangs because the claimants have refused to cooperate with them. This situation has been discussed previously in connection with the drawbacks of regional refugee protection systems which force upon the claimant a particular forum in which to file. The subject is raised here to analyze how the Canadian model (somewhat like the European in this respect) can create remedies for victims of gang violence where the American model has largely failed.

In Tobias Gomez v. Canada,86 a Salvadoran family sought refugee status and relief under section 97 based on the following facts. The family had been repeatedly threatened and extorted by MS-13 gang which had attempted to recruit the principal applicant’s son. The Federal Court Trial Division reversed the Immigration and Refugee Board based on its failure to consider whether the son was a member of a particular social group based on his opposition to MS-13’s recruitment practices for purposes of the Convention refugee definition under section 96 of IRPA. The most important aspect of its ruling, however, was the court’s ruling under section 97. For there, the court clearly drew the line between generalized harm (not a basis to fear either persecution or torture), and an individualized threat. Specifically,

In my view…[t]he applicants were originally subjected to threats that are widespread and prevalent in El Salvador. However, subsequent events showed that the applicants were specifically targeted after they defied the gang. The gang threatened to kidnap Mr. Tobias Gomez’s wife and daughter, and appear determined to collect the applicant’s outstanding “debt” of $40,000.00. The risk to applicants has gone beyond general threats and assaults. The gang has targeted them personally.87

85 IRB Paper on Risk to Life or Risk of Cruel and Unusual Treatment or Punishment, § 3.1.7.
87 Id.
V. The American Model of “Temporary Protected Status”: Protection Based on Situational Need as Opposed to the “Well-Founded Fear” Test

Of all the models which have been discussed so far, that which provides the broadest coverage is unquestionably the US Temporary Protected Status (TPS) model. Subject to its conditions (which are considerable as is shown below), TPS provides protection against not merely gross human rights violations in the home state, but also other destabilizing factors, such as economic or natural calamity, which have made social life in the country of origin non-sustainable. In this sense, TPS approaches the ideal of protection based on humanitarian need which has been put forward by Francis Deng in the UN Guidelines on Internal Displacement. Those Guidelines apply to:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border.

In a similar way, US law, through the INA § 244, sets forth the conditions under which the attorney general (now DHS) may designate a state (or a part of a state) for TPS purposes. These conditions are:

- The state to which repatriation would be effected is engaged in internal armed conflict so that returning the alien thereto would pose a serious threat to his or her personal safety.
- There has been a natural calamity in the state in question such as an earthquake, drought, or environmental disaster which has resulted in a significant disruption of living conditions. For this ground to apply, it must also be shown that the foreign state is temporarily unable to accept return of its own nationals, and that the foreign state has requested designation officially.
- There are other “extraordinary and temporary” conditions in the foreign state which prevent nationals from returning in safety, provided that the Attorney General does not find that the temporary stay of these non-nationals in the United States is contrary to the US national interest.

To be eligible under section 244, a qualifying alien must show:

- That s/he is a national of the designated state (or, if not a national, that s/he is

88 INA § 244(b)(1).
90 INA § 244(b)(1)(A).
91 INA § 244(b)(1)(B).
92 INA § 244(b)(1)(C).
stateless and that the designated state is the country of last residence). 93
• The alien has been physically present within the United States since the date of the
DHS’s most recent designation of the country involved. 94
• The noncitizen has resided continuously in the United States since the designation
by DHS. 95

There can be no doubt but that TPS has provided a widely utilized remedy since it was added
to the statute in 1990. The countries (or parts of countries) which have been designated
for TPS protection include the following: El Salvador, Honduras, Liberia, Montserrat,
Nicaragua, Sierra Leone, Somalia, Sudan, Angola, Bosnia, Guinea-Bissau, Kuwait,
Lebanon, Province of Kosovo, Serbia-Montenegro, and Rwanda.96 These designations
have been on a variety of grounds including gross civil rights violations flowing from civil
war (Liberia, for instance),97 to the occurrence of natural calamity such as a devastating
hurricane (Honduras).98

Serious limitations in the statutory remedy, however, dramatically curtail its effectiveness
—in ways which often make it appear unreasonable. For instance, protection under INA
§ 244 extends only to those who are in the United States at the time of designation. This
aspect of the legislation clearly reflects congressional anxieties regarding the prospect of
promoting mass influxes into the United States if the statute were to be extended to those
arriving after designation in the hope of securing a safe haven. Nonetheless, the automatic
cessation of benefits for those arriving after the designation date draws an essentially
arbitrary line as concerns the protected class contemplated by the humanitarian purposes
of the statute.

There is no reason, in principle, to offer protection to those already here at the time of
designation, while denying it to those arriving afterwards: both categories stand in the same
need. Moreover, since designation itself is usually coeval with human-made or natural
calamity, those already here would probably not be motivated to flee such catastrophe in
coming to the United States, but would have come here for alternative reasons. The class
which would be coming here to seek protection, those arriving after the event giving rise to
designation, would be the class least likely to receive it.

Another, and perhaps more disturbing feature of the legislation relates to the need for
designation before the right to such protection can be asserted. Under INA § 244, no form of
temporary non-deportability will be conferred unless a designation under INA § 244(b) has
been made by DHS. Not every country meriting designation has received it. Like the cut-off
point running from the entry of DHS’s order, the requirement of designation eliminates
whole populations from protection who, in principle, should qualify for it (Kerwin 2014,
S137-38). One glaring example of the limitations under discussion relates to Haiti right
after Jean Bertrand Aristide’s deposition and forced expulsion in late 1991. Designation
was not conferred on Haiti until the shattering earthquake of 2009, despite widely accepted

93 INA § 244(c)(1)(A)(i).
94 INA § 244(c)(1)(A)(ii).
95 INA § 244(c)(1)(A)(iii).
96 See, 8 CFR Part 244 [Temporary Protected Status: Country Reference Chart].
97 56 FR 12746 (March 27, 1991).
98 64 FR 524 (Jan. 5, 1999).
country condition reports showing that Haitians were suffering under systemic human rights abuses at the hands of security forces and their allies.99

In this connection, the jurisprudence of the Strasbourg Court under Article 3 of the Qualification Directive and of the ECJ under Article 3 of ECHR is more limited than TPS: protection is far from automatic and, as has been seen, its scope has not been effectively extended to the large categories of human-made or natural disaster which are now covered under INA § 244. Nonetheless, the European approach at least has the potential to reach those in flight for humanitarian reasons which the TPS provisions do not. Obviously, an adjudicative approach trades off certainty of result for the comparative benefit of not being eliminated from protection by arbitrary time lines or by exclusionary rule-making as to the countries from which flight will confer eligibility for relief.

What is needed in the United States is a case-based jurisprudence which would offer an individualized remedy based on a showing that removal would offend prevailing humanitarian standards. At a minimum, the new standard should incorporate the language of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of ECHR to the effect that: “States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement”.100 Such jurisprudence would provide for a period of humanitarian stay, temporary in nature, based on an individualized showing that return of the noncitizen to the country of origin would subject him or her to conditions which offend prevailing humanitarian standards.

**Conclusion**

This paper argues that the United States obtains far more constructive results when it turns to international law than when it relies exclusively on domestic law. This observation holds true whether one is looking at the procedural aspects of a case (e.g., when protections begin to apply), or to substantive elements (e.g., who at the end of the day is entitled to protection). Some practical policy recommendations follow.

Chief among the policy recommendations is that Sale v. Haitian Council Centers should be legislatively overturned. Congress should make clear that US “jurisdiction” exists wherever the nation exercises power in fact, whether that locus be on the high seas or through some pre-screening device as was the case in the Prague Airport case. It should provide that there can be no direct or indirect refoulement without a personal interview which would inquire into whether the noncitizen: (1) has a concern about returning; (2) wishes to apply for asylum; or (3) fears persecution in the home state or torture anywhere in the world. Sale has done substantial damage by encouraging states to employ strategies which constitute violations of the law of non-refoulement. The Hirsi case together with the response of other

99 For an excellent overview of “fixes” which could be made to the current TPS system, see, Bergeron 2014.
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jurisdictions and the opinion of scholars, offers evidence that Sale is not consistent with *opinio juris*. As it did when adopting the Refugee Act of 1980, the United States should bring its own law into conformity with general international law, including customary law and *jus cogens*, a peremptory norma of international law.

In calling for the statutory overturning of Sale, the author is mindful of the political difficulties. Eliminating interdiction in this manner may be more of long-term project than an immediate legislative possibility. However, Sale constitutes a salient violation of a fundamental rule of customary international law (the right of *non-refoulement*) and its legislative reversal would seem appropriate as a matter of public policy. It would also render US immigration strategy more consistent with the country’s long-standing concern with human rights as manifested in the public policy underpinnings of the Refugee Act of 1980.

In the area of safe third country agreements, there should be some acknowledgement of the asylum seeker’s right to choose his or her forum of adjudication. Accordingly, provision should be made, both in the US-Canadian model and in all such future agreements, to permit onward travel and admission to the country of destination for individuals who have not yet filed a protection claim in the country of first presence under specific conditions. These conditions would include: (1) circumstances where the jurisprudence of the country of destination provides a significantly more favorable framework of decision; and (2) return of the alien to the home state raises serious questions under the law of *non-refoulement*. Such a measure would preempt the phenomenon of double filing (something the current regime does not do), while preserving the individual’s customary right to choice of forum. Restoring this right of choice would, moreover, help to address imbalances in the modern system under which certain types of claims are recognized by some signatory states but not by others.

Work authorization and detention should also be revisited. Today, permission to work is covered by statutory schemes permitting the application for an Employment Authorization Document only after 150 days have elapsed after the filing of an asylum claim. This arrangement has led to much hardship for asylum seekers, often making it impracticable to advance or pursue a claim. The majority of jurisdictions retain more generous work authorization regimes. This paper proposes that the United States should emulate these signatory states by adopting a statutory scheme which would allow work permission upon the filing of a non-frivolous application for asylum.

The current requirement was designed to deter the filing of manifestly unfounded or abusive claims. The difficulty and unfairness of the resulting system has derived from the fact no effort was made to segregate *bona fide* claims from those which were not. The indiscriminate hardships of a waiting period (to obtain work authorization) imposed on the frivolous and non-frivolous alike operated to discriminate against those genuinely in need of surrogate international human rights protection.

As concerns the question of detention, it appears clear that there is no division in principle between the goals of US standards and international law. With few exceptions, detention is permissible only to ascertain the identity of the asylum seeker and to assure that the claim, as filed, is not manifestly unfounded or abusive. A rule of proportionality is followed,
explicitly in international practice, mandating that any detention not be excessive in view of the goals it is intended to secure. US practice should adopt and adhere to this principle.

As concerns expedited removal, Congress was mindful in 1996 of the manner in which unfounded asylum claims could be used to facilitate access to US territory without a proper visa. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), it sought to expand the restrictions against putative refugees by providing for their “summary” or “expedited” return in the absence of specific representations, or for failure to meet the credible fear standard before an asylum officer. For those who qualified for a credible fear interview, there remained the prospect of imminent and certain detention which could be prolonged after the credible fear interview had been passed (Legomsky and Rodriguez 2009, 506-07). Expedited removal imposes these restraints on genuine and the non-genuine asylum seekers alike, thereby arguably subjecting refugees to a penalty in derogation of the Convention. This paper recommends a statutory provision mandating release from detention once (a) the noncitizen has passed the credible fear interview; and (b) satisfactory evidence has been introduced regarding the asylum seeker’s identity.

The final policy recommendation relates to the scope of the substantive relief which can be sought in the United States. At present, available remedies are essentially restricted to asylum and/or withholding of removal (predicated on a showing of serious harm based on race, religion, nationality, membership in a social group, or political opinion), or to an objective demonstration that the individual would be tortured if returned. European law has exceeded these particularized and often narrow formulas, and permits relief predicated in large measure on generalized conditions obtaining in the country of origin.101 This is a step forward of considerable magnitude. The US model of TPS (which mirrors these protections in part, and often goes beyond them) suffers from the integument of politics in the process of “designating” states in the first place. In addition, persons in most need of relief—those who fled the triggering event itself, whether civil war, drought, or a shattering earthquake—are excluded from protection by virtue of the provision which precludes coverage for those arriving post-designation.

Congress should pass legislation to incorporate into US law the broad relief now available under Article 3 of the ECHR and Article 7 of the ICCPR, referred to earlier. The remedy created should include as well relief pursuant to the Elgafaji standard conferring non-return coupled with status where either the intensity of the violence in the home state standing alone, or the intensity of that violence taken in conjunction with the claimant’s individual circumstances, support a finding that the alien would be impacted upon return.102 The adoption of a supplementary approach (at least where civil war claims are concerned) would, through the flexibility of an adjudicative model, more adequately accommodate the needs of those in need of protection. Such a system would bring US law into conformity with the customary law of non-refoulement and help restore the country’s historical

102 See, for example, Kerwin 2014. In a similar, but more comprehensive, series of policy recommendation, the author suggests, inter alia, the adoption of a nonimmigrant visa for those who face persecution, danger or harm flowing from conditions in the country of origin. The proposal made here would confer relief upon those already in the United States (irrespective of when they arrived), provided that they could satisfy the statutory standard either before an immigration judge or before DHS.
commitment to human rights and humanitarian concerns.

Serious barriers have been erected in the United States with respect to access to non-refoulement and concerning the normative standard governing relief itself. The United States should look to advances made in the legislation and jurisprudence of other states as a model for its adoption of more appropriate standards—both on procedure and on substance. Customary international law and the scope of non-refoulement require no less.

REFERENCES


Executive Summary

World War II caused the displacement of millions of people throughout Europe. In response, the United States initiated a public-private partnership that assisted in the resettlement of hundreds of thousands of the region’s displaced persons. For nearly 40 years after the War, the US commitment to refugee resettlement played out in an ad hoc fashion as it responded to emerging crises in different ways. During this period the government’s involvement with resettlement became gradually intertwined with that of nongovernmental resettlement agencies, which came to play an increasingly vital role in the resettlement process. The budding relationship that began in the middle decades of the twentieth century set the foundation for an expansive and dynamic public-private partnership that continues to this day. The Refugee Act of 1980 solidified the relationship between resettlement agencies and the federal government, established political asylum in US law, and created the refugee resettlement program and a series of assistance programs to help refugees transition to life in the United States. This legislation marked a decisive turning point in the field of refugee resettlement.

Since passage of the Act, the United States has resettled more than two million refugees, providing them with the opportunity to start a new life. Nevertheless, almost as soon as it was established, federal backing for the domestic resettlement program began to erode, placing the program under increasing stress. Financial and programmatic support was quickly reduced because of budgetary pressures and a changing political climate in Washington, DC. Administrative control of the program was assigned to federal agencies that are responsible for different facets of the process. However, coordination and information sharing between these agencies and with resettlement agencies has been less than optimal. The lack of
adequate support for the resettlement program has placed substantial strain on refugee receiving communities and on resettlement agencies. Receiving communities have experienced particular strain as a result of secondary migration and a lack of resources to assist in refugee integration. In light of these issues, this paper highlights specific improvements that could be made to the domestic resettlement program that would ensure that the United States will remain in a strong position to welcome refugees for years to come.

**Introduction**

The United Nations High Commissioner for Refugees (UNHCR) estimates that at the close of 2012 there were approximately 15.4 million refugees worldwide (UNHCR 2013b). The international community has traditionally promoted three durable solutions to displacement: voluntary repatriation, integration into the country of first asylum, and resettlement to a third country. Voluntary repatriation is the preferred option since it signifies that the original cause for displacement has subsided to the point that it is safe for the refugee to return home. However, with the threat of continued persecution or ongoing conflict, it may be best for the refugee to remain in the country of first asylum and integrate into the local community. If remaining in the country of first asylum is not viable because of local resistance, lack of economic capacity, or another reason, resettlement to a third country might be the only realistic solution. Despite the need for third country resettlement, potential host countries have too often failed to live up to their moral responsibility to provide resettlement opportunities to refugee populations who otherwise remain mired in makeshift camps and urban centers around the world.

The United States became proactive in the resettlement of displaced persons following the end of World War II, and in response to other refugee crises that emerged in Cuba, Southeast Asia, and Eastern Europe in later decades. Until the passage of the Refugee Act of 1980, the United States admitted refugees on an *ad hoc* basis. The Act codified the definition of a refugee and the right to asylum into US law consistent with the 1951 United Nations Convention Relating to the Status of Refugees. It established a standardized admissions process that emphasizes “special humanitarian concerns,” and created a series of assistance programs that would help refugees transition into their new life in America (Anker and Posner 1981, 11). Since the Act’s passage, the United States has resettled more than two million refugees. Every year since 1994 it has resettled more refugees than all other states of the Organization for Economic Cooperation and Development (OECD) combined (Kerwin 2012, 5). Given the numbers of refugees resettled and the lives saved as a consequence, it is reasonable to argue that the system put into place by the Refugee Act of 1980 has largely been a success.

The Refugee Act of 1980 provided a solid foundation for building a robust resettlement system. Yet in the thirty years since the Act’s passage, the United States has not fully lived up to its obligations under the law. Many stakeholders have identified the need for comprehensive analysis of the strengths and weaknesses of the resettlement program. In
2003 the US State Department commissioned a study by David Martin\(^1\) on the refugee admissions system which covered issues related to the identification and processing of refugee populations overseas (Martin 2005). In 2011 the National Security Staff (NSS) completed an administrative review of the domestic side of the resettlement process which made recommendations for enhanced interagency coordination. The Government Accountability Office (GAO) has also analyzed the resettlement process and provided periodic reports highlighting both the strengths and weaknesses of the system. In addition, recent studies by private organizations have identified the need to commission further analysis on the institutional structures, relationships, processes and funding of the domestic resettlement program (Brick et al. 2010). Many of these studies have examined elements of the domestic resettlement program including the reception, placement and integration of refugees, which could bolster a larger, comprehensive assessment (Nezer 2013; Human Rights First 2012; IRC 2009; Georgetown University Law Center 2009; LIRC 2009).

This paper argues for specific reforms that would allow the resettlement system to live up to its unfulfilled promise and that would realign it with the vision set forth in the Refugee Act of 1980. Beginning in the post-World War II period, federal refugee resettlement programs became increasingly intertwined with the work of nongovernmental, humanitarian agencies. The passage of the Refugee Act signified a high point in this progression and delineated the roles and responsibilities of the federal government and private organizations in the resettlement process. At the core of the Act is the goal of helping refugees become self-sufficient. However, self-sufficiency has become narrowly defined and, in any event, the system has failed to provide the necessary resources to further this objective. In addition, breakdowns in coordination and information sharing on multiple levels have undermined the program.

**From World War II to the Refugee Act of 1980**

Due to the violent disruptions brought on by World War II and the proliferation of political, religious, and ethnic persecution during that period, millions of men, women, and children living in Europe were displaced from their homes and forced to flee in search of safety elsewhere. While the resettlement of European refugees began in earnest in the post-war period, the federal government and voluntary organizations began to coordinate their refugee resettlement work as early as the late 1930s. These early efforts planted the seeds for the public-private partnership that blossomed in later decades as their activities became more closely intertwined. This growing relationship often advanced on the heels of newly emergent refugee crises, thus providing the springboard for further development of the system.

At the height of World War II President Roosevelt established the War Relief Control Board, which became the official liaison between the federal government and voluntary agencies interested in providing humanitarian support overseas, including in matters related to displaced populations. A complementary organization, the American Council of Voluntary

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Agencies in Foreign Service (ACVA)—which was itself an early precursor to the Refugee Council USA and InterAction—was established to coordinate relief activities among the voluntary agencies and function as an interlocutor between member organizations and the federal government. In a series of meetings convened to discuss the problem of displaced persons in Europe in the mid-1940s, members of the ACVA, which included Jewish, Catholic, and Protestant groups, recognized the need for government funding and support if the United States was going to play an important role in responding to this problem. The refugee crisis confronting these organizations far exceeded the reach of their private resources; government support was not only expected but “assumed” (Nichols 1998, 61-8). Contrary to expectations, federal funding was not immediately forthcoming as some influential government officials remained resistant to the resettlement of European refugees in the United States.

Expansive resettlement efforts did not take place until three years after the war ended with the passage of the Displaced Persons Act of 1948, but consolidation of the public-private partnership began during the intervening period. The turning point came with President Truman’s executive order on December 22, 1945 that prioritized the resettlement of displaced persons, and orphaned children in particular. While only marginally effective as a tool for resettlement—it led to the admission of only 38,000 displaced persons over a three year period—the directive instituted an important change in the way voluntary organizations coordinated their work with the federal government in the resettlement process. Previously, migrants, including refugee populations, had to be sponsored for resettlement into the United States by a financially competent individual to ensure that they would not become a public charge. Following Truman’s directive, humanitarian agencies were for the first time allowed to become the sponsoring agencies of refugees. In this role, they provided guarantees that resettled refugees would not become public charges. The directive also mandated that these agencies cover the cost of travel across the Atlantic and provide for the displaced upon their arrival, so that the immediate cost of resettlement would not be borne by US taxpayers (Truman 1945).

Under the law at the time, there was no legal distinction between a refugee and an immigrant; any refugee who was admitted into the United States entered under the quota for his or her country of origin. Given the stringent nature of the quota system, proponents of the resettlement of displaced persons urged Congress to pass “emergency legislation” that would allow for more robust resettlement. The Displaced Persons Act of 1948—the preeminent example of such emergency legislation in the post-war period—provided for the admission of 202,000 displaced persons over a period of two years. In contrast to Truman’s 1945 directive, the cost of travel from Europe to the port of entry was covered by the federal government. However, humanitarian agencies were expected to provide for the needs of refugees after their arrival, including fronting the cost of travel from the port of entry to the final destination through loans paid by the refugee once they began earning money (Curtin 1952, 59). With a broadening scope of responsibilities, agencies involved in

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2 Established in 2000, Refugee Council USA is a coalition of nongovernmental organizations (NGOs) engaged in advocacy on behalf of the rights of refugees around the world and functions as the consultative forum for US-based agencies involved in resettlement work (http://www.rcusa.org/). Established in 1984, InterAction is an alliance of internationally-based NGOs that focuses on improving conditions and opportunities for the world’s most poor and vulnerable (http://www.interaction.org/about).
resettlement began to develop an expansive national network. The networks put into place to assist in the resettlement of displaced populations following the war formed the basis of these agencies’ work in later years (Scribner 2013).

The next major refugee crisis occurred following the Hungarian uprising in 1956. In response to a national uprising for political reform, Soviet troops launched a crackdown on protesters, killing thousands and forcing tens of thousands more to flee to Yugoslavia and Austria. To relieve some of the pressures of this influx on the Austrian government, President Eisenhower agreed to resettle some 35,000 Hungarian refugees into the United States (Coriden 1996). As with the displaced persons crisis following World War II, humanitarian agencies functioned as important actors in the resettlement process. Unlike earlier efforts, the federal government agreed to pay humanitarian agencies a total of $1.5 million dollars, or approximately $40 dollars per refugee, to assist in the process. Federal authorities soon thereafter issued a letter informing humanitarian agencies that these “payments do not constitute a precedent for giving payment to the voluntary agencies for similar costs for other refugee movements” (Zucker 1983, 173). While perhaps intended to be an isolated event, this precedent was later expanded and reinforced with the influx of Cuban refugees.

Between January 1959 and December 1960, the United States admitted 100,000 Cuban refugees who fled Cuba following Castro’s rise to power. Federal authorities expected that the Castro regime would soon collapse followed by a quick repatriation of Cuban refugees. However, large numbers of incoming Cubans soon required more support (Scanlan and Loescher 1983). The Cuban government’s decision in 1960 to confiscate the personal property of Cubans who fled to the United States strained the resources of local agencies and led the US government to establish the Cuban Refugee Emergency Center in Miami, Florida. President Kennedy allocated $5 million dollars for the Center to help care for Cuban arrivals. The president subsequently commissioned the Director of Health, Education, and Welfare (HEW) to establish a Cuban Refugee Program. On June 28, 1962, the Migration and Refugee Assistance Act of 1962 was enacted and funds for the program were appropriated by Congress. From 1961 through 1967 the government spent nearly $260 million dollars on direct support for refugees, including education, employment, health, reception and registration services of Cuban nationals who arrived in Miami (Thomas 1967, 47-9).3

The decision to support incoming refugee populations was reinforced during the influx of Indochinese refugees following the fall of Saigon in 1975. The US Department of State signed contracts with nine voluntary agencies and agreed to pay $500 (later $350) dollars per refugee to support the initial cost of relocation (Silverman 1980, 29). The Indochinese Refugee Assistance Act, enacted on May 24, 1975, divided the administration of voluntary agency and state assistance funds between the Department of State and HEW. Later that year, President Ford deployed a specially-created task force in HEW to help address some of the long-term needs of refugees in the community. This resulted in the release of a series of employment and training grants to the states which could be used to establish English language and vocational trainings, job placement programs, personal and family

3 While independent of the US Refugee Admissions Process, the Cuban Haitian Entrant Program continues to operate today as a public-private partnership between the Department of Homeland Security and various nongovernmental organizations.
counseling, and related programs for Indochinese refugees. These grants aimed to ease some of the financial stresses on states (Silverman 1980, 32).

The *ad hoc* nature of refugee resettlement and the *de facto* development of distinct resettlement programs that coincided with influxes of new refugee populations fostered inconsistencies in the program. For example, voluntary agencies resettling Soviet refugees were eligible for a stipend of $1,100 dollars per refugee that was to be matched by $1,100 dollars in private money, whereas agencies resettling Indochinese refugees were eligible for a $500 dollar stipend with no match required (Silverman 1980, 34). In testimony before the US Senate Committee on the Judiciary in 1979, former Senator Dick Clark—then newly appointed United States Coordinator for Refugee Affairs—expressed the need for a permanent and consistent refugee policy to replace what he characterized as an inadequate “patchwork of different programs that evolved in response to specific crises” (Kennedy 1981).

**The Emphasis on Early Employment for Self-Sufficiency**

Passage of the Refugee Act of 1980 standardized the system under which refugees were admitted, clarified the objectives of the program, authorized assistance programs that would be used to achieve these objectives, and delineated the roles and responsibilities of the various federal agencies involved in the process. One of the central objectives of the refugee resettlement system is to help refugees achieve “self-sufficiency,” which has traditionally been narrowly focused on finding employment and earning a total income that allows a family to support itself without the receipt of cash assistance from the state (Brick et al. 2010).

The Act had originally exempted refugees from work registration requirements for the first 60 days, but in 1982 Congress eliminated the exemption, thereby strengthening the connection between self-sufficiency and early employment for refugees (GAO 1983, iii). Prior to elimination of the exemption, the US Department of Health and Human Services/Office of Refugee Resettlement (DHHS/ORR) program guidelines, federal agreements with resettlement agencies, and even the Act itself “did not make clear whether employment should be an immediate goal or something to be sought following the completion of available training” (GAO 1983, 22). Following elimination of the exemption, finding employment as quickly as possible became the program’s preeminent objective while other priorities set forth in the Act, including English language and employment training programs, were marginalized.

The almost singular emphasis on self-sufficiency and economic independence, while a laudable objective, risks limiting opportunities for refugees to become accustomed to their new surroundings, find jobs appropriate to their skill sets, and access social services that could improve their long-term outcomes (Brick et al. 2010, 11). Furthermore, it overlooks a more robust understanding of integration which includes psycho-social, linguistic, and cultural integration (Ott 2011, 10). The provision of more resources to support a comprehensive approach to integration would benefit refugees and receiving communities in the long-term. For example, language barriers can diminish employment opportunities and impede the ability of refugees to navigate complex systems such as healthcare or
effectively communicate with law enforcement officials in emergency situations (US Senate Committee on Foreign Relations 2010, 2). Too frequently, training and recertification, and English language learning programs are underfunded or underprovided in a given locale (Georgetown University Law Center 2009, 22-26; US Senate Committee on Foreign Relations 2010, 4-5).

Even if more resources were targeted to employment and English language learning programs, highly educated refugees may still not be able to find employment that reflects their level of education or skills immediately after their arrival. To better address challenges associated with finding adequate employment, the refugee program could cover potential obstacles during pre-arrival orientation, engage in outreach and partnerships with potential employers, and develop individualized employment plans to help incoming refugees strategize on necessary steps to achieve their employment objectives (UNHCR 2013a, 27-37).

Changes in the types of refugee flows over time can also complicate efforts to secure quick employment for incoming refugees. From the mid-1970s until the mid-1990s, at least three-quarters of refugees coming to the United States were from the former Soviet Union or Southeast Asia. Today, the United States processes refugees from over 60 countries around the world (Dewey 2004). In 1990 nearly half (47 percent) of the refugees being resettled into the United States were from the Soviet Union and just over a quarter from Vietnam, followed by Laotian and Romanian refugees as a distant third and fourth, respectively. In 2010 the top four refugee flows were from Iraq, Burma, Bhutan, and Somalia, none of which contributed more than a quarter of that year’s total refugee flow (PRM 2010). Each ethnic group brings with it its own challenges, languages, and cultural norms that have to be taken into consideration when placing refugees in particular locales and seeking employment opportunities for them. Organizations such as the Center for Applied Linguistics, which offers a wide array of resources related to cultural orientation, should be even further enhanced and utilized within the resettlement system.

Finally, different government agencies serve competing objectives. On the one hand, the primary objective of the Bureau of Population, Refugees and Migration (PRM) of the State Department is to resettle the most vulnerable refugee populations. On the other hand, ORR has as its primary goal the promotion of “self-sufficiency and integration,” which in practice means finding employment that will allow a refugee to live without government support. However, it is the most vulnerable refugee populations—including those who have been severely traumatized or experienced physical injuries—that face the most significant obstacles to attaining self-sufficiency and integrating into receiving communities, particularly within the context of a weak economic climate (Kerwin 2012, 9).

**The Role of Federally-Funded Transitional Assistance Programs**

Although self-sufficiency through early employment is one of the fundamental goals of the resettlement process, the drafters of the Refugee Act recognized that there would be a period of transition into a new life in the United States. Two primary streams of funding provide...
support for the resettlement process, the first of which is the State Department-funded Reception and Placement (R&P) Program. The R&P Program provides initial support for the immediate needs of refugees for up to the first 90 days after arrival and offsets the costs borne by resettlement agencies. As of January 2010, the State Department doubled the R&P grant from $900 dollars to $1,800 dollars per refugee. At least $1,100 dollars of this amount must be used for direct support to the refugee, while up to $700 dollars of the remaining assistance can be used to offset program management costs (Department of State 2010). The second primary source of funding is a series of transitional assistance programs that are funded by ORR. Several programs, including employment-related services, Refugee Cash Assistance (RCA), and Refuge Medical Assistance (RMA) are available for financially eligible refugees. While well-intentioned, funding levels for these programs have failed to keep pace with the needs of refugees and local communities or have been reduced over time. Reduction in resettlement assistance has resulted in shifting the responsibility to provide cash and medical benefits from the federal to state governments (GAO 1990, 5). This section examines how this has played out in the case of the RCA and RMA programs in particular.

At the time of the Refugee Act’s enactment, refugees who otherwise qualified for Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC), or Medicaid were eligible to receive these forms of assistance. Refugees who met the financial qualifications to participate in these federally funded social service programs but did not qualify because of family composition, age, or disability, were still able to receive RCA and/or RMA benefits (Holman 1996, 20). For example, non-elderly childless adults were traditionally unqualified to receive Medicaid. In such cases, a financially eligible refugee, while not qualifying to receive Medicaid, would qualify to receive RMA benefits for a prescribed period (Bruno 2011). In addition, the Act committed the federal government to provide a 100 percent reimbursement to cover the cost borne by the state for refugees who qualified for and participated in state-level social assistance programs for the first 36 months in the United States. RCA and RMA were provided to the refugee for the same time period.

Almost from the outset, the federal government began to curtail the benefits provided to refugees. On April 1, 1982, the period of RCA and RMA support was reduced to 18 months. It was further reduced in October 1991 to eight months, where it remains today. The initial reduction to the RCA and RMA programs was due in large part to government concerns that refugee service providers viewed the programs as guaranteed entitlements that deterred refugees from seeking employment opportunities (Holman 1996, 22-24). In other words, there was a growing concern among political leaders that cash and medical assistance were forms of welfare that inhibited self-sufficiency rather than transitional support aimed at establishing a refugee in the local and national community.

The identification of refugee assistance as a form of welfare altered the way in which segments of the American public perceived recently-arrived refugees. Instead of recognizing financial and medical support for these communities as transitional assistance meant to help refugees acclimate to a new homeland—as they should be understood—the

4 Subsequent to doubling R&P assistance, the State Department has instituted periodic increases to the total amount provided, bringing the total amount at the time of this essay to $1,875 dollars per refugee.
use of assistance became viewed by some as a form of dependence (Haines 2010). A report issued by the GAO in 1983 highlighted these concerns. Focusing on the newly arriving Indochinese refugee population, which remained one of the largest refugee streams in the years following the Act, the GAO expressed concerns that the welfare dependency of this group had been consistently high since the time of their arrival. The report further noted that although some refugees might need continued public assistance, it could create a disincentive to seeking early employment (GAO 1983, 16).5

This perspective was rooted in larger, far reaching changes in the political climate concerning the government’s role in American life. By the early 1980s, a conservative shift in American politics, which was generally antagonistic toward government spending on social programs, had become ascendant. Consequently, federal funding for many social welfare, job training, and education initiatives was either cut or completely eliminated, while other programs were folded into block grants to states (Zucker 1983, 181).

Partly a consequence of this shift, reimbursements of the states’ share of the cost of the AFDC and SSI program expenses were cut. Early efforts to reduce this funding surfaced with the passage of the Balanced Budget Emergency and Deficit Control Act of 1985, popularly known as Gramm-Rudman. One of the primary purposes of Gramm-Rudman was to institute controls on spending that would result in a balanced budget by 1991. To achieve the required cuts, the refugee program shortened the time frame during which federal funds would be used to cover the state share for AFDC, Medicaid, and SSI (Holman 1996, 22). The first reduction was to 31 months in May 1986 and was progressively whittled down to zero months by October 1990.

A report issued by the GAO in 1990 noted that between 1985 and 1989 DHHS’s assistance per refugee declined 48 percent from $6,921 to $3,600 in absolute dollars. The GAO estimated that in 1990 the total cost that was shifted from the federal government to the states was around $85 million dollars. Reductions in federal funding resulted not only in service cutbacks in English language and job training programs, but also increased waiting periods for access to available programs, particularly in California and other states with large refugee populations (GAO 1990, 1–10). Critical of the federal government’s failure to provide the resources necessary to properly fund the resettlement system, Director of the California Department of Social Services Walter Barnes noted that:

> these cuts show the inability or unwillingness of Congress and the Administration to meet the commitments laid out in the Refugee Act of 1980. The constant eating away at resources is, I’m afraid, going to eat away public support for the refugee program. (Pear 1989, E4)

In 1996 the House Subcommittee on Immigration and Claims of the Committee of the Judiciary held a hearing to address some of the shortcomings of the resettlement system and discuss ways to better enable refugees to become self-sufficient. In written testimony,

5 More recent changes to the welfare system, and in particular the passage of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996 have significantly reconfigured the eligibility requirements for federal public benefits. While refugees remain qualified to receive some benefits, the limited time period for which these benefits are available to them has largely obviated concerns about “keeping refugees off of welfare.”
Representative Gary Condit (D-CA) claimed that while federal funding was used in his district to support language learning programs, employment and skills training, and provide cash assistance to refugees, federal dollars dried up quickly, placing strain on the local economy. He lamented that, “despite the fact that in the past the Federal Government has made commitments to fully support refugee resettlement, this commitment has not been met for many years,” and argued that it was “unconscionable for the federal government to place refugees in communities without providing resources for their resettlement.”

A 2010 report by the US Senate Committee on Foreign Relations concluded that the “resettlement efforts in many US cities are underfunded, overstretched, and failing to meet the basic needs of the refugee populations” and recommended that “the federal government do more to support and resource the local communities” (US Senate Committee on Foreign Relations 2010, 1).

The arrival of large numbers of refugees paired with the failure of the federal government to adequately fund the domestic refugee programs can place strain on receiving communities. Backlash against the refugee resettlement program has become more pronounced in recent years in the context of high unemployment and budget shortfalls. Tennessee, New Hampshire, and Georgia have taken legislative and executive action to try to stop resettlement into their states. In Manchester, New Hampshire, for example, Mayor Ted Gatsas requested that PRM impose a moratorium on refugee resettlement. He expressed concern over the living conditions of refugees and the lack of employment opportunities available to them. In response, PRM reduced the number of refugees resettled in Manchester from three hundred to two hundred, but refused to impose an across-the-board moratorium. A state bill to establish a moratorium passed the House, but failed to get enough votes in the Senate (Nezer 2013, 12).

Even in areas where executive or legislative efforts were not pursued at the state level, local communities have experienced a backlash against refugees. In 2008 city officials in Ft. Wayne, Indiana requested a moratorium on resettlement from the state Family Social Services Administration. In their letter of request, officials complained that the ongoing resettlement of Burmese refugees had resulted in a significant burden on the local community. While admitting that the local Catholic Charities worked extremely hard in the initial months following resettlement, it argued that after the first six months “the burden of assimilation, care and absorption falls on the local community—schools, hospitals, and numerous non-profits” (US Senate Committee on Foreign Relations 2010, 20).

Despite these concerns, refugees substantially contribute to local communities. For example, a 2013 study on the impact of refugee resettlement in Cleveland, Ohio contradicted many of the negative stereotypes applied to refugees. The study found that in 2012 the total contribution of refugees to the local economy was $48 million dollars, including approximately $2.7 million dollars in tax revenue, and that in the last decade 38 businesses were launched by refugees, which by 2012 employed 141 people (Chmura Economics and Analytics 2013, 2-5). The study also noted that “after two years in Cleveland … only eight percent of refugee households are still receiving public assistance” (Smith 2013). Further

6 Condit, Gary A. Statement to the House, Possible Shifting of Refugee Resettlement to Private Organizations, Hearing on the Subcommittee of Immigration and Claims on the Committee on the Judiciary, August 1, 1996.
studies should highlight features and potential reforms to the refugee system that would enhance the contributions of refugees to local communities.

**Funding and its Effect on Refugee Resettlement Agencies**

The failure to provide sufficient resources and inadequate long-term planning by federal agencies, alongside stresses brought by local backlash against the resettlement system, has had a corrosive effect on the resettlement agency network. A study on the role of faith-based resettlement agencies found that there was widespread concern regarding the needs of refugee communities being resettled and the availability of resources with which to do so. It noted that resettlement agency staff repeatedly expressed frustration that financial and other resources were never adequate to address the needs of their clients (Nawyn 2006, 54). Newly arrived refugees, especially those who do not have family living in the United States, are particularly dependent on the support of resettlement agencies and local charities.

In 2008 Lutheran Immigration and Refugee Service (LIRS) conducted a cost analysis of the refugee resettlement services required by the State Department and with respect to the R&P Program. In 2008 the per-person funding related to R&P provided by the State Department was $850 dollars, half of which had to be spent on the needs of the refugees. In particular, the study examined the “direct cost of ensuring basic needs as well as providing orientation and case management by front line staff and volunteers prior to refugee arrival and during the first 90 days” (LIRS 2008, 6). The study found that the federal contribution amounted to only 39 percent of the total cost accrued during this period. The remainder of the expense had to be covered by in-kind donations, volunteer hours, and direct contributions by the LIRS affiliate agencies.

According to a report by the US Senate Committee on Foreign Relations, the failure to increase funding over time in order to meet the needs of arriving refugees has significantly strained the resettlement system. In fact, the “decades-old grant level had declined by more than 50 percent in real terms due to inflation” (US Senate Committee on Foreign Relations 2010). Failing to adequately fund the costs associated with the system places a significant amount of stress on the resettlement agencies’ ability to do their job effectively; it is crucial that federal funding keep pace with the costs associated with the program. Failing to do so could in the long-term undermine the capacity of the system to continue functioning at a high level.

The significant drop in the number of refugees admitted into the United States following the September 11, 2001 terrorist attacks illustrates how a decrease in federal funding can affect the stability of resettlement agencies. In 2000, the United States resettled 68,921 refugees. In contrast, the United States admitted only 27,131 in 2002 and 28,403 in 2003 (Bruno 2013, 3). By 2004 the numbers had begun to increase, but still felt short of the average annual admissions in the pre-9/11 period. Consequently, the level of federal funding distributed to resettlement agencies, which is tied to the number of refugees being resettled, was significantly affected. Fifty-eight percent of nongovernmental resettlement agencies were forced to cut staff and 25 percent had to release more than a quarter of their employees (Nawyn 2006).
Since 2011 PRM has begun to issue a percentage of funding based on the predicted number of refugee arrivals, thereby allowing agencies to have a degree of predictability when planning their budgets. Despite this important advance, the nature of the system and the dependence of agencies on government funding expose them to volatility and unpredictability.

More recently, debates in Congress over the national debt, and particularly with respect to sequestration, could imperil the resettlement system. Sequestration puts into place automatic, across-the-board spending cuts to government programs aimed at instituting $1.5 billion dollars in deficit reduction over Fiscal Years 2012-2021. Some of those consequences are already being felt. According to San Diego Catholic Charities Director of Refugee Services Michael McKay, the sequestration caused the loss of a $15,000 dollar program that would have helped place refugees in jobs during the first four months of their arrival (Burks 2013). Financial pressures, paired with unreliable funding levels from one fiscal year to the next, have burdened an already stressed system and have contributed to the closure of various sites across the resettlement network. The resettlement network connected to the United States Conference of Catholic Bishops, for example, has witnessed the closure of resettlement agencies in the past few years in Fresno, CA; Memphis, TN; Atlantic City, NJ; Trenton, NJ; Allentown, PA; Wichita, KA; Honolulu, HI; Guam; and Dodge City, KA.

Compounding the strain on resettlement agencies is the tendency for new cooperative agreements to include requirements that result in increased workload and related costs that are often borne by resettlement agencies. Most recently, for example, PRM issued a requirement that quarterly consultations be held between local stakeholders who are involved in the resettlement process as a way to better coordinate. According to the requirement, “the affiliate(s) responsible for refugee placement shall convene and conduct quarterly consultations with state and local government officials concerning the sponsorship process and the intended distribution of refugees in such localities before their placement in those localities” (Bartlett 2013).

While the intention behind these meetings is laudable—to make sure that agencies involved in the resettlement process at the state level are working together—the responsibility for planning and implementing them should lie with the federal government as specified in the Refugee Act. The federal government has the clout to ensure that all interested parties will attend such meetings and has the capacity to explain in detail the dynamics of the resettlement system. The Refugee Act specifies that the ORR director and the associated federal agency will consult with local and state governments, and voluntary agencies, and stipulates that the director shall “provide for a mechanism whereby representatives of local affiliates of voluntary agencies regularly (not less often than quarterly) meet with representatives of State and local governments to plan and coordinate in advance of their arrival the appropriate placement of refugees among the various States and localities.”

**Secondary Migration**

Refugees may choose to pursue secondary migration following arrival to the United States.

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for a variety of reasons, including reunification with family located in another region or the lure of better financial opportunities elsewhere. Secondary migration can exacerbate the pressures that promote backlash against refugee communities and it can increase the strain on local social service networks and resettlement agencies. The placement of a refugee in a specific locale is made by a resettlement agency after taking into consideration a wide range of factors (e.g., employment opportunities, language resources, and health needs). Unfortunately, “if refugees relocate to other cities seeking more support or better job opportunities, resettlement assistance often lags behind or becomes difficult to access” (Georgetown University Law Center 2009, 35). Refugee benefits vary greatly between states and sometimes between counties in the nation’s decentralized system. A more flexible set of benefits allowing for money to follow a refugee would go a long way in addressing this problem.

In 2009 ORR commissioned a report on secondary migration, but its findings were never released. The author of the report later noted that:

> there was a growing interest in learning more about what was happening related to secondary refugee migration, including how both refugees and receiving communities were faring when there were unexpected influxes of refugees. Many communities hadn’t necessarily known that these newcomers were coming and were not always prepared for them. (Ott 8)

Putting into place mechanisms to better track secondary migration and provide more flexibility in the refugee assistance program could help to alleviate some of the stresses that suddenly arise with the arrival of new and unexpected streams of migrants.

According to Section 3 of the Refugee Act of 1980, ORR is required to “compile and maintain data on secondary migration of refugees within the United States.” Theoretically, ORR has the capacity to trace secondary migration through a state reporting system. States are required to provide the number of refugees and entrants residing in their state that had initially been resettled in another state. But this information is generally only available if the refugee applies for services once they relocate. Given that not all do, the state information is incomplete. Furthermore, due to institutional and bureaucratic delays, “by the time the ORR registers one set of secondary migrants, a new set has already arrived” (Georgetown University Law Center 2009, 36).

A second way in which secondary migration could be tracked is through the refugee travel loan program. Refugees traveling to the United States are provided an interest-free loan by the International Organization for Migration to cover their travel expenses and certain medical screenings. All refugees over the age of 18 sign a promissory note signifying their agreement to pay back the loan after they are resettled in the United States via monthly payments to the sponsoring agency. As refugees move from one locale to another, it could be possible to track secondary migration patterns through these payments. However, such information is not always immediately available to resettlement agencies. Nor is this information effectively shared between discrete organizations. Thus, this approach would impose a substantial new responsibility on resettlement agencies. Developing a centralized database to coordinate this information among the sponsoring agencies could also be costly.
A third option would be to take advantage of an existing requirement that foreign nationals, including refugees, in the United States provide notice to the Department of Homeland Security (DHS) within ten days of a move. Prior to 9/11, this statute was rarely applied, although it has been on the books for years. Due to national security concerns, this statute has been enforced more frequently in the post-9/11 era. Using this mechanism to track secondary migration would require DHS to share the information with ORR. It would also require enforcement of a highly burdensome requirement. It is unclear whether or not DHS has a system in place to do so and if they would be interested in doing so. The overlapping missions of these federal departments—DHS’s interest in national security and ORR’s humanitarian focus—could provide an obstacle to this kind of information sharing.

The issue of information sharing and coordination between government agencies in the case of secondary migration is one example of a much bigger problem confronting the resettlement system. A few areas are worth highlighting.

**Coordination and Information Sharing**

One of the pressing problems of the refugee resettlement system is the failure of the participating agencies to share information adequately at each stage and to coordinate their activities efficiently. Expanding the lines of communication between the international and domestic resettlement arenas could help to streamline the process and help avoid any logistical problems after the refugee arrives. At present, “overseas screening and adjudication agencies do not share sufficient information with domestic resettlement entities” (Kerwin 2012, 13; Nezer 2013, 17).

Information sharing between government agencies would be improved through coordinated, high-level oversight from the White House or the National Security Council. The Refugee Act requires the president to appoint, with the advice and consent of the Senate, a Coordinator for Refugee Affairs whose primary responsibilities include “the development of overall United States refugee admission and resettlement policy and the coordination of all United States domestic and international refugee admission and resettlement programs in a manner that assures that policy objectives are met in a timely fashion.” This position has the potential to streamline the entire resettlement process and to coordinate its many stages more effectively.

A good deal of attention has been paid to the importance of sharing the medical information of refugees with resettlement agencies so that they can better prepare for their arrival and anticipate specific needs. One area that has not received as much attention is mental health. The emotional and psychological trauma that many refugees experience can have a long-lasting impact on their well-being and the ability to integrate. A recent study noted that as many as 75 percent of Iraqi refugees brought to the United States suffered from some form of mental illness. In many cases, illnesses have gone untreated. In other cases, treatment has been delayed. In addition, some community health professionals report that medical records can be illegible or inadequate for diagnostic purposes (Georgetown University Law Center 2009, 32).

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Another area in which information sharing has proven inadequate is with respect to the condition of vulnerable populations. When refugees are being evaluated for resettlement, UNHCR develops a “referral for resettlement” that provides an in-depth analysis of a refugee’s life and experiences. The analysis could include information related to sexual or physical abuse of children by someone in their community or family, torture, sexual assault, and other forms of abuse. The State Department does not normally provide this information to resettlement agencies in advance of the refugee’s arrival because of confidentiality concerns. UNHCR staff has expressed concern that information regarding at-risk populations does not always reach entities involved in the resettlement process. A recent UNHCR study recommended that “domestic resettlement partners should be provided timely relevant information so that they can better understand the women-at-risk who are being (or going to be) resettled, and to enable them to prepare for and respond to the needs of these women once they arrive” (UNHCR 2013a, 4). If resettlement agencies could access this information earlier in the process, it could make it much easier for them to make placement decisions that might require special forms of support.

ORR should better align its funding mechanisms with the needs of communities that have to respond to influxes of new refugees. ORR funding for grants and contracts in a given fiscal year are dispersed among the states based on the number of refugees who arrived within the previous 36 months and who continue to reside in each state at the beginning of the fiscal year. This approach fails to account for areas that experience significant increases in refugee arrivals in short periods of time. For example, between fiscal year 2006 and 2008 arrivals to Michigan increased by 400 percent and by 1,500 percent to Detroit, specifically. But given ORR’s funding model, allocations for refugee social services in Michigan only increased by approximately 72 percent from FY 2007 to FY 2009. The significant increase in refugees arriving in Michigan between 2006 and 2008 was thus not accounted for in the funding that was provided (Georgetown University Law Center 2009, 34). Furthermore, the funding mechanism does not take into account new populations that are destined for areas of the country which have not received refugees in the last 36 months. In addition to revising the funding mechanism to address the situation of states that experience a rapid increase in new arrivals over a short period of time, more timely information sharing by the State Department regarding future arrival projections could help ORR better plan for capacity needs.

Finally, coordination related to the resettlement planning process over the course of the year—from the State Department’s budget proposal through the presidential determination—would provide a greater degree of predictability to the resettlement process. The president generally produces a federal budget proposal in February, which requests allocations for the resettlement program. The results of the request are not released until the budget is subsequently submitted to the Office of Management and Budget and to Congress. The requested allocation for the resettlement program translates directly into the number of refugees that the federal government expects to bring to the United States in a given year. None of this information is shared with the resettlement agencies, which must respond to a Request for Proposals (RFP) for the R&P Program by the end of June. This process is centered on the expected capacity for each resettlement site including a detailed budget and placement plan for refugees arriving in the upcoming year. Given that the required
consultation with Congress and the presidential determination that sets the ceiling for the following fiscal year’s total admissions and regional allocations do not occur until after the RFP deadline, resettlement agencies are playing a guessing game as to how many will be admitted, who will be admitted, and from where. The consultation usually takes place sometime in September, which is months after the proposals for the R&P Program are submitted for consideration. Following the consultation with Congress, the president issues the presidential determination that sets the final ceiling for that year (Bruno 2013, 1).

While some information is available upon which resettlement agencies can base estimates, there are no authoritative figures to guide their proposals. It would be better if the proposals from the resettlement agencies were due after the president’s consultation with Congress and if the consultation occurred more or less in tandem with budgetary proposals related to the resettlement program that the president submits to Congress. This would require moving the consultation back from September to late February or March. Shifting the schedule in this way would enable informed dialogue among community stakeholders at the local level related to incoming refugee populations and their needs.

The presidential consultation with Congress could rely more heavily on the data gathered in UNHCR’s annual publication, *UNHCR Projected Global Resettlement Needs*, a product of the Annual Tripartite Consultations on Resettlement that occur every July. Started in 1995, the consultations determine the projected resettlement needs and priorities for the coming year. Given the time frame required to process a single refugee from point of origin to resettlement in the United States—which can take one to two years or more—any refugee streams that emerge as a result of these consultations will likely not begin to arrive in the United States for at least the next couple of years. On September 30th of a given year there are often enough refugees that have proceeded far enough along in the refugee pipeline to cover almost all of the allotted slots for the next fiscal year’s refugee resettlement “ceiling,” which begins on October 1st. Over the course of the new fiscal year, refugees are continually being processed for resettlement in future years.

On the international front, requiring the State Department to provide pertinent information in a timely manner to resettlement agencies regarding who is being processed would assist resettlement agencies to engage in long-term planning. On the domestic front, the federal government should provide information related to expected refugee populations that they plan to resettle for the following year much earlier than they currently do. It would be ideal to put into place and pass multi-year appropriations for the resettlement program which could cover future flows that are already in process. This would take much of the guesswork out of the domestic resettlement process and provide a much greater degree of predictability. Multi-year appropriations would allow resettlement agencies to plan more carefully for the arrival of refugee flows and allow them to put into place the necessary resources for resettlement.

**Conclusion**

Since World War II, the US domestic resettlement system has evolved from one that responded to crises in an *ad hoc* manner to an infrastructure that reflects an expansive and dynamic public-private partnership between the federal government and voluntary
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resettlement agencies. The United States has resettled millions of refugees, helped them to integrate, become financially and socially established, and begin their lives anew. More than three decades after the passage of the Refugee Act, cracks in the system have become apparent and the need to revisit—so as to strengthen—the core objectives of the Act has become crucial. This paper has highlighted ideas and reforms that would ensure that the US domestic resettlement system remains vibrant well into the future.

While the federal government could make much needed reforms, resettlement agencies should also take responsibility for the system’s continued vitality and engage in constant self-evaluation to determine how their work could be improved upon to the benefit of refugees and receiving communities. The resettlement agencies are now engaged in a process of examining what metrics each agency collects that are not required under federal grants. Agencies supplement the work of the federal resettlement program in many different ways to strengthen the welcome of refugees. Examining the results of these projects and compiling promising practices would strengthen the response of receiving communities across the United States.

Resettlement agencies must also continue to expand and contract their networks in response to the needs of the incoming refugee populations and the local communities. This helps to relieve pressure in some areas that receive large numbers of refugees over short periods of time. It is also important that resettlement agencies take seriously the importance of public relations. Lifting up the successes that occur in refugee communities every day and highlighting the contributions that refugees make to the larger national community could help to offset some of the backlash that has occurred in recent years at the local level.

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Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection

Claire Bergeron

Executive Summary

Since 1990, the United States has offered hundreds of thousands of noncitizens who are unable to return to their countries of origin because of war or a natural disaster a vital form of humanitarian protection: temporary protected status (TPS). While a grant of TPS does not place a noncitizen on a path to permanent residence, TPS recipients receive protection against deportation and temporary permission to live and work in the United States. Nearly 25 years after the statutory creation of TPS, however, the use of the program has been the subject of some debate, largely because of concerns over whether TPS grants are truly “temporary.”

This paper examines the legal parameters of TPS and traces the program’s legislative history, exploring congressional intent behind its creation. While acknowledging that extended designations of TPS are often the result of long-running international crises, the paper argues that extended TPS designations are problematic for two reasons. First, they run contrary to congressional intent, which was to create a temporary safe haven for individuals unable to return home due to emergency situations. Second, continued grants of TPS status effectively lock TPS beneficiaries into a “legal limbo,” rendering them unable to fully integrate into life in the United States.

This paper considers several administrative and legislative “fixes” to align the TPS program with the goal of providing temporary protection to certain individuals that do not meet the refugee definition, while also ensuring

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that long-term immigrants in the United States are fully able to integrate into the fabric of the country. It considers:

- Amending the US definition of a “refugee” to enable more would-be TPS beneficiaries to qualify for asylum;
- Creating a new form of subsidiary protection for individuals who cannot return home but do not meet the refugee definition;
- Permitting TPS holders who have resided in the United States for a certain number of years to adjust to lawful permanent resident (LPR) status;
- Easing the ability of TPS holders to take advantage of existing pathways to permanent residence; and
- Implementing repatriation programs to assist former TPS holders in returning to their countries of origin.

This paper argues for the adoption of two of the above proposals. It asserts that the best way to realign the TPS statutory regime with congressional intent and the United States’ tradition of promoting full integration of long-term immigrants is to allow persons who have held TPS status for more than ten years to adjust to LPR status, while implementing a repatriation program for those with shorter-term grants of TPS that have ended.

**Introduction**

The United States has long positioned itself as a global leader in responding to humanitarian emergencies and sheltering those who are forced to flee their countries of origin. In 2012, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that the United States accepted just over 66,000 refugees for third-country resettlement, more than twice the number accepted by all other third countries of resettlement combined (UNHCR 2013, 163). That same year, the United States granted asylum to 29,484 individuals who sought refugee classification after arriving in the country (Martin and Yankay 2013, 1). It also authorized the admission of up to 70,000 refugees in FY 2013, and an additional 70,000 in FY 2014.

However, US refugee law is ill-equipped to serve as a protection mechanism for the vast majority of individuals fleeing violent or unsafe conditions at home, even when they make it into the United States. US political asylum law is closely modeled after the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. It stipulates that to be granted asylum, a foreign national must demonstrate past persecution or a well-founded fear of future persecution on account of one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social

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An individual seeking asylum must also show that he or she has an “individualized” fear—one that is particular to him or her as an individual—rather than generally applicable to all nationals of a particular country (Seltzer 1992, 779). As a result, individuals who are not themselves individual targets of persecution, but who may have very real fears of return, are excluded from the definition (Martin, Schoenholtz, and Waller Meyers 1997, 545).

Recognizing that there are often compelling reasons for granting protection to individuals who might not otherwise meet the strict refugee definition, US presidents since President Eisenhower have granted temporary protection to foreign nationals in the United States who are unable to return to their home countries because of extraordinary circumstances, such as war or natural disaster. In 1990, Congress expressly codified this practice by creating Temporary Protected Status (TPS). Yet, nearly 25 years after Congress created TPS, the use of the program has been the subject of some debate. In particular, critics charge that the US government has used TPS to grant extended periods of legal status to otherwise unauthorized immigrants, in contrast with Congress’s intent that the program be used only for temporary protection (Krikorian 2012).

Finding a long-term solution to this challenge is vitally important at this juncture since the demand for TPS is likely to grow in the coming years. Several scholars have noted that displaced migrants are just as likely to be fleeing war, generalized violence, or famine as individually-targeted persecution (Millbank 2000). One recent report predicts an uptick in political instability around the globe in the coming years (Brown, 2013). Meanwhile, as the world adapts to climate change and global warming, an increasing number of refugee-triggering events will likely be environmental, rather than man-made, catastrophes (Ota 2012, 515). In this context, many individuals fleeing harm will be unlikely to qualify for refugee status or political asylum under US law because they will not be able to prove that they have been individually targeted for persecution or would be targeted on account of a protected ground. For this reason, TPS stands positioned to play a growing role in providing humanitarian protection in the future.

Temporary Protected Status on the Ground: Where Did It Come From and What Does It Do?

Under the Immigration Act of 1990, the secretary of the US Department of Homeland Security (DHS) is authorized to designate certain countries for TPS when:

(A) [T]here is an ongoing conflict within [a] state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their potential safety; or

(B) (i) [T]here has been an earthquake, flood, drought, epidemic, or other environmental

4 INA § 208(b)
7 The 1990 Immigration Act originally delegated to the attorney general the ability to designate certain countries for TPS when they met the aforementioned criteria. This authority was transferred to the DHS secretary through the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).
disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected; (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state; and (iii) the foreign state officially has requested the designation; or (C) there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Secretary finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.8

TPS status is granted to all nationals of a particular country based on the country’s conditions, rather than the situation of a particular individual (as with asylum). Thus, TPS functions as a “blanket” form of relief for those who have left a particular nation (Wasem and Ester 2010, 2).

Pursuant to the law, an initial designation of a country for TPS must be for no less than six months, and no more than 18 months, though TPS may be subsequently extended, or a country may be re-designated.9 To qualify for a grant of TPS, a noncitizen in the United States must demonstrate that he or she has been continuously physically present in the United States since the effective date of the most recent designation of his or her country of origin for TPS, and that he or she has continuously resided in the United States since a date designated by the DHS secretary. An applicant must also register for TPS in the timeframe outlined by the DHS secretary and must be admissible as an immigrant.10

Individuals who would otherwise qualify for TPS but who are inadmissible under section 212 of the Immigration and Nationality Act (INA) generally may seek a waiver of their ground of inadmissibility. No waiver is available, however, for those who are inadmissible by virtue of having committed two or more “crimes involving moral turpitude,” most controlled substance offenses, and certain national security offenses. In addition, individuals who have committed one felony or two or more misdemeanors, as well as those who have engaged in the persecution of others, are statutorily barred.11

Noncitizens who are granted TPS receive work authorization and protection against deportation.12 They may also apply for advance parole, which gives them the ability to travel outside the United States and be readmitted.13 Furthermore, noncitizens’ time in TPS status is not counted as “unlawful presence” for the purposes of subsequent immigration applications.14

A grant of TPS, however, does not lead to any permanent immigration status in the United States. There is no legislation permitting TPS holders to adjust their status to that of lawful permanent residents (LPRs); in fact, the 1990 Immigration Act expressly prohibited the enactment of such legislation unless affirmatively approved by a three-fifths supermajority

8 INA § 244(b)
9 INA § 244(b)
10 INA § 244(c)
11 INA § 244(c)
12 INA § 244(a)
13 INA § 244(f)
14 INA § 244(f)
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Since the enactment of the 1990 law, 19 countries have been designated for TPS (Wasem and Ester 2010, 3; USCIS 2014). Eight countries—El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria—are currently designated (USCIS 2014). According to the most recent designations and extensions of TPS in the Federal Register, an estimated 340,310 people currently hold TPS. US Citizenship and Immigration Services (USCIS) also estimates that an additional 9,000 Syrians may be eligible for TPS as a result of the US government’s 2013 decision to re-designate Syria and advance the date from which eligible applicants must show that they have been continuously physically present to June 17, 2013.

TPS Legislative History: In Search of a Safe Haven Statute

Although the Immigration Act of 1990 marked the first time that TPS was codified in US law, the United States had, for decades before 1990, granted noncitizens displaced by humanitarian crises or environmental disasters a form of protection known as extended voluntary departure (EVD) (Frellick and Kohnen 1995, 341). EVD provided an administrative mechanism that essentially amounted to an exercise of prosecutorial discretion by the attorney general in deciding that individuals from certain countries would not be pursued for removal. Though the attorney general ultimately decided whether to grant EVD, recommendations for grants of EVD originated with the secretary of state, who would notify the attorney general that the situation in a particular country warranted suspending deportations (Seltzer 1992, 784-85). Between 1960 and 1990, the attorney general granted EVD to nationals of 16 countries, including Iran, Poland, Afghanistan, Ethiopia, and Uganda. The length of the deferral granted ranged from eight months, for Iran (April to November 1979) to 15 years, for Lebanon (February 1976 to February 1991) (Frellick and Kohnen 1995, 341). Following the 1989 Tiananmen Square Massacre, President George H.W. Bush granted a similar administrative reprieve from deportation, known as deferred enforced departure (DED) to certain Chinese nationals (Frellick and Kohnen 1995, 342).

By the early 1980s, however, concerns were mounting over the discretionary nature of EVD and its perceived uneven application to different countries (MacPherson 1985). In particular, immigrant advocates expressed concerns over the Reagan administration’s refusal to grant EVD to nationals of El Salvador, despite growing evidence of political instability and violence in that country (ACLU 1984, 6-7). Between 1981 and 1984, groups and individuals ranging from the United States Catholic Conference, the Archbishop of Washington, DC, the Immigration & Refugee Program of the Church World Service, the

15 INA § 244(h)
American Civil Liberties Union (ACLU), and United States Senator Edward Kennedy (D-MA) lobbied for the extension of EVD to Salvadorans (ACLU 1984, 6-7). Executive branch officials generally asserted that Salvadorans in the United States were adequately protected from persecution by US asylum law, and that most Salvadorans were coming to the United States for economic rather than political reasons (ACLU 1984, 11). Those lobbying for EVD for Salvadorans charged that the decision not to grant EVD was politically motivated. They alleged that the true reason for the United States’ withholding of EVD was that the Reagan administration generally supported the right-leaning Salvadoran government (Perl 1983).

Partly in hopes of remedying these concerns, in July 1987, Congressman Romano Mazzoli (D-KY) introduced the Temporary Safe Haven Act of 1987, which was later re-introduced the following year as the Temporary Safe Haven Act of 1988. The purpose of the bill, as outlined in the 1988 House Judiciary Committee report recommending its passage, was to “replace the practice known as Extended Voluntary Departure, under which aliens from countries experiencing turmoil are allowed to remain temporarily, with a more formal and orderly mechanism for the selection, processing and registration of such individuals.” The report noted that while the committee was convinced of the need to provide temporary protection or “safe haven” status to individuals who were fleeing danger but would not meet the definition of a refugee, it was concerned about “glaring deficiencies” in the EVD program. These included the fact that: (1) the Immigration and Naturalization Service (INS) did not maintain figures on the number of persons granted EVD; (2) the INS could not effectuate the removal of those whose EVD status was terminated because it did not track their location; (3) the conditions under which a “safe haven” was granted, extended, or terminated by the INS did not appear in any regulation, and were only conveyed to Congress and the public via press releases; and (4) there was nothing in the administrative EVD grants to prohibit “terrorists, drug traffickers, intelligence agents, and even Nazis” from being eligible for EVD.

The Temporary Safe Haven Act of 1988 called for the creation of a new authorization to remain temporarily (ART) status, which the attorney general could bestow upon noncitizens from designated countries. A country could be designated when the attorney general determined that the foreign state was unable to accept the return of its nationals because of an ongoing armed conflict, a natural disaster, or other “extraordinary or temporary conditions.” Individuals granted ART would be protected against deportation and have the ability to apply for work authorization, but they would not be eligible for public benefits. While the bill ultimately failed to pass during the 100th Congress, its text formed the backbone of the new provision authorizing TPS in the Immigration Act of 1990.

During the 101st Congress (1989-1990), bills were introduced in the House to stay the deportations and allow work authorization for several discrete groups of foreign nationals,
including Salvadorans and Nicaraguans,\textsuperscript{25} Lebanese,\textsuperscript{26} and Chinese nationals.\textsuperscript{27} These bills also called for the creation of a new “Temporary Protected Status,” which would include temporary work authorization and protection against deportation for nationals of designated countries.\textsuperscript{28} The concept of TPS was eventually incorporated into the House’s version of the larger Immigration Act of 1990, which called for the creation of a new TPS status and the designation of four countries for three-year TPS grants: El Salvador, Lebanon, Liberia, and Kuwait.\textsuperscript{29} The companion bill in the Senate contained no such provision.\textsuperscript{30} The final version of the Act signed into law on November 29, 1990 authorized the creation of TPS but designated only El Salvador, and only for 18 months.\textsuperscript{31}

Absent from almost all of the congressional debates surrounding the creation of TPS was any reference to how to treat TPS recipients when TPS status was perpetually extended. The House-Senate Conference report on the final Immigration Act of 1990 contains no mention of the subject.\textsuperscript{32} Following the passage of the Immigration Act of 1990, however, it soon became clear that the lack of legal mechanisms “resolving” the immigration status of those granted long-term TPS posed a serious problem. Writing on the new TPS program in 1995, Bill Frelick and Barbara Kohnen noted the scope of the problem and proposed a solution:

\begin{quote}
What happens when the AG [attorney general] extends TPS year after year rather than terminating the policy? Recipients of TPS begin to build their lives outside their country while still unsure whether the INS will eventually retract temporary protection. If the INS plans to continue extending TPS, then it should be recognized that dangerous conditions in the home country have not been of a temporary nature and that TPS recipients have built up equities in their respective communities. At some point, perhaps after TPS has been extended for a period of three years, the INS should have the flexibility to adjust their status. (Frelick and Kohnen 1995, 357)
\end{quote}

Four years later, at a House subcommittee hearing on extending TPS status to Nicaraguans and Hondurans, Congresswoman Sheila Jackson Lee called on Congress to create an “alternative method for encouraging TPS recipients to return home after TPS expires.”\textsuperscript{33} Nevertheless, neither an adjustment mechanism for long-term TPS beneficiaries nor a repatriation assistance mechanism for individuals whose TPS status has been terminated has ever been put into place.

\begin{itemize}
\item \textsuperscript{25} H.R. 45, 101st Cong. (1989).
\item \textsuperscript{26} H.R. 3267, 101st Cong. (1989).
\item \textsuperscript{27} H.R. 2929, 101st Cong. (1989).
\item \textsuperscript{29} H.R. 4300, 101st Cong. (1990).
\item \textsuperscript{30} S. 358, 101st Cong. (1990).
\item \textsuperscript{31} Pub. L. No. 101-649 (1990).
\item \textsuperscript{33} Designations of Temporary Protected Status and Prior Amnesty Programs: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Claims, 106th Cong., 1st sess. (March 4, 1999) (Statement of Rep. Sheila Jackson Lee).
\end{itemize}
Problems with the TPS System and Why a Fix Is Needed

Critics of the TPS regime contend that the program is not temporary. Indeed, as the list of currently designated TPS countries demonstrates, TPS designations and extensions may stretch years or even decades. Of the eight designated TPS countries, two—Honduras and Nicaragua—were first designated on January 5, 1999 (USCIS 2014). To qualify for TPS under the most recent designations, Honduran and Nicaraguan noncitizens must show that they have been continuously residing in the United States since December 30, 1998. Thus, by virtue of the program’s requirements, any individual from Honduras or Nicaragua who holds TPS has now been residing in the country for more than 15 years. El Salvador is similarly situated, having been first designated for TPS on March 9, 2001 (USCIS 2014).

The cycle of continuous designations, re-designations, and re-extensions of TPS status for certain countries is not inherently at odds with the goal of providing a “safe haven” for foreign nationals unable to return to their countries of origin because of humanitarian emergencies. After all, while the Immigration Act of 1990 mandated that no initial designation of TPS could last for longer than 18 months, there is no such strict time limit on the length of humanitarian crises. A country may legitimately be unable to ensure the safe and orderly repatriation of its nationals until many years after the initial humanitarian crisis that triggered a grant of TPS has been resolved.

There are reasons, however, to be wary of the use of TPS for long-term grants of immigration status. First, the program’s legislative history indicates a clear congressional intent for TPS to be used for temporary, short-term designations of status. Second, extended grants of TPS run contrary to the policy goals of fostering integration and full membership within American society for long-term foreign residents. Lacking many of the benefits that come with LPR status, long-term TPS beneficiaries effectively find themselves locked in “legal limbo” as de facto members of American society who are offered less than full membership.

Long-Term Grants of TPS Status Run Contrary to Congressional Intent

Although there is scant evidence in the Congressional Record indicating that Congress actively considered how TPS beneficiaries would be treated if they were perpetually granted TPS, there is ample evidence indicating that Congress intended TPS designations to be temporary. First, supporters of EVD (and later TPS) for Salvadorans emphasized that Salvadoran nationals were not seeking permanent protection in the United States. The ACLU’s 1984 publication Salvadorans in the United States: The Case for Extended Voluntary Departure noted that “all sources agree that the Salvadoreans are interested in returning to El Salvador as soon as it is safe for them to do so. These sources include the UNHCR, US officials and Salvadoran refugees themselves” (ACLU 1984, 67).

On the floor of the House, the debate over TPS centered almost immediately on concerns that the program could be used to grant “indefinite” stays of deportation, and supporters adamantly emphasized the temporary nature of the program. On October 2, 1990, Congressman William McCollum (R-FL), introduced an amendment to the House’s

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Immigration bill that called for the elimination of provisions in the Immigration Act of 1990 authorizing the creation of TPS. McCollum’s key concern was that the “Moakley provisions,” so-named for their insertion into the bill by Congressman John Joseph Moakley (D-MA), were “bad policy,” because “[t]hey keep lots of illegals here indiscriminately for extended periods of time.” In response, supporters of TPS emphasized the temporary nature of the program, noting that proponents “were not asking that these people be given permanent resident status” or “be allowed to live indefinitely in this country,” but “that they be spared deportation until war in their land subsides.” The McCollum amendment ultimately failed in the House by a vote of 131-285.38

Even after the defeat of the McCollum amendment, supporters continued to emphasize the temporary nature of TPS. Key backers of TPS, including Congressman Moakley in the House and Senator Kennedy in the Senate, characterized the program as “temporarily suspending deportation” and granting a “temporary safe haven.” Speaking about the program during the Senate’s final vote on the version of the bill agreed to by both chambers during conference, Senator Dennis DeConcini (D-AZ) emphasized that the creation of TPS and designation of El Salvador for TPS protection could actually assist the Immigration and Naturalization Service (INS) in ultimately removing Salvadorans once their TPS status was ended. He noted that the program facilitated the creation of a “registration system” which would provide “a means by which the United States can maintain accurate records of Salvadorans in this country . . . (and) facilitate the return of Salvadorans when the period of temporary protection expires.”

It is also significant that the final version of the bill to emerge from the House-Senate conference process drastically cut back on the length of initial TPS designations (and on the countries designated for such status) in the original House bill. The version of the bill that came out of conference provided that the attorney general had the authority to grant TPS for no longer than 18 months and designated only El Salvador for the new status. While the conference report emphasized that the language limiting initial TPS designations to 18 months should not be interpreted as preventing the attorney general from extending El Salvador’s initial TPS grant, the mere fact that the initial time frame for the program was cut in half underscores congressional concerns over long-term TPS grants.

Long-Term Grants of TPS Status Lock Beneficiaries into Legal Limbo

Continuous grants of TPS with no mechanism for permanent adjustment lock TPS holders into quasi-permanent “limbo” status, whereby they are effectively treated as long-term

36 Ibid.
43 Ibid.
residents in the United States but denied many of the legal protections that the United States normally grants to such residents. Unlike LPRs, for example, TPS holders may not sponsor family members for immigration to the United States. They are also ineligible for most federal public benefits (Silverman, Joaquin, and Klapel 2010).

Perhaps most significantly, the US government has long taken the position that grants of TPS are not considered “admissions” or “paroles” for the purposes of adjustment of status under INA § 245(a) (Silverman, Joaquin, and Klapel 2010). In 2013, however, the US Court of Appeals for the Sixth Circuit rejected this view, holding that the plain language of the TPS statute indicates that TPS holders should be treated as “admitted or paroled” for the purposes of adjusting status as the immediate relatives of US citizens. Nevertheless, USCIS has chosen not to apply this decision to applicants residing outside the jurisdiction of the 6th Circuit (USCIS 2013). Thus, outside of the 6th Circuit, unless a TPS beneficiary initially entered the United States through a form of lawful admission (for example, entering with a non-immigrant visa), he or she is ineligible to apply for adjustment of status even if he or she has a qualified US citizen or permanent resident relative, or US employer, willing to file a sponsorship petition.

Allowing large numbers of noncitizens to remain in the United States indefinitely in quasi-permanent legal status runs contrary to the United States’ historic commitment to fully integrating immigrants who have cultivated strong ties with the country and resided in it for extended periods of time. Since its earliest laws regulating immigration, the United States has classified all noncitizens as either “immigrants” or “non-immigrants.” “Immigrants” are those noncitizens who have been granted lawful permanent residence, which bestows heightened protection against deportation and may be renewed indefinitely. Individuals who hold LPR status can typically apply for US citizenship after five years. In contrast, “non-immigrants” are noncitizens who are admitted “for such time, and under such conditions as the attorney general may prescribe.” A fundamental characteristic of non-immigrants is that their stay in the United States is temporary; all non-immigrants must, at the end of their authorized period of admission, agree to depart. US law does not generally provide “in between” status that is short of lawful permanent residence for individuals who plan to reside in the United States indefinitely.

The United States also has a long history of allowing groups of noncitizens who fled violence or chaos abroad by entering the country in “temporary” status to adjust to LPR status. In 1934, Congress passed a law that allowed noncitizens who had entered the United States prior to July 1, 1933, and who demonstrated that they were in the country as “bona fide political or religious refugee[s]” to become LPRs. Prior to the country’s enactment of a comprehensive refugee law in 1980, Congress frequently passed laws granting LPR status to individuals who had been initially “paroled” into the United States following a war or political uprising (Kerwin 2010, 4-5). For example, in 1958, Congress enacted a law that ultimately enabled an estimated 30,752 Hungarians who had been paroled into

44 INA § 203(a)
45 Flores v. USCIS, 718 F.3d 548, 552 (6th Cir. 2013).
46 INA § 201
47 INA § 214
48 8 C.F.R. § 214.1
the country following the 1956 Hungarian revolution to adjust status (ibid.). Similarly, the 1966 Cuban Adjustment Act has granted lawful permanent residence to more than one million Cuban parolees (ibid.).

US law governing the status of asylees and refugees also reflects a concern for integrating long-term residents. Neither the Refugee Convention nor the Protocol requires countries to grant permanent legal status to individuals who are deemed “refugees” under international law (McAdam 2005, 503). Yet US law allows asylees and refugees to apply for lawful permanent residence after one year of residing in the United States.50

Each of these legalization laws reflected particular congressional concerns with respect to particular groups of noncitizens. But a common theme throughout them is that the United States has granted LPR status to individuals based on their “integration into American society and their contributions to our national future” (Motomura 2010, 236). The 1969 INS statistical yearbook exemplified this pattern through its explanation of the rationale behind the Cuban Adjustment Act:

It is true that in the beginning most Cubans hoped and confidently expected that they would be going home soon. As the years passed, this hope faded. Their children went to American schools and adopted the American way of life as their own. The parents and breadwinners wanted to earn their own way, and many were qualified to make real contributions to our society. But in order to get the jobs that they could splendidly fill, they often found that they needed to be permanent residents or citizens of the United States. As parolees, they could not be either. (INS 1969, 9)

In the 1982 Supreme Court case Plyler v. Doe,51 Justice Brennan raised the possibility that unauthorized immigrant children denied the opportunity to attend public school in the United States could easily become part of a “permanent caste” of undocumented residents, equivalent to an “underclass.”52 Although a far different group than unauthorized children, long-term TPS beneficiaries nonetheless raise similar public policy concerns. In particular, they raise the question of whether it is in the nation’s best interests to host a large group of “quasi” permanent residents who, by virtue of their long residence, have become integrated into the fabric of US society, yet because of their legal status, cannot fully participate in it.

Making Them Permanent: Proposals to Place Those in the TPS System on the Path to Permanent Status

Amending the Current Refugee Definition

One way to solve the “legal limbo” problem that long-term TPS holders face would be for the United States to amend its definition of a refugee so that individuals fleeing political violence or an environmental disaster could qualify for asylum status, which provides a pathway to permanent residence. Though the beneficiaries of TPS have long been recognized

50 INA § 209(a)
as “de facto refugees” (Frelick and Kohnen 1995, 341), they have generally not qualified for asylum status in the United States because they have been unable to demonstrate that they meet two of the criteria required for a grant of refugee status under US asylum law: that they have been persecuted or have a well-founded fear of persecution (the persecution prong) and that their well-founded fear is on account of their race, religion, ethnicity, membership in a particular social group, or political opinion (the nexus prong).

A major problem with proposals to amend US asylum law to encompass situations where individuals are fleeing generalized political violence or environmental catastrophes is that US asylum law hews closely to the definition of a “refugee” put forth in the 1951 Refugee Convention and the 1967 Protocol. International organizations, including and most critically UNHCR, have generally taken the position that individuals fleeing generalized political violence or environmental catastrophes do not meet the Convention definition of a refugee (UNHCR 2011, ch.V, para. 164). Some scholars argue that customary international law norms have shifted the definition of a refugee and that it may now include those who are fleeing environmental disasters or political turmoil (Worster 2012, 106-07). This argument, however, has yet to gain widespread acceptance in the international law community.

**Complementary Protection**

An alternate approach would be to create a new form of “subsidiary” legal status, modeled after protection in the European Union (EU). Since 2004, European Union member states have granted “subsidiary protection” to individuals who do not qualify for refugee status but who demonstrate that they cannot return to their countries of origin due to a “real risk of suffering serious harm” (Fullerton 2011, 108). EU directives define three specific types of harm as “serious harm:” (1) the death penalty or execution; (2) torture or inhuman or degrading treatment or punishment; and (3) a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (European Union 2011). The directives also provide that member states may adopt more generous criteria for granting subsidiary protection status, which a number of states have done. (ECRE 2009). Finland and Sweden, for example, grant subsidiary protection to persons who are outside of their countries of origin and who are unable to return because of environmental disasters (Mayer 2011, 383). Lithuania grants the status to individuals who have fled widespread violence that is not necessarily the result of an armed conflict (European Migration Network 2010, 8).

The specific benefits of subsidiary protection vary from country to country, but European Union directives set the minimum level of protection that states must provide. Under these directives, beneficiaries must receive residence permits that are valid for at least one year, and are renewable (European Union 2011). Individuals who hold subsidiary protection for five years become eligible to apply for long-term resident status (Council of the European Union 2011). Long-term residents receive a status that is somewhat comparable to lawful permanent residence in the United States. They may move freely within the EU, they may renew their residency indefinitely, and they are generally treated on par with EU citizens for purposes of accessing education, labor markets, and social security (European Union Commission 2014).
Not all of those granted subsidiary protection ultimately are able to apply for long-term resident status because a state may terminate an individual’s subsidiary protection status before the person has held that status for five years. Under the EU directives, states may end subsidiary protection when the circumstances which led to the granting of the protection cease to exist or have changed so that protection is no longer required. (European Union 2011, Art. 16). States may also revoke an individual’s subsidiary protection status if the person has committed fraud or a serious crime. (European Union 2011, Art. 19).

Prior to the issuance of the newest (2011) EU directive on subsidiary protection, EU directives treated beneficiaries of subsidiary protection differently than those who had been granted “refugee” status. Those with subsidiary protection faced greater restrictions on their ability to travel, work, access educational opportunities and vocational training, and receive social welfare and health care benefits (McAdam 2005, 506-14). One reason for this distinction was that legislators generally considered subsidiary protection to be less permanent in nature than refugee status (Pobjoy 2010, 221). After a number of scholars criticized this “protection hierarchy,” asserting that it was not justified under international law, the EU issued a new directive which generally calls for equal treatment for refugees and those awarded subsidiary protection (European Union 2011).

Adopting a new legal regime that resembles subsidiary protection could address some of the weaknesses of the TPS program. By providing certain noncitizens who are unable to return to their home countries with a form of temporary legal status, the United States would address the immediate humanitarian needs of individuals whose countries have suddenly become engulfed in war or devastated by a natural disaster. By initially providing only a temporary legal status, the United States would also acknowledge that in certain circumstances, individuals initially unable to return home because of these circumstances may become able to do so at a future date. At the same time, the inclusion of a mechanism for granting permanent legal status to individuals who have held temporary status for extended periods of time would address the humanitarian concerns that arise when short-term crises become long-term ones.

Subsidiary protection is far from a perfect substitute for the current TPS regime, however. Unlike TPS, EU law provides that grants of subsidiary protection must be based on individualized threats of harm. Recital 26 of the most recent subsidiary protection directive specifies that “[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm” (European Union 2011). While a recent case from the European Court of Justice clarifies that an applicant for subsidiary protection need not demonstrate the level of individualized targeting that would be required for a grant of refugee status (Allard 2010, 320), the directive assumes that a grant of subsidiary protection will be tied to an assessment of personal circumstances.

Requiring an applicant to make an individualized showing of harm may work well in a system designed to grant longer-term humanitarian protection, but less well in a system designed to deal with the immediate migration needs of individuals displaced by sudden disasters. Subsidiary protection is far from a perfect substitute for the current TPS program, however. Unlike TPS, EU law provides that grants of subsidiary protection must be based on individualized threats of harm. Recital 26 of the most recent subsidiary protection directive specifies that “[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm” (European Union 2011). While a recent case from the European Court of Justice clarifies that an applicant for subsidiary protection need not demonstrate the level of individualized targeting that would be required for a grant of refugee status (Allard 2010, 320), the directive assumes that a grant of subsidiary protection will be tied to an assessment of personal circumstances.

Requiring an applicant to make an individualized showing of harm may work well in a system designed to grant longer-term humanitarian protection, but less well in a system designed to deal with the immediate migration needs of individuals displaced by sudden disasters. TPS, as a temporary protection mechanism, is designed to grant protection to

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53 Notably, a separate EU directive governs grants of temporary protection. Under this directive, EU
individuals who face “risks to which a population of a country or a section of the population is generally exposed.” In order to continue to protect individuals covered by TPS, it is not necessary to screen for an individualized threat of harm, as the protection is based on the general conditions of their country of origin. Moreover, by requiring applicants to make an individualized showing of harm, the subsidiary protection regime requires individualized hearings and a fairly lengthy adjudication process in which an applicant’s credibility and supporting documentation is assessed. (Wettergren and Wikstrom 2013, 569). A process like TPS, in contrast, generally does not require a lengthy hearing, as individuals may be approved or denied on the basis of more “objective” criteria. Given that the goal of TPS is to provide short-term humanitarian relief, there is merit to retaining a process that is relatively simple, straightforward, and can be implemented fairly quickly.

**Adjustment of Status**

Another approach to resolving the extended TPS dilemma would be to amend current immigration law to provide a pathway to permanent residence for TPS holders. The most straightforward way to accomplish this would be for Congress to pass a new law that enables some class of TPS beneficiaries (for example, those who have held TPS status for a certain number of years) to apply for lawful permanent residence. There is some precedent behind such a law. In 1987, Congress authorized granting temporary legal status to any noncitizen granted EVD during the five-year period ending November 1, 1987, thereby placing them on the path to gaining lawful permanent residence through the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA).54 Similarly, the 1997 Nicaraguan Adjustment and Central American Relief Act (NACARA) allowed Salvadoran nationals who had entered the United States on or before September 19, 1990, and either registered for benefits through the American Baptist Churches v. Thornburgh (ABC) class settlement, or applied for TPS by October 31, 1991, to apply for “special rule cancellation of removal,” a process through which they could be granted permanent residence.55

There are several obstacles to establishing an adjustment of status program specifically for long-term TPS holders. The congressional debate surrounding the 1990 Immigration Act indicates that many members of Congress opposed this idea. The Act itself prohibits Congress from enacting an adjustment program for TPS holders unless the program is approved by a three-fifths supermajority of the Senate.56 Some scholars have pointed out, however, that members of the 101st Congress may have anticipated that long-term TPS holders would be able to take advantage of other adjustment of status mechanisms in US immigration law at that time, such as suspension of deportation, that are no longer available under current law (Martin, Schoenholtz, and Waller Meyers 1997, 577-78). Thus, a key

56 INA § 244(h)
reason that may have been used to justify not creating an adjustment of status program for long-term TPS holders in 1990 may no longer be as valid today.

Congress could also opt to allow TPS holders to qualify for a larger legalization program aimed at changing the status of a broader category of non-LPRs. For example, the language of the Senate’s 2013 “comprehensive immigration reform” bill (S. 744) makes clear that TPS holders would qualify to apply for the bill’s “registered provisional immigrant status,” the first step in a ten-year pathway to lawful permanent residence. Allowing TPS holders to take advantage of the Senate’s legalization framework would benefit TPS holders who meet the legalization program’s other criteria (for example, being physically present in the United States as of December 31, 2011). However, it would not rectify the problem of how to treat future TPS-holders who hold temporary status for extended periods of time. Like stand-alone programs to legalize certain TPS holders, it is also unclear how a larger legalization program that included TPS holders could be reconciled with the requirements of INA § 244(h), the three-fifths Senate supermajority requirement for legislation permitting TPS holders to adjust status.

A variation on the option of creating a new law authorizing adjustment of status for TPS holders would be for the executive branch to re-characterize TPS as a type of admission or parole (or as a waiver of the grounds of inadmissibility that attach with entry to the United States without inspection). This would allow greater numbers of current TPS holders who would otherwise qualify for existing family-based and employment-based pathways to permanent residence to take advantage of those pathways.

Most TPS beneficiaries who initially entered the United States without permission are barred from applying for lawful permanent residence from within the United States. This is because current law provides that, subject to limited exceptions, noncitizens who entered the country without being “admitted or paroled” are ineligible for adjustment of status. Instead, in order to gain permanent status, the law requires these individuals to depart the United States and apply for readmission at a US consulate abroad. For many noncitizens in this position, the process of leaving the country after having resided in it as an unauthorized immigrant triggers bars of inadmissibility of three or ten years. This decade-long wait dissuades many otherwise-eligible noncitizens from applying for LPR status.

USCIS could alter this outcome for TPS holders who entered the country unlawfully but are the immediate relatives (spouse, minor child, or parent) of a US citizen in one of three

57 Border Security, Economic Opportunity, and Immigration Modernization Act. S. 744. 113th Cong. (2013). Section 2101(a) of the bill, which spells out the grounds of eligibility and ineligibility for registered provisional immigrant status, states that a noncitizen lawfully present in the United States in nonimmigrant status is not eligible to apply for registered provisional immigrant status, other than an alien considered to be a nonimmigrant solely due to the application of section 244(f)(4) (the portion of the INA dealing with TPS holders).

58 INA § 245(a)

59 The “three year bar” applies to individuals who depart from the country after having resided in it in unauthorized status for more than six months but less than one year. The “ten year bar” applies to individuals who depart from the country after having accrued one year or more of unauthorized presence. INA § 212(a)(9)(B). Waivers of the three and ten year bars are available, but only to noncitizens who show that if they were denied readmission, it would cause “extreme hardship” to US citizen or lawful permanent resident spouse or parent (INA § 212(a)(9)(B)(v)).
ways. First, USCIS could decide to apply the 6th Circuit’s reasoning in the Flores decision to the entire country. Doing so would treat TPS holders who initially entered the country unlawfully as being eligible to apply for adjustment of status if they otherwise qualified to do so as the immediate relative of a US citizen.

Second, the administration could follow a recommendation set forth in an unpublished USCIS memorandum that was leaked to the public in 2010, in which the writers advised that USCIS could issue new guidance administratively granting TPS beneficiaries “parole-in-place” (Vanison, et al. 2010). “Parole-in-place,” which USCIS grants to the family of members of the military, provides noncitizens with temporary protection against removal and allows individuals who entered the United States without authorization to be considered “paroled” for purposes of adjusting status. Based on having been “paroled,” a parole-in-place beneficiary may move forward with an application to adjust status as the immediate relative of a US citizen (Stock 2011). Like applying the Flores precedent nation-wide, granting parole-in-place would allow far greater numbers of TPS holders to take advantage of existing channels for gaining lawful permanent residence.

Finally, a more incremental move would be for USCIS to issue formal guidance clarifying its position with respect to TPS holders who travel abroad and are readmitted. In a 1991 memorandum, the INS adopted the position that a TPS holder who had initially entered the country without inspection, but who, subsequent to a grant of TPS, left the country and returned with advance parole (e.g., parole approved before departure) would be considered “paroled” for purposes of the “admitted or paroled” requirement for adjustment of status (Virtue 1991). Until recently, however, USCIS took the position that TPS holders who traveled abroad with advance parole would still trigger the three and ten year unlawful presence bars if they had previously resided in the United States unlawfully. A potential sea change occurred in 2012, when the Board of Immigration Appeals issued Matter of Arrabally.60 Rejecting USCIS’s position that leaving the country pursuant to a grant of advance parole constituted a “departure” for purposes of INA § 212(a)(9)(B), the board held that a noncitizen with prior unlawful presence who left and returned pursuant to a grant of advance parole had not triggered the three and ten year bars and was still eligible for adjustment.

Like applying the Flores decision nationwide or granting “parole-in-place,” USCIS could use the Arrabally decision to provide a path to permanent residence for one particular group of TPS holders: those who are able to apply for legal status by virtue of being the immediate relative (spouse, minor child, or parent) of a US citizen, but who initially entered the country unlawfully. For individuals in such a situation, traveling abroad and re-entering the country with advance parole could enable them to be considered “admitted or paroled” for purposes of adjustment of status.61 Assuming that such a trip would not trigger the three and ten year bars (as would seem to be the case post-Arabally), these TPS holders would not be barred from adjusting, even if they had previously resided in the United States unlawfully. However, USCIS has yet to issue formal guidance on how it will apply Arrabally to TPS holders. As a result, the potential benefits of the decision for TPS holders remain unclear.

61 INA § 245(a)
Making Them Temporary: Proposals to Assist in the Repatriation of Those Who Previously Had TPS

An alternative—or complementary—mechanism for amending the current TPS regime is to put in place programmatic mechanisms that assist noncitizens whose TPS status has ended in voluntarily returning to their countries of origin. Early proposals on implementing a repatriation program focused on the role that international organizations—such as UNHCR, the International Organization for Migration (IOM), and US Agency for International Development (US-AID)—could play in assisting in the repatriation of those for whom TPS status had ended (Frelick and Kohnen 1995, 356). More recent proposals have suggested providing financial assistance to former TPS beneficiaries who agree to return, or withholding the social security taxes of TPS holders and then distributing them only upon return (Martin, Schoenholtz, and Waller Meyers 1997, 575).

Given UNHCR’s and IOM’s vast experience in the voluntary repatriation of refugees, the United States can and should draw upon the “best practices” of those organizations in structuring any future repatriation program for former TPS beneficiaries. For example, a number of scholars have examined UNHCR’s repatriation initiatives and concluded that certain factors correlate with successful repatriation programs. These include the provision of comprehensive information to migrants at the outset about the conditions in their countries of origin and the proposed return program (Rogge 1994, 29), the extent to which migrants are allowed to “transfer economic self-sufficiency” (such as money earned and goods and tools accumulated in the country of asylum) to their countries of repatriation (Rogge 1994, 35), and the extent to which migrants are provided with the tools (such as, in rural areas, farming implements, seed, and land) to establish self-sufficiency following repatriation (Rogge 1994, 35). In addition, scholars have noted that successful repatriation depends on the rebuilding of key infrastructure developments that may have been damaged during the political or environmental turmoil that caused people to flee (Rogge 1994, 36).

For its part, UNHCR, in its Handbook on Voluntary Repatriation and International Protection, has adopted many of these “best practices” into its recommended guidance. For example, the Handbook states that UNHCR may promote repatriation by undertaking a “comprehensive information campaign” to educate displaced migrants about the conditions in their home countries (UNHCR 1996, Part 3.1). The agency may also facilitate “advance visits” for displaced individuals, to allow them to see first-hand the conditions in their countries of origin (UNHCR 1996, Part 4.2). Following in the footsteps of this practice, the United States could take measures to educate individuals whose TPS is ending on the conditions in their countries of origin. It could ease travel restrictions on TPS holders, by allowing TPS holders to travel in and out of the United States without having to apply for advance parole, or by lowering the standard for granting advance parole. Such steps would increase the likelihood that former TPS holders have “on-the-ground information” about their countries of origin and would be more likely to agree to return to them when their TPS status ends.

UNHCR’s handbook on voluntary repatriation also promotes the issuance of “recovery or compensation” for movable and immovable property that refugees are unable to take with them when returning to their countries of origin (UNHCR 1996, Part 3.6). Similarly, UNHCR documents take the position that for a voluntary repatriation program to be successful,
there must be “rehabilitation” of critical infrastructure in the displaced individuals’ country of origin, such as the rebuilding of schools, clinics, water points, public facilities, and houses (UNHCR 2004, Part 1.8). Drawing off these key principles, the United States could develop a repatriation program for individuals whose TPS has ended that provides both direct aid to the returning migrants, and development aid for their countries of origin, factors that help ensure that returnees are able to return in safety and dignity.

**Drawing the Line: Dual Proposals to Allow Some TPS Beneficiaries to Legalize, and Require Others to Return**

The best way to realign the TPS program with the congressional intent behind it and with overarching US policy goals would be for Congress to pass a law that enables individuals who have held TPS for extended periods of time to become permanent residents, while putting in place mechanisms that assist those whose TPS status has ended after shorter periods to return home. While it is tempting to focus on shorter-term administrative fixes that the executive branch could implement without congressional involvement, only a full-scale legislative reform will solve the “legal limbo” problem currently facing the majority of TPS holders. Similarly, only a legislative fix could put in place standardized mechanisms for dealing with future waves of noncitizens fleeing political violence or environmental catastrophes.

In addition, crafting a new law that allows some long-term TPS holders to adjust status after they have held TPS for a certain length of time would foster the full integration of noncitizens who have built up significant equities in the United States. Of course, such a policy will require drawing a line to determine the length of time in TPS status that is required for adjustment of status. Setting this line at ten years, so that individuals who have held TPS status for ten consecutive years are permitted to adjust status, would be internally consistent with other aspects of US immigration law. Setting this line at ten years, so that individuals who have held TPS status for ten consecutive years are permitted to adjust status, would be internally consistent with other aspects of US immigration law. Setting this line at ten years, so that individuals who have held TPS status for ten consecutive years are permitted to adjust status, would be internally consistent with other aspects of US immigration law.62 It would also constitute a significant amount of time, during which TPS holders are likely to begin to put down roots in the United States and increasingly view themselves as US residents.

At the same time, the United States should take steps to ensure the repatriation of individuals who have not held TPS for ten years, but whose TPS has been ended because conditions in their country of origin have improved. Only by implementing repatriation for those whose short-term TPS has ended can the United States stay true to the initial intent of the TPS program—offering a “temporary safe haven” for individuals fleeing harm. A successful repatriation program could include withholding earnings (such as social security taxes) that would be paid to TPS holders upon their repatriation. It could also include implementing some of the “best practices” for repatriation developed by the international community, such as encouraging TPS holders to travel back and forth to their countries of origin when it begins to become safe to do so.

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62 For example, under current law, unauthorized immigrants seeking adjustment of status in removal proceedings in the form of “cancellation of removal” must demonstrate that they have been present in the United States for ten years (INA § 240A(b)). Similarly, individuals who depart the United States after accruing more than one year of unlawful presence in the country are no longer inadmissible after they have resided outside the country for ten years (INA § 212(a)(9)(B)).
Undoubtedly, implementing any kind of a repatriation program for individuals whose TPS has been terminated will prove extremely controversial, as will allowing certain long-term TPS holders to adjust status. Yet, for the United States to maintain the integrity of the TPS program, both steps are necessary. Given that the number of individuals seeking a TPS safe haven is likely to only increase in the coming years, fixing the program at this juncture could not be more critical.

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Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs

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Executive Summary

Temporary protection programs can provide haven to endangered persons while states and nongovernmental organizations (NGOs) work to create durable solutions in sending, host and third countries. They have the potential to further the interests of forced migrants in protection, states in effective and coordinated migration management, and the international community in solidarity.

US temporary protection programs rest primarily on executive discretion and have not been substantially revisited for nearly 25 years. “Parole” represents the primary vehicle for temporarily admitting noncitizens for emergency and humanitarian reasons. Prior to 1980, the United States used parole to admit large refugee and refugee-like populations to whom (in most cases) it later extended lawful permanent resident (LPR) status. The 1980 Refugee Act made the US refugee resettlement program the primary vehicle for refugee admissions, limited the use of parole to individuals (not groups), and created a presumption against granting parole to refugees.

The United States provides immigrant (permanent) visas to abused, neglected and abandoned children, as well as to certain Iraqis and Afghans who worked for the US military or for military contractors. It can also award up to 5,000 nonimmigrant (temporary) “T” visas each year to victims of human trafficking and up to 10,000 nonimmigrant “U” visas to survivors of crime who assist law enforcement officials in investigating and prosecuting crimes. However, since 1980, the United States has lacked a dedicated legal vehicle for admitting other refugee-like populations.

1 Temporary protection refers to the universe of programs that provide safe haven to persons who would be at risk in their home or host countries. Temporary protected status (TPS) is the US program that offers group protection to noncitizens from designated states.
2 In a legal fiction, parole does not constitute an “admission.” Nor does it connote criminal conduct under US immigration law. It is an exercise of executive discretion that allows physical entry and residence for a temporary period.

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Temporary protected status (TPS) applies to noncitizens from states experiencing armed conflict, the aftermath of natural disaster, or other extraordinary, temporary conditions that make it unsafe to return. The TPS statute allows the secretary of the US Department of Homeland Security (DHS) to designate states or regions within states for TPS, although the United States has never limited TPS to substate groups. TPS does not cover persons from designated states who arrive following the effective date of the designation, even those who fled great peril. TPS recipients cannot petition for the admission of close family members. In addition, TPS cannot be granted to persons in substantial need of protection from undesignated states.

Like refugees and asylees, TPS recipients receive work authorization. Unlike refugees or asylees, they are not eligible for resettlement benefits or deemed “qualified” for most federal public benefit programs. They can apply for political asylum and immigration benefits. However, TPS does not, in itself, lead to permanent status or other durable solutions.

Beyond TPS, the executive branch can exercise its discretion not to remove persons who fall outside its law enforcement priorities, including persons who might otherwise suffer violence, extraordinary hardship, or death at home.

This paper outlines international standards for the design and operation of temporary protection programs, describes the US refugee protection program writ large, and identifies gaps in protection. It recommends that Congress create a nonimmigrant “protection” visa for noncitizens who are at substantial risk of persecution, danger, or harm in their home or host countries, and that DHS expand its use of parole for de facto refugees and individuals in refugee-like situations. It also argues that the United States should prioritize the reconstruction and development of TPS-designated states and work to establish regional migration and development agreements covering North America, Central America and the Caribbean.

Congress should also pass legislation to extend LPR status to long-term recipients of temporary protection. In particular, it should advance the “registry” date to January 1, 1999 (which would provide LPR status to most noncitizens in the country since that date) and it should automatically move up the registry cut-off date each year thereafter by one year. It should also pass broad immigration reform legislation, including a legalization program that would credit years in receipt of temporary protection toward the time required to “earn” legalization. And it should allow temporary protection recipients to apply affirmatively for “cancellation of removal” (which brings LPR status) after 10 years.

DHS should also create a more inclusive TPS determination process by hosting quarterly public hearings on conditions in TPS-designated and
Creating a More Responsive and Seamless Refugee Protection System

TPS-eligible nations. It should also re-designate more states for TPS in order to allow persons from designated states who have fled dangerous conditions and entered the United States between the initial designation and re-designation periods to qualify for TPS.

**International Perspectives on Temporary Protection**

The United Nations High Commissioner for Refugees (UNHCR), the Council of the European Union (EU Council), the European Council on Refugees and Exiles (ECRE) and refugee advocates generally align on the optimal scope, use and characteristics of temporary protection programs.

According to this rough consensus, temporary protection programs should not be used as a substitute to refugee status, to delay a grant of refugee status, or to deter and deny entry to those seeking protection. Rather, they should be used to safeguard persons who are in substantial peril and who do not meet the refugee standard or who cannot avail themselves of the refugee determination process (Fitzpatrick 2000, 280). The EU Council directive “on minimum standards for giving temporary protection” conceives of temporary protection as a procedure to use in situations of “mass influx or imminent mass influx,” particularly if the asylum system cannot “process” the influx “without adverse effects for its efficient operation” (European Union 2001, Art 2(a)).

A properly structured temporary protection program can encourage states to allow access to their territory by ensuring that they will not be permanently and solely responsible for the imperiled persons that they admit. Frontline states can condition the admission of refugees and refugee-like populations on the financial and resettlement commitments of more distant states (Fitzpatrick 2000, 283, 286). They can also enlist neighboring states in a coordinated response to the conditions that compel migration.

The scope of a temporary protection program invariably depends on a state’s definition of a “refugee.” Under the 1951 United Nations (UN) Convention relating to the Status of Refugees and the 1967 UN Protocol relating to the Status of Refugees, contracting states cannot “expel or return” a refugee to territories “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³ The Refugee Convention represents a point of convergence by the international community on a humanitarian priority. It has also spurred the creation of a vast legal and operational infrastructure to protect those at risk, including the US refugee resettlement and political asylum programs.

International bodies and refugee advocates fear that temporary protection might be used to dilute refugee protections and reduce the likelihood that states will honor the legal guarantees set forth in the Refugee Convention. According to the European Union (EU), temporary protection should not be used “to prejudge” refugee determinations (European Union 2001, Art 3(1)). ECRE supports temporary protection only in emergencies when

individual refugee determinations are not “immediately practicable” and when temporary protection will enhance the likelihood of admission and territorial protection (ECRE 1997, par. 1). UNHCR views temporary protection as a stepping stone that can safeguard those in immediate need until a more durable solution can be secured (UNHCR 1981).

Commentators argue that temporary protection, if used as a “substitute protection,” will impede integration (Mansouri, Leach and Nethery 2009, 135). An analysis of the use of temporary protection for refugees in Australia, Germany and Denmark from 1999 to 2005 supports this concern. It found that those granted temporary protection experienced social and financial difficulties; separation from family members; and a heightened sense of uncertainty and political exclusion (ibid., 140-144). In addition, nongovernmental organizations (NGOs) reported difficulties in meeting the needs of temporary protection recipients for support services.

International bodies aver that temporary protection should have a firm legal foundation. UNHCR starts from “the “fundamental principle of non-refoulement, including non-rejection at frontier” (UNHCR 1981, Sec. II, A(2)). However, temporary protection programs typically rest on executive discretion (not legal obligations) and, as a result, they tend to be ad hoc (Yakoob 1999, 622).

Beyond its legal basis and the appropriate use of temporary protection, UNHCR, the EU Council and ECRE also broadly agree on the structure and characteristics of such programs. These include:

- Limited duration (ECRE 1997, par. 5);  
- Timely access to refugee or asylum determinations (European Union 2001, Art. 17(1); ECRE 1997, par. 6);  
- Rights proportionate to duration of status (ECRE 1997, par. 7), including civil rights and non-discrimination (UNHCR 1981, Sec. II, B 2(b), (d) and (e));  
- Access to justice, including to courts and administrative authorities (UNHCR 1981, Sec. II, B 2(f));  
- No unfavorable treatment due to unlawful presence (UNHCR 1981, Sec. II, B 2(a));  
- Family unity (UNHCR 1981, Sec. II, B 2(h) and (i); ECRE 1997, par. 8; European Union 2001, Art. 15, 2 and 3);  
- Education (ECRE 1997, par. 8), including equal access to education for children (European Union 2001, Art. 14, 1) and “educational opportunities for adults, vocational training and practical workplace experience” (European Union 2001, Art. 12);  
- Basic necessities like food, shelter and health care (UNHCR 1981, Sec. II, B 2(c); ECRE 1997, par. 8; European Union 2001, Art. 13);  
- Employment to promote self-sufficiency (ECRE 1997, par. 8; European Union 2001, Art. 12);  

4 Setting a maximum length for temporary protection encourages states to grant protection and to transition recipients toward a durable solution (UNHCR 2012b, par. 21).  
5 States may opt against extending temporary protection if it does not entail work authorization and social support. The United States, for example, admitted Kosovars from Macedonia in 1999 as refugees due, in part, to the lack of benefits and support services afforded under other available forms of protection (Hansen, Randall, Martin, Schoenholtz and Weil 2000, 811).
• Identity documents (ECRE 1997, par. 8) and residence permits (European Union 2001, Art. 8, 1);
• The ability to obtain visas (European Union 2001, Art. 8, 3) and only narrow restrictions on movement (UNHCR 1981, Sec. II, B 2(a));
• Protection of minors and unaccompanied children (UNHCR 1981, Sec. II, B 2(j));
• Permission to send and receive mail (UNHCR 1981, Sec. II, B 2(k));
• Registration of births, deaths and marriages (UNHCR 1981, Sec. II, B 2(m));
• Burden sharing by states, including in establishing durable solutions (UNHCR 1981, Sec. II, B 2 and IV 3; ECRE 1997, par. 5); and
• Removal of the causes of large-scale influxes and establishment of “conditions favorable to voluntary repatriation.” (UNHCR 1981, Sec. IV(6)).

Many of the preferred features of temporary protection programs could as easily apply to refugees. This is fitting since the conditions that trigger temporary protection are not inherently more fleeting than and often mirror those that necessitate refugee protection (Fitzpatrick 2000, 281). “Temporary,” in fact, might better be characterized as “impermanent.” For this reason, the EU requires that beneficiaries of subsidiary protection receive roughly equal treatment to refugees (Bergeron 2014; European Union 2011, Art. 20 to 35).

Like refugee status, temporary protection can be withdrawn when the conditions giving rise to it no longer obtain.6 However, according to a 2012 UNHCR roundtable, the decision to terminate or withdraw temporary protection should occur only when return can be “carried out in safety and dignity,” the recipient has transitioned to another status, protection responsibilities have transferred to another state, or the individual finds a durable solution (UNHCR 2012(a), par. 20). In addition, repatriation must be structured so that it does not contribute to further instability in the community of origin. ECRE holds that return should take place only on the basis of an independent and impartial human rights assessment (ECRE 1997, par. 9). Voluntary repatriation may be more successful when “the rights to work, housing, health, family reunification and education” have been honored in the host nation (Yakoob 1999, 623).

US Refugee Protection and Asylum Systems

In 2012, the United States admitted more than 58,000 refugees, provided political asylum to nearly 30,000 asylum seekers, and granted withholding of removal in more than 1,910 cases (Martin and Yankay 2013; DOJ 2013, K4). It also granted relief from removal to more than 500 persons who would likely have been tortured if returned (DOJ 2013, M1).

Under the 1951 UN Convention relating to the Status of Refugees and the 1967 UN Protocol relating to the Status of Refugees, states cannot “expel or return” a refugee to a territory “where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”7 Yet individualized refugee

6 The Refugee Convention’s “cessation” clause can be triggered by a fundamental change in the circumstances that gave rise to refugee status. Refugee Convention, Art. 1C(5).
determinations (for persons outside the United States) and political asylum adjudications (for those within the country) exclude vast categories of persons in genuine peril. In 2011, less than one-fourth of the world’s 72 million forced migrants—those displaced by violence, conflict, development projects, natural disasters and hazards—met the refugee definition (IFRC 2012, 14-17).

Nothing prevents contracting states from extending rights and benefits beyond those set forth in the Convention. The Organization of African Unity (OAU), for example, adopted a broad definition of refugee that covers persons compelled to leave their nations by “external aggression, occupation, foreign domination or events seriously disturbing public order.” The Cartagena Declaration, adopted by 10 Latin American nations and subsequently approved by the Organization of American States (OAS) General Assembly, enlarges the refugee definition to cover persons whose “lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that have seriously disturbed public order.” The European Union has created a “subsidiary” legal status for non-refugees at risk of “serious harm” in their countries of origin (European Union 2011, Art. 15; Bergeron 2014).

Subjective human rights are conceived as powers or faculties that inhere in individuals. Still it is incongruous that the Refugee Convention, adopted in response to the mass displacement caused by World War II, requires case-by-case refugee determinations and cannot be used to protect groups at immediate risk (Fitzpatrick 2000, 282). In fact, certain rights apply to groups (as in the collective right to self-determination) and group membership can serve as an effective proxy for individual rights violations. In the United States, the “Lautenberg Amendment” represents a form of group protection, establishing a presumption of refugee eligibility for persons in historically persecuted groups (particularly religious minorities) from the former Soviet Union, Southeast Asia, and Iran. The amendment eases the burden of proof for refugee applicants from these groups, and allows beneficiaries to apply for adjustment to lawful permanent resident (LPR) status after one year.

The US Refugee Act of 1980 enshrined the obligations and standards set forth in the Refugee Convention into domestic law. Under current law, the United States cannot admit refugees as a group (there must be individual screening), and it cannot admit as refugees noncitizens displaced by generalized violence, civil war, human rights violations, man-made or natural disasters, or those at risk of persecution but not on an enumerated ground.

The experience of Mexican and Central American asylum seekers exemplifies the difficulties faced by endangered persons that seek protection in the United States. Over the last three

8 Refugee Convention, Art. 5.
10 Similarly ECRE maintains that temporary protection “does not reduce need of supplementary refugee definition in Europe” (ECRE 1997, par. 1).
years, US Border Patrol arrests of unaccompanied minors—who are primarily from Mexico, Honduras, Guatemala and El Salvador—have increased dramatically (UNHCR 2014). Many minors report having fled transnational criminal gangs. Their fear of violence appears to be well-founded. In 2011, the intentional homicide rates in Honduras (91.6 per 100,000), El Salvador (70.2 per 100,000) and Guatemala (38.5 per 100,000) substantially exceeded the rate in Mexico (23.7 per 100,000) (UNODC 2013). To place this level of violence in context, the lower-end estimate of drug-related killings in Mexico since the government’s crackdown on drug cartels in December 2006 is 60,000 (BBC News 2013; Molloy 2013).

Substantial percentages of those fleeing violence in Mexico would appear to be strong candidates for political asylum, including journalists, police officers who fought cartel infiltration, and members of targeted families in violence-ravaged communities. Unaccompanied minors fleeing gang violence in certain Central American states present equally strong claims. Yet asylum approval rates for Mexicans and Central Americans have been extremely low (Chang and Linthicum 2013; Kerwin 2012; Hennessey-Fisk 2012).

**Temporary Protection for Noncitizens in the United States**

US temporary protection programs rest primarily on executive discretion and have not been overhauled for nearly 25 years. Parole is the primary vehicle for offering physical entry to noncitizens for emergency and humanitarian reasons. Prior to 1980, the United States used parole to admit large refugee populations. Congress later extended LPR status to most of these groups. The Refugee Act of 1980 formalized and made the US refugee resettlement program the primary vehicle for refugee admissions. The Act limited the use of parole to individuals (not groups), created a presumption against parole for refugees, and set narrow eligibility criteria (“urgent” humanitarian reasons or “significant public benefit”). Parole does not, in itself, lead to LPR status. Moreover, legislation to adjust parolees to LPR status requires a supermajority vote in the Senate, and the US Department of Homeland Security (DHS) does not consider TPS recipients to have been admitted or paroled, as is required to adjust to LPR status in the United States (Bergeron 2014).

Temporary protected status (TPS) applies to noncitizens from designated foreign states or regions within states. TPS does not cover nationals of designated states who enter the United States following the effective date of the designation, even those who have fled great peril. Nor does it permit recipientst to petition for the admission of close family members. In addition, it applies only to persons from designated states, not to those from non-designated states who are in substantial need of protection. In the event of an extension or re-designation of TPS, beneficiaries must re-register. Some do not and, thus, lose status.

Like the US refugee program, TPS status affords employment authorization. However,

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13 However, those who fear generalized violence, criminality or persecution (but not “on account of” an enumerated ground) would not be eligible for political asylum.

14 The DHS secretary can designate foreign states for TPS based on armed conflict, environmental disaster, or other “extraordinary and temporary conditions” that prevent the safe return of their nationals. Immigration and Nationality Act (INA) § 244(b)(1).
unlike refugees or asylees, TPS recipients do not receive refugee resettlement benefits and are not deemed “qualified” for most federal public benefits. They can apply for political asylum and pursue other avenues to legal status. However, the TPS statute does not identify durable solutions for recipients following the termination of a TPS designation or the withdrawal of TPS in individual cases. Nor does US Citizenship and Immigration Services (USCIS) track how many TPS recipients fall out of status, secure another status, or return home, either voluntarily or through deportation.

TPS populations are not among the “protracted” refugee populations that the United States has prioritized for durable solutions. Nor has the United States explicitly prioritized TPS-designated states for foreign aid and development assistance, which could lay the groundwork for the voluntary return of beneficiaries.

Temporary Protection for Noncitizens outside the United States

The United States has limited options for temporarily admitting imperiled noncitizens. DHS can grant parole for urgent humanitarian reasons or significant public benefit on a “case-by-case” basis. Parole can only be used “spARINGLY.” Immigrant visas are also available for certain Iraqi nationals who worked for the United States or for US contractors, and to Afghani translators who worked for the US military.

Pre-1980 Parole of Refugee Groups

Until 1980, the US attorney general (AG) frequently exercised his discretionary parole authority to admit groups of refugees. In a legal fiction, parole does not constitute a legal “admission;” it simply allows physical entry.\(^\text{15}\) Between 1956 and 1979, the United States admitted far more “parolees,” an average of more than 44,000 per year,\(^\text{16}\) than it did “conditional entrants” under the legislative quota for refugees.\(^\text{17}\) Paroled groups included 640,000 Cubans who fled the communist revolution, 360,000 Indochinese after the fall of Saigon, 32,000 Hungarian refugees following the failed revolution in October 1956, 30,000 Soviet Jews and other religious minorities, nearly 20,000 from displaced persons camps following World War II, and several hundred Chileans following the 1973 overthrow of the Allende government (Vial et 1979, 18, 47; USCIR 1997, 215).

During these years, Congress passed several laws to allow de facto refugees and parolees to adjust to LPR status outside the quota system (Vial et 1979, 24). In 1958, for example, it authorized the adjustment of Hungarian parolees after two years of residence.\(^\text{18}\) In 1975, it allowed certain Vietnamese, Laotian, and Cambodian parolees to adjust.\(^\text{19}\) In total, between

15 In the immigration context, parole does not imply criminal conduct.
17 Prior to 1980, conditional entrants could apply to adjust to LPR status after two years.
19 The law applied to Vietnamese, Cambodians and Laotians that had been paroled into the United States subsequent to March 31, 1975 or had been “inspected and admitted or paroled” on or before March 31, 1975 and were present in the United States on March 31, 1975. Indochina Migration and Refugee Assistance Act of 1975, as amended in 1977, Pub. L. No. 95-145, 91 Stat. 1223 (Oct. 28, 1977).
World War II and passage of the Refugee Act of 1980, more than 2 million persons adjusted status on the basis of legislation of this kind (Kerwin 2012, 31).

The Cuban Adjustment Act of 1966 (CAA) has been the largest and longest US adjustment program for a national group.20 It allows Cubans to adjust to LPR status one year after they have been admitted or paroled to the United States.21 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 stipulates that the CAA can only be repealed upon a presidential determination that Cuba has a democratically elected government.22 The United States granted LPR status to roughly 1.1 million Cuban nationals between 1960 and 2011 (DHS 2012, table 2).

**The Refugee Act of 1980**

The US Refugee Act of 1980 created the US refugee resettlement program and sought to channel refugees (“normal flow” and emergency admissions) into it.23 In doing so, it responded to concerns regarding the legality of the AG’s discretionary admission of refugee populations.24 The Act’s emergency admission provisions were intended to replace the AG’s authority to parole “large groups of refugees,” to set criteria for emergency admissions, and to formalize the consultative process that had arisen with Congress to guide the exercise of parole.25 The Act did not seek to limit the AG’s authority to parole non-refugees.26

**Humanitarian Parole**

Although eviscerated as a refugee protection tool, parole remains the primary means for admitting noncitizens on humanitarian grounds who do not meet the refugee standard. It can be granted by DHS “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”27 However, an individual refugee cannot be paroled unless there are “compelling reasons in the public interest” to admit him or her as a parolee, rather than as a refugee.28 In addition, would-be parolees must first exhaust other legal immigration alternatives (GAO 2008, 15)

All three of DHS’s immigration agencies can grant parole to persons from abroad. A 2008 Memorandum of Agreement (MOA)29 between the agencies seeks to coordinate and establish

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21 The CAA also covers accompanying spouses and children.
27 INA § 212(d)(5)(A).
28 INA § 212(d)(5)(B).
29 Memorandum of Agreement Between United States Citizenship and Immigration Services (USCIS), United States Immigration and Customs Enforcement (ICE), and United States Customs and Border Protection, “Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary’s Parole Authority Under INA § 212(d)(5)(A) With Respect to Certain Aliens Located Outside of the United States” (September 10, 2008), http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.
a framework for the exercise of parole for those at US ports-of-entry.\textsuperscript{30} The agreement does not constrain the “inherent authority” of US Customs and Border Protection (CBP) to grant parole or stipulate the categories of parole requests within its jurisdiction. It provides that USCIS will handle requests that entail “urgent medical, family, and related needs” and for persons that seek to participate in civil proceedings with “private” (nongovernment) litigants. US Immigration and Customs Enforcement (ICE), in turn, is responsible for adjudicating requests that involve persons in government proceedings or investigations; in removal proceedings or with a final order of removal; that wish to attend events hosted by international organizations; and who are admitted for intelligence purposes.

Parole requests and approvals can vary substantially from year to year. However, in 2012, CBP granted parole in 3,054 cases and USCIS approved 353 parole applications (Hennessy-Fisk 2013; USCIS, n.d.). No public figures exist for ICE parole adjudications, and neither CBP nor ICE produced parole statistics at the author’s request.\textsuperscript{31}

The principal grounds for humanitarian parole requests are family reunification, medical emergencies, and “emergent” reasons such as visiting a sick or dying family member or attending a funeral (GAO 2008, 41-42). Between FY 2002 and FY 2008, USCIS approved roughly 25 percent of the nearly 10,000 humanitarian parole requests it received (GAO 2008, 4-12; USCIS 2009).

Since 1980, the United States has regularly granted parole to at-risk and vulnerable persons. In the early 1990s, for example, the AG used her parole authority to allow nearly 11,000 Haitians—those screened at Guantánamo Naval Base and found to have a credible fear of persecution in Haiti—to enter the United States to seek asylum.\textsuperscript{32} In the year following the January 12, 2010 earthquake in Haiti, the DHS secretary paroled nearly 900 Haitians, most of them orphans who had been approved for adoption by US families (Hennessy-Fiske 2013; DHS 2010). Since 1980, however, parole has not served as a reliable or designated vehicle for admitting persons in refugee-like situations.

DHS can also expedite adjudication of cases, relax deadlines and documentation requirements, and exercise its discretion on behalf of persons from nations that have experienced a natural or human disaster. Following the devastation of Typhoon Haiyan in November 2013, for example, USCIS announced limited “immigration relief measures” for Filipinos in the United States, including extension of grants of parole, advance parole (which allows noncitizens to leave the country knowing they will be allowed to return), and expedited processing of advanced parole requests (USCIS 2013a).\textsuperscript{33}

### Legislation to Adjust Parolees and De Facto Refugees

In the 1990s, Congress passed legislation that allowed several refugee-like groups to adjust...
to LPR status, including:

- Nationals from the former Soviet Union, Vietnam, Laos, and Cambodia who had been inspected and paroled into the United States after being denied refugee status between August 15, 1988 and September 30, 1990;\(^\text{34}\)
- Nationals from the People’s Republic of China who had received deferred enforced departure (DED), an exercise of executive discretion not to remove, following the repression at Tiananmen Square;\(^\text{35}\)
- El Salvadoran, Guatemalan, and Soviet bloc asylum seekers, and certain Nicaraguan and Cuban nationals;\(^\text{36}\) and
- Haitian asylum seekers who had been paroled into the United States to seek political asylum in 1991 and 1992, and unaccompanied minors.\(^\text{37}\)

In 2008, Congress established special immigrant (permanent) visas for Iraqi nationals who worked for the United States or for US contractors in Iraq for at least one year after March 20, 2003, to Iraqi and Afghani translators who worked for the US military, and to the spouses and minor children of both groups.\(^\text{38}\) These groups receive refugee resettlement assistance and benefits.

**Temporary Protection for Noncitizens within the United States**

US law offers two primary vehicles for residents who do not qualify for political asylum or a related form of protection, but who could face violence or hardship if returned home: (1) TPS for persons from states or from regions within states that the DHS secretary designates for protection; and (2) an executive decision not to pursue removal, either in the normal course of enforcement of the law or in the form of special programs for individuals in particular groups.

US law also reserves immigrant (permanent) and nonimmigrant (temporary) visas for select categories of endangered persons. Special immigrant visas are available for abused, abandoned or neglected children who have been declared dependents of a juvenile court or placed in the custody of an agency or department of a state, or a court-appointed individual or entity. Nonimmigrant (temporary) visas, which can lead to LPR status, are available to survivors of human trafficking and to victims of crime who assist law enforcement to detect, investigate, or prosecute crime.

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**Temporary Protection Pre-1990: Extended Voluntary Departure**

Prior to 1990, the AG could grant extended voluntary departure (EVD) to persons from nations experiencing civil strife, rampant human rights abuses, and other dangerous conditions (Seltzer 1992, 783-4). EVD removed the threat of deportation and allowed recipients to work. Between 1960 and passage of the Immigration Act of 1990, the AG extended EVD to residents from 13 nations (ibid., 785). EVD took the form of blanket protection for nationals from designated states who were in the United States at the time of the designation (Frelick and Kohnen 1995, 341). Unlike TPS, it did not have a statutory basis.

Although widely used, EVD proved to be an imperfect protection tool for several reasons. First, the conditions prompting EVD often persisted for lengthy periods, undermining the expectation that it would lead to voluntary departure in a short period of time. Czechoslovakia, for example, received EVD from August 1968 to December 1977 and Uganda from June 1978 to September 1986.\(^{39}\) Second, foreign policy and political considerations influenced EVD designations, leading to the denial of EVD to persons targeted by regimes that the United States supported. Third, the Immigration and Naturalization Service (INS) did not track the location of EVD recipients. The government did not know who EVD covered until individuals in the designated populations faced deportation. Fourth, the AG did not exercise discretion to grant, extend or terminate EVD through a publically accessible process.

Congress ultimately allowed persons granted EVD over the five-year period ending on November 1, 1987, including Poles, Afghans, Ugandans and Ethiopians, to apply for temporary residence and, thereafter, to adjust to LPR status.\(^{40}\)

The executive branch also exercised its discretion to allow failed Nicaraguan asylum seekers to remain in the United States. In July 1987, AG Edwin Meese created the Nicaraguan Review Program, which allowed Nicaraguans denied political asylum to register, obtain work authorization, and reapply for political asylum (Wasem 1997, 7-8). The Supreme Court’s 1987 decision in *Immigration and Naturalization Service v. Cardoza-Fonseca* prompted the creation of the review program.\(^{41}\) In *Cardoza-Fonseca*, the Court held that the stringent “clear probability of persecution” standard for withholding of deportation (*non-refoulement*) did not apply to political asylum cases. The AG ordered Nicaraguan asylum cases reviewed under the more generous “well-founded fear” asylum standard.

**Temporary Protected Status**

In 1990, Congress attempted to formalize and codify its temporary protection programs by creating temporary protected status.\(^{42}\) In doing so, it did not seek to eliminate executive discretion, but to create a more structured process to guide its exercise (Seltzer 1992, 788). TPS represents the DHS secretary’s “exclusive remedy” to allow parolees and those

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39 By contrast, Iranian nationals received EVD for a short period—from April to December 1979—following the overthrow of the Shah.
potentially subject to removal to remain temporarily based on their nationality.\footnote{INA § 244(g). At the creation of DHS, the authority to designate nations for TPS and to administer the TPS program transferred from the AG to the DHS secretary (Wasem and Ester 2011, 2, note 5).}

After consulting with the “appropriate agencies of the Government,”\footnote{The US Department of State enjoyed a more direct role in initiating and advising INS on EVD requests (Seltzer 1992, 774, 784).} the DHS secretary can designate for TPS any foreign state or part of a foreign state:

- experiencing armed conflict that would “pose a serious threat to the personal safety” of returning nationals;
- that experienced an “environmental disaster … resulting in a substantial, but temporary, disruption of living conditions,” which is “unable, temporarily, to handle adequately” the return of its nationals and that requests TPS; or
- undergoing “extraordinary and temporary conditions” that prevent nationals from returning in safety, unless contrary to US national interests.\footnote{INA § 244(b)(1).}

The TPS determination process can be opaque. Under the law, the DHS secretary is required to provide notice in the Federal Register of designations, the relevant time periods, the number of noncitizens likely to be affected, their immigration status(es) and the basis for designations.\footnote{INA § 244(b)(1)(C); INA § 244(b)(3)(A).} Foreign states often advocate for the designation, re-designation and extension of TPS status. Often they argue for re-designation or extension based on the difficulty of re-integrating returned nationals, a rationale that arguably goes beyond the statutory criteria for a TPS designation in certain cases. NGOs likewise advocate for TPS designations through regular liaison meetings with USCIS, sign-on letters and other means.

The current process permits the DHS secretary to make determinations that invariably implicate sensitive diplomatic, political, humanitarian and resource considerations, without publicly offending the state under review (or other states) or establishing untenable precedents. It also allows for more expeditious decision-making in response to emergency situations than might otherwise be possible with a more involved process.

On the other hand, the system’s lack of transparency leads stakeholders to mistrust the stated rationale for TPS decisions. It can be difficult to understand why certain nations receive TPS designations and others do not. Armed conflicts have led to designations for some nations, but not for others (Frelick and Kohnen 1995, 45-6). Natural disasters have prompted TPS designations for Haiti, Nicaragua, and Honduras, but not for states in similar circumstances (Wasem and Ester 2011, 6). As of this writing, the DHS secretary had not designated the Philippines for TPS, despite the massive destruction caused by Typhoon Haiyan, including more than 10,000 deaths, and four million displaced. This may be due, in part, to the large Filipino population in the United States and the significant resource challenge that a TPS designation for the Philippines would present to USCIS.

It can also be difficult to understand the timing of TPS decisions. Even before the January 12, 2010 earthquake, for example, Haiti was the poorest nation in the Western Hemisphere. In 2008, Hurricanes Gustav and Ike and Tropical Storms Fay and Hanna led to widespread devastation and suffering, including 800 deaths, the destruction of more than 100,000
homes, and food and water shortages. Despite these conditions, the United States did not designate Haiti for TPS until after the cataclysmic earthquake in January 2010.

TPS limits participation to members of designated groups. It cannot be granted to individuals from non-designated states that would face extreme danger and insecurity if returned home, or to persons who arrive after the TPS-designation date. TPS recipients cannot petition for family members to join them on the basis of TPS status. In addition, TPS requires individual registration and re-registration, which leads many to fall out of status.47

The initial period of designation must be between six and 18 months.48 If the conditions giving rise to the designation persist, the DHS secretary can extend the period of designation.49 Designation cut-off dates and registration deadlines seek to deter influxes of migrants from designated nations (Frelick and Kohnen 1995, 344).50 TPS determinations are not subject to judicial review.51 Recipients can pursue political asylum or apply for any other immigration relief or benefit. The statute does not detail the options available to those whose TPS status is terminated or withdrawn.52

The DHS secretary can also re-designate nations for TPS, which extends eligibility to nationals of designated states who arrive between the designation and re-designation dates. Thus, following the January 2010 earthquake in Haiti, the United States granted TPS to Haitians residing in the United States as of January 12, 2010. It subsequently extended TPS to Haitians for an additional 18 months and “re-designated” Haiti for TPS, which effectively moved the arrival date forward to January 12, 2011 (DHS 2011). In this way, the DHS secretary can relax the normal practice of limiting TPS to those in the country on the initial TPS designation date. TPS has since been extended for Haiti to January 22, 2016.53

Like EVD, TPS beneficiaries can work, avoid removal, travel abroad with prior authorization, and secure documentation.54 However, TPS does not, in itself, lead to LPR status.55 Congress cannot extend LPR status to TPS groups without a supermajority vote of the Senate, which has never occurred.56

TPS recipients are “not qualified” for federal public benefits, making them ineligible for most means-tested benefit programs.57 However, they are eligible for emergency Medicaid, public health programs (like immunizations), disaster relief, school breakfast and lunch programs, and public education through high school. TPS cannot be granted to persons who are inadmissible on criminal and national security grounds.58

47 INA § 244(c)(1)(A); INA § 244(b)(3)(C).
48 INA § 244(b)(2)(B).
49 INA § 244(b)(3).
50 The concern over a magnet effect would not justify short re-registration periods.
51 INA § 244(b)(5).
52 INA § 244(b)(3); INA § 244(c)(3).
54 INA § 244(a)(1); INA §244(d); INA § 244(f)(3).
55 INA § 244(d).
56 INA § 244(h).
57 INA § 244(f).
58 INA § 244(c)(2).
In the congressional debate on TPS, several members expressed concern that TPS would lead to permanent or indefinite US residence. Its supporters, in turn, argued that the measure would lead only to short-term admissions.\(^5^9\) TPS’s statutory framework—the limited periods of designation and extension, and the inability of beneficiaries to sponsor family members, to receive most public benefits, and to adjust status—evidences Congress’ intent that TPS not become a long-term status. Yet, as prior “temporary” programs had proven, “extraordinary conditions” often lead to long-term displacement and instability. For this reason, TPS designations have often extended for protracted periods. For example, Somalia was designated for TPS in September 1991 for “extraordinary and temporary conditions” that made it unsafe to return,\(^6^0\) but TPS has most recently been extended for Somalia through September 17, 2015. TPS has also frequently been extended after the conditions which led to the initial designation have subsided.\(^6^1\) In addition, TPS covers stateless persons who last resided in the designated state.\(^6^2\) In these and other cases, there may be no option for return.

Frequent TPS extensions ensure that its beneficiaries are not returned to dangerous or otherwise untenable situations and that designated states are not destabilized by large-scale repatriation. At the same time, TPS does not represent or necessarily lead to a durable solution.

**Executive Discretion and Visas for Persons at Risk of Violence**

The US Constitution vests responsibility for the faithful execution of the laws in the executive branch.\(^6^3\) The US Supreme Court has held that the executive branch enjoys “absolute discretion” not to “prosecute or enforce, whether through civil or criminal process” based on “a complicated balancing of factors which are peculiarly within its expertise.” \(^6^4\) These factors include “whether a violation has occurred … whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”\(^6^5\)

Federal immigration agencies exercise prosecutorial discretion consistent with their priorities and judgments on how best to enforce the law (Kerwin, Meissner and McHugh 2010). They have repeatedly affirmed that they do not prioritize the removal of persons at risk of violence or persecution in their home countries.

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59 Of course, “temporary” does not technically mean short-term or preclude long-term admission: instead, it means fixed, limited and not permanent.
61 Of current TPS recipients, the most recent designation of TPS for El Salvador was March 9, 2001; for Honduras and Nicaragua January 5, 1999; for Somalia September 18, 2012; for Sudan and South Sudan May 3, 2013; for Haiti July 23, 2011; and for Syria October 1, 2013 (USCIS 2013c). However, several of these nations were initially designated for TPS well before their most recent designations, including El Salvador March 2, 2001; Honduras and Nicaragua December 30, 1998; Somalia September 16, 1991; and Sudan November 4, 1997 (Wasem and Ester 2011, 4). The new Republic of South Sudan was first designated on November 3, 2011 and Haiti was first designated on January 21, 2010 and re-designated on July 23, 2011.
62 INA § 244(a)(1)).
65 Ibid.
While the INS had long exercised discretion not to pursue deportation in “non-priority” cases, it began to operate under more formal operating instructions in 1975 (Wadhia 2010). An INS memorandum in 2000 directed officers “to exercise discretion in a judicious manner at all stages of the enforcement process.”66 The memorandum identifies several factors to guide the exercise of discretion that are relevant to persons in need of temporary protection, among them conditions in the country of origin, likelihood of removal, future eligibility for immigration status, and better alternative uses of the law enforcement resources.

In 2007, the US Government Accountability Office (GAO) urged ICE to develop comprehensive guidance covering arrest and removal decisions, including guidance “dealing with humanitarian issues and aliens who are not investigation targets” (GAO 2007, 34). In 2007, ICE instructed its agents that they were expected to exercise discretion “at all stages of the enforcement process.”67 In 2010, ICE prioritized enforcement activities that furthered its national security and public safety mission.

Deferred enforced departure, a formal expression of executive discretion, has been used to extend safe haven and work authorization to those who fear return based on conditions in their country of origin. In 1990, President George H.W. Bush awarded DED to Chinese students following the repression at Tiananmen Square.68 President Clinton granted DED to Haitians found to have a “credible fear” of persecution and who were soon to become eligible for LPR status under the Haitian Refugee and Immigration Fairness Act of 1998.69

DED has also been used in tandem with TPS to protect long-term “temporary” populations. Liberia received a TPS designation in March 1991. After TPS expired in September 1999, roughly 10,000 Liberians were granted DED, which was ultimately extended through September 2002 (Wasem and Ester 2011, 6). On October 1, 2002, the United States redesignated Liberia for TPS. The designation was extended to October 1, 2007. At that point, the Bush administration granted DED to Liberians who had received TPS. DED has been continuously extended for Liberians since that time. Most recently, President Obama extended DED through September 30, 2014 due to “compelling foreign policy reasons,”70 which include the potentially deleterious effects of returning Liberians on social cohesion and post-war reconstruction efforts.

Deferred action—another stylized exercise of executive discretion—likewise provides work authorization and temporary protection from removal. It can be granted to noncitizens who are too young, too old or have serious disabilities; have close family connections in the United States; committed minor infractions that prevent them from receiving LPR

66 Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service (INS), to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel,” HQOPP 50/4, November 17, 2000.
status; cannot be removed; or can assist in investigating or prosecuting criminal conduct.\textsuperscript{71}

The Deferred Action for Childhood Arrivals (DACA) program represents the most recent and ambitious use of executive discretion. DACA applies to “DREAMers;” i.e., unauthorized persons who entered the United States as children, most of whom have few connections to their country of birth.\textsuperscript{72} To qualify for DACA, applicants must:

- have been under the age of 31 as of June 15, 2012;
- have entered the United States prior to age 16;
- have resided continuously since June 15, 2007;
- apply within the United States;
- not have committed a felony, significant misdemeanor or three or more misdemeanors; and
- be in school, a high school graduate, a General Education Development (GED) recipient or an honorably discharged veteran.

DACA provides temporary protection from removal and work authorization for a two-year period, with the possibility of renewal. Administration officials have repeatedly argued that the removal of DREAMers does not represent an appropriate use of DHS’s limited enforcement resources.

The secretary of DHS can also grant parole to noncitizens residing in the United States who have not been “admitted” or “paroled,” but whose cases raise substantial humanitarian considerations. “Parole-in-place” is subject to the same standards and limitations as humanitarian parole. However, USCIS has recently demonstrated a willingness to allow group membership to weigh “heavily” in parole determinations. While recognizing that parole should be used “sparingly” and granted on a case-by-case basis, a recent USCIS policy memorandum concluded that it would be an “appropriate exercise of discretion” to grant parole-in-place to the “spouse, child or parent of an Active Duty member of the US Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the US Armed Forces or the Selected Reserve of the Ready Reserve” (USCIS 2013d).

\textbf{Visas for Persons at Risk of Violence}

US law provides special immigrant visas to children who have been abused, neglected or abandoned.\textsuperscript{73} To qualify, a child must be declared a dependent of a juvenile court or be placed by such a court in the custody of a state agency or department, or a court-appointed


\textsuperscript{72} “DREAMers” refers to persons brought to the United States as children who would be eligible for legal status under the Development, Relief, and Education for Alien Minors Act (the “DREAM” Act).

\textsuperscript{73} The Violence Against Women Act (VAWA) allows the qualifying family members of abusive US citizens or LPRs to petition for a family-based visa without the knowledge or cooperation of the abuser. It also allows for cancellation of removal and adjustment to LPR status of “inadmissible or deportable” persons who have been “battered or subjected to extreme cruelty” by a US citizen or LPR spouse or parent, or who have a child who has suffered abuse by the spouse or parent.
individual or entity. In addition, the child must not have a viable option for reunification with one or both parents due to abuse, neglect or abandonment. The court must also find that it is not in the child’s best interests to be returned to his or her country of birth. In addition, DHS must consent to granting the special immigrant visa and to the juvenile court’s decision on child custody and placement.

The United States also offers two nonimmigrant (temporary) visas to persons who, although not refugees, nonetheless have experienced or are at risk of violence. The “T” nonimmigrant visa is available to survivors of severe forms of human trafficking, who were trafficked to a US port of entry or into the United States, complied with reasonable requests to assist in trafficking investigations and prosecutions, and would suffer extreme hardship and unusual and severe harm if returned. The law sets a ceiling of 5,000 visas per year for principal beneficiaries, which does not count visas granted derivatively to spouses, sons, daughters, or parents. A T visa holder can adjust to LPR status after three years of continuous presence or after a continuous period of presence during a completed investigation or prosecution for trafficking. He or she must also have been a person of good moral character during this period, have assisted in the investigation or prosecution of trafficking, would suffer “extreme hardship involving unusual and severe harm” if removed, or have been younger than age 18 when trafficked.

The “U” nonimmigrant visa is available to survivors of crime who have experienced substantial physical or mental abuse, possess information on criminal activity, and have been, are being or will likely be helpful in the detection, investigation or prosecution of an enumerated crime. To qualify, applicants must obtain certification from a US law enforcement agency regarding their assistance in an investigation or prosecution. U nonimmigrant visas can extend for up four years, with the possibility of renewal. Recipients can adjust to LPR status after three years of continuous physical presence. The law sets a ceiling of 10,000 U visas per year, not counting derivative family members, although there is no limit on the number of visas that can be approved.

In 2012, the United States approved 17,543 U visas and 536 T visas (USCIS 2013f). USCIS has approved the maximum number of U visas (10,000 for primary beneficiaries) over each of the last five years (USCIS 2013e).

74 INA § 101(a)(27)(J)(i).
75 Ibid.
76 INA § 101(a)(27)(J)(ii).
77 INA § 101(a)(27)(J)(iii).
80 INA § 245(l).
81 INA § 245(l)(1).
82 INA § 101(1)(15)(U).
Recommendations

The United States should expand its capacity to admit limited numbers of de facto refugees and others who are at substantial risk of persecution, danger or harm in their home or host countries.

One of the most glaring deficiencies in the US refugee protection system is its paucity of tools and its limited ability to admit de facto refugees and imperiled non-refugees whose admission would serve the nation’s interest (Fitzpatrick 2000, 280). Humanitarian parole is granted primarily for medical emergencies, to visit sick family members, or to attend funerals. In a typical year, only a very small (albeit unknown) number of persons granted parole are fleeing refugee-like conditions.

Congress should pass legislation that establishes a new nonimmigrant “protection” visa that would be available to persons at substantial risk of persecution, danger or harm in their home or host countries. Like all temporary protection vehicles, the new visa would serve as a complementary form of protection, rather than a substitute for robust refugee and asylum policies. It would be available to members of particularly vulnerable and at-risk groups like:

• human rights activists;
• crusading journalists;
• orphans;
• children at risk of retaliation for resisting gang recruitment;
• the elderly in refugee-like situations;
• religious minorities;
• victims of gender-based violence;
• persons who cooperated with US military, law enforcement or intelligence agencies; and
• persons whose protection would serve US interests in promoting rights, the rule-of-law, and robust democratic institutions.

Like the T and U nonimmigrant visas, the protection visa would be granted only in extreme circumstances, would be numerically limited (15,000 per year for primary beneficiaries), and would allow for adjustment of status after three years of continuous physical presence. The visa would also be available to “parolees” within the United States in need of more formal and potentially longer-term protection; US residents who meet the substantive criteria for TPS but are not from a TPS-designated nation; persons from TPS-designated states who arrive following the designation date and would be at extreme risk if returned; and the immediate family members of TPS beneficiaries who are abroad.

It would also cover internally displaced persons who would otherwise meet the refugee criteria if they were outside their nation of birth. US embassies and consular offices can already refer persons for refugee screening and, on occasion, they work to shepherd at-risk persons to safety in the United States. While it must be carried out with great discretion, a protection visa (as one of multiple protection options) would not invariably expose applicants to an unacceptable or a heightened level of risk. Some at-risk persons are sporadically pursued by government actors or by groups that the government cannot control. Others may be at risk only in certain geographic regions. In addition, persecutors—
whether state agents or their proxies—do not invariably operate in an efficient, systematic way. They often possess imperfect knowledge, limited resources, and multiple priorities. Targeted persons can, in turn, move, hide, disguise their identities, and take other steps to evade detection. In addition, interviews for protection visas and processing could take place at unofficial locations.

The DHS secretary should also use his or her parole authority more consistently to admit persons on a case-by-case basis who are at risk of persecution and harm. Congress should also expand the criteria for parole to include de facto refugees who cannot avail themselves of the refugee determination process. An example of an appropriate, but currently unlikely candidate for parole would be a woman in a refugee camp who does not fall within a designated, refugee priority population, but who has been raped and remains (with her children) at substantial risk. A more generous parole standard would permit and encourage USCIS to grant parole to persons in such circumstances.

The United States should prioritize TPS-designated states for reconstruction and development assistance.

The US Department of State (DOS) reports that 10.3 million persons or two-thirds of the global refugee population live in protracted refugee situations, defined as those in which at least 25,000 persons from the same nation have sought protection outside their country of origin for at least five years (DOS 2013b).83 The United States has recently made it a priority to develop durable solutions for six protracted refugee populations: the 1.7 million registered Afghans in Pakistan, many of whom have lived in Pakistan since the Soviet occupation; 340,000 Somali refugees in the Dadaab and Kakuma camps in Kenya; 150,000 Burmese refugees in Thailand; more than 100,000 ethnic Bhutanese refugees in Nepal; 73,000 displaced Croatian and Bosnian citizens in Serbia; and Liberian refugees in West African nations (DOS 2013c).

The United States should likewise concentrate its relief, development, and diplomatic resources on TPS-designated states and relevant communities within those states, with the goal of allowing residents to stay and making voluntary repatriation a viable option for TPS beneficiaries.84 In 2012, South Sudan was the only TPS-designated state among the top ten recipients of US foreign assistance (Epstein, Lawson and Tiersky 2013, 10).

The TPS-designated Central American and Caribbean states, as well as Guatemala, a major source of unaccompanied migrant children, should be a particular priority. In FY 2012, DOS contributed $148 million in economic support to Haiti, and targetted development assistance of $46.3 million to Guatemala, $46.3 million to Honduras, $23.9 million to El Salvador, and $9.4 million to Nicaragua (DOS 2013a, 159, 161). In addition, DOS provided $141 million for global health initiatives to Haiti and the US Agency for International Development (USAID) added $25 million (ibid., 155, 157). The United States provided far less for health initiatives to Guatemala ($17.6 million), Honduras ($9 million), and Nicaragua ($2.9 million) (ibid.).

83 Of course, it is best to address potential destabilizing conditions before they lead to wide-scale displacement.
84 The United States should also condition development assistance on adherence to human rights benchmarks (Yakoob 1999, 628).
The United States also supports the creation of “accountable, democratic rule of law institutions” through the Central America Regional Security Initiative and the Caribbean Basin Security Initiative (ibid., 94). Promotion of the rule of law in TPS-designated states should be a top-tier priority since rule of law deficiencies drive substantial numbers of residents of these nations, including unaccompanied children, into international migration streams (UNHCR 2014, 98, 106).\(^85\)

**The United States should work to establish regional migration and development agreements that include, as necessary, temporary protection and voluntary return programs.**

Mexico, Guatemala, Honduras and El Salvador continue to experience high levels of emigration due to violence, human rights violations, family separation and privation. Similarly, US Coast Guard interdictions of nationals from Caribbean states remain at high levels (USCG 2014), and four years after its devastating earthquake, Haiti remains the poorest country in the Hemisphere and ranks among the world’s lowest scoring nations on the UN Human Development Index (UNDP 2013, 146).

The United States should make it a diplomatic priority to pursue regional migration and development agreements for North and Central America, and for the Caribbean. Such agreements would identify the conditions leading to involuntary migration, develop coordinated responses to them, identify individuals and groups that are particularly in need of protection (like unaccompanied minors), and work toward temporary and durable solutions for displaced populations.\(^86\) The Regional Conference on Migration, a multilateral process with 11 member states from North and Central America, constitutes an obvious forum for dialogue and increased cooperation in addressing these challenges. However, there is no similar regional consultative process for Caribbean states.

Under such agreements, the United States would work closely with migrant sending states, local communities of origin, and diaspora groups on development, institution building and voluntary return initiatives. The Concerted Plan of Action of the International Conference on Central American Refugees (CIREFCA) provides a model for coordinated regional action. A centerpiece of the plan, which led to the repatriation of El Salvadorans, Nicaraguans and Guatemalans from camps in the region, was to build health care, transportation, water systems, educational, housing and other infrastructure in communities of origin (Martin, Schoenholtz and Meyers 1998, 565). In other contexts, states have provided financial support to temporary protection recipients who returned home.\(^87\)

The United States should also remain in contact with temporary protection beneficiaries in

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85 Between 2011 and 2013, the number of apprehensions of unaccompanied children seeking to enter the United States more than doubled to 41,890 (UNHCR 2014, 16).

86 Temporary protection agreements can be difficult to negotiate due to the lack of consensus on the conditions that trigger protection, the rights to which beneficiaries are entitled, and different state definitions of refugee. Regional temporary protection systems may be more viable given the sense of shared risk and community (Yakoob 1999, 631-632).

87 Switzerland, for example, provides financial assistance to TP recipients but only upon their return to their communities of origin (Yakoob 1999, 627). The United Kingdom, the Netherlands and other European nations sponsored “exploratory returns” for Bosnian refugee to allow families to assess the viability and safety of return (Hansen, Randall, Martin, Schoenholtz and Weil 2000, 809).
order to facilitate their voluntary return (Fitzpatrick 2000, 299). Community supervision programs have proven effective in ensuring that persons in removal proceedings do not abscond (Meissner and Kerwin 2009, 54). Such programs could be used effectively with forced, temporary migrant populations that wish to return to their countries of origin.

The United States should allow long-term recipients of temporary protection to adjust to LPR status.

The effects of civil war, armed conflict, environmental disaster and generalized violence often persist for years. In addition, relief, development and reconstruction initiatives typically extend beyond the time-frames for temporary protection recommended by international entities and set forth under US law. Recipients of long-term, temporary protection often develop family, work, religious and other permanent bonds to the United States. After a period, many do not want to return to their countries of origin and the United States does little to encourage or prepare them to do so.

Like refugee status, temporary protection is not a durable solution (Fitzpatrick 2000, 299). Instead, extensions of TPS and other forms of temporary protection can keep recipients in a legal limbo, without benefits, the ability to integrate, or a path to permanent legal status (Bergeron 2014). In addition, the longer persons reside in the United States, the more they contribute to federal benefit programs like Social Security and Medicare, and the more inequitable it becomes to deny them core benefits (Segerblom 2007, 671).

For these reasons, Congress should pass legislation to allow certain long-term recipients of temporary protection to adjust to LPR status. It can do so in at least three ways. First, since 1929, the United States has allowed long-term residents to legalize their status through “registry” (Kerwin 2010). Congress has regularly advanced the date by which noncitizens must have entered to qualify. The Immigration Reform and Control Act of 1986 moved forward the registry date to January 1, 1972, which allowed more than 72,000 residents to legalize (ibid., 2). To be eligible for registry, long-term residents must have exhibited good moral character, not be ineligible for citizenship, and not be inadmissible or deportable for terrorist activities.

Congress should pass legislation that would advance the registry date to January 1, 1999 and move this date forward automatically by one year each year thereafter. This would allow persons who have resided continuously in the United States for at least 15 years and who meet the other statutory requirements for registry to adjust to LPR status.

Second, Congress should pass broad immigration reform legislation that expedites the path to legal status for long-term recipients of temporary protection by crediting time in protected status toward qualifying years for the purposes of earned legalization. It should also allow recipients of temporary protection (in whatever form(s)) and their immediate family members to adjust to LPR status after 10 years.

Third, US law also provides for “cancellation of removal,” a form of equitable relief

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88 Some commentators have proposed that TPS beneficiaries be required to report regularly to immigration officials (Martin, Schoenholtz and Meyers 1998, 571).

89 Temporary protection recipients can secure permanent status in Scandinavian nations and Switzerland when it becomes apparent that their stay is no longer temporary (Segerblom 2007, 677, 681).
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from removal (deportation), for long-term, unauthorized residents with strong ties to the United States and strong claims to remain. Immigration judges have the discretion to grant cancellation (which brings LPR status) to unauthorized persons who have resided continuously in the United States for 10 years, have demonstrated good moral character, have not been convicted of certain offenses that would make them inadmissible or deportable, and whose removal would “result in exceptional and extremely unusual hardship” to their US citizen or LPR spouse, parent or child. As it has done for other populations, Congress should allow temporary protection recipients to apply affirmatively for cancellation of removal to USCIS (e.g., without waiting to be placed in removal proceedings) if they have resided in the United States for 10 years, have exhibited good moral character, and have strong equitable claims to remain.

Some argue that temporary protection programs will lose political and public support if they lead to permanent status. This assumption deserves to the challenged. The US refugee resettlement program, which has admitted three million persons since 1975, has enjoyed broad, bi-partisan support over the years. Like refugees, long-term recipients of temporary protection are at risk of danger and harm, need a durable solution, and enjoy strong equitable ties to the United States.

The United States should allow for more public input into the TPS determination process.

TPS has numerous advantages and strengths. It has proven to be a flexible, timely and generous tool for offering protection to groups that the United States and (often) the country of origin agree should not return home. In 2011, more than 330,000 TPS beneficiaries resided in the United States (Wasem and Ester 2011, 4). The streamlined TPS application process affirms the applicants’ nationality, date of entry and continuous presence, while avoiding the complexity and length of time required to adjudicate asylum applications (Fitzpatrick 2000, 285). In addition, TPS has not generated the political acrimony of other US immigration programs.

TPS determinations should remain discretionary, flexible, and applicable to national and sub-national groups. However, it would not infringe on executive discretion or delay time-sensitive decisions to establish a more transparent and inclusive TPS determination process. In particular, DHS/USCIS should host quarterly, public hearings that would allow academics, diaspora groups, expatriates, NGOs, government officials, and others to submit materials and testify to country conditions in TPS-designated and TPS–eligible nations. These hearings would inform the DHS secretary’s exercise of discretion, provide DHS with an opportunity to explain the TPS process and standards to stakeholders, and increase the public’s confidence in TPS decisions. It would not, as some commentators argue, insulate the process from diplomatic or political pressure. However, it would respond to concerns that TPS decisions often seem arbitrary and ad hoc (Fitzpatrick 2000, 286).

The DHS secretary should allow certain persons from TPS-designated countries that enter after the initial designation period to secure protection.

TPS is not available to imperiled nationals of designated states who arrive after the designation date, including the immediate family members of TPS recipients. Some

90 INA § 240A(b).
commentators have proposed extending protection to those who arrive after the initial designation date in certain circumstances. Others propose granting TPS entirely on a case-by-case basis (not based on nationality) in order to cover persons in desperate need, while avoiding the magnet effect of moving forward the TPS cut-off date (Martin, Schoenholtz and Meyers 1998, 569).

The DHS secretary should make more liberal use of his or her authority, as Secretary Napolitano did with Haiti in May 2011, to “re-designate” nations for TPS. Re-designation should occur when the conditions giving rise to the initial designation persist and when desperate persons have arrived in the interim. However, the secretary will need to use this authority prudently in order not to encourage irregular migration.

**Conclusion**

The legislative expansion of US temporary protection programs and the effective use of current programs and legal authorities depend heavily on political will. As discussed, the executive branch enjoys broad discretion to offer temporary protection in different forms. The response to Haitian “refugees” in the early 1990s illustrates this point, and highlights the tools, challenges and competing goals in play in extending temporary protection to at-risk persons. On September 30, 1991, the Haitian military overthrew the democratically elected government of Jean-Bertrand Aristide and initiated a reign of killings, persecution and suppression of actual and suspected Aristide supporters. In response, tens of thousands fled Haiti by boat. The United States sought both to protect those fleeing for their lives and to deter large-scale, irregular migration from Haiti. Its hydra-headed response included:

- The rescue by the US Coast Guard of tens of thousands of Haitians at sea;
- “Credible fear” screening of Haitians by USCIS Asylum Officers at Guantánamo Naval Base;
- Parole of roughly 11,000 persons found to have a credible fear into the United States in order to pursue political asylum claims;
- Interdiction and summary return of Haitians pursuant to a May 24, 1992 Executive Order;
- Regular extensions of parole and work authorization for paroled asylum seekers;
- Large-scale political asylum programs by NGOs;
- A refugee processing program within Haiti from 1992 and 1995;
- Passage of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) which allowed paroled Haitians who had not yet received political asylum to adjust to LPR status.
- DED to those eligible for HRIFA to ensure they would not be deported prior to the Act’s implementation.

The interdiction and summary return of Haitians without refugee screening or interviews violated the right to non-refoulement guaranteed in Article 33 of the Refugee Convention. In addition, the United States should have provided refugee interviews and screening at

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91 Of course, the creation of a nonimmigrant visa for persons in refugee-like situations would allow additional persons in desperate need to arrive through legal channels.

92 Re-designation would also benefit those in the country who failed to register on time.
Guantánamo, obviating the need for political asylum adjudications and later congressional action. At the same time, however, the United States made a substantial commitment—involving multiple federal agencies, all three branches of government, several US states, NGOs, and the creative use of its immigration authorities—to extend temporary and (ultimately) permanent protection to Haitians who were found to meet the “credible fear” standard in the months between Aristide’s overthrow and the initiation of the summary return policy. If the convoluted and contradictory nature of the US response to this crisis reflects competing goals and pressures, it also underscores the indispensable ingredient in any temporary protection program: a genuine commitment to protect.

REFERENCES


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The Intersection of Statelessness and Refugee Protection in US Asylum Policy

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Executive Summary

More than ten million people are stateless today. In a world of nation states, they live on the margins without membership in any state, and, as a consequence, have few enforceable legal rights. Stateless individuals face gaps in protection and in many cases experience persecution that falls within the refugee paradigm. However, US asylum policy does not adequately address the myriad legal problems that confront the stateless, who have been largely invisible in the jurisprudence and academic literature.

Two federal appellate court opinions shed new light on the intersection of statelessness and refugee law in the United States. In 2010, Haile v. Holder examined the asylum claim of a young man rendered stateless when the Ethiopian government issued a decree denationalizing ethnic Eritreans. In a 2011 case, Stserba v. Holder, the court reviewed an asylum claim by a woman who became stateless when the Soviet Union collapsed, and the successor state of Estonia enacted citizenship legislation that included a language requirement. This article analyzes the opinions which suggest that state action depriving residents of citizenship on ethnic and other protected grounds warrants a presumption of persecution. This article also identifies additional circumstances in which stateless individuals may have a well-founded fear of persecution that qualifies them for asylum in the United States.

In addition, this article notes that although far too many stateless individuals face persecution, not all of them do. Stateless persons who do not fear persecution, however, are also vulnerable. The absence of state protection condemns them to a precarious existence and their inability to obtain passports or other travel documents often prevents their return to states where they formerly resided. The refusal of most states to admit noncitizens frequently keeps stateless persons in limbo. Stateless individuals stranded in the United States live under a supervisory patchwork that serves neither their interests nor those of the United States. Rather than relying on incremental case law developments and inapposite regulatory schemes, the US State Department and the Department of Homeland
Security should convene a task force to report on the size and composition of the stateless population in the United States and the need to develop legislative, regulatory, and other policy guidance concerning statelessness claims.

Introduction

Half a century ago, Earl Warren, the former chief justice of the United States Supreme Court said, “Citizenship is man’s basic right, for it is nothing less than the right to have rights.”\(^1\) Without citizenship, individuals lack the mechanisms to access their rights. A central notion of refugee law is that those who fear persecution in their homeland and cannot rely on their own government to protect their rights can call upon the international community to provide protection. Refugees may possess passports, a firm sense of national identity, and a legal basis for citizenship, but their formal citizenship does not protect them. They are \textit{de facto} stateless while the threat of persecution continues, and they need surrogate protection, which treaty and customary international refugee law have evolved to provide (see, e.g., Goodwin-Gill and McAdam 2007).

But what about those who are \textit{really} stateless? In a world of nation states, the \textit{de jure} stateless lack “the right to have rights.” Because no government recognizes them as citizens, they are uniquely vulnerable. Frequently, stateless persons do not have birth certificates; many cannot obtain travel documents to visit family members in other states or seek opportunities elsewhere. A state may, as a matter of national law, authorize stateless residents to remain, to work, to go to school, and to partake in other aspects of the life of the community. A state may, as a matter of policy, extend to stateless individuals all the rights and protections extended to other noncitizens, and these rights may be substantial. Nonetheless, if the state of residence chooses not to allow noncitizens to remain, the stateless—in contrast to other noncitizen residents—have no other state to fall back on. Stateless persons who migrate to obtain work often find their residence permission tied to their employment authorization. If the job ends and they are ordered to leave, no other state, including the state where they were born, has an obligation to allow them to enter. In these circumstances, statelessness is “rightslessness” (Darling 2009).

Denial of re-entry, refusal to provide birth certificates, and inability to obtain travel documents are examples of the protection needs of the stateless. To date, US refugee law and policy have largely failed to identify and address these and other legal problems that confront stateless persons.\(^2\) In many instances stateless populations face severe harm that rises to the level of persecution. These situations fall within the ambit of refugee law, although, thus far, they have been largely invisible in the jurisprudence and academic literature.

In other cases, the vulnerability and uncertainty in which stateless persons live may not trigger the protections of refugee law. This, however, does not mean that protection is unwarranted. Rather, the precarious situation of stateless individuals stranded far from

\(^1\) Perez v. Brownell, 356 U.S. 44, 64 (1958) (dissenting opinion).
\(^2\) This analysis does not focus on the protections that international human rights law may confer upon the stateless.
their former residence suggests that statelessness raises complex protection concerns and, at times, may point to the need for different solutions that refugee law cannot provide.

This article examines two federal appellate court opinions, *Haile v. Holder*3 and *Stserba v. Holder*,4 that shed light on ways in which statelessness may be a form of persecution. It also identifies additional circumstances in which stateless persons may have a well-founded fear of persecution that qualifies them for asylum in the United States. In addition, it identifies some of the practical problems facing stateless persons whose claims do not fall within the refugee paradigm, and suggests policy approaches to protect stateless individuals marooned in the United States.

**Background**

The 1951 Convention relating to the Status of Refugees extends its protections to persons who are outside their country of nationality and unable or unwilling to avail themselves of its protection due to their fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group.5 The Convention expressly acknowledged that stateless persons may need protection: it includes in the refugee definition “those not having a nationality and being outside [their] country of former habitual residence” who are unable or, due to their fear of persecution, unwilling to return to their former residence.6 This explicit text notwithstanding, the stateless have been largely unnoticed in the scheme of international law—fallen between the cracks in a system built on nation states.7

The post-World War II diplomatic community that drafted the conventions concerning refugees and stateless persons assumed that statelessness was a temporary phenomenon. The stateless were a byproduct of the ravages of a global war, the disintegration of empire, and the decolonization process (see Hathaway 1991). Statelessness would gradually diminish as the age of empire ceased, colonies gained independence, and the post-war

3 591 F. 3d 572 (7th Cir. 2010).
4 646 F. 3d 964 (6th Cir. 2011).
5 “For the purposes of the present Convention, the term “refugee” shall apply to any person who [a]s a result of events occurring before January 1, 1951 and 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 the country of his 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Article 1 A (2), 1951 Convention relating to the Status of Refugees, signed July 28, 1951, 189 U.N.T.S. 137 [emphasis added]. See also 1967 Protocol relating to the Status of Refugees, done January 31, 1967, 19 U.S.T.
6 Article 1 A (2).
7 There are two international treaties that address statelessness, the 1954 Convention relating to the Status of Stateless Persons, adopted July 28, 1951, G.A. Resolution 429(V), 360 U.N.T.S. 117, entered into force, June 6, 1960, and the 1961 Convention on the Reduction of Statelessness, adopted August 30, 1961, G.A. Resolution 896(IX), 989 U.N.T.S. 175, entered into force, December 13, 1975. Only 74 states are parties to the 1954 Convention, and even fewer – 45 – have ratified the treaty that commits states to take concrete measures to reduce statelessness (see UNHCR, UN Conventions on Statelessness: Key for Protecting the Stateless, http://www.unhcr.org/pages/4a2535c3d.html). These treaties have attracted far fewer than the 145 states that have ratified the 1951 Refugee Convention and the jurisprudence concerning statelessness is minimal.
world was rebuilt and revitalized. During its first half century, the United Nations did not
task any unit or agency to attend to the stateless.\(^8\)

History proved the predictions wrong. The Office of the United Nations High Commissioner
for Refugees (UNHCR) estimates that there are 10 million stateless people in the world
today.\(^9\) In the 1990s, the UN General Assembly formally placed the stateless within the
UNHCR mandate.\(^10\)

Statelessness in recent history has often resulted from political upheaval, armed conflict, or
ethnic targeting. For example, more than one million Rohingya Muslims who live on the
borders of Myanmar and Bangladesh are denied nationality by each State (Pitman 2012).
They are derided as “illegal” immigrants, though their families have resided in the same
villages for multiple generations. They need government permission to leave their villages,
to marry, or to have more than two children. Fleeing from communal violence, boatloads of
Rohingya have been turned back by coast guard units in Bangladesh and elsewhere (ibid.).

Palestinians form another large stateless community. The population displaced by the Arab-
Israeli war of 1948 has taken root in many other countries in the Middle East. Lebanon,
Syria, and other Arab States that host large groups of Palestinians generally provide
residence and travel permits, but not citizenship.\(^11\) While many Palestinians acquired
Jordanian nationality, the past decade has seen Jordan’s withdrawal of citizenship from
thousands of Palestinians (Human Rights Watch 2010). The uprisings in the Arab world
and unsettled situations in the region have exacerbated the insecurity of the stateless and
placed many Palestinians and others in peril.

In September 2013, many thousands born in the Dominican Republic became subject to
statelessness when the Constitutional Court of the Dominican Republic issued a decision
that interpreted a constitutional provision concerning citizenship to exclude those born
in the Dominican Republic to unauthorized migrants during the past 85 years.\(^12\) Ruling
that children born in the Dominican Republic to foreigners “in transit” do not obtain
citizenship, the court held that unauthorized migrants were “in transit,” notwithstanding
the official registration of their children as Dominicans, their acceptance as such by the
larger community, and the fact that they have lived their entire lives there.\(^13\) Moreover,\(^8\)

\(^8\) International law defines a stateless person as a “person who is not considered a national by any State under
the operation of its law.” Art. 1, 1954 Convention relating to the Status of Stateless Persons, done September
28, 1954, 360 U.N.T.S. 117. See Batchelor 1998 for a discussion on the anticipated interaction between
statelessness and refugee protection.

\(^9\) UNHCR estimates there were 16.7 million refugees, more than 10 million stateless people, and 33.3 million
internally displaced persons in 2013 (UNHCR 2014a, 2).


\(^11\) See, e.g., *Ouda v. INS*, 324 F.3d 445 (6th Cir. 2003) (stateless Palestinians born in Kuwait traveled on
Egyptian travel documents); *Faddoul v. INS*, 37 F.3d 185 (5th Cir. 1994) (stateless Palestinian born in Saudi
unrwa.org/etemplate.php?id=86.

\(^12\) *Sentencia TC/0168/13*, Constitutional Court of the Dominican Republic, September 23, 2013, http://

\(^13\) *Id*. The Constitutional Court ruled against Ms. Juliana Dequis Pierre, who had been born in the Dominican
Republic to parents who had migrated from Haiti decades earlier. Ms. Dequis Pierre, herself the mother of
four Dominican-born children, had been officially registered at birth as a Dominican citizen (see UNHCR
2013).
the court concluded that this citizenship provision applied retroactively to 1929. The impact of this ruling fell largely on the sizeable group of longtime residents who are of Haitian descent; some estimate 200,000 individuals could be affected (Archibold 2013).

Many found themselves suddenly bereft of the right as citizens to seek the government’s protection, and violent attacks against Haitians in the Dominican Republic have intensified their sense of insecurity (Delva 2013). Those who have never been to Haiti, do not speak the language, and have no family or work prospects there were not comforted by the Dominican Republic’s assertion that they can apply to the Haitian government for recognition as Haitian citizens.

Perhaps the greatest cause of the increase in stateless populations during recent decades has been the dissolution of states. For example, the end of the Soviet Union in 1991 left close to 300 million Soviet citizens in need of acquiring a new nationality. The successor states adopted different nationality laws that left substantial numbers of long-time residents without citizenship (UNHCR 1996). Similar problems arose in the dissolution of Yugoslavia in the early 1990s, and in the Velvet Divorce of the Czech Republic and Slovakia in 1993 (UNHCR 2000). The independence of Eritrea from Ethiopia later that same year may have created additional groups of stateless persons, and the subsequent border war resulted in discriminatory denationalizations. The Arab Spring revolutions that began in 2011 may also produce further groups of stateless people.

In addition to political upheaval, a number of other factors contribute to statelessness. These include the inability of many vulnerable populations to register births, gender discrimination in nationality laws, and the impact of jus sanguinis citizenship regimes. Many parents are unable to register the births of their children, in particular when families have been displaced from their homes. Whether forced migrants remain within their country of residence or cross territorial borders, they frequently do not have access to registration offices (UNHCR 1996). Sometimes those living in camps or temporary shelters find registration officials reluctant to issue documents to non-permanent residents. In other cases individuals in short-term accommodations or in flight think they should delay registration until they return home or until they reach a final destination. By the time they do—if they do—reach someplace they can call home, the registry offices may no longer be open to them. Those whose births have not been registered or who cannot produce evidence of registration are unable to prove where they were born or who their parents are. Children without birth certificates grow up to be adults whom no country will acknowledge as nationals.

Gender discrimination in nationality laws can also result in statelessness (UNHCR 2012a).

14 Id. In addition to denying that Ms. Dequis Pierre is a citizen, the court instructed government officials to identify similarly situated persons who had been registered as Dominican citizens since 1929. For additional commentary, see Aber and Small 2013.

15 The government of the Dominican Republic also stated it would propose legislation that would provide a pathway for long-term residents to regularize their status and eventually to naturalize (Fieser 2014). In May 2014 the Congress of the Dominican Republic passed legislation granting citizenship to children born to foreign parents, provided the children have Dominican government identification documents and are listed in the civil registry (Archibold 2014). The number of people who will benefit from the new law is unclear.

16 Under jus sanguinis principles, citizenship is based on the citizenship of the parents; under jus soli, citizenship is based on the territory in which the birth occurs.
Statutes that link citizenship of married women to their husbands can leave women stateless if their spouses die or divorce them (ibid.; see also UNHCR 2014b and 2012b). Even without death or divorce, women can become stateless if their home state automatically deprives them of citizenship upon marriage to a national of another state, yet their husband’s state does not automatically grant citizenship based on marriage. Gender discrimination combined with *jus sanguinis* principles can increase the incidence of statelessness. To give an example, some states confer citizenship at birth according to paternal descent. A woman from such a country married to a stateless man would not be able to pass her citizenship to her child, who would be stateless. Another common example is that of children born to unmarried parents who receive at birth the citizenship only of the mother. If the mother is stateless, so is the child, even if the father is a national of the state where the child is born.

Even in the absence of gender discrimination, *jus sanguinis* approaches to citizenship may lead to statelessness. Some states require citizens born abroad to reside in the home country for a specified period of time in order to retain the citizenship they acquired from their parents at birth. Families that live and work abroad for many years may be unable to satisfy the home country residence requirement. These and other scenarios contribute to the persistence of statelessness today.

**US Law: Statelessness as Persecution**

The Refugee Act of 1980, generally tracking the 1951 Convention, specifies that stateless persons fall within the refugee definition when they face persecution or a well-founded fear of persecution in their country of residence on one of the enumerated grounds. The US refugee definition is even more expansive than the 1951 Convention definition, in ways that may be especially pertinent to those who are stateless.

First, in contrast to the 1951 Convention, the US refugee legislation encompasses those who suffered persecution in the past but no longer face a threat of future persecution. Accordingly, stateless populations who have already suffered severe harm may be able to receive protection in the United States even though they lack evidence of current persecutory threats. US law requires that the past persecution must have been linked to race, religion, nationality, political opinion, or membership in a social group, and these types of animus are frequently the basis for hostility directed against groups that are stateless.

17 E.g., US legislation confers citizenship at birth to a child born outside of US territory to parents who are US citizens only if one of the parents resided in the US prior to the birth of the child. INA § 301(c). If one parent is a US citizen and the other is not, a child born outside of US territory acquires citizenship at birth only if the US citizen parent was physically present in the US for at least 5 years or more, at least 2 years of which were after the parent was 14 years old. INA § 301(g).

18 The term “refugee” means 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 has habitually resided. . . . INA § 101(a)(42).

19 The term “refugee” means (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 has habitually resided. . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . INA § 101(a)(42).

20 Id.
In addition, pursuant to the US refugee definition, those who have not left their country of nationality or residence may receive protection. The stateless, who frequently lack the ability to obtain travel documents, often find it difficult to cross international borders. While remaining in the country where they reside precludes them from refugee protection under the 1951 Convention, even if they have a well-founded fear of persecution, this limitation does not interfere with protection under US refugee law.

Despite the elaboration of the US refugee definition in ways that increase the likelihood of its applicability to stateless individuals, the case law is sparse. Two federal court opinions, in 2010 and 2011, addressed claims for protection raised by stateless persons. Together, the cases begin to explicate the circumstances in which statelessness constitutes a form of persecution in the context of US asylum policy.

**Haile v. Holder**

In a 2010 case, *Haile v. Holder*, the US Court of Appeals for the Seventh Circuit examined the asylum application of Temesgen Woldu Haile, a young man born in Addis Ababa, Ethiopia in 1976 to parents of Eritrean background. Haile and his parents were citizens of Ethiopia, at that time ruled by Mengistu, the Soviet-backed military dictator. After the Soviet Union collapsed, Mengistu’s government was overthrown, a new transitional government was formed, and a referendum about the independence of Eritrea from Ethiopia was scheduled. The referendum vote was overwhelmingly in favor of independence, and Eritrea became independent in 1993. A year earlier, in 1992, Haile’s parents had moved to Eritrea, leaving their teenage son in Ethiopia. After independence, the parents renounced their Ethiopian citizenship and acquired Eritrean citizenship. The son had remained in Ethiopia, where he resided in 1998 when war broke out between Eritrea and Ethiopia over the territorial boundary between the two countries. The war brought mass deportations, with each country deporting thousands of citizens and residents of the “wrong” background. For example, Ethiopia decided to identify and expel residents of Eritrean origin who provided support to Eritrea. This led to the expulsion of more than 75,000 Ethiopia citizens of Eritrean heritage, many in an arbitrary and vengeful manner with no proof of disloyalty to Ethiopia (see Human Rights Watch 2003). The war ended in 2000, but tensions remained high between the two countries. After the fighting concluded, Ethiopia passed several

21 The term “refugee” [encompasses] 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 is persecuted or has a well-founded fear of persecution. . . . INA § 101(a)(42).

22 591 F. 3d 572 (7th Cir. 2010). For additional commentary on *Haile v. Holder*, see Forbes 2013.

23 The collapse of the Soviet Union had consequences, direct and indirect, on the political events that gave rise to both *Haile v. Holder* and *Stserba v. Holder*, the subsequent case. When the Soviet Union dissolved, Estonia and the other former Soviet republics became independent countries. In the Baltic region and elsewhere, the result of new citizenship legislation was that many lifelong residents lost their nationality. See Barrington 1999 and Visek 1997. Farther afield, the collapse of the Soviet Union led to the evaporation of Soviet aid to Africa, which indirectly led to the downfall of the Ethiopian government. Subsequent events there, especially the border war between Ethiopia and Eritrea, manifested longstanding ethnic hostilities and resulted in deportations and actions to strip citizenship from groups of residents.

24 *Id.* at 573.

25 591 F. 3d at 575.
laws allowing certain categories of former citizens and residents who had suffered during the war to apply to regain their property and their citizenship. It is unclear whether these laws have been effective.26

Haile, who was 21 or 22 years of age when war broke out, fled Ethiopia and ultimately applied for asylum in the United States, alleging that Ethiopia’s removal of citizenship from ethnic Eritreans constituted persecution. The immigration judge rejected his application after reviewing a record that apparently contained no evidence that Haile had been arrested, harassed or otherwise targeted for persecution before he left Ethiopia.27 The immigration judge ruled that a country has the sovereign right to define its citizenry, and that the removal of citizenship does not constitute persecution per se.28 Because Haile did not allege other harsh treatment, the judge concluded that Haile had had neither suffered persecution in the past, nor was likely to suffer harm in the future now that the war had ended. Accordingly, the immigration judge denied his claim;29 the Board of Immigration Appeals (BIA) affirmed.30 The US Court of Appeals for the Seventh Circuit remanded the case to the BIA to examine more closely the claim that Haile had been or would be deprived of his Ethiopian citizenship:

[The immigration judge’s] reasoning is problematic—it fails to recognize the fundamental distinction between denying someone citizenship and divesting someone of citizenship. . . . [No] case of which we are aware . . . suggests that a government has the sovereign right to strip citizenship from a class of persons based on their ethnicity. It is arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution.31

The court expressly declined to analyze whether “denationalization as such amounts to persecution”32 and further noted that the record was insufficient to determine the current citizenship status of ethnic Eritreans who had left Ethiopia during the war.33 Accordingly, the court remanded the case to the BIA for further factual findings and legal consideration.

The BIA rejected the asylum claim a second time. It reasoned that denationalization does not always constitute persecution, even when the denationalization is linked with ethnic group or another ground protected by the 1951 Convention. Rather, the BIA ruled, an asylum applicant must produce some evidence of actual harm that accompanied or resulted from the loss of citizenship.34 In Haile’s second appeal to the Seventh Circuit, the court focused on statelessness as persecution:

[Although] a change of citizenship incident to a change in national boundaries is not persecution per se, it does not follow that taking away a person’s citizenship because of his religion or ethnicity is not persecution. If Ethiopia denationalized the petitioner

26 Id.
27 Id. at 495.
28 Id.
29 Id.
30 Id.
32 Id.
33 Id. at 496-7.
34 591 F 3d 572 at 573-4.
because of his Eritrean ethnicity, it did so because of hostility to Eritreans; and [this] created a presumption that he has a well-founded fear of being persecuted should he be returned to Ethiopia. Indeed, *if to be made stateless is persecution, as we believe, at least in the absence of any [contrary explanation], then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you behave yourself* [emphasis added]. 35

The court noted that the record lacked information concerning the impact, under either Ethiopian or Eritrean law, on a minor child of parental renunciation and/or acquisition of citizenship. 36 There was also a lack of evidence examining the applicability to Haile of a 2003 law allowing Ethiopians to regain their nationality if they had lost it by acquiring another nationality. 37 Pointing out that Haile had not renounced his Ethiopian citizenship in order to acquire another nationality, but that Ethiopia had apparently made him stateless, 38 the court remanded the case to the BIA for further analysis and proceedings.

Although this opinion does not attempt to provide a definitive analysis of statelessness as a form of persecution, its initial and tentative thinking is instructive. The Seventh Circuit rejected as insufficient the abstract argument that a sovereign has the right to define the terms of citizenship. The court insisted that it was relevant to examine the context in which citizenship decisions are made. It emphasized three aspects of the government’s decree: the apparent ethnic basis of the decree; the consequent statelessness (as contrasted with situations in which statelessness might not result); and the government’s affirmative action to strip citizenship from someone who had possessed it for years. In combination, these factors appear to bring the case directly within the persecution paradigm: government action motivated by ethnic animus causing severe harm to a despised minority. The advance in the *Haile* court’s reasoning is that the issue of statelessness is central, and the court recognizes that statelessness itself can constitute severe harm.

**Stserba v. Holder**

In 2011, one year later, the Sixth Circuit addressed another situation of statelessness. In *Stserba v. Holder*, 39 a woman born in Estonia during the Soviet era to an ethnic Russian family, claimed that Estonia’s application of its citizenship law to her constituted persecution. Lilia Stserba grew up in Estonia, but went to Russia for her medical training and married a Russian citizen. 40 Back in Estonia, she practiced medicine and gave birth in Estonia to a son, Artjom. 41 After Estonia regained its independence from the Soviet Union in 1991, there was great hostility to the Soviet oppression (see, e.g., Lottman 2008; Barrington 2008).
Soviet forces had occupied Estonia since the Second World War, and they had made efforts to dilute the Estonian population by encouraging ethnic Russians to move to Estonia and help pacify the area. The new Estonian nationality law automatically conferred citizenship on those whose families had possessed Estonian citizenship prior to the Soviet occupation in 1940. Others, including lifelong residents, were eligible for citizenship if they could speak Estonian and pass a language test.

Lilia Sterbsa and Artjom did not qualify for citizenship under the new Estonian law, presumably because they did not speak Estonian. The record did not indicate whether they were eligible for Russian citizenship via Stserba’s husband and Artjom’s father, but they apparently did not acquire Russian citizenship and consequently became stateless. Two years later, as part of an electoral change, Stserba and her son Artjom became Estonian citizens. Five years after that, in 1998, Estonia stopped recognizing scientific degrees issued by Russian institutions, with apparent retroactive effect because Stserba reported that this policy change meant that she could no longer practice medicine in Estonian hospitals.

Stserba and her husband came to the United States in 2003, where Stserba applied for asylum based on the persecution she had suffered on account of her Russian ethnicity. The persecution she alleged consisted of her statelessness between 1991 and 1993, the inability to practice her profession after Estonia revoked its recognition of Russian scientific degrees, and claims of inferior medical treatment for her son. The record showed that roughly 65,000 ethnic Russians were naturalized in Estonia during the 1990s, and that ethnic Russians living in Estonia without Estonian citizenship could remain residents, obtain travel documents, and vote in local elections. Noncitizens, however, could not vote in national elections, purchase property, or join political parties.

The immigration judge concluded that the harms that Stserba had experienced did not constitute persecution. He noted that Stserba had regained citizenship relatively quickly, had not suffered “any adverse consequences” during the time she was stateless, and had experienced diminished professional opportunities and reduced levels of medical treatment that did not rise to the level of persecution. The BIA affirmed the denial of asylum.

The Sixth Circuit Court of Appeals expressed a more nuanced view of the situation:

Regardless of the practical ramifications that befall a denationalized person, the inherent qualities of denationalization are troubling when a country denationalizes a
person who is not a dual national, thereby making him or her stateless. Statelessness is “a condition deplored in the international community of democracies.”51 The essence of denationalization is “the total destruction of the individual’s status in organized society” because, “[i]n short, the expatriate has lost the right to have rights.”52 “While any one country may accord [a denationalized person] some rights, . . . no country need do so because he is stateless.”53 “The calamity is ‘not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever.’”54 The United States Supreme Court has described denationalization as “a form of punishment more primitive than torture.”55 Accordingly, because denationalization that results in statelessness is an extreme sanction, denationalization may be per se persecution when it occurs on account of a protected status such as ethnicity. Although the status of “[s]tatelessness . . . does not entitle an applicant to asylum,”56 a person who is made stateless due to his or her membership in a protected group may have demonstrated persecution, even without proving that he or she has suffered collateral damage from the act of denationalization.57

The court noted that there was reason to suspect that the Estonian law, though neutral in its terms, impermissibly targeted ethnic Russian residents of Estonia. If so, said the court, then Stserba may have suffered past persecution when she became stateless, whether or not the statelessness had a serious impact on her daily life.58 The court remanded the case to the BIA, emphasizing that “[a]lthough not every revocation of citizenship is persecution, ethnically targeted denationalization of people who do not have dual citizenship may be persecution.”59

**Denationalization and Naturalization Laws Resulting in Statelessness**

The Sixth and the Seventh Circuits offer strikingly similar perspectives on fundamental statelessness issues. Both courts examined the impact of statelessness in the framework of refugee law where evidence of past or future persecution is central. Both courts emphasized the salience of government actions that target or have a substantial impact on those who fall

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52 *Id.* at 101-2.
53 *Id.* at 101.
56 *Maxismova v. Holder*, 361 F. App’x 690, 693 (6th Cir. 2010) (denying asylum to Estonian woman claiming persecution based on statelessness, religious discrimination and ethnic persecution).
57 *Stserba*, 646 F 3d at 974 (emphasis in original).
58 *Id.* at 975. The Sixth Circuit provided further guidance for the BIA’s reconsideration of the case. The court emphasized that if the BIA concluded that Stserba had suffered past persecution, then U.S. law would entitle her to a presumption that she will fear persecution in the future. 8 C.F.R. § 208.13(b)(1). At that point the government could introduce evidence to rebut the presumption by showing that circumstances had changed so substantially that future persecution would be unlikely. The court noted that Stserba’s reacquisition of citizenship in 1993 might suggest that things have changed in such a way that she would not have a well-founded fear of future persecution.
59 *Id.* at 973.
within one of the grounds enumerated by the 1951 Convention. Both courts indicated that depriving citizens of nationality based on grounds protected by the 1951 Convention may constitute persecution. Moreover, they suggested that withdrawing citizenship in situations that render individuals stateless is presumptively persecutory. Further, they posited that denationalization on ethnic grounds that results in statelessness may constitute persecution \textit{per se}, obviating the need for applicants to produce evidence that statelessness caused them practical harm. Because they remanded the cases for further development and analysis, neither the \textit{Haile} nor the \textit{Stserba} court addressed the type of evidence that might rebut a presumption of persecution.

The examinations of statelessness in \textit{Haile} and \textit{Stserba} are an important step forward for US refugee law and asylum policy. They acknowledge the great vulnerability that statelessness engenders. They also indicate that when governments take actions that render people stateless, this should give rise to a presumption of persecution. This view is in line with the concept of surrogate protection, one of the central policies of refugee law (see Goodwin-Gill and McAdam 2007). When individuals cannot rely on their home states to protect them from persecution, they can turn to other states. Those made stateless by government action should also be able to turn to other states for protection.

It is important to note, however, that the \textit{Stserba} case arose in a significantly different context from \textit{Haile}. The dissolution of the Soviet Union, and with it the disappearance of Soviet citizenship, led to substantial gaps in citizenship law and citizenship status. Each of the new states that arose out of the constituent parts of the former Soviet Union fashioned its own citizenship legislation. Thus, politically freighted decisions concerning membership were simultaneously underway in multiple new states. This was compounded by the fact that some states, such as Estonia, viewed themselves as regaining their pre-existing sovereignty after decades of foreign occupation. From this perspective, they were not “new” states, but already established states reasserting the terms of membership in their polity.\footnote{This is not necessarily to agree with actions taken by Estonia, but to provide a perspective on the legal steps the government of Estonia took.}

In contrast to \textit{Haile}, Stserba was not stripped of her citizenship by government decree. Instead, she and other residents whose families had not been citizens of Estonia prior to the Soviet takeover in 1940, faced a naturalization process that included a language requirement. The language requirement clearly placed a burden on the portion of the resident population who did not speak Estonian, but, as opposed to the Ethiopian decree withdrawing citizenship from ethnic Eritreans, residents in Estonia were eligible to seek naturalization, and thousands of ethnic Russians successfully naturalized. These and other aspects of the dissolution of the Soviet Union and the consequent developments in citizenship law in successor (or reestablished) States made the Estonia circumstances markedly different from the wartime decrees in Ethiopia and Eritrea.

Nonetheless, different though they are, both the \textit{Haile} and \textit{Stserba} opinions agree that denationalization on ethnic grounds that results in statelessness should lead to a presumption of persecution. These opinions do, however, leave many unanswered questions as to when statelessness does not constitute persecution, and more generally, as to the intersections
of statelessness and refugee law. The Stserba and Haile courts at times characterize the situations as denationalizations, or deprivations of already acquired citizenship. Is this an appropriate framework for analyzing claims that arise when one country dissolves and new countries, with new citizenship legislation, come into existence? More fundamentally, does the analysis of whether statelessness constitutes persecution depend on whether the government has affirmatively acted to remove citizenship? Or is a government’s failure to act to confer citizenship sufficient to create a presumption of persecution?

Dual (or multiple) nationality is another factor that may affect the analysis. If a government strips citizenship from a group of residents, some of whom are left stateless and some of whom are nationals of another state, should the presumption of persecution come into play? Would this be a situation in which the presumption of persecution might be rebutted in some instances (those with another nationality) but not in others (those rendered stateless)? Would it constitute persecution if the state of residence deprives a dual national of citizenship, when the individual has never visited her other state of citizenship? If this individual cannot speak the language of the second country and has no economic prospects there, should we view her as effectively stateless despite her formal claim to another state’s citizenship?

Taking this line of inquiry one step further, should it matter to the analysis of statelessness as persecution if the individual deprived of citizenship has the ability to acquire citizenship in another state through a spouse or parent? For example, would it be relevant if Stserba could acquire Russian citizenship based on her long-term marriage to a Russian citizen? Should the citizenship decisions of parents matter to the analysis of a state’s deprivation of the citizenship of the child? Was it relevant that Haile’s parents departed from Ethiopia and renounced Ethiopian citizenship or was the salient fact that Ethiopia removed the citizenship of a young man who had neither left the country of his birth nor renounced its citizenship?

Another set of concerns arises when naturalization laws have a disproportionate impact on minority populations and may render substantial numbers of them stateless. Under refugee law principles, persecutory actions linked to race, religion, nationality, political opinion, or membership in a particular social group are proscribed. Should the presumption of persecution be rebuttable in certain historic and political settings? In the context of independence from a colonial power, would it constitute persecution if citizenship laws

61 The 1951 Convention regards those with multiple nationalities as refugees if they can show they have a well-founded fear of persecution in each of their States of nationality. Art. 1. A (2) (2nd para.). The Refugee Act of 1980 includes different text that supports the conclusion that individuals with more than one nationality are eligible for refugee status in the United States if they have a well-founded fear of persecution in one of their countries of nationality. For a thorough discussion of the text, legislative history, and prior US practice, see Bauer, forthcoming.

62 In the traditional asylum context, US regulations provide that applicants who suffered past persecution shall be presumed to have a well-founded fear of persecution on the basis of the original harm they experienced. The government can rebut the presumption by showing a fundamental change in circumstances that removes the fear of future persecution or by showing that the applicant can avoid future persecution by relocating to a different part of the applicant’s country. 8 C.F.R. § 208.13(b)(1)(i). A working group or comprehensive report on the protection needs of stateless persons in the United States should examine whether or not there are analogous circumstances in which the US government could present evidence to rebut a presumption that state action that resulted in statelessness for a portion of the population constituted persecution.
disfavor the colonizers and their descendants? In response to government policies that have intentionally aimed to change the ethnic composition of a restive area (consider Tibet under Chinese rule, Estonia under Soviet rule), would citizenship laws that disfavored those groups that had arrived as part of the pacification plan escape the presumption of persecution? For example, although the historical details were not developed in Stserba, it is safe to assume that many ethnic Estonians believed that the Soviet government intentionally encouraged ethnic Russians to move to Estonia in order to dilute the percentage of Estonian residents who might oppose communist rule. Would this be relevant in analyzing whether subsequent Estonian citizenship legislation constituted persecution if its requirements were more difficult for ethnic Russians to satisfy? This raises a related question concerning citizenship laws that impose language requirements. Generally viewed as a legitimate eligibility factor for those seeking naturalization, do language requirements constitute persecution when applied to lifelong residents? Would it matter if the language test was imposed in the context of succession of states? Or that the disfavored group was entitled to citizenship elsewhere?

There are many additional and pressing questions at the intersection of refugee law and statelessness that the facts of the Haile and Stserba cases did not raise. What happens when longtime stateless residents lose their jobs and, as a consequence, their residence permits? In what circumstances might this constitute persecution? If a state cannot expel a stateless person, does living without rights under the perpetual threat of deportation constitute persecution? Conversely, if a stateless person is temporarily outside her state of long-term residence, are there circumstances in which refusal to re-admit her amounts to persecution? These and similar scenarios have arisen with troubling consequences in the Middle East and Asia in recent years. They alert us to the context-specific nature of persecution, and the myriad forms that it can take. They also guarantee that, with more than 10 million stateless individuals in the world today, we are likely to confront many circumstances when state action and inaction regarding stateless persons are linked to race, religion, nationality, political opinion, or membership in a particular social group and are presumptively persecutory.

**US Law: Other Protection for Statelessness**

Although statelessness may frequently arise in the context of persecution, there are instances when the stateless do not fear persecution. In such situations, US asylum policy does not protect the stateless. Nonetheless, these persons may be unable to return to their country of former residence; other countries are unlikely to accept them. As a result, they are effectively stranded. Without asylum or some form of lawful immigration status, they

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63 E.g., US naturalization law requires applicants to “demonstrate an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language.” INA §312(a).
64 For the US perspective that the refusal to readmit stateless Palestinians can constitute persecution, see David A. Martin, General Counsel, US Immigration and Naturalization Service (INS), Legal Opinion, October 27, 1995: “The expulsion of or denial of reentry to a stateless Palestinian . . . by his country of last habitual residence may result in such serious violations of the applicant’s basic human rights as to constitute persecution. Whether such an asylum applicant can establish that he has been persecuted will depend on the particular circumstances of each case. If he does establish [persecution] because of his national origin as a Palestinian, or because of another protected ground, he may qualify as a refugee under United States law.”
remain in limbo.\textsuperscript{65}

It is estimated that approximately 4,000 people fall into this category in the United States.\textsuperscript{66} Many of them have applied for asylum and for protection under the Convention Against Torture, but have not succeeded in their claims (Acer and Magner 2013). US government statistics present a snapshot of the situation. Between 2005 and 2010, 628 stateless applicants filed affirmative asylum claims with the US Asylum Office. Of this number, 283 received asylum, 359 were referred to immigration court where an immigration judge would evaluate their claim, and 23 were denied asylum (USCIS Asylum Division as reported in UNHCR 2012c, 22). During the same period, the US immigration courts reported that 1,087 stateless individuals raised asylum claims as a defense to removal. Of this number, 463 received asylum, 166 were denied asylum, and 295 either relinquished their asylum claims or received some other form of relief (US Department of Justice, Executive Office for Immigration Review as reported in UNHCR 2012c, 22-23).

Anecdotal evidence indicates that many of the stateless in the United States came from the former Yugoslavia and the former Soviet Union, having fallen into the gaps between the citizenship laws of the new states after dissolution (UNHCR 2012c, 23). Other stateless people in the United States include ethnic Eritreans denationalized by Ethiopia, as in Haile. The recent judicial opinion in the Dominican Republic retroactively withdrawing citizenship from many Dominicans of Haitian descent may render stateless numerous members of the Dominican diaspora in the United States.\textsuperscript{67} The Palestinian community in the United States is another group that may include stateless persons, as Palestinians born in Egypt, Kuwait, Saudi Arabia, Lebanon, and other countries generally were not granted citizenship in those states.

Stateless individuals who have not filed for asylum or whose protection claims have failed are caught in the gaps of a world of nation states. When the United States cannot find a country to accept them, they are commonly ordered removed but by necessity remain in the United States, without lawful status and subject to the threat of removal at any time. Current US law contains no provisions to recognize the protection needs of the stateless in these situations and no means for them to regularize their status. The typical scenario is that the United States detains those with final orders of removal for 90 days in order to accomplish the logistics of their removal.\textsuperscript{68} If the person does not leave the United States within this period, he or she can be released “pending removal” under a government order of supervision.\textsuperscript{69} These policies apply to all who cannot be removed in the foreseeable future—not just the stateless—and require that the individuals continue to try to obtain travel

\textsuperscript{65} For an overview of statelessness in the Western Hemisphere, in general, and in the United States, in particular, see Price 2013.
\textsuperscript{67} Reports indicate that there were approximately 1.5 million people of Dominican descent in the United States in 2010 (Motel and Patten 2012). This number includes all those born in the Dominican Republic, as well as those born in the United States or elsewhere who reported one of their ancestries to be Dominican (See Migration Policy Institute 2004). The number who are also of Haitian descent is unknown.
\textsuperscript{68} See INA § 241, 8 U.S.C. § 1231, Detention and Removal of Aliens Ordered Removed.
\textsuperscript{69} INA § 241(a)(3).
documents from other countries, submit to medical and psychiatric exams, and routinely report in person to immigration officials.\textsuperscript{70} Persons subject to an order of supervision may receive employment authorization,\textsuperscript{71} but this requires applications, renewals, and annual processing fees (UNHCR 2012c).

These conditions are neither reasonable nor efficient when the individual who cannot be removed is stateless. The supervisory orders require futile acts, and they do nothing to assure public safety.\textsuperscript{72} They keep stateless individuals in a temporary and tenuous setting, though they are, in effect, permanently marooned in the United States. Those who are stateless are unable to seek family reunification; they are unable to travel outside the United States for family or other emergencies; and they live in a precarious psychological state as they must continually justify their situation, which is beyond their control.

Some states, such as Hungary, have enacted legislation specifically addressed to the protection needs of stateless people within their communities.\textsuperscript{73} For example, Hungary’s immigration law provides protection to stateless residents and establishes a procedure through which they can apply to the Office of Immigration and Nationality for determination that they are entitled to legal status (Gyulai 2010).\textsuperscript{74} Those determined to be stateless have the right to obtain a humanitarian residence permit, travel documents, basic public health care services, and free public elementary and secondary education.\textsuperscript{75} They are eligible for work permits, although these may be difficult to obtain, and to seek family reunification for immediate relatives.\textsuperscript{76}

Proposed legislation in the United States would accomplish similar goals. The comprehensive immigration reform bill, S. 744, passed by the Senate in June 2013 included provisions creating a pathway for stateless individuals in the United States to regularize their situation.\textsuperscript{77} The secretary of Homeland Security, in consultation with the secretary of state, could designate certain groups of individuals as stateless persons.\textsuperscript{78} Stateless persons would be eligible for discretionary protection known as conditional lawful status.\textsuperscript{79} While in conditional status, they would receive authorization to work, travel documents that would allow them to be readmitted to the United States, and their spouse and minor

\textsuperscript{70} 8 C.F.R. § 241.13(h).
\textsuperscript{71} 8 C.F.R. § 241.13(h)(3).
\textsuperscript{72} See Gary Mead, Memorandum on ICE Reporting Guidance, August 23, 2012, concerning the use of discretion on reporting requirements for noncitizens with final orders of removal. This policy may reduce the onerousness of the supervisory orders, but will not cure the heart of the problem with regard to the stateless, which is the futility of treating them as if the circumstances preventing their removal will change.
\textsuperscript{73} Procedures to determine statelessness exist in France, Hungary, Italy, Latvia, Mexico, and Spain (UNHCR 2012d).
\textsuperscript{74} Only foreigners with legal permission to reside in Hungary are eligible to apply for stateless status, which limits the applicants to between 10 and 50 per year (Gyulai 2010, 16, 27).
\textsuperscript{75} (Gyulai 2010, 31-5).
\textsuperscript{76} (Gyulai 2010, 32, 35-6).
\textsuperscript{78} Proposed § 210A (a)(2).
\textsuperscript{79} Proposed § 210A (b)(1).
children would be able to receive the same status. 80 After one year in conditional status, and after clearing criminal background investigations and security checks, they would be eligible for lawful permanent residence in the United States. 81 Ultimately, they would be able to apply for naturalization so they could become US citizens. 82 Those who renounced their citizenship or knowingly let it lapse in order to become stateless would be ineligible for this relief. 83

The Department of Homeland Security realizes that the lack of a mechanism to deal with stateless persons whom the United States cannot remove is a problem. It has indicated it would favor legislative or regulatory changes to address this situation (Acer and Magner 2013). But, with immigration reform legislation effectively stalled, other avenues of improving US protection policy need to be explored.

Conclusion

This complex and under-studied area needs careful and systematic attention. Thus far, the issues have surfaced sporadically and haphazardly. Judges and government officials, dependent on the specific situations and resources of individual litigants, have struggled to respond to the protection needs of those in front of them.

Under the existing legal framework, the stateless can be divided into two major groups: (1) those with a fear of persecution who are eligible for refugee protection and asylum in the United States, and (2) those who fall outside the current asylum policy of the United States. Within the first category, those who become stateless via denationalization decrees appear to fit more easily within the refugee paradigm and may be entitled to a presumption of past persecution because these governmental acts typically stigmatize entire vulnerable groups based on ethnic, religious, or political animus. Those who become stateless as a result of the dissolution of states, when the causal link to discriminatory government action is indirect or absent, might be treated differently. The specter of ethnicity-based legislation in successor states, however, suggests that they, too, should warrant a rebuttable presumption of the need for protection.

The instances in which people are born into statelessness, due to the operation of the *jus sanguinis* laws of the states of which their parents are citizens or due to a failure to have been registered at birth may not warrant a presumption of persecution, but may still fall within the persecution paradigm. Individuals born stateless or who become stateless by marriage are likely to be members of vulnerable populations that endure discriminatory treatment. Depending on their circumstances, they may have a well-founded fear of persecution. News reports of the refusal of the April 2014 Myanmar census to allow the 1.3 million Rohingya Muslims to identify themselves as “Rohingya” rather than “Bengali” (implying that these multi-generational residents are not citizens of Myanmar but unlawful migrants from neighboring Bangladesh), are a reminder that the protection needs of the stateless

80 Proposed § 210A (b)(5) - (7).
81 Proposed § 210A (c).
82 INA § 316(a). The naturalization requirements include five years of continuous residence in the United States after being lawfully admitted for permanent residence.
83 Proposed § 210A (b)(1)(C).
are ongoing (Associated Press 2014). Violent attacks against the Rohingya in Myanmar in the past two years, leaving almost 300 dead and forcing 280,000 to flee, demonstrate that persecution on account of religion and nationality continues to afflict stateless populations (ibid.).

Despite the far too many stateless individuals who face persecution or severe harm, not all of them do. This second group of stateless people, though they do not qualify as refugees, remains exceedingly vulnerable. Their inability to procure the protection of any state condemns them to a precarious existence in the United States.

A major problem in generating solutions is the dearth of information on the dimensions of the problem. At this point, no one knows exactly how many stateless individuals there are in the United States. Nor is there reliable information on the countries from which they came, the circumstances through which they became stateless, or any protection alternatives which they may be able to pursue. Rather than relying on incremental case law developments and ad hoc regulatory fixes, there should be a serious and sustained evaluation of the protection needs of the stateless in the United States. The US State Department should commission a report on the size and scope of the protection gap in the United States and develop legislative, regulatory, and other policy guidance concerning statelessness claims. There is precedent for this approach in the 2004 State Department study of the US refugee resettlement program that led to an exhaustive report with an array of legislative and administrative reforms to improve the refugee admissions system (Martin 2005).

Another possibility is to convene a working group to examine the issues related to statelessness. The US task force on refugee women overseas provides a useful model. The working group, coordinated by the secretary of state in conjunction with the attorney general and the Department of Homeland Security, surveyed the potential protection gaps involving women at refugee camps overseas. The task force’s work, which involved careful review of international and national law, as well as investigation of the legal, practical, and cultural challenges encountered by a particular population seeking protection, resulted in a nine-page set of Gender Guidelines for Overseas Refugee Processing (Weiss 2001).

A task force or a commissioned report is warranted in order to produce guidance on a range of statelessness issues. In addition to developing an empirical basis for understanding the needs, one or both of these approaches could consider the strengths and weaknesses of proposed solutions, and could contemplate the manner in which multiple policy changes might complement each other. For example, the process could examine the current regulatory framework for the US asylum policy and the manner in which past persecution triggers a rebuttable presumption of persecution in the future. It could evaluate whether regulations should include a similar presumption for those rendered stateless by denationalization decrees and for those whose statelessness is a direct result of ethnic discrimination.

A task force or commissioned report could also review the legislation proposed during the last decade, including provisions included in S. 744, which would regularize the status of stateless individuals who cannot be removed to other countries. It would consider what should be the contours of the regularization process. How long should it take? What benefits

84 8 C.F.R. § 208.13(b)(1).
should it entail? Should it be open to all stateless individuals in the United States or only to those who have filed for asylum but have been rejected?

Furthermore, the process could reflect on the need for continuing education for government personnel who encounter stateless individuals. Asylum officers, immigration judges, members of the BIA and other public officials currently receive training concerning the refugee law developments and country conditions. They could no doubt benefit from additional sustained attention to the complex topic of statelessness. They need to understand the protection needs of stateless individuals and to be aware of the possible avenues of protection available under US law.

In addition, future scholarly research and litigation should explore more deeply the ramifications of statelessness. These efforts, in tandem with government measures to acknowledge and ameliorate the difficulties facing stateless individuals in the United States, can help create a humane approach for the future. The stateless were largely invisible in the human rights developments in the last half of the twentieth century. The dawn of the twenty-first century should begin to shine light on this phenomenon and its human and legal implications.

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85 E.g., asylum officers receive training in international human rights law, international and national refugee laws and principles, and other matters relevant to asylum determinations. 8 C.F.R. § 208.1(b).


On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict, and Disaster

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Executive Summary

Today, perhaps more than ever, humanitarian crises permeate the lives of millions, triggering increased human movement and repeatedly testing the international community’s capacity to respond. Stakeholders within the international community have recognized that existing legal and institutional frameworks for protecting forced migrants are inadequate to address the diversity of movements and needs. This article examines the situation of noncitizens who are caught in violence, conflict, and disaster, and asserts that they are an at-risk population requiring tailored responses.

Recent history has witnessed numerous humanitarian crises in which noncitizens have been among those most seriously affected. With more people than at any other point in history residing outside of their country of origin, the presence of new and sustained eruptions of violence and conflict, and the frequency and intensity of disasters predicted to increase, noncitizens will continue to be caught in countries experiencing crises. Destination countries, as well as origin countries whose citizens are caught in crisis situations abroad, must understand the challenges that noncitizens may encounter in accessing assistance and protection, and must formulate responses to ensure that their needs are accommodated adequately.

While both citizens and noncitizens may encounter difficulties in any given humanitarian crisis, research on five recent crises—the Libyan uprising,

1 The authors are grateful to Professor Susan F. Martin for providing the opportunity to undertake this research and for general comments and suggestions on the issue.
2 Sarah Drury primarily provided research assistance on the Libya and Syria crises; Pitchaya Indravudh on the Thailand crisis; Aaron Gregg on the Japan crisis; and John Flanagan on the Unites States crisis. The authors would also like to thank all the research assistants who provided editorial and research support for this paper.

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the Tohoku earthquake, the tsunami and Fukushima nuclear accident in Japan, flooding in Thailand, Hurricane Sandy in the United States, and the on-going conflict in Syria—demonstrate that a range of factors create particular challenges for noncitizens. Factors related to the underlying environment in the country undergoing a crisis and the responses of different actors may exacerbate the vulnerability of noncitizens. Moreover, different groups of noncitizens manifest distinct protection needs due to specific attributes. In a given context, the interaction of these factors leads to varying levels of vulnerability for different groups, and the experiences of noncitizens in crisis situations implicate a range of fundamental human rights.

Promising practices which may reduce the vulnerabilities of noncitizens and their exposure to harm during crises include: limiting immigration enforcement activities in favor of dispensing life-saving assistance; communication of emergency and relief messages in multiple languages and modes; facilitating entry and re-entry; and providing targeted relief services. These practices are not limited to countries experiencing crises; origin countries have also displayed judicious actions, undertaking bilateral negotiations to address specific needs and seeking external assistance in order to protect their citizens who are caught in crisis situations.

This article seeks to inform ways to mitigate the vulnerabilities and address unmet assistance and protection needs of noncitizens caught in countries experiencing crises. It focuses primarily on vulnerabilities experienced during crises, acknowledging the importance of preventive action that targets the potential vulnerabilities and needs of noncitizens. It also acknowledges that assistance and protection needs often persist beyond the abatement of crises and warrant ongoing intervention. The observations presented in this paper are drawn from desk research on a limited number of situations, and therefore, the article is an introductory attempt to call attention to the issues at play when a crisis occurs, rather than an in-depth study of the subject. Nonetheless, it offers recommendations for alleviating the exposure of noncitizens, which include actions aimed at:

- addressing the underlying legal and policy landscape related to crises and relevant areas like immigration so as to account for the presence and needs of noncitizens;
- ensuring that all categories of noncitizens are able to access, understand and navigate information regarding emergency and relief assistance and are able to utilize them; and
- limiting the exposure of noncitizens to harm through targeted measures that address their particular needs and vulnerabilities.
Part 1: Crisis Migration and Noncitizens as an At-Risk Population

Today, perhaps more than ever, humanitarian crises permeate the lives of millions, triggering increased human movements and repeatedly testing the international community’s capacity to respond. In November 2013, the devastation reaped by Typhoon Haiyan in the Philippines affected 14.1 million people and displaced 4.1 million (Yonetani et al. 2014). Weeks later, an escalation of violence among political factions in South Sudan created widespread instability and forced thousands to flee within and across borders, many of whom had only recently returned to settle in the country. Amid prolonged drought, there is also growing concern over severe food insecurity and the possibility of famine in South Sudan (IRIN 2014). Meanwhile, in Syria, almost half of the population is in urgent need of humanitarian assistance due to the armed conflict, including millions of internally displaced persons and those living as refugees in neighboring countries and beyond (IDMC 2014b; UNHCR 2014a). And by late-2014, Ebola had killed thousands of people and crippled much of West Africa, prompting Guinea, Liberia, Mali, Sierra Leone, and other countries to adopt measures to curtail movement and prevent the spread of the epidemic (WHO 2014). Across the Atlantic, tens of thousands of children from El Salvador, Guatemala, Honduras, and Mexico have been displaced within their countries and across international borders with more than 68,000 apprehended at the US-Mexico border in 2014 after undertaking perilous journeys. Most were escaping pervasive gang and drug cartel violence (UNHCR 2014c).

As is evident from these examples, humanitarian crises—described as any situation in which there is a widespread threat to life, physical safety, health, or basic subsistence that is beyond the coping capacity of individuals and the communities in which they reside (Martin, Weerasinghe and Taylor 2014)—may be triggered by a diverse range of events and processes. Triggers include hurricanes, tsunamis, earthquakes, drought, famine, environmental degradation, other impacts of climate change, epidemics or pandemics, nuclear and industrial accidents, acts of terrorism, armed conflict, generalized violence, and political instability. While these triggers may often constitute the immediate “cause” of a humanitarian crisis, underlying stressors related to the political and socio-economic context in a given country or locale, and individual- and community-level agency, resources and capacities, generally determine its scale and intensity.

Human movement stemming from diverse crises is at unprecedented levels and may increase in years to come. The latest statistical compilation from the Office of the United Nations High Commissioner for Refugees (UNHCR) reveals that persecution, conflict, generalized violence, and human rights violations alone had forcibly displaced 51.2 million individuals by the end of 2013 (UNHCR 2014e; Türk 2014), representing the highest figures since UNHCR first began compiling such statistics (Türk 2014). Moreover, during the five-year period between 2008 and 2012, an estimated 143.9 million people in 125 countries were displaced by disasters stemming from rapid-onset weather-related and geophysical hazards such as floods, storms, earthquakes, and wildfires (Yonetani 2012, 11). These figures do not necessarily capture displacement emanating from technological hazards (such as nuclear and industrial accidents), biological hazards (such as epidemics and pandemics), and slower-onset processes such as droughts and sea-level rise (IDMC 2014a). In addition, climate change is projected to increase the displacement of people in the twenty-first century (IPCC 2014). Meanwhile, processes of political change not only
generate instability, but also provoke new movements and protracted needs.

Existing legal and institutional frameworks for protecting forced migrants are inadequate to address the diversity of movements and needs. Frameworks that were conceived to protect those who flee persecution, human rights violations and ongoing conflict, may evolve and possess sufficient elasticity to accommodate “so-called” new phenomena, such as cross-border displacement deriving from gang and drug cartel violence. Even so, they cannot accommodate all those who are compelled to flee as a consequence of other triggers, such as weather-related, geophysical, technological, and biophysical hazards. This understanding is perhaps best captured by the words of the United Nations High Commissioner for Refugees in a ministerial-level address to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees: “While the nature of forced displacement is rapidly evolving, the responses available to the international community have not kept pace.”

A range of initiatives aims to better understand movements and protection needs in the context of crises. Among these is Georgetown University’s Institute for the Study of International Migration’s (ISIM) project on crisis migration, which seeks to discern the commonalities in movements and protection needs stemming from diverse humanitarian crises as a first step towards enhancing protection and assistance. The project’s preliminary findings relate to a range of thematic areas, including the vulnerabilities and protection needs of certain categories of at-risk populations who are not typically singled out as being vulnerable. This paper presents findings relating specifically to noncitizens caught in countries experiencing crises.

4 See, for example, the Nansen Initiative, UNHCR’s Guidelines on Temporary Protection or Stay Arrangements, and the International Organization for Migration’s Migration Crisis Operation Framework.
5 For more information on Georgetown University’s project on crisis migration, supported by the John D. and Catherine T. MacArthur Foundation, visit: http://isim.georgetown.edu/crisis.
6 The project posits three principal ways in which movement occurs in the context of crises: (1) displacement as a direct result of a crisis; (2) anticipatory movement in the context of impending crises; and (3) planned relocation, particularly for those who might be otherwise trapped in life-threatening situations. Displacement encompasses those who are affected or threatened directly by a humanitarian crisis and who are compelled to move. Anticipatory movement encompasses those who move because they anticipate future threats to their lives, physical safety, health, or subsistence. Relocation, particularly for populations that may otherwise be trapped in life-threatening situations, encompasses those who are in harm’s way, but are trapped in place and have not moved due to physical, financial, security, logistical, or other reasons that impede movement. These movements may be temporary, protracted or permanent, internal or across international borders, and legal or (particularly with regard to the first two categories) clandestine. These categories are not intended to operate as legal definitions, but rather reflect an attempt to understand movement in the context of humanitarian crises. The categories are not mutually exclusive as individuals may move from one to another, or simultaneously fall into more than one.
7 Other at-risk populations that the research has examined include those who travel by sea, those who are trapped in place and require assistance to move out of harm’s way, and those who are displaced to urban areas.
8 The term noncitizen is used in this article to describe persons who are present (regardless of duration or legal status) in a country in which they are not citizens. The term includes migrant workers, refugees, asylum seekers, stateless persons, students, and others.
Over the last 25 years, the world has witnessed numerous humanitarian crises in which noncitizens were among those most seriously affected. The issue first came to prominence during the Gulf War in 1990-1991, which affected more than one million noncitizens who were residing in Kuwait, along with hundreds of thousands in Iraq. Fifteen years later in 2006, renewed conflict in Lebanon posed considerable challenges for hundreds of thousands of refugees and asylum seekers, stateless persons and domestic workers from lower-income countries (Jureidini 2011). Outside the Middle East, post-election unrest in Côte D’Ivoire displaced thousands from neighboring countries in 2010. Many were left to find their own means of exit from the country, as evacuations and humanitarian assistance were thwarted by violence (Koser 2014). In 2011, when hundreds of thousands of migrant workers were caught up in political instability and civil war in Libya, the need to make provisions to better assist and protect noncitizens in times of crisis surfaced as a priority for policymakers. In the months that followed, the devastating consequences of the earthquake, tsunami and nuclear disaster in Japan along with severe flooding in Thailand and the worsening conflict in Syria, reified the need among states and the broader international community to formulate a coordinated response for noncitizens residing in countries in the throes of acute humanitarian crises.

Humanitarian crises triggered by the sudden onset of violence, conflict, or disaster have called attention to the risks to which noncitizens are exposed in these situations, as well as their protection needs. There is a tendency for the protection of noncitizens to fall through the cracks because of failure to understand and/or take account of the unique challenges they face, and because extant frameworks and mechanisms insufficiently articulate the responsibilities of different actors. In this context, in late 2013, amid mounting academic, institutional, and policy debates at the UN High-Level Dialogue on International Migration and Development, the United States and the Philippines launched a state-led initiative on Migrants in Countries in Crisis (MICIC) to improve the capacity of states and other stakeholders to “prepare for, respond to, alleviate suffering, and protect the dignity and rights of migrants caught in countries in situations of acute crises” (IOM, n.d.).

With this political momentum as a backdrop, this paper seeks to shed light on protection implications for noncitizens caught in countries experiencing violence, conflict and disaster by examining five prominent crises across three continents between 2011 and 2012: the Libyan uprising; the Tohoku earthquake, tsunami and the Fukushima nuclear accident in Japan; flooding in Thailand; Hurricane Sandy in the United States; and the ongoing conflict in Syria.9

This paper illustrates that in the context of violence, conflict and disaster:

- Noncitizens may be distinctly vulnerable due to a range of factors pertaining to the underlying environment in the country experiencing the crisis and the responses of different actors. These include: transmission of crisis-related information in modes that do not cater to noncitizens; insufficiently attuned laws and policies; exclusion

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9 These crises were chosen because media reports indicated that significant populations of noncitizens were affected in each of these situations. Evidence presented in this paper was collected through desk research using publicly available sources from international organizations, think tanks, international nonprofit organizations, governments, and media outlets. There are limits on the extent to which it is possible to generalize from these examples, and this paper does not use a case study method with the intent of generalizing across all crises.
from or difficulties accessing or benefiting from relief services; lack of consideration of noncitizens in national frameworks; actions of rogue authorities and private actors; targeting due to ethnicity; border restrictions of contiguous countries; and lack of origin country mechanisms and capacity for protecting citizens abroad.

- Among noncitizens, different groups manifest distinct protection needs due to specific attributes. Those with heightened vulnerabilities may include: persons without immigration status, domestic workers, refugees, asylum seekers, stateless persons, and detainees.
- Noncitizens may be susceptible to violations of fundamental human rights.

The paper also describes a handful of promising practices in the context of humanitarian crises triggered by violence, conflict, and disaster.

While the analysis emphasizes protection needs and responses during crises, it suggests that greater awareness of, and attention to, the vulnerabilities and protection needs of noncitizens throughout all phases of a crisis could mitigate harm to these populations (IOM 2014a). Specific and targeted measures are needed to address vulnerabilities that affect noncitizens before a crisis, protection and assistance during a crisis, and challenges that prevail following the abatement of a crisis. Responses may also need to be tailored to address the diversity of movements and non-movement that occur in the context of crises as people may move within a country, into neighboring countries, or farther afield, or face impediments to moving out of harm’s way and require assistance to relocate.

The paper provides an overview of the five crises, describes factors that influenced the vulnerability of noncitizens, and concludes with recommendations.

**Part 2: Recent Crises**

**I. Libyan Uprising**

In mid-February 2011, anti-government protests spread across Libya, meeting a violent crackdown from Colonel Muammar Gaddafi’s regime (BBC News 2011a). Unlike the uprisings in Egypt and Tunisia, Libya’s civil unrest descended into an armed conflict between government forces and North Atlantic Treaty Organization-backed rebels, which continued until Gaddafi’s overthrow in October 2011. The main period of crisis ended with the fall of the Gaddafi regime, but weak rule of law and widespread insecurity has continued with suicide attacks, frequent abductions, and clashes between rival militias in and around towns and cities throughout the country.
Libya was a popular country of destination and transit for noncitizens due to its oil wealth and proximity to Europe. Some estimates before 2011 indicate the presence of up to 2.5 million noncitizens, including 1.2 million without immigration status (Aghazarm, Quesada, and Tishler 2012). Thousands of foreigners occupied high-skilled jobs in the oil industry, health, and education sectors. However, the majority of noncitizens residing in Libya at the time of the crisis were men from Egypt, Chad, Tunisia, Niger, Mali, and Sudan working in lesser-skilled occupations in the construction, agriculture, oil, and service industries (HRW 2011a).\(^1\) Libya was also a transit and destination country for refugees and asylum seekers, and a recipient country of boats of mixed populations prevented from entering Europe (Frelick 2009). According to UNHCR, at the beginning of 2011, there were around 8,000 registered refugees and approximately 3,000 asylum seekers residing in Libya\(^2\) from countries such as Côte D’Ivoire, Eritrea, Ethiopia, Iraq, Palestine, Somalia, Sudan, and Western Sahara (Amnesty International 2011).

Prior to the crisis, the protection landscape for noncitizens inside Libya was far from favorable, colored by human rights violations, racial discrimination, and an uneven regional balance of power (HRW 2011b). Existing protection challenges were aggravated by the outbreak of political unrest and armed conflict. The violence generated widespread suffering and mass displacement within and across the Libyan border, affecting a significant population of noncitizens.\(^3\) Overall, between late February 2011 and January 2012, 790,000 noncitizens fled to neighboring Tunisia, Egypt, Chad, and Niger, as well as Italy and Malta, to escape the escalating violence, although many of these countries were themselves experiencing some degree of political and economic instability (Aghazarm, Quesada, and Tishler 2012, 11).\(^4\) 45 percent of those who fled (316,321 people) sought refuge in a country that is not their country of origin (IOM 2011a). Due to lack of financial resources and travel documents, the vast majority of noncitizens had no personal means of exiting (ibid., 10). A total of 550,000 people were displaced within Libya in 2011 (UNHCR 2014b), a portion of whom were believed to be migrant workers, asylum seekers, refugees, and stateless persons (Fiddyan-Qasimyeh 2011). Others, particularly noncitizens from sub-Saharan Africa, were trapped or detained inside the country with little or no recourse, a phenomenon which only increased amid growing xenophobia, fear, and mistrust of foreigners after the conflict began (Nebehay 2011). Human rights groups expressed concern that these persons faced arbitrary detention and abuse (Amnesty International 2013c).

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11 Migrant workers in Libya also included tens of thousands from Asian countries (Aghazarm, Quesada, and Tishler 2012).
12 UNHCR suspects that the true number is higher, given that many do not register. In 2007, although 12,000 refugees, asylum seekers, internally displaced, and stateless persons in Libya were registered with UNHCR, it estimated that there were close to 30,000 persons in need of protection residing in the country. See http://www.nationalityforall.org/libya.
13 In Libya, distinctions between different types of noncitizens (migrant workers, refugees, asylum seekers, stateless persons, diplomats, business travelers, tourists, and students) are often blurred.
14 While 247,167 Libyan nationals crossed into Egypt during the crisis and 626,010 went to Tunisia, the International Organization for Migration (IOM) notes that most of these movements were circular, with the vast majority of Libyans returning home by the end of August 2011. Notably, very few Libyans sought shelter at temporary camps on the border. Almost no Libyans were found among those arriving by boat on the shores of Italy and Malta, a mode of movement that comprised 3.9 percent of the overall number of people fleeing Libya (Aghazarm, Quesada, and Tishler 2012, 11).
II. Triple Disaster in Japan

On March 11, 2011, a 9.0 magnitude earthquake struck the Japanese coastline, triggered a 30-foot tsunami and decimated communities primarily in the northeastern prefectures of Iwate, Miyagi, and Fukushima (Bartel 2011). These natural occurrences prompted one of the worst nuclear disasters since Chernobyl at the Fukushima Daiichi Nuclear Power Station. The earthquake and tsunami killed more than 15,800 and injured over 6,000 (Izumi 2012b). The bulk of the death toll was associated with the tsunami (Ferris and Solís 2013). No deaths have been attributed to the nuclear meltdown or the resultant radiation release, although stress and anxiety related to the incident have been credited with creating many health problems for those affected (Conca 2014). Approximately 465,000 people were evacuated (Ferris and Solís 2013). The economic cost of the crisis is estimated at $360 billion (ibid.), with 250,000 buildings damaged or destroyed, 4.4 million households without electricity and 2.3 million without access to water in the immediate aftermath (Koike 2011).

At the time of the triple disaster, Japan was home to roughly 2,078,480 noncitizens (Izumi 2012b). Chinese citizens constituted the largest enclave in Japan with South Koreans, Brazilians, and Filipinos comprising other sizable populations (ibid). The noncitizen population included roughly 141,774 foreign students, the majority hailing from surrounding Asian countries, most significantly China and South Korea, and to a lesser extent Taiwan, Vietnam, and Malaysia (JASSO 2010). The population of refugees and asylum seekers in Japan is much smaller than other classes of noncitizens: at the end of 2010, Japan was home to just 2,586 refugees and persons in refugee-like situations, 3,078 asylum seekers, and 1,397 stateless persons (UNHCR 2011).15

An estimated 700,000 noncitizens were residing in areas that were in some way affected by the triple crisis (IOM 2011b) with approximately 33,000 in the three main affected prefectures, 200,000 in the surrounding prefectures, and 423,000 visiting the area (Izumi 2012b). The earthquake and tsunami killed 236 and injured 173 noncitizens (ibid.), while an estimated 470,000 foreigners are reported to have left Japan during the time of the disaster (Duncan 2013). Many refugees and asylum seekers also chose to leave (Koike 2011). There is little additional aggregate-level information on noncitizens affected by the crisis. Government efforts to track the missing indicate that Japan worked with foreign embassies to compile a list of at least 600 missing noncitizens and that this information was furnished to the local police and rescue administration (IOM 2011b).

III. Flooding in Thailand

From August to December 2011, Thailand experienced its worst flooding in 50 years, creating devastating effects for residents and the economy and prompting the government to execute countrywide disaster management and relief measures. The floods were a byproduct of four major storms, which resulted in the country’s highest level of rainfall in more than 60

15 The asylum seeker figure is based on the number of pending applications.
16 This figure does not include those missing and presumed dead. For more information on this see “Damage Measures and Police Countermeasures Report,” accessible at: http://www.npa.go.jp/archive/keibi/biki/higajjokyo_e.pdf.
years, and also heavily affected the neighboring countries of Laos, Cambodia and Vietnam, all of which had citizens residing in Thailand. As a result of the floods, Thailand incurred $45.7 billion in costs as of December 2011 (World Bank 2011; The Economist 2012). 66 out of Thailand’s 77 provinces were critically impacted (Bhoocha-oom and Dixon 2012). The central region, which generates a large portion of the country’s economic output, experienced the longest period of flooding (Pongsudhirak 2011; Chariyaphan 2012).

Thailand has historically hosted large populations of noncitizens, especially from neighboring countries, who seek refuge from conflict and violence or greater opportunity within its growing economy (Jones and Im-em 2011). At the end of 2009, an estimated 3.5 million noncitizens resided in Thailand, consisting of refugees and asylum seekers, ethnic minorities without Thai citizenship (UNESCO 2014), permanent residents, students, and migrant workers (IOM 2011c). Low-skilled migrant workers from Myanmar, Cambodia, and Laos represent the largest population of noncitizens in Thailand. These workers are employed primarily in sectors such as agriculture, construction, and fishing (ibid.). At the end of 2010, there were an estimated 2.4 million noncitizens originating from these countries, with 1.4 million (almost 60 percent) designated as unregistered migrant workers or family members. According to the International Organization for Migration (IOM), 141,076 refugees and asylum seekers were living in Thailand in 2010, and of this population, 95,330 refugees resided in camps along the Thai-Myanmar border (ibid.). Thailand is not a signatory to the 1951 United Nations Convention relating to the Status of Refugees. Thailand considers individuals whose visas have expired to be unauthorized immigrants and they are therefore subject to arrest, detention, and deportation (den Otter 2007, 14; Frelick and Saltsman 2012).

Overall, the floods affected 13 million people (Bhoocha-oom and Dixon 2012), with 1.5 million displaced (Yonetani 2012), and over 800 killed (Agence-France Presse 2011). A demographic breakdown of these statistics, particularly the total number of foreigners impacted or displaced by the crisis, is unavailable. However, out of the 3.5 million noncitizens estimated to be living in Thailand, one million migrant workers are believed to have lived in areas affected by the floods (Koser 2014). Aid workers put the number of migrant workers stranded due to the disaster at 600,000 (ibid.). The floods significantly impacted industrial parks in Ayutthaya and Pathum Thani, which employ large numbers of migrant workers, often in unsafe living and working conditions (Gemenne, Brücker, and Ionesco 2012; IOM 2011c). Severe flooding in these areas put many migrant workers temporarily or permanently out of work (IOM 2011c). While only a few refugee camps along the Thai-Myanmar border were affected (ADRA 2011), UNHCR estimates that the floods also displaced 2,000 urban refugees and asylum seekers living in Bangkok (McKinsey 2011).

IV. Hurricane Sandy in the United States

On October 27, 2012, Hurricane Sandy, the largest Atlantic hurricane on record, struck the densely populated East Coast of the United States, creating widespread devastation for the

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17 “Unregistered migrant workers” refers to migrants who work in the country but do not have a valid work permit, though some may have a temporary Thai identification card procured through a previous formal registration or valid work permit.
residents of New York City, the New Jersey coastline, and southern Connecticut (Webley 2012). This disaster, which media outlets and meteorologists termed a “super storm,” left more than 130 people dead in the United States, with fatalities recorded elsewhere in Haiti, Cuba, Puerto Rico, the Bahamas, the Dominican Republic, and Canada (Rogers 2012). Hurricane Sandy forced some 450,000 people to evacuate damaged and destroyed homes (Susman, Tanfani and Simon 2012). Overall, the disaster cost around $65 billion in damages, making it the most expensive storm in US history after Hurricane Katrina (NOAA, n.d.).

Some of the hardest-hit areas in New York and New Jersey contained large immigrant populations. The foreign-born population of New York City is the largest of any city in the United States (US Census Bureau 2011), at just over three million people. Roughly 51 percent of the foreign-born are naturalized US citizens. Of the foreign-born residents of New York City, 51.5 percent come from Latin America and the Caribbean; 27.5 percent from Asia; and 15.9 percent from Europe (ibid.). An analysis of data from 2000 to 2006 conducted by Jeffrey S. Passel estimated there were 535,000 unauthorized immigrants and 374,000 unauthorized workers in New York City, comprising 10 percent of the resident workforce (Kallick 2007). Meanwhile, in the nine New Jersey counties hardest hit by Sandy, the foreign-born population made up an average of 25 percent of the population in 2011, as compared with 21 percent of the population in the state overall (US Census Bureau 2011). In New Jersey, unauthorized workers comprised around 8.6 percent of the state’s workforce (approximately 400,000 workers) in 2010 (Passel and Cohn 2011).

There are no comprehensive statistics that detail Sandy’s impact on noncitizens. However, a nongovernmental organization survey of 416 self-identified immigrants living in the disaster-affected areas of Staten Island and Suffolk County, New York, revealed that one in three of those surveyed suffered damage to their home and/or personal property.18 Obstacles to accessing assistance included confusion over eligibility, language barriers, and fear of interacting with authorities (Torrens 2012).

Another issue affecting the protection of noncitizens was in the enforcement of labor law in the post-disaster recovery period. As in previous disasters, immigrant day labor was a key flank in the initial cleanup efforts. A survey of 11 workers’ rights organizations conducted by the City University of New York found that, despite increased outreach by the US Department of Labor and the state labor departments of New Jersey and New York, more than three quarters reported the occurrence of wage theft, and 64 percent reported significant workplace injuries during the cleanup period (Cordero-Guzman and Pantaleon 2013).

V. The Conflict in Syria

Since March 2011, peaceful protests against endemic corruption, inequality, and brutality, have met with violent backlash, persecution, and suffering at the hands of government
forces and non-state actors intent on disrupting civilian life and reaping destruction. In July 2012, the International Committee of the Red Cross (ICRC) declared a situation of non-international armed conflict in Syria (ICRC 2012). Shelling, bomb attacks, and fierce fighting continue to devastate major cities, towns, villages, and camps, with countless reports of house raids, arbitrary arrests and detention, disappearances, sexual violence, and summary executions. Meanwhile, the nature of the conflict has severely restricted humanitarian access to both citizen and noncitizen populations inside Syria.

More than three years since the unrest began, Syria is in the grip of a humanitarian crisis that has killed more than 191,000 people and internally displaced over 7.6 million. Others remain trapped without access to basic supplies, and are unable to move out of harm’s way. Yet over three million people have fled the country, the majority of them to neighboring Lebanon, Jordan, Turkey, Iraq, and Egypt, while others have risked their lives attempting to cross the Mediterranean in a desperate bid to reach Europe.

Hundreds of thousands of noncitizens have been affected by the crisis since 2011. The vast majority are refugees, asylum seekers, and stateless persons, but also migrant workers, students, journalists, and aid workers. Of the 540,000 Palestinian refugees registered in Syria, approximately 270,000 have been internally displaced, while more than 50,000 have fled to Lebanon. Fewer have managed to cross the border to other neighboring countries, such as Egypt and Gaza (UNRWA 2014a). Of those still in Syria, more than 18,000 remain inside the Yarmouk refugee camp in Damascus, which has largely remained under siege since early 2013 (UNRWA 2014b). Almost all of the Palestinian refugees in Syria are reported to be in need of humanitarian assistance (UNRWA 2014a). With a resurgence of violence in Iraq and entry restrictions imposed by neighboring countries, thousands of Iraqi refugees in Syria also face limited options to escape from harm (UNHCR 2014a). In addition to refugee populations, a sizable population of migrant workers has been affected by the crisis. In 2010, Syrian labor officials estimated the number of domestic workers to be between 75,000 and 100,000, consisting primarily of women from Indonesia, the Philippines and Ethiopia (IRIN 2012a). In early 2013, IOM, which has assisted with evacuations and repatriations of migrant workers from Syria, estimated that there could be up to 120,000 migrant workers in the country (IOM 2013).

Part 3: Protection Implications

This section discusses the experiences of noncitizens in the five crises and identifies some of the factors that impacted their vulnerability. These factors are analyzed on two levels: (1) those that are a product of the surrounding environment, such as risks pertaining to the underlying conditions in the country experiencing the crisis and the responses of

19 For the latest statistics on the situation in Syria, see: United Nations Office for the Coordination of Humanitarian Affairs, “Syria Crisis,” http://syria.unocha.org/. See also Internal Displacement Monitoring Centre (IDMC), “Syria,” http://www.internal-displacement.org/middle-east-and-north-africa/syria/. Note that due to the restrictions on access to Syria, numbers reported by the IDMC of internally displaced persons have not been updated since September 2013. Current numbers are thought to be considerably higher.
diverse actors; and (2) those that stem from attributes specific to non-citizens or particular groups of noncitizens. In each of the five crises, factors on both levels converged to create complications for noncitizens. This analysis sheds light on fundamental human rights that may be compromised in crisis situations, and a handful of these rights are also highlighted in this section.

I. Environment-Level Factors and Responses of Diverse Actors

The vulnerabilities of noncitizens during humanitarian crises may be influenced by the underlying economic, social, political, and legal environment in the country experiencing a crisis, as well as the actions of government authorities and private actors.

Transmission of Crisis-Related Information

Lack of access to the internet or telecommunications may limit the ability to receive crisis-related information. Further, the limitations of relying solely on such forms of communication are exacerbated when coupled with language barriers faced by noncitizens affected by a crisis. The crises in Japan, the United States, and Thailand speak to this dynamic.

During the crisis in Japan, the government provided critical information on its website and official Facebook page (IOM 2011b) and the radio network broadcasted disaster-related information in 17 languages (Izumi 2012a; Yamamoto 2013). In addition, phone signals were cut to allow more bandwidth for emergency services to communicate (Kaufmann and Penciakova 2011). Asylum seekers and refugees, however, seemed to have had difficulties procuring reliable information (Koike 2011).

Where technology proves inadequate in reaching foreign-born populations, outreach operations may be effective, particularly in reaching those who are unwilling and/or unable to leave their homes. In the United States during Hurricane Sandy, a nongovernmental organization concerned primarily with Asian communities conducted door-to-door outreach in Chinatown to check on housebound residents and provide them with information in the appropriate language (Mok 2012).

Although the Thai government provided some relief and relocation assistance to noncitizens, many were unable to benefit from this assistance due to, among other things, a lack of clear communication and information in their native language (Bhoocha-oom and Dixon 2012). Many migrant workers possessed little information about available rescue shelters and consequently could not access services (ibid.). Even if they were able to reach shelters, some migrant workers were turned away due to language barriers (Mahtani 2011).

Insufficiently Attuned Laws and Policies

Immigration and other laws and policies that are inadequately attuned to the protection needs of noncitizens in crises may heighten vulnerability. Continued immigration enforcement in these circumstances may place individuals in perilous situations by restricting their mobility or compelling them to make adverse decisions in order to preserve their ability to remain and work in the country. Thailand, Syria, and Japan provide examples.
In Thailand, work permit stipulations and related policies limited the mobility of noncitizens and their access to information. At the time of the floods, more than 500,000 migrant workers held permits that restricted them to designated zones (Mahtani 2011). During the floods, police and immigration officials continued to enforce movement-related restrictions despite the Ministry of Labor temporarily voiding these policies (ibid.). Moreover, although the floods damaged many businesses, migrant workers were reluctant to seek alternative employment because doing so would result in losing a work permit and entering into unauthorized status (Koser 2014).

For domestic workers in Syria, an exit permit is required in order to leave the country and can only be obtained by the employer’s consent and a fee paid to immigration officials (Russeau 2012; IRIN 2012a). Without receiving reimbursement for the recruitment costs of migrant workers, some employers refused to give permission to grant a permit, presenting an obstacle for women trying to escape the conflict zone (Torres 2012; Sevilla 2013). In September 2012, however, after a visit from a delegation from the Philippines, the Syrian government agreed to waive the exit permit and fee for Filipino nationals (the vast majority of whom were female domestic workers) and posted the announcement in newspapers (Center for Migrant Advocacy 2014). Between March 2011 and September 2013, more than 4,500 Filipino workers had been repatriated from Syria (Esplanada 2013). The fate of thousands of other domestic workers thought to be residing in Syria remains unknown and, thus far, the Syrian government has not waived exit visas for any other nationality. For the many domestic workers who reside in Syria without authorization, there is no means of obtaining an exit permit.

Although the Japanese government facilitated re-entry processes for some classes of noncitizens (Izumi 2011a), asylum seekers and refugees appear to have been excluded from similar accommodations (Koike 2011). According to a representative from the Japan Association for Refugees, this presented difficult predicaments for many, including having to choose between staying in the country during the crisis, returning to their countries of origin where they may face persecution, traveling to another country and potentially jeopardizing their application for refugee status, or breaking up families (Koike 2011).

**Exclusion of Noncitizens from Relief Services**

In crisis situations, response and recovery assistance and programming may not cater to the particular needs of noncitizens. Moreover, they may be excluded from relief services. Thailand and the United States provide examples.

Reports indicate that rescue shelters provided by the Thai government were largely inaccessible to noncitizens due to geographic isolation from migrant worker-concentrated areas, lack of translation services, and the inability of noncitizens to present identification documents either due to immigration status or loss of documents in the floods (Htwe 2011; Mahtani 2011). There are also reports that the severity of the crisis forced Thai authorities to prioritize their own citizens and turn away migrant workers from evacuation centers (Mahtani 2011). The government made some efforts to respond to this issue by establishing at least a couple of shelters specifically for noncitizens. One, which was set up in Nakhon Pathom (and was later moved to Ratchaburi due to fears of further flooding),
provided relief supplies and free health care. However, it quickly filled to capacity and became overcrowded with roughly 432 people (ibid.; Ashayagachat 2011; USAID 2011). A second shelter established by the Department of Employment and Ministry of Labor also provided basic humanitarian supplies as well as some tailored services including temporary employment placement and assistance with returning to countries of origin. The shelters’ limited capacities still left thousands of migrant workers without assistance (Bhoocha-oom and Dixon 2012; Mahtani 2011).

In the United States, while certain types of assistance were made available to noncitizens, only 22 percent of 416 self-identified immigrants surveyed in the disaster-affected areas of Staten Island and Suffolk County, New York applied for US or local government assistance (Make the Road New York 2012, 17). One contributing factor was that unauthorized immigrants were not eligible for federal cash assistance unless there was a US citizen child in the household. However, all affected persons were eligible for crisis counseling and non-monetary assistance, such as food and blankets (FEMA 2004). Confusion over the eligibility guidelines was the most frequently cited reason for not applying for aid (Llenas 2012).

**LACK OF CONSIDERATION FOR NONCITIZENS IN NATIONAL FRAMEWORKS**

The absence of national frameworks to account for the assistance and protection needs of noncitizens in humanitarian crises may aggravate their vulnerability. For example, the exclusion of noncitizens from Thailand’s relief services arguably reflects an overall lack of consideration of them by the Thai government in disaster management planning (Hall 2012b). Thailand does not explicitly include this population as part of the country’s permanent disaster management infrastructure, and no government agency was assigned responsibility for supporting this population during the floods (Hall 2012a). Representatives from the Ministry of Foreign Affairs and the Immigration Bureau were notably missing from the National Disaster and Prevention Committee, which is the government’s primary emergency planning apparatus (Chariyaphan 2012).

**ACTIONS OF ROGUE AUTHORITIES AND PRIVATE ACTORS**

The actions of corrupt authorities may elevate the vulnerability of noncitizens by creating added costs and impeding the ability to escape harm. This is also the case where regulatory environments allow private actors such as employers to confiscate travel documents with impunity. Both Thailand and Libya provide examples.

Immigration authorities at the Thailand-Myanmar border made it more difficult for migrant workers to escape the floods by reportedly demanding fees between THB 12,000 and 15,000 (US $400-$500) for crossing the border (Koser 2014). A large number of migrant workers were employed in industrial parks in Thailand with poor living and working conditions and salaries below the national minimum (IOM 2011c). At the time of the crisis, there were reports that employers failed to pay outstanding wages and withheld travel documents, with some even demanding high fees for their return (Amnesty International 2012).

Lawlessness persisted in parts of Libya, with the government unable and/or unwilling to
control militias in the country. Smuggling of sub-Saharan noncitizens by Libyan gangs continued across the country’s borders (Murray 2012a). Media reports suggest that local militias cheated noncitizens trying to escape from Libya out of their savings by falsely promising them passage by boat to Europe (Ba 2013).

**ETHNIC PROFILING**

In crisis situations, if hostility towards “otherness” or perceived “outsiders” increases, noncitizens may become targets of xenophobic violence and discrimination. This was an issue in Libya. Deeply rooted racial discrimination against sub-Saharan Africans within Libyan society was exacerbated by the politicization of race and ethnicity, as certain groups of foreigners became associated with distinct political factions embroiled in the conflict. Colonel Gaddafi recruited some sub-Saharan Africans and ethnic minorities into his armed forces, in many cases through coercion with the promise of identification papers (Fahim and Kirkpatrick 2011; Murray 2012b). Following reports that African mercenaries had been recruited to fight on behalf of Colonel Gaddafi, migrant workers, refugees and asylum seekers from Chad, Niger, Mali, Nigeria, and other sub-Saharan countries became targets of arbitrary arrest and violence by rebel factions and vigilante groups (HRW 2011a). Non-Arab minority groups such as the Tebu, Tuareg and Amazigh—some of whom may be stateless (van Waas 2013)—were also vulnerable to marginalization and racial discrimination at the height of the violence. In particular, Tuaregs in Awbari reported experiencing attacks and looting on a weekly basis due to the alleged involvement of some as mercenaries in pro-Gaddafi forces (IRIN 2012b).21

**BORDER RESTRICTIONS OF CONTIGUOUS NEIGHBORING COUNTRIES**

In times of crisis, particularly in conflict situations when the need to cross borders in order to escape harm is often greater, restrictions on entry to contiguous neighboring countries may disproportionately affect noncitizens. For example, restrictions of countries bordering Syria have heightened risk of harm for refugees. While Lebanon allowed intermittent entry by Palestinian refugees until the recent imposition of visa restrictions on all refugees from Syria, Jordan has refused entry to Palestinians since early 2013. This has left many Palestinians with limited options: to remain inside the conflict zone or risk traveling across the country to attempt crossing to Lebanon. Iraqis have faced similar problems in reaching safety, compelling some to return prematurely to Iraq and others to remain inside Syria (Middle East Monitor 2014).

**MECHANISMS AND CAPACITY FOR PROTECTING CITIZENS ABROAD**

Noncitizens whose countries of origin do not have policies and mechanisms in place to assist citizens caught in humanitarian crises in other countries may face increased exposure

21 See also, *Report of the United Nations Inter-Agency Mission to Southern Libya*, November 15-18, 2011, on file with the authors.
to harm. For example, during the initial stages of the Libyan crisis, Bangladeshis reportedly ran into difficulties procuring passports and travel documents, and accessing embassy personnel (BBC News 2011b). In Thailand, there were reports of Burmese embassy officials denying services to flood-affected Burmese citizens based on the fact that they had left Myanmar in breach of immigration laws (Hall 2012b, 8).

The vulnerability of noncitizens is also affected by the capacity and know-how of their country of origin to provide assistance. With some notable exceptions, noncitizens from developing countries may be relatively more vulnerable than those from developed countries as their diplomatic missions may have poorer emergency infrastructure and may therefore need external assistance from other countries, intergovernmental organizations, and/or civil society.

In Libya, the evacuation of high-skilled Britons and Canadians, among others, began early-on in the crisis and was generally characterized by fewer complications than the experiences of Chadians, for example, who were forced to travel in poor conditions and required substantial assistance from humanitarian organizations (Williams and Millar 2011; Aghazarm, Quesada, and Tishler 2012). South Korea also employs a robust set of overseas protections for its citizens abroad through its Ministry of Foreign Affairs (Young-ho 2012). Among the support services are programs to provide citizens with emergency cash assistance and a series of emergency communications programs, including the Travel Advisory System, Safe Travel Campaign, traveler registration system, and dissemination of safety information via text message (ibid.). In Japan, the Korean government issued its Rapid Deployment Team, which mobilized evacuation transportation, including military aircraft and coastguard boats, primarily for Korean citizens within 20 kilometers of the disaster zone (Asiaone 2011). Similarly, the Philippines has chartered flights to evacuate citizens and deployed high-level delegations to countries experiencing crisis such as Syria and Libya to negotiate and facilitate safe removal of Filipino citizens (Reyes 2012). In an effort to assist its citizens residing in the United States, the Mexican government filled some of the gap in access to services following Hurricane Sandy. The Mexican Consulate gave around $500 in cash to each affected citizen, replaced lost documents, and provided psychosocial support (24 Horas 2013).

II. Attributes Specific to Particular Groups of Noncitizens

The attributes of certain groups of noncitizens may create unique challenges. Depending on the crisis situation, these attributes may translate into varying degrees of vulnerability. Groups that are differentially vulnerable based on distinct attributes are distinguished below.

Noncitizens without Immigration Status

Persons residing in a country without immigration status may face unique challenges during violence, conflict, and disaster. For example, their status may inhibit the ability to access or benefit from relief services, such as emergency assistance or evacuation. Where fear of

22 Claudia Zamora, Mexican Consulate, Personal Interview, 4 April 2014.
government authorities prevails, the vulnerabilities of unauthorized noncitizens may be exacerbated. In order to avoid authorities and reduce the chance of arrest and deportation, the unauthorized may take actions that aggravate their own vulnerabilities or increase their exposure to harm, such as by remaining in crisis-affected areas or failing to seek assistance. Lack of knowledge of the circumstances and whereabouts of the unauthorized may also impede authorities from providing relief to these populations. Hurricane Sandy, the flooding in Thailand, and the conflict in Syria provide examples.

In Thailand, many noncitizens decided to stay in flood-affected areas due to fear of police and immigration officials, the risk of being arrested or deported, or jeopardized prospects of future employment (Koser 2014). As noted previously, the restrictive regulatory environment for lesser-skilled workers residing in Thailand also resulted in authorized workers being trapped within flood-affected areas, as movement restrictions were ordinarily tied to work permits (IRIN 2011).

In the United States, while a certain amount of temporary relief was available for those without immigration status, including crisis counseling, disaster-related legal services and other forms of non-cash emergency aid, many people were unaware or confused as to the extent of their eligibility and whether or not their coming forward to receive aid would put them or their families in danger of deportation (Torrens 2012). Fear of approaching authorities for assistance was also an issue in mixed-status families, particularly if the only US citizen in the family was an infant or child reliant on unauthorized family members to navigate eligibility guidelines to seek support on their behalf (Make the Road New York 2012).

Fear of authorities may also prompt the unauthorized in particular to use illegal brokers, human smuggling networks, and other clandestine means to escape harm, becoming easy prey for exploitation. For example, migrant workers in Thailand hired illegal brokers to transport them in and out of the country using clandestine routes at costs between THB 2,500 to 4,000 (US $80 to $130) per person (Hall 2012a). They traveled by night in large trucks that held up to 150 people, and were highly susceptible to exploitation by immigration officials in Myanmar and Thailand, as well as Burmese militia groups (IRIN 2011).

In Syria, where some 90 percent of migrant workers from the Philippines were thought to reside without immigration status in 2012, officials from the Philippine government have struggled to locate the whereabouts of female domestic workers. Government officials from the Philippines have attempted to reach out to those in major cities through radio announcements and leaflet campaigns. However, there are few records of the locations of these women, who appear to be scattered throughout the country and living in the midst of conflict in the homes of employers who may or may not release them from their jobs (Sevilla 2013; McGeown 2012).

**Female Domestic Workers**

Isolation and lack of access to social networks may impact the extent to which noncitizens are able to access protection and assistance in crisis settings. While isolation may stem from language barriers and other factors such as fear of arrest and deportation, it may also
be exacerbated by the nature of employment.

As noted above, female domestic workers often work in isolated conditions. They have been described as invisible due to their confinement to employers’ homes and their dispersal within countries of destination (IASC Gender Sub-Working Group 2011). Isolated domestic workers may have limited access to information in crisis situations and may encounter difficulties in escaping harm, particularly in contexts where their travel documents and mobile phones are confiscated (IOM 2012).

In April 2012, as the fighting in Syria intensified, a domestic worker from the Philippines was allegedly killed by sniper fire as she tried to flee from her employer in Homs to seek shelter at the Philippine Embassy in Damascus (Russeau 2012). Other domestic workers who had fled Syria reported having experienced forced relocation with employers to Lebanon, and heightened abuse and exploitation at the hands of employers taking advantage of diminished regulations amid the crisis situation (Habbab 2014).23

**Stateless Persons, Refugees, and Asylum Seekers**

Noncitizens who are unable or unwilling to avail themselves of the protection of their country of origin or residence and those who are not considered nationals by any country may face additional challenges in accessing assistance and protection. This was apparent in both the Libyan and Syrian crises.

Refugees and asylum seekers who were able to flee the fighting in Libya, largely from Eritrea, Somalia, and Sudan, were assisted by UNHCR at border camps in neighboring Egypt and Tunisia (Ambroso 2012, 6-7). Around 900 refugees and 350 asylum seekers remained in the Salloum border camp in Egypt some eighteen months after they became secondarily displaced as durable solutions remained elusive (Abughazaleh and Al Achi 2013).

In Syria, hundreds of thousands of Palestinian refugees have been displaced, many of whom have been trapped inside besieged areas without food and medical care (UNRWA 2014c). For those attempting to seek refuge in neighboring countries, options are limited, as Jordan has denied entry to Palestinians possessing only a Syrian travel document since late 2012.24 While Lebanon continues to allow intermittent access to Palestinians, they remain exposed to heightened vulnerabilities due to border closures, barriers to legal migration, threats of deportation and limited humanitarian assistance (HRW 2014).

Also in Syria, tens of thousands of Iraqi refugees who once fled sectarian violence in their country have faced the dilemma of risking return to an increasingly unstable Iraq, remaining in Syria amid ongoing conflict, or traveling illicitly by land, air or sea to other countries in search of safety. While more than 50,000 Iraqis were reported to have returned to Iraq in late 2013, little is known about the fate of around 149,000 estimated to be in

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23 Another example of the way in which this population was affected in a crisis situation is the 2006 conflict in Lebanon, when thousands of female domestic workers from South and Southeast Asia were caught up in the violence (IRIN 2006; Jureidini 2011).

24 Note that some Palestinian refugees residing in Syria have Jordanian citizenship, which would allow them to cross the border into Jordan (Amnesty International 2013a).
Syria. UNHCR reported that it was assisting 28,300 Iraqi refugees inside Syria in late 2013 (UNHCR 2014a).

**Noncitizens in Detention**

Noncitizens may suffer from arbitrary arrests and heightened abuses in detention during times of crisis, particularly in situations where chaos and criminality prevail. Those who are already detained at the height of a crisis may also be particularly vulnerable to harm, especially if detention centers are affected and enveloped in the crisis.

In Libya, thousands of noncitizens were reportedly subject to arbitrary arrests and held in deplorable conditions, which included being burned, beaten with electrical cables, housed in overcrowded rooms, and denied access to adequate food, water, basic medical care, and hygiene (Amnesty International 2013b). In August 2013, it was reported that some were being held in the Tripoli Zoo along with animals (Westcott and Wahhab 2013).

**Human Rights Implications**

The above discussion demonstrates that in situations of disaster, violence, and conflict, a range of fundamental human rights may be implicated. Beyond the rights to life and security of the person, which may affect both citizens and noncitizens in a similar manner, noncitizens may be particularly vulnerable to violations of other fundamental rights. These include the prohibition against discrimination (for example, in the provision of relief services), the prohibition on *refoulement* (where individuals fleeing persecution or other forms of serious harm are restricted from entering neighboring countries), the right to leave any country (for example, in contexts where exit permits limit the ability of noncitizens to depart a country, or where employers confiscate travel documents) and the right to freedom of movement (for example, where mobility restrictions are placed on authorized workers), among others.

**Part 4: Promising Practices**

While each of the crises discussed in this paper reveal circumstances in which noncitizens’ vulnerabilities have been exacerbated, the crises also feature actions by various stakeholders that have the potential to mitigate such vulnerabilities. These practices provide lessons for addressing the protection needs of noncitizens in future humanitarian crises. The following section provides a brief review of a handful of examples of these promising practices.

**Communication Systems**

Communications mechanisms that are designed to operate at the community level are important for relaying crisis-related information and providing support networks, particularly in situations of isolation, power shortages, or where noncitizens’ access to technology may be limited. Civil society in the Philippines, for example, has invested in cultivating support networks for its citizens abroad based on the premise that they
themselves can reach and assist one another in crisis situations. This initiative, named Balabal (shawl or cloak) was effective in supporting civil society and the Philippines government to assist a group of migrant workers trapped in Syria, enabling them to reach safety and return home (IOM 2011b). Similarly, where technology is available, a variety of multi-lingual dissemination mechanisms may facilitate more effective communication of crisis- and relief-related information to noncitizens, ensuring that those who may not have host language proficiency are able to understand important messages.

Both Japan and the United States broadcasted emergency information via websites and online social networks in multiple languages. The Japanese Ministry of Foreign Affairs (MOFA) assumed a prominent role in supporting noncitizens in at-risk areas of the country during the 2011 triple disaster. Immediately following the earthquake, a special page on the website of the MOFA was set up for the purposes of sharing up-to-date information in both Japanese and English surrounding the crisis and rescue efforts (IOM 2011b). The radio network was also used to broadcast information in 17 languages. Updates were provided in English, Arabic, Bengali, Burmese, Chinese, French, Hindu, Indonesia, Korean, Persian, Portuguese, Russian, Swahili, Thai, Urdu, and Vietnamese (Izumi 2012a; Yamamoto 2013). In the United States, the government provides web-based information on crisis situations through a comprehensive and user-friendly site called, “Ready: Prepare, Plan, Stay Informed,” in 12 languages other than English, including: Arabic, Chinese, French, Haitian, Hindi, Japanese, Korean, Russian, Spanish, Tagalog, Urdu, and Vietnamese.\(^25\)

\textbf{Temporary Cessation of Immigration Enforcement Activities}

As noted earlier, fear of law enforcement may deter noncitizens from coming forward to seek relief assistance or inhibit them from moving out of harm’s way. To address this concern, US authorities suspended certain enforcement activities in anticipation of Hurricane Sandy. Shortly before the storm hit, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) issued a joint statement in multiple languages confirming that in the event of an officially ordered evacuation or an emergency government response, their highest priority would be to promote safe evacuation and life-saving assistance while maintaining public order. Moreover, the statement reported that there would be no immigration enforcement initiatives associated with evacuations or sheltering related to Sandy, including the use of checkpoints during an evacuation.\(^26\) Similarly, the United States Citizenship and Immigration Services (USCIS) issued a statement to alert individuals affected by the storm of “temporary immigration relief measures” and to express understanding that a natural disaster may impede an individual’s ability to maintain lawful immigration status or obtain certain benefits (USCIS 2014).

In order to ensure that information is disseminated accurately and effectively, civil society organizations have an important role to play in reaching immigrant populations who might not trust or otherwise be aware of government announcements.


**Creating Channels for Re-entry**

Some noncitizens will put themselves in high-risk situations and remain in countries that are undergoing crises out of fear that they may be unable to return. In Japan, the Ministry of Justice and the Immigration Bureau made it easier for many affected foreigners to obtain re-entry by swiftly processing visas and return applications, and allowing re-entry for those whose visas were not valid for renewal (Izumi 2012a). Additionally, the government eased, to some extent, management of Certificates of Eligibility, a document which verifies that a person meets certain conditions for immigration (ibid). Asylum seekers and refugees, however, appear not to have benefited from similar privileges (Koike 2011).

**Targeted Action to Address Unique Needs That Arise During Crises**

In crisis settings, services that uniquely address challenges faced by noncitizens may mitigate vulnerabilities. During the floods in Thailand, the Ministry of Labor created the Flood Relief and Assistance Center for Migrant Workers, which provided a number of targeted services, including some employment opportunities and assistance with returning to countries of origin (Boocha-oom and Dixon 2012, 10). Following the flooding, Thailand began to work with neighboring countries on bilateral agreements to streamline the legalization process for some migrant workers and to create systematic channels for them to return to their countries of origin. The government of Myanmar also worked with Thai officials to open recruitment centers and offices for processing documents for migrant workers (Hall 2012a, 2012b). An additional example was seen in the Philippines government delegation to Syria to negotiate the exit of Filipino domestic workers stranded there. During the crisis in Libya, it was reported that the vast majority of the population of 916 Sahrawi stateless students were evacuated and returned to camps in Algeria, courtesy of the Algerian government. In this instance, it is notable that in the absence of a country of origin for Sahrawis, Algeria assumed responsibility to move these students to safety, as the host country to the largest number of Sahrawis, who reside across five desert camps in Tindouf (Hall 2012b, 13).

**Seeking External Assistance**

As the situation in Libya deteriorated in early 2011, Bangladesh actively sought financial and technical assistance for repatriating its citizens to safety. Out of an estimated 50,000 Bangladeshi citizens thought to be residing in Libya, more than 30,000 had returned home with IOM assistance by the end of March, while another 6,500 were evacuated in subsequent weeks. The repatriation of another 10,000 migrant workers was paid through a $40 million World Bank loan which Bangladesh secured as the crisis unfolded. The majority of the loan was allocated to provide livelihood support and reintegration assistance for returnees (Kelly and Wadud 2012).

While the examples of promising practices highlighted above focus primarily on actions that could be undertaken before or during crises, the needs of noncitizens may continue to persist well after the abatement of the crisis. In such situations, post-crisis interventions that address needs and challenges, including outstanding wages, compensation, psychosocial trauma, and reintegration, may become necessary. Similarly, tailored responses to the protection needs associated with the mobility of noncitizens are critical.
Conclusion

With more people than ever living outside their home countries, new and sustained eruptions of violence and conflict, and the frequency and intensity of disasters predicted to increase, noncitizens will continue to be caught in countries experiencing crises. This paper has described some factors that influenced the vulnerabilities and protection needs of noncitizens caught in five crisis situations. It has highlighted specific groups of noncitizens which require targeted action to mitigate vulnerabilities based on distinct attributes, identified implications for fundamental human rights, and presented a selection of promising practices to address their needs.

There are limits on the extent to which generalizable lessons may be drawn from the five crises and examples provided. Nonetheless, the examples suggest that interventions addressing three key issues are valuable when undertaking efforts to alleviate challenges noncitizens may encounter in accessing assistance and protection during crises, and to mitigate their exposure to harm. These interventions apply primarily to countries experiencing a crisis, but also to origin countries seeking to assist and protect citizens abroad. They include the following:

1. Actions aimed at addressing the underlying legal and policy landscape to minimize the vulnerabilities of noncitizens when a crisis occurs. These actions may include:

   • Mapping the size, location, demographics, and categories of noncitizens in country.
   • Providing increased communication channels between countries of origin and noncitizens abroad through mechanisms such as the establishment of designated focal points at consulates and/or the creation of trusted social networks among the diaspora in countries of destination.
   • Ensuring noncitizens are factored explicitly into contingency planning and crisis-preparedness measures at both national and local levels.
   • Allocating one (or more) department(s) at the national and local government levels to be responsible for the protection of noncitizens in the context of crises.
   • Reviewing and reforming laws and policies that could exacerbate the vulnerabilities of noncitizens in crisis situations, such as those that place restrictions on freedom of movement or impede the ability to leave the country.

2. Actions aimed at ensuring that all categories of noncitizens are able to access, understand, and navigate information regarding emergency and relief assistance and are able to utilize them when a crisis occurs. These actions may include:

   • Ensuring emergency and relief messages are communicated in multiple languages and using a range of modes that meet the particular circumstances of different categories of noncitizens.
   • Enlisting the support of civil society and other actors to assist noncitizens in accessing services for which they are eligible.

3. Actions aimed at limiting the exposure of noncitizens to harm when a crisis occurs through targeted measures that address their needs and vulnerabilities. These actions may include:
• Non-discriminatory access to life-saving and emergency relief services.
• Prompt accountability for violations of laws by government authorities and agents.
• Calling on external actors to provide resources and technical assistance when necessary.
• Limiting or suspending immigration enforcement activities in favor of providing life-saving assistance.
• Ensuring that lack of documentation—which may be due to unauthorized status, confiscation by employers, or loss during the crisis—does not inhibit access to relief, and that there are mechanisms in place to provide replacement documentation to facilitate travel.

The state-led Migrants in Countries in Crisis Initiative spearheaded by the United States and the Philippines, with Australia, Bangladesh, Costa Rica, Ethiopia, and the European Commission (in partnership with the IOM, UNHCR, ISIM, and the Office of the Special Representative of the UN Secretary General on International Migration) seeks to develop non-binding voluntary guidelines with a view to enhancing protection and assistance for noncitizens caught in violence, conflict, and disaster (IOM 2014b). The initiative is an important step in advancing global governance of crisis migration and addressing gaps for at-risk populations.

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On the Margins


On the Margins


On the Margins


Problems Faced by Mexican Asylum Seekers in the United States

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Executive Summary

Violence in Mexico rose sharply in response to President Felipe Calderón’s military campaign against drug cartels which began in late 2006. As a consequence, the number of Mexicans who have sought asylum in the United States has grown significantly. In 2013, Mexicans made up the second largest group of defensive asylum seekers (those in removal proceedings) in the United States, behind only China (EOIR 2014b). Yet between 2008 and 2013, the grant rate for Mexican asylum seekers in immigration court fell from 23 percent to nine percent (EOIR 2013, 2014b). This paper examines—from the perspective of an attorney who represented Mexican asylum seekers on the US-Mexico border in El Paso, Texas—the reasons for low asylum approval rates for Mexicans despite high levels of violence in and flight from Mexico from 2008 to 2013. It details the obstacles faced by Mexican asylum seekers along the US-Mexico border, including placement in removal proceedings, detention, evidentiary issues, narrow legal standards, and (effectively) judicial notice of country conditions in Mexico. The paper recommends that asylum seekers at the border be placed in affirmative proceedings (before immigration officials), making them eligible for bond. It also proposes increased oversight of immigration judges.

Introduction

Over the past seven years, Mexican citizens have faced escalating violence from organized-crime groups, military, and government officials. Many have fled to the United States seeking protection. In the United States, they frequently endure prolonged detention and an asylum system that is unresponsive to the danger they have escaped. This paper discusses specific barriers faced by Mexicans in the US asylum system from the perspective of an attorney who represented Mexican asylum seekers on the US-Mexico border in El Paso, Texas from 2011 to 2013. It addresses impediments to asylum at various stages of the process and makes recommendations on how the system can be reformed.
The Drug War in Mexico

When Felipe Calderón was elected President of Mexico in 2006, drug trafficking networks were well-established throughout the country (Bonner 2012). Almost immediately upon taking office Calderón initiated a war on drug trafficking and violence skyrocketed. Calderón’s highly militarized offensive sought to target the leaders of drug trafficking organizations (DTOs) as a means to splinter these networks, which, in turn, created between 60 and 80 new DTOs (The Guardian 2012). The birth of new DTOs kindled succession struggles and battles for territory (Lee 2014). The DTOs expanded their reach into Central America, and branched out into extortion and kidnapping (Beittel 2013). It has been estimated that at least 120,000, and possibly more than 130,000, people were killed as a result of the drug war between 2007 and 2012 (Molloy 2013). Of these homicides, 11,400 took place in Ciudad Juárez. The Mexican government estimates that an additional 27,000 people have officially disappeared. The rate of homicide grew from 24 per day in 2007 to 75 per day in 2011 (ibid.).¹ In 2011, according to some reports, Mexican cities made up five of the top 10 most violent cities in the world, with Ciudad Juárez the highest at number two (Seguridad, Justicia y Paz 2012). Up to 220,000 people left their homes in Ciudad Juárez between 2007 and 2010, and some sources claim that 1.6 million people were internally displaced in Mexico as of 2011 (Internal Displacement Monitoring Centre 2011).

In addition to the violence perpetrated by organized-crime groups, there have been pervasive human rights violations committed by the military and police forces across Mexico. Complaints of torture and ill treatment by federal and military officers more than quadrupled between 2007 and 2011, according to the Mexican National Human Rights Commission (CNDH) which received a total of 4,841 complaints during this period (Amnesty International 2012). These reports do not account for offenses committed by municipal police for which there is no systematic data collected, though there are approximately three times more non-federal officers in the country. Widespread corruption amongst security forces and in the judicial sector, and the deference to military justice, has led to general impunity for human rights abuses (US Department of State 2012).

As early as 2008, media reports described Mexico as susceptible to becoming a failed state, and United States lawmakers had begun to question its integrity and viability (Abbott 2011). The United States has contributed to the Mexican conflict. Ninety percent of illegal firearms in Mexico come from the United States,² and Mexico is the United States’ number one supplier of marijuana, methamphetamine and cocaine.³ In June 2008 Congress passed the Mérida Initiative, a three-year, $1.4 billion security assistance program to stem drug trafficking and organized crime in Mexico, Central America and the Dominican Republic.

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¹ The numbers are reported by the Mexican media and INEGI, Mexico’s National Statistical Agency. According to the Justice in Mexico Project at the University of San Diego, the number of deaths reported is often politicized and difficult to accurately ascertain due to “empirical and methodological challenges in attempting to define and measure drug- and organized crime-related violence as a specific phenomenon” (Molzahn, Rodríguez Ferreira and Shirk 2013).
In 2011, the Obama Administration pledged an additional $500 million for that year (Office of National Drug Control Policy, n.d.). The priorities of the Mérida Initiative in Mexico, which include further securing the southern US border and supporting the militarization of the drug war in Mexico, have come under significant criticism because of their lack of any measures to reduce demand for drugs or supply of illegal weapons (Abbott 2011, 7). Furthermore, only 15 percent of the funding was dependent on Mexico meeting human rights standards (ibid., 8).

Despite the multi-year, multi-national and multi-billion dollar intervention to combat drug trafficking, violence in Mexico remains at a humanitarian crisis level. The number of homicides in 2012 was more than three times that of 2007. Following the succession of Enrique Peña Nieto as President of Mexico in December 2012, initial data indicated nearly the same level of violence in the first seven months of 2013 (Molloy 2013). The escalation of the drug war in Mexico has had a brutally predictable effect: Mexican people have fled the country and sought protection in the United States, Canada and elsewhere.

Asylum Claims Brought by Mexican Citizens in the United States

US asylum claims are considered in two different ways. An individual may apply for asylum affirmatively if they have never been apprehended by immigration officials. In this process, the claimant files an application with the US Citizenship and Immigration Services (USCIS) Asylum Office within one year of entry. Affirmative asylum seekers are given a non-adversarial interview with an asylum officer. Individuals who have been apprehended by immigration officials and placed in removal proceedings must apply “defensively.” Under this process, the claimant files an application with an immigration court and has a hearing before an immigration judge.

The defensive process also applies to individuals who request asylum at or near a port of entry or border. Persons apprehended at or near the border or who are stopped at a port-of-entry face “expedited removal” unless they state an intention to apply for asylum or express a fear of return to their country or origin to a Customs and Border Protection (CBP) official. CBP must refer persons who satisfy this initial requirement to the Asylum Office for a “credible fear” interview. In this interview, an asylum officer determines whether there is a significant possibility that they could establish eligibility for asylum before an immigration judge. If the claimant meets the credible fear standard, the case proceeds to a removal hearing in immigration court where the claimant can apply for asylum.

Earlier studies have pointed out the low Mexican asylum filing numbers and approval rates during the early years of the drug war, as well as extremely high numbers of withdrawn asylum claims (Kerwin 2012, 25). In 2013, the rate at which all asylum seekers withdrew their cases was 17.5 percent, while the rate for Mexican asylum seekers was 30.8 percent (EOIR 2014a, 2014b). It is difficult to account for this discrepancy precisely, but it is likely that some of the difficulties (described below) which Mexican asylum seekers face in going through the system also function to pressure them to withdraw, including long and arbitrary periods of detention, lack of representation in high density areas and waiting years for hearings in non-detained courts due to backlogs. The withdrawal rate might also
be disproportionate for Mexican nationals for unrelated reasons like their ability to pursue immigration status through an alternative path.

In 2013 Mexico was the second highest asylum seeker producing country, behind only China (EOIR 2014b; UNHCR 2014). Some asylum denials can be attributed, in part, to narrow legal standards and the difficulty of sustaining claims based on the extortion, kidnapping, and homicides by criminal organizations (Buchanan 2010). Still, despite the dramatic increase in violence in Mexico, the grant rate for Mexican asylum claims adjudicated in immigration court plummeted from 23 percent to nine percent between 2008 and 2013, and these numbers were, in turn, dwarfed by the numbers who withdrew their claims (EOIR 2013, 2014b).

Some commentators have attributed low approval rates to the political, military, and economic ties between the United States and Mexico, and what they view as bias against Mexican asylum seekers reflected in political discourse, public opinion and media reports (Campos and Friedland 2014; Burns 2011; LCCREF 2009). Asylum determinations are strongly influenced by country conditions and human rights violations in sending countries (Salehyan and Rosenblum 2008). The asylum claims of citizens of US allies have historically been more difficult to win than the claims of nationals from US government foes or ideological opponents (ibid., 106). Asylum seekers from US trading partners have also had lower grant rates historically.

Recent political attacks on asylum seekers, particularly those subject to “expedited removal,” have focused on Mexicans and Central Americans (Campos and Friedland 2014). Politicians and media outlets have spoken out against Mexican asylum seekers, calling them criminals and their asylum claims fraudulent (La Jeunesse 2013). In response to a Fox News article in August 2013 claiming that Mexican asylum seekers are “gaming” the US immigration system, US Senator Jeff Sessions (R-AL) stated that the ability to seek asylum at the border was destroying border enforcement. He went on to say:

[W]hat we should say is, “Mexico is not a country that is persecuting people.” It’s a democracy and if anybody claims they’re being persecuted, we ought to call the Mexican government and have them come pick them up and protect them from persecution. How in the world can we determine if someone deep in Mexico has had a run-in with a drug cartel? (Poor 2013)

These viewpoints have no explicit or formal influence over the asylum system, but they may well influence immigration judges. Indeed, a growing body of empirical research on disparities in asylum grant rates has found strong evidence of country-specific adjudicator bias in the determinations of asylum officers and immigration judges (Rajmi-Nogales, Schoenholtz, and Schrag 2007).

4 A defensive asylum application is one that is filed with an immigration court after a noncitizen has been placed in removal proceedings. The immigration court grant rate presented in this paper is calculated as a percentage of all asylum claims decided in court for Mexican asylum seekers on the merits (i.e., grants and denials). Not all asylum cases decided in immigration court originated as defensive claims. If an affirmative claim for asylum is not granted, then the case is referred to the immigration court. The grant rate statistics do not reflect the high rate which Mexican asylum seekers withdraw their cases.
Problems Faced by Mexican Asylum Seekers in the United States

The Asylum Process
The following sections describe the experience of Mexican asylum seekers at various stages of the asylum process.

Entry
Recent focus on comprehensive immigration reform has cast renewed attention on unauthorized migration. Many asylum seekers from Mexico enter the United States without authorization, but an increasing number simply go to the nearest port of entry to ask for humanitarian protection. The Department of Homeland Security (DHS) reported that in the first three quarters of FY 2013 there were more than 14,000 credible fear claims at the border, in contrast to just under 7,000 for the whole of 2011 (Skoloff 2013). This section addresses how asylum procedures at the border disadvantage Mexican asylum seekers.

Defensive versus Affirmative Proceedings
A significant systemic problem that Mexican asylum seekers face at the border is that they are placed in defensive, and not affirmative, asylum proceedings even if they have no criminal or immigration history. This broad rule disproportionately affects Mexican asylum seekers because of the large numbers of Mexicans who seek asylum in this manner. Defensive proceedings take longer than affirmative ones. Defensive proceedings are more arduous and much more difficult to navigate without counsel. Defensive proceedings also expend more of the government’s time and resources. A fairer, less burdensome process would simply place asylum seekers at the border in affirmative proceedings. Asylum seekers with criminal histories or other potential bars would be transferred to immigration courts and there would be no greater risk of fraud than is already present in the system.

Interview Procedures
Persons seeking admission to the United States who express a fear of return to their country of origin are interviewed by CBP officers about their claim for asylum. Mexican asylum seekers in this situation are often fleeing recent, traumatic events. The humanitarian crisis in Mexico has hit the border areas particularly hard. The safest, closest place of refuge is often the United States for persons fleeing violence and many asylum seekers are able to reach the border within hours of experiencing violence and persecution. When an individual suffers trauma or violence, their ability to communicate and remember what happened to them is naturally interrupted (Chaudhary 2010). CBP interviews occur under oath, are documented and asylum seekers must attest to their accuracy. Once an asylum seeker has been released or detained, a USCIS asylum officer administers a credible fear interview usually via videoconference. Neither of these two interviews is recorded verbatim. They are both paraphrased or summarized by the officer who conducted the interview.

Interview procedures, which entail detailed statements, often lead to denied asylum claims based on credibility. This issue is discussed in more depth in the section on adjudication in immigration court. While immigration officials need to secure information from persons
seeking protection, the interview process often prejudices the asylum seeker without benefiting Immigration and Customs Enforcement (ICE) or CBP. Eliminating repetition, being more sensitive to the psychological state of the interviewee, and removing the pressure of attesting to the complete accuracy of the statement, would benefit the process and lead to fairer and more informed decisions under the law.

**Language and Literacy**

The interview procedures further jeopardize the rights of Mexican asylum seekers who are illiterate or whose first language is not Spanish. Written documents are a central part of the border procedure, and illiterate asylum seekers are frequently pressured to sign documents without receiving a full explanation. This includes notes documenting their own interviews which have not been read back to them and which they have not had the opportunity to correct.

Indigenous Mexican asylum seekers are at a significant disadvantage. Typically, members of indigenous groups in Mexico grow up speaking an indigenous language while only having a rudimentary understanding of Spanish. Many CBP officers speak Spanish, but often neglect to provide interpretation services, as required, for non-Spanish speakers. When indigenous Mexicans ask for asylum, CBP officers frequently interview them in Spanish, leading to miscommunication between the border official and the asylum seeker and inaccuracies in the recorded interview.

Asylum seeker R.M., for example, had the misfortune of being both illiterate and a non-native Spanish speaker. She crossed into the United States without documentation and was apprehended and interviewed by a CBP officer. Despite the extreme difficulty she had speaking and understanding Spanish, the officer did not secure an interpreter to conduct the interview in R.M.’s native language. Before the interview started, the officer failed to explain to R.M. her rights as required in a way she could understand. In the interview notes, the officer made significant mistakes, often using answers given by other members of the group with which R.M. was found, not her own group. At the end of the interview, the officer did not read the notes of the interview back to R.M., yet nonetheless made her attest to their accuracy. R.M. knew how to write her name, but not her initials, so the officer wrote her initials on a scrap of paper, and R.M. painstakingly wrote them at the bottom of each page of notes without knowing what the notes contained. At her immigration court proceedings, the government attorney raised the issue of inconsistencies between her testimony and the CBP transcript, leading the immigration judge to question her credibility. Providing interpretation services, greater oversight of CBP interviews, and verbatim transcripts of interviews would prevent *bona fide* refugees from being denied status.

**Rights Violations**

It is difficult to estimate the number of asylum seekers who have been illegally turned away at the border since this information has not been collected systematically. However, legal practitioners have reported that some asylum seekers have been threatened with incarceration and separation from their family at the time they make a protection claim,
while others have been turned away by CBP officers who have told them that “the United States is full.” These responses highlight a disturbing fact: border agents have complete authority over asylum seekers at the point of entry, and violations are extremely difficult to remedy.

**Detention**

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created the “expedited removal” system, which provides immigration officials with the authority to remove summarily noncitizens who they encounter at or near the border who lack proper documents (Kerwin 2012; Keller et al. 2005). To prevent the summary removal of persons with *bona fide* protection claims, migrants who express a fear of returning to their country of origin are entitled to a credible fear interview. During this interview, an asylum officer asks a set of questions to determine whether there is a “significant possibility” that the migrant can demonstrate a fear of persecution on account of one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group. Immigrants in expedited removal proceedings are subject to mandatory detention, but those who are deemed to have a credible fear can be considered for release. A 1997 Immigration and Naturalization Service (INS) memorandum provides that “parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”

Although asylum seekers who are found to have a credible fear may be released from detention, the standards for release are unreviewable and discretionary. This means that if an immigration officer feels that an asylum seeker is a flight risk, he or she can continue to be detained and the decision is not appealable. Legal service providers on the border have observed the frequent practice of selective detention for Mexican families whose members meet the credible fear standard and have no immigration or criminal history. A common scenario is to detain the father, but to release the rest of the family, which makes it very difficult for many families to sustain themselves and remain intact throughout the asylum process. Though the non-detained adult family members may be able to secure work authorization, they frequently must care for young children and have fewer opportunities to secure employment than the detainee would.

Additionally, detained asylum seekers along the border are much less likely to be able to secure legal representation. Not only is it difficult to afford representation, but immigration attorneys and organizations on the border are flooded with far more asylum seekers than they can represent. As numerous studies have demonstrated, asylum seekers with legal counsel prevail in their claims at far higher rates than those without representation (Ramji-Nogales, Schoenholtz, and Schrag 2007). The US Commission on International Religious

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Freedom, for example, found that 25 percent of represented asylum seekers over a four-year period who had been subject to expedited removal (arrested at or near the US-Mexico border) received asylum, versus just two percent in unrepresented cases (Kuck 2005, 239). Thus, it might be more accurate to say that, without counsel, asylum seekers cannot craft viable “claims.” Detention also negatively influences asylum approval rates (Kerwin 2004). Moreover, it concentrates asylum seekers in border communities. Families typically do not move away from the border when a relative is in detention there. Mexican asylum seekers, both detained and non-detained, are therefore heavily concentrated in the border region. Given all of these factors, asylum seekers often withdraw or abandon their claims and chose to return home even if they possess a genuine fear of return.

The United States should change its policy of discretionary release, and instead make release the norm and require justification to keep persons found to have a “credible fear” in detention. Problems associated with the standards for release from detention could also be addressed by greater training of immigration judges and judicial review of custody decisions in these cases.

*Reasonable Fear Interview Procedures*

If a noncitizen expresses a fear of persecution or torture but cannot apply for asylum due to a removal order or a prior removal, deportation, or exclusion order that is reinstated, they can apply for withholding of removal or relief under the Convention Against Torture (CAT). In these circumstances, they are entitled to a reasonable fear interview, which is a more rigorous standard but similar procedurally to a credible fear interview. However, the timeframes in which the two interviews are conducted vary substantially. In 2012, 97.99 percent of all credible fear decisions were completed within 14 days (USCIS Asylum Division 2012, *Credible Fear FY 2009-FY 2012*). Although the regulations require that reasonable fear determinations take place within 10 days, the average time for a reasonable fear decision in 2012 was 113 days (USCIS Asylum Division 2012, *Questions and Answers*). Mexican nationals had the largest share of the reasonable fear decisions in every month of 2012 (USCIS Asylum Division 2012, *Credible Fear and Reasonable Fear Workloads*). The fact that Mexico and the United States share a border means that it is much more likely that people seeking asylum from Mexico may have had a prior removal.

Because of the reasonable fear procedures, many Mexican asylum seekers often spend months in detention before they appear before an immigration judge. During this time, individuals cannot request a bond from a judge because they are not yet in immigration court proceedings, and they have no avenue for discretionary release because they have not received a reasonable fear decision. Asylum seekers, especially those who have been persecuted or tortured by their own governments, often find detention to be intolerable. Many suffer from post-traumatic stress disorder and detention re-traumatizes them. This can lead asylum seekers to give up on a genuine claim. Furthermore, while asylum seekers wait for a reasonable fear decision, they are not yet listed in the automated Executive

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8 A 2008 study by the United States Government Accountability Office found that representation “generally doubled the likelihood of affirmative and defensive cases being granted asylum,” after controlling for other effects like nationality and immigration court location (GAO 2008).

9 8 CFR § 208.31(b).
Office for Immigration Review system, making it very difficult for legal service providers to locate and represent them.

**Access to Counsel**

Despite the potential dangers of being deported to a country where they fear persecution, indigent asylum seekers have not yet been determined to be categorically eligible for government-funded legal counsel (Kerwin 2005). Difficulty accessing counsel is exacerbated for asylum seekers in detention or expedited removal proceedings. Because of the shortage of legal counsel, Mexican asylum seekers experience *notario* fraud at high rates. In Mexico, a *notario* is a qualified attorney, whereas in the United States a notary public is empowered only to perform such duties as to verify identity, make certified copies, and administer oaths. The concentration of Mexican asylum seekers at and near the border and the lack of affordable counsel leave them vulnerable to notary publics passing themselves off as qualified attorneys. These *notarios* not only take money from Mexican asylum seekers under false pretenses, but often do harm to their asylum cases which cannot be remedied. Since *notarios* or people who claim to be notaries are not attorneys, they are not subject to sanction by a bar association. In addition, it is often very difficult to convince law enforcement to prioritize or even pursue any of these cases. Some jurisdictions have made efforts to educate asylum seekers and to encourage reporting and prosecuting these crimes, but these efforts need to be greatly increased. Additionally, the procedure for remedying the harm to the asylum seeker’s case by filing a motion to reopen should be simplified and expanded. *Notario* fraud should also be added to the list of crimes for which an immigrant can get a “U” visa, a form of relief available for victims of criminal activity, considering the dire consequences that can arise from it.

**Legal Issues**

Among many problems in US asylum law, there are two legal issues that specifically affect Mexican asylum seekers: the particular social group standard for asylum claims and the meaning of “acquiescence to torture” in Torture Convention claims when government agencies and officials do not uniformly support torture.

*Particular Social Group*

The 1951 Convention relating to the Status of Refugees states that a refugee’s well-founded fear of persecution must be for reasons of race, nationality, religion, political opinion or membership in a particular social group.\(^{10}\) It is difficult for many Mexican asylum seekers to prove that the persecution they fear or suffered fits within one of the five grounds, though there are some cases, like those of human rights activists and journalists, which fit squarely into the refugee definition (Harville 2012; Garcia 2011; Buchanan 2010). However, a significant number of Mexicans seek protection because they resisted extortion or recruitment by gangs or cartels, and US asylum law can be unwelcoming to people in these situations (Uchimiya 2013). Particular social group claims under US law now require

\(^{10}\) 1951 Convention Relating to the Status of Refugees, Art. 1(a)(2).
particularity (a discrete, often smaller group) and social visibility to the wider community. These standards, which do not apply to any of the other grounds, make it more difficult to prevail in these claims (Kerwin 2012).

Asylum seeker J.M. worked as an informant for the US Drug Enforcement Administration (DEA) in Ciudad Juárez. After many years, the Juárez cartel discovered he was an informant and he had to flee for his life. Despite his long service to them, DEA agents reneged on their promise to assist him with an “S” visa, and so he applied for asylum. The immigration judge denied his request for asylum saying that the proposed social group of informants was not acceptable because the nature of an informant is to hide your identity and therefore the social group did not meet the visibility requirement.

**Acquiescence to Torture**

Immigration attorneys representing Mexican asylum seekers often look to the possibility of relief under CAT when asylum is not available to their client. Withholding or deferral of removal under the Convention requires a showing that a person will likely be tortured if returned to their country of origin. The torture need not be on account of one of the enumerated grounds of asylum. Asylum requires that the persecutor either be the government or an entity that the government is unwilling or unable to control. By contrast, eligibility for CAT relief requires that the “pain or suffering” be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity.”

The most substantial barrier to CAT relief stems from the fact that governments, especially in times of crisis, do not act monolithically. In Mexico, corruption is endemic and frequently government agencies and officials work at cross purposes. US asylum laws and regulations, however, do not explicitly instruct judges about how to address these situations. Immigration judges sometimes become confused when, for example, municipal police might be trying to prevent torture, but the army is perpetrating it. The situation can become more obscure if the municipal police are trying to prevent torture, but the army knows of torture and is acquiescing to it. In both of these situations, judges have denied CAT relief on the basis that there are elements of the Mexican government that are trying to prevent torture. Judges have said that because of the efforts of a discrete branch of government, the “government” (as a whole) cannot be acquiescing to torture. In addition, government perpetrators are often treated as “rogue officers.” The idea of a rogue officer, in particular, is contrary to the US civil rights definition of acts “under color of law.”

12 “S” visas are awarded to immigrants who work as informants for US law enforcement agencies.
Problems Faced by Mexican Asylum Seekers in the United States

Adjudication in Immigration Court

Once Mexican asylum seekers reach immigration courts, they confront additional barriers in the form of lack of procedural rules, negative credibility decisions, and judicial notice of country conditions in Mexico. Additionally, long delays in non-detained courts can push Mexicans who apply for asylum affirmatively beyond the one-year filing deadline, a procedural rule requiring that asylum seekers file their applications within one year of arriving in the United States unless extraordinary or changed circumstances can be found to warrant a delay.\(^{14}\)

**Lack of Procedural and Evidentiary Rules**

Federal rules of evidence and procedure do not apply to the hearings of asylum seekers. Immigration courts are adjudicatory entities, but not independent courts constituted under Article 1 of the US Constitution. Though the *Immigration Court Practice Manual* and the *Immigration Judge Benchbook* and other publications attempt to make procedure in immigration courts uniform and predictable, those guidelines are not binding. The *Immigration Court Practice Manual* says explicitly in the opening chapter that, “The requirements set forth in this manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case [emphasis added]” (Office of the Chief Immigration Judge 2013).

There is no coherent set of rules for immigration courts. Immigration courts are not bound by the strict code of evidence;\(^{15}\) instead, relevance and fundamental fairness are the only bars to admissibility.\(^{16}\) The *Immigration Court Practice Manual* also states that for detained individual hearings, filing deadlines are specified by the immigration court.\(^{17}\) This procedural flexibility allows immigration judges to influence—for better or worse—the outcome of asylum hearings. Denial of asylum based on unfair procedures is very difficult to challenge at the appellate level.

**Judicial Discretion Regarding Credibility Findings**

In the wake of the REAL ID Act of 2005, the testimony of an asylum seeker “may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”\(^{18}\) The ability of an asylum seeker to corroborate a claim can be very difficult, especially if agents of that government were involved in the persecution or torture. In addition, securing affidavits in the mail from witnesses in war-torn countries can be extremely slow, if not impossible.

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14 IN\(A\) 208(a)(2)(B); 8 CFR 208.4(a)(2) and 1208(a)(2).
18 8 USC §1158(b)(1)(B)(ii).
An immigration judge may consider a variety of factors when making a credibility determination:

[T]he demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.\(^{19}\)

All of these factors can lead to denials. For example, the demeanor of an asylum seeker might be misjudged by an immigration judge because of cultural differences or trauma. In other cases, a judge might doubt the plausibility of particularly horrific treatment because they have not heard similar stories or entertained similar claims in the past.

Many Mexican asylum seekers are in defensive proceedings either because they asked for asylum at the border or asked for asylum after being apprehended in the United States without immigration status. These individuals have had either a credible fear or reasonable fear interview with an asylum officer, frequently by video conference. Almost all of them have also had a long in-depth interview with a CBP official, either at the border or when they were arrested. As noted previously, these first interviews frequently occur within days or hours of an initial trauma that causes the asylum seeker to flee his or her home. This means that there are two detailed accounts of what happened to the asylum seeker already on the record before the individual asylum hearing. Under the REAL ID Act credibility provisions, any inconsistencies between the statements, or the statements and the testimony provided in court, can legitimately be used by the immigration judge to make a negative credibility decision.

An applicant for CAT relief, D.T., fled from his home in Chihuahua with his family after being shot in the arm by a member of the military. His wife had been beaten so badly that she miscarried. The family fled to the US border and, from there, was taken directly to a hospital where D.T. was cleaned up and given strong pain medication. He was then returned to the border for his initial interview. In that interview he stated that the soldiers came to his house in black trucks. D.T. was detained and his family was released, a not uncommon outcome. He later received a reasonable fear interview where he said that he thought the trucks were dark green and dusty, but it was hard to make out their color. Despite all the other points of consistency in his statements and testimony, his medical records, and his traumatized state when he gave the first statement, the judge used this specific discrepancy to make a negative credibility determination and deny D.T. deferral of removal under CAT.

The CBP and USCIS practice of taking multiple detailed and sworn statements effectively gives immigration judges broad discretion to deny claims. Few people can tell a detailed story three times in the exact same way, especially when stressed, traumatized or injured, or if the recitations are months or years apart. Inconsistencies naturally occur and the REAL

\(^{19}\) 8 USC §1158(b)(1)(B)(iii).
ID Act provisions give immigration judges free rein to use these inconsistencies if they are inclined to issue a negative decision.

In cases where an immigration judge’s credibility decision seems unreasonable and derails a client’s case, appealing to the Board of Immigration Appeals is not a viable solution. First, immigration judges have broad discretion on credibility decisions. Thus, the immigration judge in the case of D.T. was well within his rights to make that decision. Second, even if the asylum seeker can present other evidence that buttresses his or her testimony and can contradict a negative credibility decision, findings of fact (as on credibility) can “be reviewed only to determine whether [they] are clearly erroneous.” Immigration judges should be able to decide credibility based on a wide range of factors. However, the decision should be reasonable, justified and subject to meaningful review.

Judicial Bias in Country of Origin Information

Empirical research on disparities in asylum grant rates has found evidence of country-specific adjudicator bias (Rajmi-Nogales, Schoenholtz, and Schrag 2007). Country of origin bias can be a particular problem for Mexican asylum seekers when it comes to educating immigration judges about the situation in Mexico. Generally, it is difficult to educate an immigration judge on country conditions because of the limited amount of time that they have to commit to each case. However, asylum seekers from Mexico have a different problem. Immigration judges in US-Mexico border communities often think that they already know about conditions in Mexico because of its proximity. However, in reality, many have only a passing, informal knowledge of the country. Immigration judges need to be deliberately and thoughtfully educated about the situation in Mexico so that incomplete or inaccurate information gained from the media or other less reliable sources is not the context for their decision making.

Backlogged Immigration Courts

Another problem for defensive asylum seekers is the massive backlog of cases in immigration courts. According to the Transactional Records Access Clearinghouse, cases have been pending in immigration court for an average of more than 500 days (TRAC 2014). In El Paso, Texas, initial master calendar hearings—case status hearings which take place before the hearing on the merits—are being scheduled up to four years into the future. Though Mexican asylum seekers who are paroled into the United States can obtain work permits immediately under the “paroled in the public interest” category, those who are released on their own recognizance or are bonded out of detention have to wait for years without being able to file their asylum applications and start the clock for employment authorization as asylum seekers. Additionally, people have to live for years in limbo while they wait for their cases to lumber through the immigration courts.

Conclusion

Mexican asylum seekers on the border encounter procedural, practical, political and legal barriers to asylum from the time they encounter immigration officials until a determination is made on their claim. As a result, Mexican asylum claims are weeded out and few are granted. Low US asylum approval rates for Mexicans persist despite a significant quantity of filings from 2008 to 2013, over which time period an estimated 120,000, and possibly more than 130,000, people were killed as a result of the drug war (Molloy 2013). In the midst of a humanitarian crisis in Mexico, the United States should take particular care to live up to its obligations under international law and make its asylum procedures fair and consistent in these cases.

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Humanitarian Protection for Children Fleeing Gang-Based Violence in the Americas

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Executive Summary

By the end of 2011, the US Customs and Border Protection (CBP) began to see a steady rise in the number of Unaccompanied Alien Children (UAC) from Central America, particularly from the Northern Triangle countries—El Salvador, Honduras and Guatemala—arriving to the US-Mexico border. The number of children entering the United States from these countries more than doubled during fiscal year (FY) 2012 and continued to grow through FY 2014. In FY 2013, CBP apprehended over 35,000 children. That number almost doubled to 66,127 in FY 2014, with Central American children outnumbering their Mexican counterparts for the first time. Research has identified high levels of violence perpetrated by gangs and drug cartels in the Northern Triangle countries and Mexico as a primary reason for this surge. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) passed with bi-partisan support in 2008, children from Central America cannot be deported immediately and must be given a court hearing.

In contrast, unless there are indicia of trafficking, Mexican children are returned immediately to their country. Advocates have expressed concern that expedited removal of Mexican children places children with valid humanitarian claims at risk of being returned to harm, including forcible recruitment into drug cartels and trafficking rings. After the spike in arrivals in FY 2014, several members of Congress called for a change in the TVPRA, urging that Central American children be treated like Mexican children and undergo expedited procedures for their removal. Many of their constituents supported such measures. The Obama administration requested additional funds to strengthen border security, speed up deportation procedures and implement measures to address the humanitarian crisis in Central America. Groups and individuals across the

1 The authors would like to thank former Maggio + Kattar interns Catherine Betts, Gillian Davies, Pegah Eftekhari, and Katherine Thacker for significant contributions to this article.

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country came together to provide shelter, medical and psychological care, and legal representation to many of these children. Despite these efforts, much needs to be done to ensure that their rights are protected.

This paper provides an overview of the violence perpetrated by gangs and other criminal organizations which compels many children to flee their communities. It describes the US government’s obligations to protect UAC upon arrival, and good practices of other governments relating to the protection of child migrants and refugees. It also discusses Special Immigrant Juvenile Status, gang-related asylum case law, and the difficulty of prevailing in asylum claims based on persecution by gangs. It concludes with recommendations to the administration and policymakers to ensure compliance with US obligations under national and international laws.

Introduction: Flight from Northern Triangle Countries and Mexico

At the end of 2011, the United States started to experience a dramatic increase in arrivals of Unaccompanied Alien Children (UAC)\(^2\) from Central America, particularly from the countries of El Salvador, Honduras, and Guatemala (CBP 2014). The number of UAC entering the United States from these countries more than doubled in fiscal year (FY) 2012 and continued through FY 2014 (ibid.).\(^3\) The Department of Health and Human Services Office of Refugee Resettlement (HHS-ORR), which provides for the care and custody of UAC, had a record number of 10,005 children in its care by April 2012 (Jones and Podkul 2012). In FY 2013, the US Customs and Border Patrol (CBP) apprehended over 35,000 unaccompanied children. That number almost doubled to 66,127 in FY 2014, with Central American children outnumbering Mexican children for the first time (CBP 2014).

Various studies, including those commissioned by the United Nations High Commissioner for Refugees (UNHCR), the Women’s Refugee Commission, and the American Immigration Council, have attempted to understand the underlying reasons for the dramatic rise in UAC arrivals to the United States\(^4\) (Jones and Podkul 2012; UNHCR 2014a; Kennedy 2014). Interviews with children have identified high levels of violence perpetrated by gangs and drug cartels as a primary push factor (Jones and Podkul 2012; Kennedy 2014). Other

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2 An “unaccompanied alien child” is any child who (1) does not have legal status in the United States; (2) is under 18 years old; and (3) has no parent or guardian in the United States who can care for him or her. 6 U.S.C. § 279(g)(2).

3 During the first quarter of FY 2015, 10,100 children were apprehended at the Southwest border, a 39 percent decrease compared to the same period in FY 2014. However, analysts suggest that the numbers will likely accelerate unless measures to address the root causes of flight are implemented. See Meyer et al. 2015.

4 The United States may not always be the default option. Children often try first to relocate within their country, and, if they have family in a nearby country, they are likely to seek protection in a country other than the United States (Kennedy 2014, 4). In fact, UNHCR reported a 432 percent increase in asylum applications from the neighboring countries of Belize, Costa Rica, Nicaragua, Panama and Mexico by individuals from El Salvador, Honduras, and Guatemala (UNHCR 2014).
reasons for their flight include extreme poverty, domestic violence, family reunification, rumors of immigration benefits, and lack of adequate employment and educational opportunities. A 2014 study conducted by Fulbright Fellow Elizabeth Kennedy in El Salvador found that 90 percent of 322 minors interviewed had family in the United States, but only 35 percent provided family reunification as a reason for attempting to reach the United States (Kennedy 2014, 3). Most of the children interviewed cited fear of crime and violence as the reason for seeking to reunify with family in the United States.

A study by the US Conference of Catholic Bishops found that over 50 percent of children from Honduras, Guatemala, and El Salvador reported that violent crime in their country of origin had influenced their decision to leave home (USCCB 2012, 7-8). About 50 percent of Honduran refugees had witnessed gun or gang-related violence, including the murder of family or friends (ibid., 8-9). Rising levels of gang membership also support the claim that widespread violence and gang activity are an underlying cause of UAC migration to the United States (Seelke 2014). Additionally, children who reach their teenage years start receiving threats and pressure to join gangs, prompting them to undertake a perilous journey at a young age with the hope of attaining long-term security.

This article examines why unaccompanied children have arrived in record numbers to the United States in recent years. It provides an overview of the violence that children face in El Salvador, Guatemala, Honduras and Mexico perpetrated by gangs and other criminal organizations. The article discusses the US government’s legal obligations towards children arriving at its borders and describes good practices of other governments relating to the protection of child migrants and refugees. It describes possible forms of relief from
deportation with a focus on asylum and Special Immigrant Juvenile Status (SIJS). The article concludes with recommendations for the administration and policymakers to ensure that the rights of these children are protected.

Background: Children and Gangs

**Gang Culture in the United States**

Much of the violence in Central America and flight of Central Americans north is the consequence of long-term social inequality and poverty throughout the region. Violence in the region grew and spread in large part due to US support of wars against popular movements seeking social change in Northern Triangle countries in the 1970s and 1980s. The violence and displacement over the past decades are the legacy of these wars with consequences not only in Central America but in the United States as well.6

The origin of gangs in the United States can be traced as far back as the 1780s. Gangs emerged with particular force when waves of Irish, Italian, Slavic and other immigrants came to the country in the nineteenth century (Thale and Falkenburger 2006; Howell and Moore 2010). Gangs in Central American immigrant communities began to develop in Los Angeles by the 1980s, the Mara Salvatrucha (MS-13) and the 18th Street Gang being the most prominent (Thale and Falkenburger 2006, 2-4; Howell and Moore 2010, 9-12, 14; Seelke 2014). Gangs tend to “originate in communities characterized by poverty, racism, disenfranchisement, deprivation, and low levels of social control” and exposure to violent conflict increases the risk of affiliation (Johnson 2006).

US politicians mistakenly believed that deportation of gang members would remedy the gang problem in the United States. This led, in part, to congressional approval of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which significantly expanded the range of criminal activities and convictions for which immigrants could be deported (Thale and Falkenburger 2006, 4; Seelke 2014, 2-3). Persons with certain criminal convictions became subject to deportation regardless of their length of time in the United States, family and community ties, or status as lawful permanent residents (LPRs) (Johnson 2006). Deportations of thousands of Central Americans occurred at the same time as Guatemala and El Salvador were ending long-term civil wars and Honduras was recovering from low-intensity conflict that left more than ten thousand persons disappeared.

The United States has targeted gang members through programs such as Operation Return to Sender implemented in 2006, and the ongoing Operation Community Shield, launched in 2005 (Thale and Falkenburger 2006, 4; Seelke 2014, 15). Unfortunately, the involuntary return of gang members to countries of origin has resulted in strengthening the transnational link between the Central American and US gangs, without curtailing the level of gang violence in Central America or in the United States (Thale and Falkenburger 2006, 4).7

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7 See also Seelke 2014 stating that policymakers in Central America have expressed concerns regarding the
Migration flows have reinforced this link and have contributed to the spread of US gang culture throughout Central America (Arana 2005; Thale and Falkenburger 2006, 4; Howell and Moore 2010, 15; Johnson 2014).

In response, Central American governments have adopted highly repressive policing strategies, often referred to as *mano dura* (iron fist), in order to curtail gang violence and to assert control over the increasing rise in gang membership. *Mano dura* laws and policies have made youth gang membership unlawful and apply more “relaxed evidentiary standards” in legal proceedings against them, resulting in massive detention of gang members and harsh prison sentences (Thale and Falkenburger 2006, 3, 5). Gangs now control many of the prisons in El Salvador, Guatemala, and Honduras, operating their criminal activities form within prison walls. Rather than reducing gang activity, these short-term repressive policies have stimulated gangs to go underground, become more organized, commit more violent crimes, become involved in new types of criminal conduct, and lower their public profile (ibid., 4-5, 11, 20). In addition, gangs are often blamed for crimes actually committed by other parties, and a large number of young men are being arrested merely for having a tattoo or wearing baggy pants (ibid., 3, 5; Seelke 2014, 4).

**Violence in Honduras**

During the last six years, transnational criminal groups, especially Mexican drug cartels, have increased their presence in Honduras. The 2009 coup that removed President Manuel Zelaya from power exacerbated the instability in the country. Shortly after the coup, Colombian drug traffickers changed their routes and made Honduras the primary point for cocaine transfer to the Mexican cartels (Noriega and Lanza 2013). Local gangs such as the 18th Street gang and the Chirizos have grown in great part due to the presence of the Colombian and Mexican cartels (Gurney 2014). The Honduran police force is one of the most corrupt in the Americas. The government often uses the military to enforce the law and the judicial system is weak (InSight Crime 2014). Gang violence, propelled by drug trafficking and weak law enforcement, has made Honduras one of the most violent countries in the region (*The Economist* 2013).

As of 2012, the most recent year for which global statistics are available, Honduras had the highest homicide rate in the world at 90.4 deaths per 100,000 people (UNDOC 2013). Total homicides increased from a total of 2,417 in 2005 to a peak of 7,172 homicides in 2012, before declining slightly to 6,757 in 2013 (Observatorio de la Violencia 2006; 2013; 2014). The most recent reports released by the Honduran government on December 31, 2014, report that the homicide rate has decreased to 66 per 100,000 inhabitants from a rate of 79 per 100,000 in 2013 (Gagne 2014; *La Prensa* 2015). San Pedro Sula and Distrito Central (an area comprising the capital, Tegucigalpa), had the first and fourth highest homicide
rates in the world outside a war zone, at 169.30 per 100,000 and 101.99 per 100,000, respectively (CCSPJP 2013).

Children and teens have been the primary targets of the “significant increase in both inter-gang and generalized violence” (Jones and Podkul 2012, 9). According to the Washington Office on Latin America, “Honduran boys and men ages 15 to 30 have a one in 300 chance of being murdered” (Jesuits and WOLA 2014). Since 2005, the murder rates for women and girls have increased by 346 percent, while murder rates for men and boys increased by 292 percent (ibid.; Observatorio de la Violencia 2006; 2013; 2014). In the first five months of 2014, over 454 young people under 24 years of age were murdered, with 102 murders occurring in May alone. Of these recent homicides, 64 percent of victims were 18 to 23 years old, while 36 percent were under 17 years old (La Nación 2014).

While the statistics do not indicate which proportion of these deaths resulted from gang violence, UNHCR found that about 34 percent of Honduran children were fleeing to escape violence perpetrated by gangs or other criminal groups (UNHCR 2014a). Selvin, a 23-year old Honduran, fled Honduras when he was 16 years old and now lives in Worcester, Massachusetts. He described his experience with gangs as follows: “[t]hose guys, they make you to do things that you don’t want to do. You’re trying to be someone in life, but you can’t, unless you join them selling drugs, killing people. And you didn’t want to do that. You want to be a better person” (Malone and Gaynor 2012).

Police and members of the public in Honduras also engage in violence against poor adolescents, and young men in particular (US Department of State 2014c). Young people who do not belong to a gang and who have not been violently targeted by gangs may fall victim to police and civilian violence, particularly if they are “supposed habitual criminals [or] suspected gang members” and sometimes for no apparent reason at all (ibid.).

**Violence in El Salvador**

El Salvador’s homicide rate declined from 66 per 100,000 in 2011 to 41.2 per 100,000 in 2012 as the result of a truce between its two biggest gangs, the 18th Street gang and MS-13. However, it still has the fourth highest homicide rate in the world (Jones and Podkul 2012, 10; UNDOC 2013, 122-33). While the homicide rate dropped in 2012, the rate of extortion remained the same, or increased in some areas (Villiers Negroponte 2013). As the truce began to break down, homicides increased by nearly 70 percent in the first half of 2014 (Mejia Giraldo 2014; El Espectador 2014). The National Police report a total of 3,912 homicides in 2014—an average of thirteen murders a day—representing a 35 percent increase from the prior year (El Salvador.com 2015).

The 2013 US Department of State Human Rights Report for El Salvador notes that prisoners—including gang members—conduct criminal activities from prison, sometimes with the assistance of prison guards, raising serious concerns about the government’s ability to control the violence, which disproportionately targets children, young adults and single women (US Department of State 2014a).

According to the Women’s Refugee Commission, children are mostly targeted by gang members at their schools, leading to one of the lowest school attendance rates in Latin
Women and girls are particular targets of violence, and 580 out of 4,000 murders committed in 2010 were classified as femicides, or gender-based murders (ibid., 11).

UNHCR noted with concern that 72 percent of Salvadoran children interviewed had traveled to the United States after experiencing severe harm, and 66 percent left specifically to avoid violence by gang or criminal groups or because of police incapacity in the face of such threats (UNHCR 2014, 31). Kennedy found that 59 percent of Salvadoran boys and 61 percent of Salvadoran girls identified crime, gang threats, or violence as a reason for migrating (Kennedy 2014, 1). Gang members threatened and beat Mario, age 17, for instance, when he rebuffed their attempts to recruit him and he reported the threats to the police. When the police failed to respond, he fled to the United States with copies of the complaints he filed with the police. Many of his friends had been murdered or disappeared for refusing to join a gang (Malone and Gaynor 2012).

Children frequently recounted witnessing murders, extortion, and threats to family members. UNHCR reported that while boys most often feared gang recruitment and retaliation, girls feared sexual violence. Maritza, age 15, left El Salvador after her uncle told her that a gang member was planning to hurt her. She stated, “in El Salvador they take young girls, rape them and throw them in plastic bags.” After hearing of the threat, Maritza’s family decided that it was safer to send her to the United States to reunite with her mother than for her to remain at home (UNHCR 2014a, 34).

According to Kennedy, children who do not have a gang presence in their neighborhoods “frequently indicated that they expect one to arrive soon,” viewing it as inevitable (Kennedy 2014). Children are targeted by gangs and police alike and have few opportunities. Carlos, a young Salvadoran, described the challenges he faced as a young man in El Salvador. He stated, “[i]n El Salvador, there is wrong—it’s being young. You’re stalked by gangs, the authorities beat and follow kids because they don’t trust them; they think they are gang members. There are no jobs for young people because employers don’t trust the kids either . . . It is better to be old” (Jones and Podkul 2012).

**Violence in Guatemala**

Almost twenty years after the end of Guatemala’s bloody civil war, the country continues to suffer from pervasive violence committed by gang members and supported by state corruption. Guatemala joins El Salvador and Honduras as a country with one of the highest murder rates in the world. Guatemala’s 2012 homicide rate topped out at 39.9 per 100,000 people, the fifth highest rate in the world (Jones and Podkul 2012; The Economist 2013). Guatemala also has one of the highest rates of femicide in the world, along with Honduras and El Salvador (Musalo and Bookey 2013), and anecdotes of gang-perpetrated rapes and femicides abound (see, e.g., UNHCR 2014a; Jones and Podkul 2012; Musalo and Bookey 2013). Although homicide rates have declined in 2014, UNICEF has named Guatemala as the second most dangerous country in the world for children from zero to 19 years of age; El Salvador placed first (UNICEF 2014; Examiner.com 2014).

The MS-13 and 18th Street gang are Guatemala’s most prominent street gangs. Although
they mainly focus on extortion, they are also involved in other major crimes, including kidnapping and bank robberies. While estimates vary widely, the United Nations Office on Drugs and Crime calculated that there were 22,000 members of the MS-13 and 18th Street gangs in Guatemala in September 2012 (UNDOC 2012). Although both gangs are transnational in nature, they are not as centralized and organized as the Zetas (Daughterty 2015), a violent transnational criminal organization from Mexico.

The Zetas have established operations in Guatemala for their drug trafficking, money laundering, and contraband networks. Their presence dates back to 2008 when they first stored narcotics and arms in the northern region of the country. The Zetas’ control over local police and the military is growing and they launder their proceeds through private businesses and public contracts. The Zetas bribe local police and their supervisors, members of the judiciary, and prosecutors, to provide information and protection for the maintenance and growth of their operations. They also recruit former military personnel—especially those from the Special Forces known as the Kaibiles—to provide security (InSight Crime 2011; Sacks 2013). The Zetas have been responsible for some of the most horrific violence in Guatemala, including the 2011 massacre of 28 farmhands of Los Cocos farm in northern Guatemala (InSight Crime 2011).

Children from the urban areas of Guatemala are amongst the most vulnerable to the long-lasting problems of food insecurity, targeting and recruitment by gang members, and the rise in the use of force and violence on the part of state militarized security forces (Jones and Podkul 2012, 11). The United Nations has criticized Guatemala for the militarization of its police force, raising concerns of greater violations of human rights in the country (Gagne 2015). Only 20 percent of Guatemalan children interviewed by UNHCR reported fleeing violence in society, including gang violence. However, many stated that they were fleeing domestic abuse, extreme poverty, and state-sponsored violations, which make children more vulnerable to gang recruitment (UNHCR 2014a, 34; US Department of State 2014b, 19).

Canilo, a young Guatemalan who fled to the United States because of gang violence, reported that gang members came to the store where he worked and robbed him. He stated, “[t]hey took me out of the store, and they took the money and they beat me up . . . they were following me everywhere” (Malone and Gaynor 2012).

**Violence in Mexico**

There are several major drug cartels operating in Mexico, including the Zetas, the Sinaloa Cartel and the Knights Templar, all of them involved in drug trafficking, human smuggling, extortion, and human trafficking. Armed civilian vigilante groups have formed in a number of areas across the country to defend their communities against cartels (*The Telegraph* 2014).

The war against the cartels launched in 2006 by Mexican President Felipe Calderón has resulted in significant violations of human rights (HRW 2014b). It is estimated that more than 120,000 Mexicans died and 27,000 disappeared between 2007 and 2012 (Molloy 2013). Torture is widely practiced by security forces to obtain information and forced
confessions. The criminal justice system rarely provides justice to the victims of violent crimes and human rights violations (HRW 2014b).

Criminal groups in Mexico often engage children in smuggling activities precisely because US authorities deport them back to Mexico with little delay (UNHCR 2014a, 38). Their age, poverty, and exposure to violence from criminal groups and cartels make children vulnerable to trafficking and exploitation (ibid., 38, 39). Criminal organizations force children to engage in “unlawful and dangerous activities,” including smuggling, which facilitates the flight of families and children from Northern Triangle countries who cross the US-Mexico border to escape gang violence in their home countries (ibid.).

The Zetas also regularly kidnap migrants from Northern Triangle countries in Mexico and demand ransom from their family members in the United States. Franklin, for instance, was 16 years old when he fled Honduras and was kidnapped by Los Zetas in Mexico. He noted, “[t]he Zetas are dangerous. They want money, and they want to know if you have family in the US who can pay.” After five days in captivity, Franklin was able to escape and eventually reached the United States (Malone and Gaynor 2012).

**US Legal Obligations to Children Fleeing Violence in Their Home Countries**

As the number of unaccompanied minors has steadily risen over the years, the US government has developed a structure to address the needs of children seeking protection. In 2002, Congress passed the Homeland Security Act of 2002. The Act eliminated the Immigration and Naturalization Service (INS), created the Department of Homeland Security (DHS) and transferred all of its immigration benefit and enforcement functions to DHS’s Immigration and Customs Enforcement (ICE), CBP, and US Citizenship and Immigration Services (USCIS) (Byrne and Miller 2012, 6).9 The Act also transferred responsibility for the care and custody of UAC to HHS-ORR.10 US law defines UAC as persons under age 18 who lack lawful immigration status in the United States and have no parent or legal guardian who is willing or able to provide them with care and physical custody.11

**TVPRA Screening**

The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 (TVPRA) governs the treatment of UAC arriving in the United States.12 The TVPRA instituted screening procedures for UAC that provide different treatment for UAC

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11 6 USC § 279(g)(2) (2012). Typically, this means that “if a parent or legal guardian is not present to provide care (or cannot be present within a short period of time) that child is technically considered unaccompanied and processed accordingly” (quoted in Zamora 2014). Thus, a child may have relatives in the United States, but if they live on the opposite coast and do not have the money to travel, the child will likely be classified a UAC (see ibid.).
from contiguous countries (i.e., Mexico and Canada) than for UAC from other points of origin (Seghetti, Siskin and Wasem 2014). While federal immigration law mandates that unaccompanied children from non-contiguous countries be admitted and placed into the custody of HHS, similarly-situated children from Mexico do not have the same rights and can be deported within 24 hours of their arrival if they do not have a valid humanitarian protection claim.

CBP must screen all incoming UAC (or suspected UAC) within 48 hours to determine whether they are UAC from a contiguous country and, if so, whether they have been victims of trafficking or persecution (Seghetti, Siskin and Wasem 2014, 3-5). Those UAC from contiguous countries who fear persecution or may have been victims of trafficking must be transferred immediately to HHS-ORR. UAC from contiguous countries who are not found to have a credible fear of persecution or to have been trafficked may be allowed to withdraw their application for admission to the United States and voluntarily return to their country rather than be placed in removal proceedings (ibid.). The number of Mexican children who enter HHS-ORR custody is small (Graham 2014).

Reports have shown that most Mexican children do not receive adequate screening at the border. UNHCR found that despite the US government’s legal burden to establish that each Mexican UAC does not have an international protection need during the TVPRA screening, CBP’s operational practices reinforce a presumption of an absence of a protection need. During field missions to the border, UNHCR personnel observed a bias by CBP officers which desensitized them to the needs of Mexican children (UNHCR 2014b).

ICE must transfer all UAC arriving from non-contiguous countries such as El Salvador, Guatemala, and Honduras to HHS-ORR custody within 72 hours; these children are typically subject to removal proceedings and may begin an application for asylum or other immigration relief in the course of those proceedings (Seghetti, Siskin and Wasem 2014, 3-4, 8).

Prior to the TVPRA, there were many obstacles for UAC who hoped to obtain legal immigration status in the United States, whether through Special Immigrant Juvenile Status (SIJS), political asylum, or other means (USCCB 2012). SIJS applicants often aged out of eligibility because USCIS had no mandatory processing deadline, and some would-be applicants could not even apply because DHS refused to provide its consent, which was a pre-requisite. Furthermore, successful applicants did not have access to the specialized, federally-funded foster care programs that now exist (ibid.). Likewise, underage asylum applicants did not benefit from a tolling of the one-year bar, and they were required to pursue their cases before a federal immigration court instead of through USCIS (ibid.).

Enactment of the TVPRA eliminated many of these barriers (USCCB 2012, 3-5, 8).

13 8 USC § 1232 (2012).
14 8 USC § 1232(a)(2).
17 For those UAC who do not qualify for asylum, SIJS may be the only immigration relief available. SIJS allows children who come to the United States—legally or not—to adjust to permanent resident status if they have been abused, abandoned, or neglected by at least one parent. SIJS may be available to children who are unmarried, under 21, and physically present in the United States at the time of filing (USCIS 2014a).
Additionally, it provided that SIJS applicants only had to prove that reunification with one parent—rather than both—was not possible due to abuse, neglect, or abandonment, and that return to their home country was not in their best interest (ibid., 8). Unfortunately, because of their limited access to this form of protection, Mexican minors who are apprehended at the border are unable to apply for SIJS.

It is important to note that until the recent influx of unaccompanied children at the border, the TVPRA had a history of bipartisan support dating back to 2000, when Congress originally passed the law. The TVPRA was reauthorized in December 2008 by Congress and signed into law by President Bush.

Shortly after the surge in arrivals of families and unaccompanied children at the border in 2014, President Obama requested $ 3.7 billion in emergency supplemental funding to respond to their needs. In response to the president’s request, several members of Congress introduced legislation seeking to amend the TVPRA in order to be able to apply the same standards to Central American children that apply to Mexican children. These bills included provisions to expedite screening and removal of all unaccompanied children arriving at the border and to detain children until proceedings were finalized (Zamora 2014).

With the exception of advocacy groups, few in the public or private sectors have suggested that Mexican children should be provided the same procedural protections at the border as their Central American counterparts. This is particularly troubling given the length and breadth of violence suffered by children in Mexico, including gang and cartel violence, violations committed by the military and police, domestic abuse and human trafficking.

**Apprehension and Detention of Unaccompanied Minors**

Typically, UAC enter the immigration system through apprehension and detention at a port of entry by ICE, CBP or the US Coast Guard. Less commonly, they may be apprehended internally by local, state, or federal authorities (Byrne and Miller 2012, 9-10). In the latter scenario, UAC who have entered the juvenile or criminal system can be transferred to DHS detention facilities (ibid., 10). After DHS takes UAC into its custody, they are then transferred to a temporary detention facility. This temporary detention facility is where preliminary DHS processing occurs, in which an initial determination of UAC status is conducted (ibid.).

If the child is an *accompanied* minor from a contiguous country (Mexico or Canada), he or she will be removed with his or her parent or guardian unless it is suspected that he or she may be a victim of trafficking or fears persecution. If the child is an accompanied minor from a non-contiguous country, he or she will be placed in family detention facilities, from which DHS will initiate removal proceedings. If older than 18 years of age, he or she will be placed in DHS custody, from which point removal proceedings will be initiated.

18 8 USC § 1232(d) (2012).
Different detention procedures apply for unaccompanied children. If the child is unaccompanied, under 18 years of age, and Mexican or Canadian, a voluntary return process will be initiated by DHS unless the child fears persecution or may be the victim of trafficking. If the child is from a non-contiguous country, DHS will initiate removal proceedings and transfer the child to the custody of HHS-ORR’s Division of Unaccompanied Children’s Services (DUCS).

ORR provides care for children in its custody through a network of private and nonprofit entities and governmental juvenile agencies (Byrne and Miller 2012, 14). Services such as education, health care, recreational activities, vocational training, mental health services, case management, and, if possible, efforts to reunite the child with family, must be provided (ibid.; Women’s Refugee Commission 2009, 5).

ORR initially places children according to the information provided by ICE regarding age, gender, country of origin, date and location of apprehension, and medical and psychological condition. Children are placed in shelter care, staff-secure care, secure care, and transitional (short-term) foster care, based on their special needs, criminal record and age (Women’s Refugee Commission 2009). According to a Vera Institute of Justice report, 80 percent of children are transferred to shelter care, four percent to secure care, another four percent to staff-secure care, and the rest to short-term care (ibid., 15).

Typically, when children are transferred to HHS-ORR-affiliated long-term foster care programs, they undergo a second screening process to determine their eligibility for any form of immigration relief, including SIJS, asylum, T non-immigrant visa (T visa), and U non-immigrant visa (U visa) (USCCB 2012, 3-5). However, a study conducted by the US Conference of Catholic Bishops Migration and Refugee Services (USCCB/MRS) revealed that very few UAC who applied for asylum were granted asylum, and none of the UAC in USCCB/MRS custody had successfully applied for a U or T visa (ibid., 12). Children had much higher success rates with SIJS applications (ibid.).

### Protection of Minors: A Global Perspective

**Convention on the Rights of the Child: Providing Emergency and Humanitarian Aid to Children**

As of August 1, 2014, 194 states are parties to the Convention on the Rights of the Child. Although the United States signed the Convention, it has not ratified it. The United States and Somalia remain the only two signatories who have not ratified this treaty. While the Convention is not binding in the United States, many of its provisions have been

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20 See Byrne and Miller 2012 diagramming pathways through the immigration system for an arriving alien child.  
22 Id.
incorporated into US law.\textsuperscript{23}

The Convention defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”\textsuperscript{24} The Convention requires that states parties take appropriate measures to ensure that child refugees and children seeking refugee status receive protection and assistance from the state.\textsuperscript{25} Furthermore, the Convention lays out a number of rights related to the treatment of unaccompanied minors and victims of violence, including:

- States parties are obliged to protect children from trafficking, drugs, and exploitation, whether economic, sexual, or otherwise.\textsuperscript{26}
- States parties must undertake appropriate measures to help child victims heal physically and psychologically from any abuse, exploitation, or violence they have suffered.\textsuperscript{27}
- Children have a right to health care and an adequate standard of living.\textsuperscript{28}
- States must provide care and custody when a child’s parents or guardians are unable or unavailable to do so.\textsuperscript{29}

\textit{Best Interests of the Child Standard and US Practices}

These obligations conform to one of the Convention’s foundational concepts: that states parties must act in the best interests of the child.\textsuperscript{30} The “best interests of the child” standard has deep roots in US domestic and international law (Carr 2009).\textsuperscript{31} In instances of abuse and neglect, child custody battles, and other lawsuits involving children, courts seek to determine the child’s best interests when crafting an appropriate legal solution (ibid., 125-26).

In immigration law, however, the “best interests of the child” standard rarely applies. Prior to 2008, a federal court settlement, known as the Flores Settlement Agreement, served as the guideline for treatment of UAC and included no requirement relating to the “best interests of the child” (Hill 2010, 91-97). The United States added “best interests of the child” language to the TVPRA in 2008, requiring UAC in HHS-ORR custody to “be promptly placed in the least restrictive setting that is in the best interest of the child” (Hill 2010).\textsuperscript{32} However, this standard does not necessarily apply in determining a legal remedy for the

\textsuperscript{23} Databases.
\textsuperscript{24} Convention art. 1.
\textsuperscript{25} \textit{Id.} art. 22.
\textsuperscript{26} \textit{Id.} art. 32–36.
\textsuperscript{27} \textit{Id.} art. 38.
\textsuperscript{28} \textit{Id.} art. 24, 27.
\textsuperscript{29} \textit{Id.} art. 20.
\textsuperscript{30} \textit{Id.} art 3.
\textsuperscript{31} The UN Committee on the Rights of the Child asserts that the standard must be read in light of the Convention’s goals and other protections and should not be taken out of context to justify corporal punishment or more extreme practices detrimental to a child’s life and human dignity. Rep. of the Comm. on the Rights of the Child, at 42 ¶ 61, 65th Sess., UN Doc. A/67/41 (2012), available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhj4NMy4LulTOebFNRdP8XISC5b81sCc2pljDCS0TyCmeD87%2f%2bNSaPeKfgyIT8SjXek9PC0bOS6OpnrW7Yz3UVb6SWt9LEe31wrZbE3d.
\textsuperscript{32} See also 8 USC §1232(c)(2)(A).
child, who may be treated exactly like an adult under US immigration law.\(^{33}\) Furthermore, US immigration law too often discards this standard for the sake of expediency or other priorities (Carr 2009, 126; Cavendish and Cortazar 2011, 46-47). After recent allegations that CBP officers have mistreated UAC while in custody, CBP has initiated an internal investigation, but stories of substandard UAC and family detention conditions abound (Preston 2014; Hennessy-Fiske and Carcamo 2014).

Despite progress in the development of US legal standards governing the treatment of UAC, Human Rights Watch has criticized sub-par screening processes:

> Under current US policy, unaccompanied migrant children who may be refugees must undergo initial asylum screenings and some trafficking screenings by armed and uniformed CBP officers. By contrast, international standards say it is in unaccompanied children’s best interests to be assessed in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques. (HRW 2014a)

Unaccompanied children are generally held in shelters or temporary holding facilities by the US government upon apprehension. While these facilities are distinct from adult detention centers, they are secure. The practice of housing children in detention-like conditions is extremely detrimental to their well-being given their vulnerability (Corlett et al. 2012; Farmer 2013; Plumer 2013). To worsen matters, the United States does not guarantee the right to free legal representation for unaccompanied children, despite international community recommendations that children should be provided counsel especially in court proceedings (Jones and Podkul 2012, 26). The United States recognizes the importance of legal counsel for children in other contexts—its own child welfare system provides representation for minors in the court system as a safeguard of a child’s interests in the outcome of his or her case (ibid.).

**Other Country Practices Relating to Migrant and Refugee Children**

While no one state implements all of the Convention’s articles perfectly, a number have developed practices worth adopting, some of which are detailed below.

**Sweden**

In 2009, Sweden was among the states parties that had strictly complied with the Convention’s recommendations and had implemented new legislation and public laws to enhance and protect the rights of children. For example, 2006 legislation divested the Swedish Migration Board of the care and responsibility of UAC and transferred that responsibility to municipalities, who have more experience in the care and integration of children into their communities.\(^{34}\) Sweden also enacted anti-discrimination legislation,

\(^{33}\) See, e.g., 8 USC § 1158 (establishing requirements for asylum, which apply equally to children and adults).

\(^{34}\) Concluding Observations of the Committee on the Rights of the Child: Sweden, at 2, 51st Session., UN Doc. CRC/C/SWE/CO/4 (2009), on file with the authors [hereinafter Concluding Observations: Sweden].
which entered into force on January 1, 2009. The legislation included age as a protected ground and also prohibited discrimination throughout the education system. Furthermore, it established the Office of the Equality Ombudsman which is responsible for implementing the law.\footnote{Id.}

On a related note, the Swedish Migration Board is very careful in its age assessment procedures for incoming UAC. Children are interviewed by an official who makes an initial determination of age based on a range of factors, not just physical appearance. In cases where the immigrant’s age is uncertain, officials may pursue additional investigation or request x-rays to help determine his or her age (Corlett et al. 2012, 65). In case of continuing doubts, the case will be resolved in favor of the immigrant (ibid.).

Even after the enactment of the Anti-Discrimination Act in Sweden, the Committee on the Rights of the Child, the treaty body which monitors the implementation of the Convention, was concerned that such laws would not eliminate discrimination in practice and criticized “de facto discrimination against and xenophobia and racist attitudes towards children of ethnic minorities, refugee and asylum-seeking children, and children in migrant families.”\footnote{Id. at 14.} The Committee commended legislation passed in 2008 that provides asylum seekers and former asylum seekers a right to health care and medical services similar to that of children with legal residency status.\footnote{Id. at 14.} However, the Committee expressed concern that undocumented children had access only to urgent medical care. It also noted that large numbers of unaccompanied asylum-seeking children disappear from reception centers, even after the responsibility for their housing and custody has been transferred to municipalities. It also criticized the absence of legislation to appoint a temporary legal guardian within 24 hours of a UAC’s arrival.\footnote{Id.}

**Belgium**

Belgium has also implemented a number of praiseworthy laws and programs for the humane treatment of arriving UAC.\footnote{Concluding Observations of the Comm. on the Rights of the Child: Belgium, 54th Sess., U.N. Doc. CRC/C/BEL/3-4 (2010), available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCaghKb7yhsk88r1vpHio%2fg7Mp83cTcS1c05QT5mnR5tnCrmZ3uipq9%2fANFxMfS0dGWgJH76%2bIZ%2f9Ef3M18BxdhvcysWt%2fR46vm6bL6qs8qRTOHy7vbg [hereinafter Concluding Observations: Belgium].} The International Detention Coalition has highlighted Belgium’s guardianship procedures and housing and detention policies as worthy of imitation (Corlett et al. 2012, 66, 75, 85).

Immigration authorities in Belgium have no connection to Guardianship Services, the entity that appoints guardians for arriving children. Ultimately, the guardian ensures the child’s overall mental and physical wellbeing. This involves finding housing and a lawyer for the child and helping him or her to navigate the country’s legal system. It also requires developing a relationship of trust as the guardian proceeds to resolve problems and find a long-term solution for the child (ibid., 66).
Belgium offers a variety of housing options for arriving minors, including collective housing facilities, individual housing, and autonomous living with guidance from guardians (72). Belgium also avoids detaining children and families that are required to return to their country of origin, instead lodging them in “return houses,” where they generally have access to education and appropriate medical care (85).

**Potential Legal Protections for Minors in the United States**

While there exist a number of legal protection options for minors in the United States, including T and U visas, for victims of trafficking and other crimes, DACA, and relief under the Violence Against Women Act, this section will focus only on asylum and SIJS.  

I. Asylum  

A. Eligibility Criteria

US law establishes baseline requirements for asylum in 8 USC § 1158. To qualify, a person must meet the definition of a refugee as defined in the statute, must satisfy procedural filing requirements and must not be statutorily barred from asylum. The Immigration and Nationality Act defines “refugee” as “any person who is outside any country of such person’s nationality… 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…” US law requires that the protected ground (e.g., political opinion, social group) be “at least one central reason” for the persecution.

Most gang-based asylum claims rely on the particular social group or political opinion categories, although cases have succeeded on religious grounds as well, where applicable. Since the issuance of the Supreme Court’s decision in *INS v. Elias-Zacarias*, courts have also put particular emphasis on the “nexus” language in the definition of refugee, which requires persecution “on account of” one of the enumerated protected categories.

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40 For information on T and U visas, visit the website of ASISTA, a nongovernmental organization dedicated to the protection of immigrant survivors of domestic violence and sexual assault at: http://www.asistahelp.org/en/about_asista/.  
41 INA § 208; 8 USC § 1158.  
42 INA § 101(a)(42)(A), 208; 8 USC § 1101(a)(42)(A), 1158. See also, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST. 6223, T.I.A.S. 6577 (establishing the international bases for refugee status, which correspond to the US definition in 8 USC § 1101(a)(42)(A)).  
43 INA § 208(b)(1)(B)(i); 8 USC § 1158(b)(1)(B)(i).  
45 502 US 478, 483 (1992) (holding that neutrality is not a political opinion).  
46 INA § 208(b)(1)(B)(i); 8 USC § 1158(b)(1)(B)(i).
words, there must be some objective indication that the claimant was persecuted because of his or her political opinion, social group, or other category, and not merely because he or she refused to fight with guerillas or join a gang, for example.\textsuperscript{47}

This poses a challenge in asylum cases, where refusal to join a gang does not, on its own, constitute expression of a political or religious opinion or membership in a particular social group.\textsuperscript{48} In fact, “[a]judicators [of gang-based asylum claims] have been quick to conclude that gangs are motivated by the desire to increase their ranks, wealth, or power” rather than by the victim’s political opinion, religion, or social group membership.\textsuperscript{49} This has been particularly problematic in political opinion and religious persecution cases, since persecutors rarely share with their victims the precise reasons for their beating, kidnapping, or torturing (Frydman and Desai 2012, 15).\textsuperscript{50} Social group cases often fail in the first instance on social visibility and particularity grounds, as discussed below (ibid.).

\textbf{B. Gang-Related Asylum Case Law}

\textbf{1. Particular Social Group}

Courts have uniformly adopted the Board of Immigration Appeals’ (BIA) formulation of particular social group in \textit{Matter of Acosta} as one whose members “share a common, immutable characteristic…that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”\textsuperscript{51} \textit{Matter of Acosta} goes on to specify that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience…”\textsuperscript{52}

However, subsequent decisions have altered the \textit{Acosta} formula, creating challenges for gang-based asylum seekers. In 2008, the BIA decided \textit{Matter of S-E-G-},\textsuperscript{53} which officially designated “social visibility” and “particularity” requirements for social group membership. Its companion case, \textit{Matter of E-A-G-},\textsuperscript{54} rejected the claimants’ two proposed social groups for failure to meet these new requirements: (1) “young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons” and (2) “family members of such Salvadoran youth.”\textsuperscript{55} \textit{Matter of E-A-G-} refused social group status to “persons resistant to gang membership” for lack of social visibility\textsuperscript{56} and rejected the proposed group of “young persons who are perceived to be affiliated with gangs” because association with criminal entities—and thus the mistaken perception that one is involved with such entities—cannot underpin an asylum claim.\textsuperscript{57}

\textsuperscript{47} INS v. Elias-Zacarias, 502 U.S. at 483.
\textsuperscript{49} Id.
\textsuperscript{50} Gafoor v. INS, 231 F.3d 645, 650 (9th Cir. 2000).
\textsuperscript{52} Id.
\textsuperscript{53} 24 I&N Dec. 579 (BIA 2008).
\textsuperscript{54} 24 I&N Dec. 591 (BIA 2008).
\textsuperscript{57} Id. at 595–96 (BIA 2008).
The circuit courts have largely adopted the BIA’s “social visibility” and “particularity” requirements from Matter of S-E-G- and Matter of E-A-G-, and generally show no sign of changing course in the near future. However, the Third and Seventh Circuits have refused to defer to these BIA requirements, and the Ninth Circuit seems on course to join them (Frydman and Desai 2012, 3-6).58 Perhaps because of this circuit split, the BIA decided two new cases in 2014 which explicitly attempted to clarify—not overrule—the “social visibility” requirement, which the BIA renamed “social distinction.”59 In doing so, it emphasized that “social visibility” had never meant literal ocular visibility.60 Matter of W-G-R- then stated that “[t]o have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”61 Matter of M-E-V-G- further clarified that the persecutor’s actions or perceptions, though relevant, are not determinative; rather, courts must look to society’s perception or recognition when determining the validity of a given social group.62 The potential repercussions of these decisions are not yet known since the circuit courts have not yet had the occasion to address this new precedent.

While gang-based social group claims are often difficult to prove at the BIA and circuit court level, successful claims before immigration judges indicate an openness on their part to consider them. For example, in one case, the immigration judge determined that the claimants were members of a social group defined by membership in their family and the fact that they were identical twin girls.63 Despite the fact that the girls had never been physically harmed by gang members, the judge found that they had suffered past persecution based on the alleged aggressiveness of certain gang members and the fact that the girls had changed schools and essentially secluded themselves at home, taking taxis between home and school to avoid recruitment, rape, or other misfortune.64 The judge found past persecution but also made sure to analyze well-founded fear of future persecution in case the government appealed the decision.65

Generally, social group cases fall into one of a few categories, some of which have proven more successful than others. Ultimately, the only category of social group claim that almost invariably fails is the claim predicated exclusively on resistance to gang recruitment or

58 See also Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083, 1087-91 (9th Cir. 2013) (holding that “witnesses who testify against gang members” may constitute a particular social group and casting doubt on the BIA’s “social visibility” requirement); Valdiviezo-Galdamez v. Holder, 663 F.3d 582, 606-07 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
62 Matter of M-E-V-G-, 26 I&N at 242–43 (responding to the Ninth Circuit’s decision in Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013)).
63 Matter of M-, at 28 (Jan. 14, 2009), available at: http://www.uscirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asymmetry_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_M%20_IJ_Decision.pdf.
64 Id. at 32.
65 Id. at 35–40.
refusal to join a gang. Courts at all levels have consistently denied these claims, although if they succeed, it tends to be at the immigration judge level. On the other end of the spectrum, claims of persecution based on membership in a particular family are among the most successful. Courts at all levels recognize the family as sufficiently visible and particular, so the major challenge with these groups is proving nexus (Frydman and Desai 2012, 12-14). Claims by former gang members also tend to succeed, although current gang members—active or not—will be denied asylum. Prosecutorial witnesses and police informants have met with less success due to the BIA's decision in In re C-A- which denied relief to “former noncriminal government informants working against the Cali drug cartel.” However, many circuits have since recognized that police informants constitute a particular social group (ibid., 11-12). Relief will therefore largely depend on the federal judicial circuit in which the individual resides (ibid.). Gender-based claims can be successful as well, particularly at the immigration judge level. However, many of the gender social group claims are rejected as overly general, amorphous, unpaticular, or insufficiently visible in society. For example, a particular social group of women between certain ages


67 See, e.g., Matter of __, (Arlington, Va., Aug. 4, 2009), available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_IJ_Decision.pdf; Transcript of Immigration Proceedings, Matter of __, (Harlingen, Tex., Dec. 11, 2002), available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/ES_007.pdf.

68 See, e.g., Aquino Cordova v. Holder, No. 13-1597, 2014 WL 3537873, (4th Cir. July 18, 2014); Martinez-Seren v. Holder, 394 F. App’x 404 (9th Cir. 2012); Matter of C-A-, 23 I. & N. Dec. 951, 959 (BIA 2006) (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”); Matter of S-, (Baltimore, Md., June 11, 2009), available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_S_IJ%20Decision.pdf.

69 See, e.g., Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014); Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (recognizing former gang membership as a valid social group but denying relief on other grounds); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) (denying relief for current gang members); Matter of Edwin Jovani Enamorado, (Harlington, Tex., Nov. 22, 1999), available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/H_008.pdf. But, see Matter of W-G-R-, 26 I&N Dec. 208, 221, 224 (BIA 2014) (denying claim for lack of particularity and nexus).


71 See, e.g., Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013); Garcia v. Att’y Gen., 665 F.3d 496 (3rd Cir. 2011), as amended (Jan. 13, 2012).

72 See, e.g., Perdomo v. Holder, 611 F.3d 662, 666 (9th Cir. 2010) (noting that the BIA has never “specifically addressed in a precedential decision whether gender by itself could form the basis of a particular social group”); In re Sandra, (Baltimore, Md., Nov. 8, 2006) available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/G_008.pdf. But, see Rivera Barrientos v. Holder, 658 F.3d 1222, 1225 (10th Cir. 2011) (affirming the BIA’s refusal to grant asylum, even though the woman had been the victim of gang rape for her refusal to join a gang); Caal-Tiul v. Holder, 582
without more characteristics may be taken as too broad and considered a mere demographic division. Such a group possesses a multiplicity of other characteristics, including lifestyles, diverse cultural backgrounds and religious affiliations. In order to bolster such claims, evidence of other characteristics in addition to gender should be submitted to “…narrow the diverse and disconnected group.” 73

2. Political Opinion

As with social group claims, refusal to join a gang for allegedly political reasons does not typically qualify a person for asylum. Courts almost uniformly deny such cases on two grounds: (1) lack of political opinion or imputed political opinion and (2) lack of nexus (Frydman and Desai 2012, 16-18).74 In fact, since Matter of S-E-G- and Matter of E-A-G-, which addressed political opinion claims as well, no published cases have found that refusal to join a gang substantiates a political opinion asylum claim.75 In those two cases, the BIA found no indication that the gangs’ persecution resulted from respondents’ political or imputed political opinion, stating that it was equally possible that the gangs merely wanted to increase their ranks.76 Even in seemingly worthy cases, like Rivera Barrientos v. Holder,77 the courts have dismissed indications that political opinion caused persecution, concluding instead that recruitment concerns were the gangs’ primary motivation.78

Rivera Barrientos had responded to MS-13 recruitment attempts saying, “[n]o, I don’t want to have anything to do with gangs. I do not believe in what you do,,” to which they responded “[i]f you don’t want to join with us, if you don’t participate with us, if you are against us, your family will pay.”79 Later, MS-13 members gang-raped her, but the circuit court still determined that this could have occurred just as much for recruitment purposes as for her political opinion.80 Under the Immigration and Nationality Act, an applicant for asylum must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the claimed persecution.81 Concerns have been raised that courts are misinterpreting the “one central purpose” language in the statute to mean “the central purpose” when analyzing nexus in political opinion cases and, thereby, impermissibly limiting other potential purposes (Frydman and Desai 2012, 17). Courts seem to approve such claims only when the applicant was already a member of a group that the persecutors viewed to be a political opponent.82

Political opinion cases based on extortion or on a person’s decision to become a police

F.3d 92 (1st Cir. 2009) (rejecting asylum based on membership in the social group of “indigenous women”). 73 Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010).
74 See, e.g., Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010); Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008).
75 Mendez-Barrera v. Holder, 602 F.3d at 16–18.
77 658 F.3d 1222 (10th Cir. 2011).
78 Id. at 1225, 1228.
79 Rivera-Barrientos v. Holder, 666 F.3d 641, 643 (10th Cir. 2012).
80 658 F.3d at 1228.
82 Escobar v. Holder, 657 F.3d 537 (7th Cir. 2011) (member of Columbia’s Liberal Party); Martinez-Buendia v. Holder, 616 F.3d 711, 717 (7th Cir., 2010) (member of Colombian Health Brigades).
informant also tend to fail due to lack of nexus because courts attribute greed and a desire for retribution as the primary motivators for gang persecution in such cases (ibid., 18-19).

Cases at the immigration judge level seem to meet with more success. For example, applicants have received asylum for imputed political opinion based on family members’ politics and for repeated refusal to join a gang. In other cases, belief in the rule of law and opposition to “crime and the criminal lifestyle” constituted a political opinion.

3. Religion

Claims based on religious persecution can be successful, particularly at the immigration judge level. When they fail, it is often for lack of nexus. In fact, circuit courts that have adjudicated gang-based religious persecution cases have not yet approved a case, each finding lack of a sufficient nexus. However, these cases either lacked evidence that gang members knew of and cared about the claimants’ religious views, or they involved a mixed-motive, and the courts found personal and financial reasons to be the initial and central cause of the persecution. Thus, there is no reason to believe that these claims will continue to fail in the circuit courts if the nexus between religious views and persecution can be established. In cases in which gang members knew of the claimant’s religious opinions before approaching them, the claim would be better-situated than those which the circuit courts have addressed thus far.

II. Special Immigrant Juvenile Status (SIJS)

For those UAC who do not qualify for asylum, SIJS may be the only immigration relief available. SIJS allows children who come to the United States—legally or not—to adjust

87 See, e.g., Bueso-Avila v. Holder, 663 F.3d 934 (7th Cir. 2012); Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010); Quinteros-Mendoza v. Holder, 556 F.3d 159 (4th Cir. 2009).
88 Bueso-Avila, 663 F.3d at 938; Mendez-Barrera, 602 F.3d at 27; Quinteros-Mendoza, 556 F.3d at 164.
89 Bueso-Avila, 663 F.3d at 938; Mendez-Barrera, 602 F.3d at 27.
to LPR status if they have been abused, abandoned, or neglected by at least one parent.\textsuperscript{90} SIJS may be available to children who are unmarried, under 21, and physically present in the United States at the time of filing (USCIS 2014).

To qualify, a US state juvenile court must designate the UAC a dependent on the court and declare that the UAC cannot reunite with one or both parents due to abuse, abandonment, neglect, or similar reasons (USCIS 2011). Furthermore, the juvenile court must determine that “it is not in the best interests of the child to be returned to his or her country of citizenship” (ibid.). After the juvenile court makes this factual finding, USCIS can adjudicate the immigration application and grant SIJS (ibid.).

Although a grant of LPR status to an unaccompanied child is certainly a positive outcome, it does not come without a price. The law prevents a child from petitioning for a parent or a sibling based on his or her LPR status. In addition, the family court process can place a child in the uncomfortable and difficult position of alleging neglect against his or her parents who have made the difficult decision of sending their child north on a dangerous journey. Parents must decide between the dangers at home versus the journey north with the hopeful goal of protection for their child in the United States, and children typically find no fault in their parent’s decision.

The number of applications for SIJS has steadily risen over the last years from 1,645 in 2010 to 3,993 in 2013 (USCIS 2013). These numbers are low in comparison to the potentially thousands of eligible children who enter the United States on a yearly basis. Lack of counsel and the bifurcated nature of SIJS proceedings, which involve family courts and USCIS pose a real challenge in identifying and obtaining SIJS for many children.

**Conclusion**

There are a number of ways in which the US government, nongovernmental organizations (NGOs), and individuals can work together improve protection of unaccompanied children fleeing their countries. Local and state bar associations across the United States are working with immigration and family lawyers within their ranks to create \textit{pro bono} programs to identify and provide representation to children. Immigration courts are working closely with NGO advocates and private attorneys to create Friend of the Court programs, encouraged by the Executive Office for Immigration Review (EOIR), to better adjudicate children’s cases.\textsuperscript{91}

Several medical-legal-social partnerships have been created in cities, including New York, Philadelphia, San Francisco, Los Angeles and in the Rio Grande Valley. A large number of children are fleeing their countries of origin because of violence and trauma. While the most pressing needs may be medical attention and legal representation for children shortly after their arrival, psycho-social support is vital in the long-term for them and for their caregivers.

\textsuperscript{90} INA § 245(h) (2012); 8 USC § 1255(h) (2012); INA § 101(a)(27)(J) ; 8 USC § 1101(a)(27)(J) (2012).

In order to comply with national and international obligations, the Obama administration and policymakers should focus on the following:

- **Additional personnel to adjudicate claims:** The number of immigration judges and USCIS Asylum Officers is insufficient to adequately and fairly process the claims for protection filed by children. As a result, backlogs have increased in the adjudication of cases in both the courts and before the USCIS Asylum Office. There are over 430,000 cases pending on the dockets of 260 immigration judges sitting in 58 immigration courts across the country. Cases remain pending on some court dockets for up to 800 days.\(^92\) The number of applications for asylum filed in immigration court and with USCIS in 2014 rose to 121,200 claims—44 percent more than the number filed the previous year (UNHCR 2014c, 3).\(^93\) As a result of the overload of cases, applicants who file with the USCIS Asylum Office can expect long delays as they wait to be interviewed, in some cases from one to two years (Carlson 2015). Resources should be provided to train and hire new immigration judges and asylum officers immediately in order to assure that due process rights of both the children and those affected by the backlogs are protected. Long delays adversely affect the asylum process. Witnesses may no longer be available. Memories fade. Torture victims suffer greatly when they are unable to present their claims in a timely fashion. They are left in a state of limbo, which can and often does cause psychological harm.

- **Incorporating “best interests of the child” standard into all decision-making, not just custody decisions.** The bipartisan immigration reform bill passed by the Senate in 2013, S. 744, would require CBP to give “due consideration” to the best interests of the child, “family unity” and “humanitarian concerns” in repatriation decisions. Amendment 1340 to that bill, which was unfortunately not included in the Senate vote, would have made the best interests standard the “primary consideration” in all federal decisions involving unaccompanied children. Congress should pass S.744 and include the amendment.

- **CBP screening:** Organizations and individuals have raised concerns regarding the Border Patrol’s ability to fairly screen children from contiguous countries for trafficking and persecution and to prevent the return of children to persecutors or abusers. Measures must be taken to improve the screening process. Men and women in uniform with weapons should not question children. CBP screeners should, at minimum, be paired with child welfare experts or NGO personnel, as proposed in S. 744. Alternatively, CBP screeners should be replaced with USCIS asylum officers.

- **Due process protections:** Organizations and individuals have advocated for a system which provides greater procedural protections, resources, and time to protect families and children under the law without unduly delaying the adjudication process. These measures can and should include access to court-appointed counsel and legal orientation programs. US immigration law has been


\(^93\) For more on the USCIS asylum backlog, see Matza 2015.
likened in complexity to US tax law. Thus, the need for adequate and free counsel along with understandable information on the legal process is vital to protect children fleeing the violence in their countries.

Efforts to address the problems arising as a result of the violence in the Northern Triangle countries and Mexico should not be limited to the United States. Mexico, Guatemala, El Salvador, Honduras and the United States must share responsibility for addressing the push and pull factors of refugee flows northward. A human rights-based approach must form the basis for collaboration and should prioritize the following: 94

- **Promote sustainable economic development**: Development should focus on job creation, training and education to provide opportunities for young people in sending countries.

- **Sponsor violence prevention programs**: Funding should be funneled to credible and successful violence prevention programs in communities, to reintegration efforts for young people seeking to leave behind the influence of gangs, and for the protection of children who have suffered or are at risk of violence. Organizations in the United States such as Homeboy Industries in Los Angeles, internationally recognized as one of the most successful gang intervention and reentry programs of its kind, can provide a model for the creation of similar programs in the Northern Triangle countries.95

- **Strengthen civilian institutions**: In order to effectively confront and resolve problems of organized crime, gangs and insecurity, the Northern Triangle countries, Mexico, and the United States should work together to create and support professional and accountable police forces and an unbiased and effective criminal justice system. Civilian institutions, not the military, should be responsible for criminal investigations, prosecutions and sentencing. The United States is urged to share its resources and experiences in strengthening institutions to effectively enforce laws against organized crime within its borders.

- **Combat corruption and increase accountability**: Strong programs must be established to increase transparency and accountability to address deep corruption which prevents access by individuals to services, weakens state bodies, and poisons democracy.

The United States is urged to support governments and agencies whose leaders demonstrate a serious commitment to strengthening civilian-led enforcement, sound prosecutions, and the rule of law. Sending countries must encourage and create conditions necessary for the effective participation of civil society in this process; otherwise, it will fail.

94 The Washington Office of Latin America published these suggestions after a meeting of Vice-President Joseph Biden, the presidents of El Salvador, Guatemala and Honduras and Inter-American Development Bank President Luis Alberto Moreno on November 14, 2014, during which they discussed a joint plan to respond to the underlying conditions driving migration from Central America. More information is available at: http://www.wola.org/sites/default/files/SIF-CAmericaAd-ENG-WEB-FNL-1118.pdf.

95 For more information on Homeboy Industries, visit its website at http://www.homeboyindustries.org/why-we-do-it/.
Although unexpected numbers of migrants and refugees—especially vulnerable families and children—certainly pose challenges for the US government, measures consistent with US legal and moral obligations must be taken to protect those seeking refuge and safety in our nation. We should heed Pope Francis’ call that “these children be welcomed and protected” as he stated during his 2014 Colloquium on Migration in Mexico (Blumberg 2014). To do otherwise runs contrary to our identity as a nation.

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Humanitarian Protection for Children Fleeing Gang-Based Violence


Children’s Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects

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Executive Summary

In light of rising numbers of unaccompanied minors at the Mexico-US border in 2014, this article examines child migration from Mexico, Guatemala, El Salvador, Costa Rica, and Nicaragua. Using data from the Mexican and Latin American Migration Projects that permit us to go beyond simple descriptive analysis about children apprehended at the border, we investigate the extent to which children from these countries: (1) enter without legal authorization to do so; (2) are more likely to cross the border now than in the past; and (3) are tied to their parents’ migration. In theory, if immigration and refugee protections worked well for children and offered them legal pathways to reunify with their families, then we would expect low levels of unauthorized entry and no dramatic shifts over time. However, our examination of child migration shows that it is strongly linked to unauthorized entry, period of entry, and parents’ US experience.

The findings show that the migration of children is closely linked to their parents’ migration history. Although the overall likelihood of a Mexican child making a first US trip is quite low, it is practically non-existent for children whose parents have no US experience. Thus, the increase in child migration from Central America, and the continued high levels of child migration from Mexico result from widespread migration networks and the United States’ long-standing reliance on the children’s parents as immigrant workers. The findings suggest that these children need protection in the form of family reunification and permanent legal status.

1 We are grateful to the generous support received from Vanderbilt University’s College of Arts and Science for this project.

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Introduction

In 2014, the number of unaccompanied children detained at the Mexico-US border for attempting to cross without legal documents rose dramatically to almost 68,000. The US Customs and Border Protection (CBP) reported a surge in the number of children (up to 17 years of age) from El Salvador, Guatemala, and Honduras from approximately 1,000 per nation in 2009 to between 16,000 and 18,000 per nation in 2014, and high numbers from Mexico (averaging close to 15,000 per year) (CBP 2014). In prior fiscal years, total apprehensions of unaccompanied children increased from 16,067 in 2011 to 24,481 in 2012 and 38,833 in 2013 (Chishti and Hipsman 2014). Media coverage of the 2014 surge was extensive. Caldwell (2014a) and others described thousands of children as “alone” without parents or other relatives. Photographs showed young children with fearful faces from behind iron bars in sterile institutional settings, and reports described them as being scared, hungry, and tired (Caldwell 2014b).

In light of rising numbers of unaccompanied minors at the Mexico-US border, we examine child migration from Mexico, Guatemala, El Salvador, Costa Rica, and Nicaragua. Using data from the Mexican and Latin American Migration Projects2 that permit us to go beyond simple descriptive analysis about children apprehended at the border, we consider the extent to which children from these countries: (1) enter without legal authorization to do so; (2) are more likely to cross the border now than in the past; and (3) are tied to their parents’ migration.

When attempting to understand children’s growing presence at the border, many cite the difficult and dangerous conditions that children face in Mexico and countries in Central America including high levels of violence and poverty. Such explanations imply that children are rational actors who, like many international migrants, calculate the costs and benefits of migrating versus staying at home. Evidence from our analysis offers a correction to such narratives by underscoring that children’s migration is strongly linked to that of their parents. Unlike other children who face similarly difficult (or worse) conditions in everyday life around the world, children from Mexico and Central America have access to migrant human capital in the form of their parents’ US experience. Therefore, rather than viewing them as independent, rational actors who, on their own, decide to leave dangerous conditions and/or limited economic opportunities in their homelands, we suggest that many children are migrating together with their parents or based on information and other resources related to parents’ migration experiences. Violence and poverty are structural conditions that underlie migration decisions, but on their own, they do not predict child migration.

2 The Mexican Migration Project (MMP) gathers data from households and communities about Mexico-US migration. Created in 1982, data are collected from new households and communities each year and added to the dataset. All data are available to the public (mmp.opr.princeton.edu). Each household sample represents households in that community in a given year. In addition, each community’s household sample is supplemented by a small number of interviews with migrants who left their community of origin to permanently migrate to the United States. The Latin American Migration Project (LAMP) is an extension of the MMP. LAMP data have been collected in many countries in Central and South America, including Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, and Peru (lamp.opr.princeton.edu). Unfortunately, Honduras is not included in the dataset.
If most unaccompanied child migrants have parents or other relatives in the United States, they should be eligible for protections under a comprehensive immigration system that safeguards the rights and outcomes of children. Yet, recent reports document cases of unaccompanied minors that have been issued deportation orders upon arrival in the United States even though their parents are residing in the country legally with Temporary Protected Status (Sacchetti 2014). Unfortunately, this treatment occurs because contemporary immigration policy has been driven largely by security and enforcement since the 1990s, and especially after September 11, 2001 (Massey, Durand, and Malone 2002; Kerwin 2012).

In theory, if immigration and refugee protections worked well for children and offered them legal pathways to reunify with their families, then we would expect low levels of unauthorized entry and no dramatic shifts over time. However, our examination of child migration from Mexico and four Central American nations shows that it is strongly linked to unauthorized entry. In addition, for children from Mexico, we see that, net of other factors, their lifetime chances to migrate without authorization are substantially higher if their parents are migrants and these chances fluctuate considerably across recent periods.

**Children in the Process of Migration**

The World Bank (2006) estimated that young people, defined as those between 12 and 24 years of age, make up one-third of all international migrants, and as a consequence, migrant youth have become a major economic development issue. For Mexican immigrants in the United States, the share of youth is lower but still substantial: approximately 14 percent of all Mexican immigrants are aged 19 or below (Gans 2009). This suggests that a sizeable number of Mexicans who migrated to the United States did so when they were children (ibid.). Moreover, using IPUMS-International data from 11 censuses, McKenzie (2008) shows that the migration of youth was largely tied to that of their parents; children often migrated with parents or made trips to join their parent in host societies.

Since the 1990s, scholars have begun to focus on children in the migration process. Some have examined the consequences of US migration for children (Kanaiaupuni and Donato 1999a, 1999b; Donato, Kanaiaupuni, and Stainback 2003; Menjivar and Abrego 2009; Donato and Duncan 2011; Nobles 2011; Dreby 2010, 2012; Adsera and Tienda 2012). Others have analyzed the experiences of the children of global immigrants (Portes and
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Rumbaut 2001; Farley and Alba 2002; Portes, Fernandez-Kelly, and Haller 2005; Kasinitz et al. 2010; Mazzucato and Schans 2011; Bledsoe and Sow 2011; Graham and Jordan 2011; Lee and Zhou 2014). Finally, recent scholarship has examined the experiences of unauthorized Latino immigrant youth in the United States, especially as they transition into adulthood (Abrego and Gonzales 2010; Gonzales 2011; Abrego 2013; Enriquez 2014).

Yet exactly how children are involved in border crossing is less well understood. In the Mexico-US case, studies describe an intergenerational process whereby migration has been passed down from one generation to the next, especially from fathers to sons (Reichert and Massey 1979; Massey et al. 1987; Massey and Liang 1989). Other studies refer to child migration but they do not explicitly target their movement as a focus for study. For example, when describing the pre-1965 and post-1965 phases of Mexico-US migration, Reichert and Massey (1979, 1980) report only that many women and children migrated to join former agricultural workers who had become legal US immigrants. Theoretically speaking, Stark (1991) and others imply that children are involved in the migration process in arguing that households—and not individuals—make migration decisions which seek to diversify household risks and costs. Relatedly, women and children enter the migration process as it unfolds over the lives of Mexican communities and households (Massey, Goldring, and Durand 1994); when Mexican communities first participate in out-migration, they usually send mostly young single men who cross without documentation for US farm or other unskilled jobs. Over time, however, as migration streams mature, many women and children accompany male family members from Mexican communities (Reichert and Massey 1980; Fonseca and Moreno 1988; Goldring 1990; Durand and Massey 1992; Donato 1993, 1994; Cerrutti and Massey 2001; Donato, Wagner, and Patterson 2008; Creighton and Riosmena 2013).

In contrast, Tucker and colleagues (2013) explicitly consider how Mexican youth, aged 14-24, make migration decisions using data from semi-structured interviews. Like many adults migrating northward, youth with prior US experience reported that economic hardship and difficulty finding a job were their main reasons for migrating. Furthermore, their decision to migrate depended on their parents because most migrant children accompanied their parents. However, among those interviewed who had never migrated, adolescents and young adults wanted to remain in Mexico. These youth had no plans to migrate because they could envision economic opportunities for themselves in Mexico and because they feared the difficulties they would face crossing the border and living in the United States without authorization.

Therefore, although studies point to children and young adults in the Mexico-US migration process, most do not focus on children’s experiences per se. Furthermore, it is unclear the extent to which children migrate with their parents. If it is true that children have fueled Mexico-US migration for decades, then understanding how, when, and with whom they move is important to understanding children’s movement from nations in Central America. Moreover, even if parents are an important trigger of children’s migration, studies have yet to empirically examine how children’s migration prospects vary by different periods of entry and legal status—an important task given the emphasis on security and enforcement in US immigration policy since September 11, 2001 (Kerwin 2012).
Push and Pull Factors

No agreement exists about the push and pull factors that underlie the recent rise in the number of child arrivals in the United States (Chishti and Hipsman 2014; Kandel et al. 2014). Yet, although the “precise combination of motives” behind the rising numbers of child migrants is not clear, three conditions—limited economic and educational opportunities, family reunification, and recent US immigration policies—are certainly implicated (Kandel et al. 2014, 12). So is the violence that children face, especially in some Central American countries. For example, Honduras, El Salvador, and Guatemala are among the top five nations with the highest murder rates, and they are also known for having smugglers that recruit young children to migrate (Kennedy 2014). These and other conditions were described by children who entered the United States after 2011, and who were interviewed by the United Nations High Commissioner for Refugees (UNHCR) Regional Office for the United States and the Caribbean. They gave protection-related reasons for migrating which suggest that most children in El Salvador, Guatemala, Honduras, and Mexico “may well be in need of international protection” (UNHCR 2014, 6).

In addition to personally threatening conditions, children in these nations face limited economic and social mobility. For example, in Mexico, which is considerably wealthier than other nations in Central America, student performance in schools remains well behind that of other Organization for Economic Cooperation and Development (OECD) countries, despite the government’s sizable investments in Mexico’s educational system since the 1990s (Acevedo and Salinas 2000). In 2012, Mexico had one of the highest rates of preschool enrollment but its effectiveness was challenged by high student-teacher ratios (OECD 2012). In addition, although Mexico expanded compulsory attendance to the secondary level in 1993, secondary school graduation rates remain very low.

Complicating the story is an enforcement-first US immigration policy regime that has made conditions difficult for all immigrants (Meissner et al. 2013; Aranda, Menjivar, and Donato 2014; Donato and Sisk 2013). As a consequence, more unauthorized immigrants have settled rather than returned home after working temporarily in the United States (Massey, Durand, and Malone 2002). With enforcement spending much larger than it was in 1986 and billions spent on CBP and Immigration and Customs Enforcement each year (Meissner et al. 2013), immigrant families have lived in a context of pervasive fear and anxiety since the mid-1990s (Rodriguez and Hagan 2004). More deportations have created family trauma (Hagan, Castro, and Rodriguez 2009; Hagan, Eschbach and Rodriguez 2008; Hagan et al. 2003), which is especially injurious for children (Dreby 2012).5

Not surprisingly, these structural conditions drive “the desire for family reunification” (Kandel et al. 2014, 15). However, children are migrating temporarily because many who reside in Mexico, El Salvador, Guatemala, and Honduras have ties to parents in the United States. UNHCR (2014) reports that 22, 49, 27, and 47 percent, respectively, of unaccompanied children entering the United States from these four countries since 2011 had at least one parent living in the United States. Some Central American parents residing in the United States, such as El Salvadorans, Hondurans, and Nicaraguans, have Temporary Protected Status, but it cannot be extended to their children or other beneficiaries without

5 Studies also describe a wide range of other consequences (see Garcia 2010; Armenta 2012; Donato and Rodriguez 2014).
US Senate support (Kerwin 2014; Bergeron 2014).

At the center of public debates about the rising numbers of unaccompanied minors at the US border are provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. It guides the treatment of minors being apprehended at the border, and mandates that only those from contiguous countries—Mexico and Canada—may be quickly processed and deported. Children from non-contiguous countries, such as those in Central America, are placed in formal removal proceedings and, after processing, are released to parents or other relatives who will care for them as they wait to appear in front of an immigration judge as part of formal removal proceedings. As a result of immigration court backlogs, however, unaccompanied minors apprehended during the summer of 2014 were given a waiting period of approximately two years for their court dates. Chishti and Hipsman (2014) suggest that long-waiting periods, as well as the Deferred Action for Childhood Arrivals (DACA) program, have helped to create a perception among many potential migrants that the United States’ treatment of minors “has softened in recent years” and the “false idea” that the children entering now could receive legal status. Thus, more children may be attempting to enter because they believe they will ultimately receive permission to remain permanently in the United States.

Data and Methods

Given this backdrop, we analyze data about child migration from the Mexican and Latin American Migration Projects (MMP and LAMP). Although they cover periods when child migration from Central America represented a small share of overall child migration, these data offer three important advantages. First, they give us an opportunity to go beyond simple descriptive results, such as those using US Customs and Border Patrol data to describe recent patterns and shifts in unaccompanied minor apprehensions at the southwest border. Second, MMP and LAMP data tell us about all children who migrate rather than only unaccompanied minors apprehended at the Mexico-US border. And third, the data permit us to consider whether there are social protections that work for children; if they exist and work well, then we would expect low levels of unauthorized entry and no dramatic shifts over time.

Using detailed information on the social and demographic characteristics of children and their parents from the MMP and LAMP, we consider how many children make a first US trip, where they come from, and the extent to which their crossing is linked to family reunification, unauthorized status, and particular periods of entry. In addition, we use the larger MMP sample to examine how children’s propensities to migrate vary by: (1) parents’ migration histories; (2) children’s period of entry; and (3) legal status, controlling for the effects of other factors. Using life table analysis, we also show how children’s cumulative

6 Minors entering from Mexico and Canada are summarily deported only if screening results show they are not trafficking victims or have asylum claims based on a credible fear of persecution or torture.

7 The LAMP and MMP data reported here were not designed specifically to examine the migration experiences of children; however, the survey design allows us to investigate some elements of child migration, especially how it relates to parents’ experiences and legal status.
migration chances (up through age 17) vary by these three characteristics.

The analysis is divided into two sections, the first of which is a descriptive analysis of MMP and LAMP data. For the descriptive analysis, we illustrate the extent that children from four Central American countries and Mexico make a first US trip. To make the descriptive analysis comparable across countries, we use surveys conducted from 2000-2013. We use all LAMP countries in Central America (Nicaragua, Costa Rica, Guatemala, and El Salvador); these data include 23 communities and, within each, 4,112 randomly chosen households. For Mexico, we use MMP data from 71 communities and 10,723 randomly chosen households. For all countries, the analysis is limited to respondents residing in households where they are categorized as a child of the head of household and are 40 years of age or younger at the time of the survey.

With these sample restrictions, we create a sample of Mexicans and Central Americans who migrated to the US as minors between 1977 and 2013, with information about the legal status of those trips and migration history of their parents.

The second section is a multivariate analysis of MMP data. Because MMP data represent many more respondents than the LAMP, the second half of the analysis uses multivariate regression and life table techniques to examine how children’s migration from Mexico varies by parents’ migration, legal status, and period of entry, net of other factors. This analysis is restricted to children residing in two-parent households and to those with at least one biological parent in the household. The MMP’s larger sample of communities reflects the project’s longer history (since the mid-1980s) and includes an economically and geographically diverse set of sending communities. Unlike the descriptive analysis, the larger sample size allows us to limit the multivariate analysis only to respondents who are aged 17 or younger at the time of the survey. We also use data from surveys conducted from 1987 to 2013.

Given each child’s date of birth and the year of the survey, we construct a year-by-year life history up to the date of the child’s first US trip. The outcome measure is whether the

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8 Unfortunately, Honduras is not included in the LAMP dataset.
9 We use data from 9 communities and 1,789 households in Nicaragua, 7 communities and 1,428 households in Costa Rica, 3 communities and 513 households in Guatemala, and 4 communities and 382 households in El Salvador.
10 Although it may be preferable to restrict the analysis only to respondents who are minors at the time of the survey, we are unable to do so because of the small sample size of respondents who migrated as children in the LAMP data.
11 The majority were interviewed in Mexico or Central American origin communities; the US samples accounted for less than two percent of our total sample.
12 In a separate analysis, we added children from one-parent households to those from two-parent households and re-estimated the multivariate models by including a 0,1 dummy variable to control for children in one-parent households. We also ran separate models by family structure. Although children from one-parent households were slightly more likely to make a first US trip, the findings reveal no substantive differences for children in two versus one-parent households in the coefficients for predictors of a first US migrant trip (analysis available upon request). Thus we chose to display results from the two-parent household analysis.
13 That is, we built a discrete-time person-year file that followed each child from birth to the date of their nineteenth birthday or to the first US trip, whichever came first.
child migrated within the person-year in question. If he/she did not migrate in a given year, the migration variable is coded 0; if he/she migrated in that year, it is coded 1, and all later years of life are excluded from the file. In every year when migration occurred, we also record legal status (authorized or unauthorized).  

We regress the 0-1 migration variable on indicators representing legal status, child’s period of entry, parental migration history, gender, age, and type of origin community from which the migration occurred. Children’s period of entry includes: before 1987, when Mexico-US migration was largely predictable and circular; 1987-96, immediately after passage of the 1986 Immigration Reform and Control Act (IRCA) which increased border enforcement funds and offered amnesty to approximately three million previously unauthorized immigrants; and 1997-2011, a period after passage of the 1996 Immigrant Responsibility and Act which strengthened IRCA’s enforcement provisions and set new standards that criminalized immigrants. This period also covers post-September 11, 2001, during which immigration became a national security issue and the Department of Homeland Security was established. We capture the migration history of both parents in the household relative to children in three categories: either of the parents migrated in a year before the child migrated; either of the parents migrated in the same year as the child migrated; and both parents did not migrate (reference category). Finally, in addition to gender and age, we include a measure of the metropolitan status of the community of origin (large metropolitan status is the reference).

**Descriptive Results**

Table 1 presents three different sets of percentages to assess national origin differences in child migration calculated from the LAMP and MMP data. Panel A shows the percent of sons and daughters who were 40 years or younger at the time of the survey and reported a first US trip from surveyed households from Mexico, Nicaragua, Costa Rica, Guatemala, and El Salvador. Approximately 10 percent from Mexico had migration experience, compared to 4.7 percent for those from Nicaragua, 5.8 percent from Costa Rica, 8.1 percent from Guatemala, and 14.3 percent from El Salvador. That most percentages were significantly lower than Mexico’s is worth noting, except for El Salvador; its percentage well exceeds Mexico’s.

Similar national origin differences appear in Panel B, which presents the percentages of all sons and daughters who made a migrant trip as a minor by national origin. Although overall percentages are smaller because of the additional restriction that migrants crossed at ages younger than age 18, rates remained higher for Mexicans than for Nicaraguans and Costa Ricans (3.4 versus 2.2 and 2.2, respectively). Moreover, although rates did not significantly differ between Guatemalans and Mexicans, El Salvadorans reported a significantly higher share of sons and daughters who made first trips as minors (5.3 percent).

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14 Legal (or authorized) child migrants had valid US documents to enter and reside in the United States; unauthorized migrants did not.
Table 1. Migration Characteristics of Sons/Daughters in Household Ages 40 and Below, by Country

<table>
<thead>
<tr>
<th>Panel A: Percent of All Sons/Daughters Reporting US Migration Trip</th>
<th>Mexico</th>
<th>Nicaragua</th>
<th>Costa Rica</th>
<th>Guatemala</th>
<th>El Salvador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent</td>
<td>10.0</td>
<td>4.7*</td>
<td>5.8*</td>
<td>8.1*</td>
<td>14.3*</td>
</tr>
<tr>
<td>Total N</td>
<td>33,195</td>
<td>5,384</td>
<td>3,652</td>
<td>1,514</td>
<td>892</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel B: Percent of All Sons/Daughters Reporting US Migration Trip as a Minor (Age &lt; 18)</th>
<th>Mexico</th>
<th>Nicaragua</th>
<th>Costa Rica</th>
<th>Guatemala</th>
<th>El Salvador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent</td>
<td>3.4</td>
<td>2.2*</td>
<td>2.2*</td>
<td>2.9</td>
<td>5.3*</td>
</tr>
<tr>
<td>Total N</td>
<td>33,195</td>
<td>5,384</td>
<td>3,652</td>
<td>1,514</td>
<td>892</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel C: Of Migrants, Percent Reporting First US Migration Trip as a Minor (Age &lt; 18)</th>
<th>Mexico</th>
<th>Nicaragua</th>
<th>Costa Rica</th>
<th>Guatemala</th>
<th>El Salvador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent</td>
<td>34.1</td>
<td>46.0*</td>
<td>36.1</td>
<td>35.2</td>
<td>36.7</td>
</tr>
<tr>
<td>Total N</td>
<td>3,375</td>
<td>252</td>
<td>213</td>
<td>122</td>
<td>128</td>
</tr>
</tbody>
</table>

* Indicates value is significantly different (p<.05, two-tailed test; ^ p<.10, two-tailed test) from Mexico.

Note: Analysis limited to survey years 2000-2013 and respondents classified as a son/daughter of the household head that are age 40 or younger at the time of the survey.

Panel C switches the focus somewhat by presenting the shares of migrant sons and daughters who were 40 years or younger at the time of the survey and made that trip as a minor (younger than 18 years of age) by country. Approximately one-third (34.1 percent) of Mexican migrants made their first trip as a minor. Moreover, although rates of first minor trips from Costa Rica, Guatemala, and El Salvador were comparable to those for migrants from Mexico, significantly more migrants from Nicaragua (46 percent) than Mexico made a first trip as a minor.

Because differences in Table 1 likely reflect other characteristics about immigrants from these five countries, Table 2 offers us more detail about the minor sons and daughters who made first US trips. The table features critical information regarding minor migrants: legal status, period of entry, and parents’ migration experience. Among those from Mexico, for example, fully 81 percent were unauthorized on their first trip, with 1994 as their average year of entry, 42 percent made the initial trip after 1996, and slightly more than half (52.6 percent) had at least one parent with US migration experience. Compared to Mexicans, Nicaraguans, Costa Ricans, and Guatemalans were less likely to be unauthorized but the percentage for El Salvadorans was comparable to that for Mexicans. The average year of first trip was earlier for both Nicaraguans and El Salvadorans (1988 and 1990), but only Nicaraguans differed significantly from Mexicans in that a smaller share made a first trip after 1996. Among minor migrants from other countries, including Mexico, approximately 40 percent made their first trips after 1996. With respect to parental migration, the shares...
of child migrants from Nicaragua and Costa Rica with migrant parents were higher than for Mexico, but significantly lower for those from Guatemala and no different for those from El Salvador.

Table 2. Characteristics of Sons/Daughters in Household Ages 40 and Below Who Migrated to the United States as Minors, by Country

<table>
<thead>
<tr>
<th></th>
<th>Mexico</th>
<th>Nicaragua</th>
<th>Costa Rica</th>
<th>Guatemala</th>
<th>El Salvador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorized Migration on First Trip (%)</td>
<td>81.2</td>
<td>35.3*</td>
<td>12.9*</td>
<td>58.1*</td>
<td>72.3</td>
</tr>
<tr>
<td>Parents with Migration Experience (%)</td>
<td>52.6</td>
<td>61.2*</td>
<td>64.9*</td>
<td>11.6*</td>
<td>40.4</td>
</tr>
</tbody>
</table>

* Indicates value is significantly different (p<.05, two-tailed test; ^ p<.10, two-tailed test) from Mexico.

Note: Analysis limited to survey years 2000-2013 and respondents classified as a son/daughter of the household head that are age 40 or younger at the time of the survey.

National origin differences in parental migration experience are related to legal status. Figure 1 contains two panels: the top panel describes the percent of sons and daughters who reported making a first US trip as a minor by national origin and parental migration experience; the second describes these differences only for minors who were unauthorized. For those from Mexico, 2.1 percent of respondents whose parents had no history of migrating took a US trip as a minor; by comparison, 7.6 of respondents whose parents did have US experience migrated as a minor. Among those from Nicaragua, the gap between minor children with and without migrant parents was much bigger. Although approximately one percent of respondents with parents with no US experience made a first US trip as a minor, 16 percent of those who had migrant parents did so. Parents’ migration history also increased the possibility that minor children from Costa Rica and El Salvador would make a first US trip, although it had no effect for those from Guatemala.

The bottom panel of Figure 1 reveals that parents’ history differentiates the unauthorized migration chances of minor children from Mexico, Nicaragua, and Costa Rica. For example, of all sons and daughters from Mexican households aged 40 years or younger at the time of the survey and who made their first trip as a minor, approximately two percent migrated as minors on an unauthorized trip if their parents had no migration experience compared to more than twice that share (5.5 percent) for those with parents with migration experience. Parental migration history also significantly differentiated the shares of unauthorized migration of minor children from Nicaragua and Costa Rica, although levels for the latter were very small.
Figure 1. Percent of All Sons/Daughters Reporting US Migration Trip as a Minor (Age < 18) by Parental Migration History

Panel A: All Migration Trips

Panel B: Unauthorized Migration Trips

* Indicates statistically significant (p<.05, two-tailed test; ^ p<.10, two-tailed test) within-country difference between respondents with and without parental migration history.

Note: Analysis limited to survey years 2000-2013 and respondents classified as son/daughter of the household head and age 40 or younger at the time of the survey.
The findings suggest some interesting differences by legal status, period of entry, and parental migration. First, parental migration affects children’s migration. Whether we consider all child migrants or only those making a first unauthorized US trip, their ties to parents with prior or current migration history translate into significantly more migration. The gaps are especially large for Nicaragua, El Salvador, and Mexico (in that order) among those making a trip as a minor child. For those minors making an unauthorized trip, the gap between children with and without parental migration is statistically significant and notably different only for Nicaragua and Mexico. Given that the overall percentages of respondents who reported having migrated as children are relatively low and range from only two to five percent across countries (see Panel B of Table 2), the results in Figure 1 indicate that for Mexico, Nicaragua, and El Salvador, there is a strong link between parental migration and the likelihood that a minor child will migrate to the United States.

To examine whether these differences hold net of other factors, Table 3 presents regression models that predict whether or not a child makes a first US trip up through age 17. The first set of columns refers to all first trips, whereas the next two sets of columns refer to authorized and unauthorized trips. Results for all first trips suggest that the likelihood of migrating varies by children’s period of entry. Among those entering in the 1987-96 period, the likelihood of migrating is higher than in the pre-1987 period. This finding suggests that children’s migration was linked to IRCA’s amnesty program, although children were far less likely than their parents —especially fathers (Donato 1993)—to regularize their status during this period. By comparison, children’s likelihood of making a first trip drops in 1997-2011, which reflects growing restrictions on all immigrants during this time.

Coefficients for parents’ migration experience clearly show that it is linked to children’s migration. Compared to children whose parents had no US experience, those with migrant parents (either in the past or present) were much more likely to make a first US trip. Girls were much less likely than boys to migrate, and older children were more likely than younger ones to migrate. Community type also matters; compared to children from metropolitan areas, the likelihood of children migrating was higher in small urban areas and isolated ranchos in rural areas.

Comparison of the next two sets of models reveals a very different process of first-trip migration for children making authorized versus unauthorized trips. Yet there is one exception: it refers to effects for parents’ migration history. Whether we consider children’s authorized or unauthorized first trips, children are much more likely to migrate in the year their parents migrate, and they are also more likely to migrate if their parents migrated in the past, relative to children whose parents have never migrated.

However, differences in time period are much larger for children’s making unauthorized first US trips. Similar to the model for all trips, the likelihood of making a first unauthorized trip is highest during the amnesty period, relative to the pre-1987 period. The likelihood turns negative in 1997-2011. Among children making their first authorized trip, the only effect is negative and marginally significant (at p< .10) for the 1997-2011 period.

Among the remaining effects, gender matters for children’s unauthorized first trips but not for authorized ones. Girls were significantly less likely than boys to make a first unauthorized trip. Age effects were also different across the two models. Although children
Table 3. Results of Logistic Regression Predicting First US Migration Trip, Ages 0-17

<table>
<thead>
<tr>
<th>Variable</th>
<th>All Trips</th>
<th>Authorized</th>
<th>Unauthorized</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>B</td>
<td>SE^a</td>
<td>B</td>
</tr>
<tr>
<td><strong>Period (pre-1987=reference)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987-1996</td>
<td>0.19^</td>
<td>0.10</td>
<td>-0.07</td>
</tr>
<tr>
<td>1997-2011</td>
<td>-0.40**</td>
<td>0.12</td>
<td>-0.39^</td>
</tr>
<tr>
<td><strong>Parent Migration History (none=reference)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parent Migrated Earlier</td>
<td>1.34**</td>
<td>0.10</td>
<td>2.31**</td>
</tr>
<tr>
<td>Parent Migrated in Same Year</td>
<td>4.15**</td>
<td>0.10</td>
<td>5.69**</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female (male=reference)</td>
<td>-0.61**</td>
<td>0.07</td>
<td>-0.16</td>
</tr>
<tr>
<td><strong>Age in Years (0-1=reference)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2-3</td>
<td>0.04</td>
<td>0.15</td>
<td>0.11</td>
</tr>
<tr>
<td>4-5</td>
<td>-0.04</td>
<td>0.16</td>
<td>-0.66*</td>
</tr>
<tr>
<td>6-7</td>
<td>-0.29</td>
<td>0.18</td>
<td>0.05</td>
</tr>
<tr>
<td>8-9</td>
<td>-0.16</td>
<td>0.18</td>
<td>-0.02</td>
</tr>
<tr>
<td>10-11</td>
<td>-0.06</td>
<td>0.18</td>
<td>0.20</td>
</tr>
<tr>
<td>12-13</td>
<td>0.56**</td>
<td>0.16</td>
<td>0.46</td>
</tr>
<tr>
<td>14-15</td>
<td>1.74**</td>
<td>0.14</td>
<td>0.95**</td>
</tr>
<tr>
<td>16-17</td>
<td>2.80**</td>
<td>0.13</td>
<td>1.36**</td>
</tr>
<tr>
<td><strong>Community (metropolitan area=reference)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small Urban Area</td>
<td>0.30*</td>
<td>0.13</td>
<td>0.19</td>
</tr>
<tr>
<td>Town</td>
<td>0.11</td>
<td>0.13</td>
<td>-0.69**</td>
</tr>
<tr>
<td>Rancho</td>
<td>0.24^</td>
<td>0.13</td>
<td>-0.02</td>
</tr>
<tr>
<td><strong>Constant</strong></td>
<td>-7.82**</td>
<td>0.16</td>
<td>-9.72**</td>
</tr>
<tr>
<td>Person Years (N)</td>
<td>400,612</td>
<td></td>
<td>388,721</td>
</tr>
<tr>
<td>Pseudo R²</td>
<td>0.258</td>
<td></td>
<td>0.265</td>
</tr>
</tbody>
</table>

**p<0.01, * p<0.05, ^ p<0.10

^ Robust standard errors that adjust for within-individual cluster correlation.

Aged 14-15 and 16-17 were more likely to make a first trip than younger ones, irrespective of legal status, these coefficients were much larger for unauthorized trips. In addition, among children crossing without authorization, those aged 12-13 were also significantly more likely to make a first US trip. Finally, compared to large metropolitan areas, children from small urban areas, towns, and rural ranchos were more likely to make a first unauthorized trip.
Figure 2. Predicted Probability of Unauthorized First US Migration Trip by Parental Migration History and Period, Ages 0-17

Note: Probabilities generated from logistic regression model displayed in Table 3, holding all other variables at their means; in Panel C, probability for 1997-2011 period is statistically different (p<.05, two-tailed test) from previous periods.
Figure 2 presents predicted probabilities of children making a first unauthorized trip from Mexico by parental migration history and period of entry. These probabilities were calculated from coefficients in the unauthorized model in Table 3. Figure 2 shows that, while the chances that children make an unauthorized trip are low, children’s migration is clearly tied to their parents. Net of other factors, the chances that children make a first unauthorized trip are higher for those whose parents crossed in the same year. In addition, the chances were highest in 1987-96, followed by the 1970-86 period, and lowest in 1997-2011.

To make the results of this analysis even more tangible, we used the model coefficients in Table 3 to generate predicted probabilities of children making a first legal and unauthorized trip and from these probabilities, we derived a set of life tables to compute the cumulative probability of children’s legal and unauthorized migration by age 17. Table 4 presents the cumulative probability that children would migrate by age 17—with and without authorization—for the three time periods and across the three different states of parental migration.

### Table 4. Cumulative Probabilities of First US Migration Trip by Parental Migration History and Legal Status

<table>
<thead>
<tr>
<th></th>
<th>No Parental Migration</th>
<th>Parent Migrated Earlier</th>
<th>Parent Migrated in Same Year</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Panel A. All Trips</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970-1986</td>
<td>.020</td>
<td>.074</td>
<td>.692</td>
</tr>
<tr>
<td>1987-1996</td>
<td>.024</td>
<td>.089</td>
<td>.755</td>
</tr>
<tr>
<td>1997-2011</td>
<td>.013</td>
<td>.051</td>
<td>.555</td>
</tr>
<tr>
<td><strong>Panel B. Authorized Trips</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970-1986</td>
<td>.001</td>
<td>.012</td>
<td>.315</td>
</tr>
<tr>
<td>1987-1996</td>
<td>.001</td>
<td>.012</td>
<td>.298</td>
</tr>
<tr>
<td>1997-2011</td>
<td>.001</td>
<td>.008</td>
<td>.226</td>
</tr>
<tr>
<td><strong>Panel C. Unauthorized Trips</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970-1986</td>
<td>.019</td>
<td>.063</td>
<td>.537</td>
</tr>
<tr>
<td>1987-1996</td>
<td>.024</td>
<td>.079</td>
<td>.621</td>
</tr>
<tr>
<td>1997-2011</td>
<td>.012</td>
<td>.041</td>
<td>.398</td>
</tr>
</tbody>
</table>

Note: Results generated from regression models in Table 3.

These results show what would happen if a child born in Mexico were to go through their seventeenth year of life subject to the rates of out-migration prevailing in different years. Overall, irrespective of legal status, there are two noteworthy findings. First, children
with parents migrating in the same year have much higher chances of making a first trip than children with parents who never migrated or those whose parents migrated earlier. The chance that a child makes a first US trip if his/her parents have no US experience ranges between 1 and 2 percent across the three periods of entry, but for those whose parents migrated in the same year, the chances are considerably higher (.692, .755, and .555 across the three periods). Second, the chances that children, by age 17, make a first trip are consistently higher for the 1987-96 period, when IRCA’s amnesty program was implemented, but only for unauthorized trips. For example, the probability that a young child would make a first unauthorized US trip during the year his/her parent migrated was .537 in 1970-86, grew to .621 during the period when many Mexicans received amnesty, and then dropped to .398 in 1997-2011. These results, when taken together, indicate that the overall likelihood of child migration from Mexico has substantially decreased for children with and without parents with US experience. Moreover, children’s lifetime chances of making a first unauthorized trip shift across different periods of entry.

**Discussion**

Although the data we examine here do not include the child migrants who arrived at the US-Mexico border in 2014, they do offer some insight into the mechanisms by which individuals migrate as minors. In particular, our findings indicate that the migration of children is closely linked to that of parents, and that a minor child is significantly more likely to go on a first US trip if their parent has US migration experience. Rather than supporting the hypothesis that child migrants are independent rational actors, this finding lends support to the idea that child migrants are incorporated into the migration process via their ties to families.

Our analysis of child migration from Mexico, in particular, highlights the interconnections of migration between parents and children. Although the overall likelihood of a Mexican child making a first US trip is quite low, it is practically non-existent for children whose parents have no US experience and it increases significantly for children with migrant parents. Furthermore, while annual rates of Mexico-US immigration have declined over the past decade (Passel, Cohn, and Gonzalez-Barrera 2012), the Central American immigrant population has grown rapidly (Stoney and Batalova 2013). These trends suggest continued growth of Central American immigration in the future, which implies that the linkages between migrant parents and their children in communities of origin will continue to be a part of the Central American migration landscape for years to come (see also Massey, Durand, and Pren 2014). Thus, we recommend that discussions of children’s migration should be rooted in a larger discussion about the opportunities that these minors have for family reunification and access to legal immigration.

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15 Between 2000 and 2010, Central American immigrants grew faster than any other Latin American region. In the last three decades, the numbers of Central American immigrants have nearly tripled from 1.1 million to more than 3 million (Stoney and Batalova 2013). During the 2000s, after Mexico, the top national origins for unauthorized immigrants in the United States are El Salvador, Guatemala, and Honduras, and this population grew faster than that from Mexico (Hoefer, Rytina, and Baker 2012). Finally, immigrants from Central American nations have been the primary recipients of Temporary Protected Status (Wasem and Ester 2010).
As migrant human capital has grown in recent decades between the United States and Central America, Congress has been unable to pass comprehensive immigration policy reform. The existing policy regime has significant shortcomings, especially with respect to protections for child migrants and family reunification. Therefore, the number of unaccompanied minors recently apprehended at the border should not be surprising. Although the structural conditions leading to out-migration are related to high levels of poverty, violence in communities of origin, and smugglers who promote migration among children, the rising number of children from Central America and Mexico is related to widespread migration networks and a long-standing reliance on immigrant workers in the United States. It is time to recognize that these children need protections in the form of permanent legal status to reunify with their families. If the United States cannot pass comprehensive immigration reform, at minimum it should provide for the children of immigrants it readily employs.

REFERENCES


Executive Summary

There has been no significant legislation related to the asylum process enacted in Congress in nearly a decade. In 1996, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) became law, rolling back protections for asylum seekers by including a one-year deadline for filing asylum applications, subjecting asylum seekers to “expedited removal” procedures, and expanding the detention of asylum seekers. In 2005, Congress enacted the REAL ID Act, which created additional legal barriers to asylum, including new requirements for proving an asylum claim.

During the past several sessions of Congress, bills have been introduced that would make significant changes to the country’s asylum laws and refugee admissions program. This paper provides an overview of the pending legislation and the changes proposed. This overview is instructive in understanding (1) which members of Congress have demonstrated interest and leadership in refugee and asylum issues; (2) which refugee and asylum reform issues have been of most interest to members of Congress in recent years; (3) the different approaches to refugee and asylum issues by members of Congress who have shown leadership on these issues; and (4) which provisions have been enacted, which have gained traction, and which remain pending without significant movement through the legislative process.

While it is difficult to imagine in the current partisan climate how any asylum or refugee legislation could be enacted into law, some legislative provisions have been reintroduced over a number of sessions of Congress and some have a history of bipartisan support. Legislation focused on a group of particular interest or concern to members of Congress could gain traction. A more comprehensive legislative approach framed by the need generally to improve the system could be less effective, particularly in the context of the years-long stalemate on comprehensive immigration reform.

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Pending Asylum and Refugee Legislation in the US Congress

While legislation is unlikely to pass in the near future, it remains important for members of Congress who believe in the importance a fair, effective, and humane asylum system and refugee resettlement program, to introduce and build support for asylum and refugee legislation. Provisions in bills that have already been introduced, like those in S. 744, are more likely to be included in legislation that is moving through Congress. In addition, these bills demonstrate the continued interest of members of Congress in asylum and refugee issues and the need for reform. They also provide an important tool for advocates for education and outreach to Congress and the public.

Introduction

There has been no significant legislation related to the asylum process enacted in Congress in nearly a decade. In 1996, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) became law, rolling back protections for asylum seekers by including a one-year deadline for filing asylum applications, subjecting asylum seekers to “expedited removal” procedures, and expanding the detention of asylum seekers. In 2005, Congress enacted the REAL ID Act, which created additional legal barriers to asylum, including new requirements for proving an asylum claim.

In recent years, legislation has been enacted to: increase admissions of Iraqi and Afghan refugees who helped US efforts during the conflicts in those countries; give the Administration more authority to exempt refugees, asylees, and asylum seekers from the broad terrorism-related grounds of inadmissibility; and facilitate the processing of religious minorities from Iran and the former Soviet Union. However, comprehensive legislation related to the US refugee resettlement program has not been enacted since the

2 “Expedited removal” refers to the summary deportation by US immigration officials, without a hearing or review by an immigration judge, of noncitizens who are apprehended at a port of entry or within 100 miles of the border, have been in the country for less than 14 days and do not possess proper travel documents. If the individual expresses a fear of persecution or intention to apply for asylum, the individual must have the opportunity to demonstrate to an asylum officer that they have a “credible fear” of persecution. Immigration and Nationality Act § 235(b)(1)(A).


Refugee Act of 1980.8

During the past several sessions of Congress, bills have been introduced that would make significant changes to the country’s asylum laws and refugee admissions program. This paper provides an overview of the pending legislation and the changes proposed. This overview is instructive in understanding (1) which members of Congress have demonstrated interest and leadership in refugee and asylum issues; (2) which refugee and asylum reform issues have been of most interest to members of Congress in recent years; (3) the different approaches to refugee and asylum issues by members of Congress who have shown leadership on these issues; and (4) which provisions have been enacted, which have gained traction, and which remain pending without significant movement through the legislative process.

Pending Refugee and Asylum Bills

S. 744: The Border Security, Economic Opportunity, and Immigration Modernization Act

In June 2013, the United States Senate passed a comprehensive immigration reform bill that contained a number of refugee and asylum-related provisions,9 including many which refugee and asylum advocates had prioritized.10 The refugee and asylum provisions of the Senate bill were collectively named the “Frank R. Lautenberg Asylum and Refugee Reform Act” shortly after the Senator died and before the bill passed the Senate. Similar comprehensive immigration reform legislation was introduced in the House of Representatives as part of H.R. 15, co-sponsored by 199 members of the House, which contains identical provisions to S. 744 relating to refugees and asylum seekers.11 H.R. 15 has not passed the House.

Prior to the introduction of S. 744 in April 2013, the refugee and asylum provisions of the Senate bill were intensely negotiated during the bill’s drafting period by the “Gang of 8” Senators.12 However, they were not the subject of much attention outside of the Gang of 8’s deliberations until the Boston Marathon bombings on April 15, 2013, allegedly committed by the children of asylees, focused congressional attention on the provisions. A hearing on the bill on April 23, 2013 focused on its refugee and asylum provisions,13

10 Some of these priorities are outlined in “Refugee Council USA Policy Framework: Recommendations and Actions for the Obama Administration and the 113th Congress,” (March 2013), www.rcusa.org/uploads/pdfs/RCUSA_2013_FINAL.pdf.
12 The “Gang of 8” senators were Michael Bennet (D-CO), Richard J. Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Robert Menendez (D-NJ), Marco Rubio (R-FL), and Charles Schumer (D-NY).
and there was extensive discussion about them during the Judiciary Committee mark-up of the bill. As a result, some asylum-related provisions were added to the bill during the mark-up, although none dramatically changed the bill. Amendments to repeal the asylum and refugee provisions, most of which Senator Grassley (R-IA) introduced, were defeated during the mark-up.\textsuperscript{14}

### S. 645: The Refugee Protection Act

Senator Leahy (D-VT) introduced S. 645, the Refugee Protection Act, in March 2013, “to amend the Immigration and Nationality Act to reaffirm the United States’ historic commitment to protecting refugees who are fleeing persecution or torture.”\textsuperscript{15} Senator Leahy had introduced similar legislation in the 111\textsuperscript{th} and 112\textsuperscript{th} sessions of Congress. Also in March 2013, Representative Zoe Lofgren (D-CA), the ranking minority member of the House Judiciary Committee Subcommittee on Immigration and Border Security, introduced H.R. 1365, the companion bill to S. 645.\textsuperscript{16} The two bills are identical.

The Refugee Protection Act contains a number of provisions that were later included in the Senate immigration bill, S. 744.\textsuperscript{17}

### H.R. 651: The Strengthening Refugee Resettlement Act

Representative Keith Ellison (D-MN) introduced H.R. 651 in February 2013 “to modify provisions of law relating to refugee resettlement, and for other purposes.”\textsuperscript{18} The bill is co-sponsored by Representative James Moran (D-VA) and Representative Janice Schakowsky (D-IL). The bill focuses on issues relating to refugee resettlement. In a press release on H.R. 651, Representative Ellison stated that the goals of the bill are “to increase coordination and provide much-needed resources for new Americans fleeing war, persecution, or natural disaster.”\textsuperscript{19} The bill authorizes funding to establish a case management system to assist resettled refugees in gaining access to services.\textsuperscript{20}

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\textsuperscript{15} Cosponsors are Richard Blumenthal (D-CT), Mazie Hirono (D-HI), and Carl Levin (D-MI). Prior versions of the bill were introduced as S. 1202 in the 112th Congress (identical), and S. 3113 in the 111th Congress (similar, but not identical). Senator Leahy has introduced a number of versions of the Refugee Protection Act since 1999.

\textsuperscript{16} Representative Lofgren introduced H.R. 2185 in the 112th Congress, which was similar but not identical to H.R. 1365.

\textsuperscript{17} The Refugee Protection Act of 2013, S. 645, 113th Cong. §201(a), §3, §17, §20, §8 (2013).

\textsuperscript{18} Representative Ellison introduced an identical bill, H.R. 6460, in the 112th Congress.


\textsuperscript{20} The Strengthening Refugee Resettlement Act, H.R. 651, 113th Cong., information on funding located in §7(b).
**H.R. 1784 and S. 883: Domestic Refugee Resettlement Reform and Modernization Act of 2013**

Representative Gary Peters (D-MI), introduced H.R. 1784 along with 12 Democrat co-sponsors and two Republican co-sponsors, in April 2013.\(^{21}\) Senator Debbie Stabenow (D-MI) introduced an identical companion bill, S. 883, in the Senate in May 2013.\(^{22}\) The Senate bill has no co-sponsors.

The goal of the bill is “to reform and modernize domestic refugee resettlement programs.” Unlike the Strengthening Refugee Resettlement Act, the bill does not authorize expenditures to implement its provisions, although it notes that “additional resources and better data could strengthen refugee services and better respond to the needs of highly vulnerable refugees.”\(^{23}\)

**H.R. 2278: The Strengthen and Fortify Enforcement Act (the SAFE Act)**

The SAFE Act was introduced in June 2013 “to amend the Immigration and Nationality Act to improve immigration law enforcement within the interior of the United States.” Judiciary Committee Chair Bob Goodlatte (R-VA) and Immigration Subcommittee Chair Trey Gowdy (R-SC) co-sponsored the bill, along with 18 other Republican members of Congress.\(^{24}\) The bill was reported out of the Judiciary Committee on a party line vote after a contentious mark-up.\(^{25}\) House leadership indicated in June that it was considering including the SAFE Act in a group of bills as part of a “step-by-step” approach to immigration reform, which would allow House bills addressing different aspects of the immigration system to be voted on separately (Immigration Policy Center 2013).

In a statement on record submitted for the mark-up of the SAFE Act, a coalition of faith and refugee rights groups expressed concern about provisions of the bill relating to refugees and asylum seekers.\(^{26}\) The statement said that the SAFE Act would negatively...
impact refugees, asylum seekers, and stateless persons by expanding the terrorism-related inadmissibility grounds (TRIG) of the Immigration and Nationality Act. The purpose of the TRIG provisions is to bar individuals who have engaged in terrorism-related activity from admission to the US. While intended to address legitimate security concerns, the TRIG provisions are extremely broad and have resulted in the exclusion of thousands of bona fide refugees and asylum seekers from protection (Hughes 2009). The statement also noted that the SAFE Act would expand the US immigration detention system which already confines many survivors of torture and others seeking protection in the United States.

The SAFE Act would “bar from a finding of good moral character and naturalization” anyone who is described as a “terrorist” in the Immigration and Nationality Act. This would permanently bar from naturalization any refugee or asylee who is subject to the TRIG bars to admission, possibly including those who obtain exemptions from the TRIG bars from the Department of Homeland Security (DHS). The bill would also require DHS to complete background and security checks before granting any immigration benefit, including employment authorization. This could have serious consequences for asylum applicants whose security and background checks are delayed, as well as for individuals subject to the TRIG bars whose cases have been “on hold” for as many as 10 years while the administration develops an exemption process.

**Senate-Passed Legislative Provisions**

The following provisions were agreed to by the bipartisan Senate Gang of 8, survived the bill’s mark-up, and were included in S. 744 when it passed the Senate. Some of these provisions are also contained in the Refugee Protection Act and other pending bills not passed by the House or Senate.

**The One-Year Filing Deadline for Asylum Applications**

Since 1996, the law has required that asylum seekers apply for asylum within one year of arrival in the United States. According to studies, this requirement prevents individuals with legitimate claims of persecution from gaining asylum protection if their applications were delayed due to fear, lack of information, or other circumstances beyond their control (Schrag et al. 2010; Acer et al. 2010). In addition, the filing deadline has significantly lengthened the adjudication of asylum cases and diverts scarce immigration court time and resources from considering the merits of asylum claims.

S. 744 would repeal the one-year filing deadline for asylum applications. The bill also would allow individuals whose asylum claims were denied because of the one-year filing deadline to reopen their cases within two years of the date of enactment of the legislation.

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30 SAFE Act, H.R. 2278, 113th Cong. §206 (2013); see also Hughes 2013.
32 Ibid.
if they meet certain eligibility requirements.34

The Refugee Protection Act would also repeal the filing deadline,35 as would the “Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2013,” or “CIR ASAP Act,” a Democrat-sponsored immigration reform bill pending in the House of Representatives.36

The Refugee Protection Act also exempts children from reinstatement of removal, a process that allows immigration judges to order the removal without any opportunity for relief of an individual who has illegally reentered the United States after having been previously ordered removed.37

Refugee and Asylee Family Reunification

S. 744 would eliminate barriers to family reunification by expanding the categories of family members who qualify for derivative asylee and refugee status to include the children of a refugee or asylee’s spouse or children.38 This section fixes the “derivative of a derivative” problem that affects a small number of people but creates serious hardship for those whom it affects. For example, if the refugee seeking asylum had a teenage daughter who has a child, the teenage daughter’s child could not join her mother and grandmother in the United States under current law. The Refugee Protection Act also contains this provision.39

Refugees and asylees also benefit from other sections of S. 744 that apply more broadly to immigrants, including a provision that would allow an asylee or refugee’s spouse or child to immigrate to the US after the principal asylee or refugee’s death.40

S. 744 does not include a provision included in the Refugee Protection Act that would allow children in the care of a refugee approved for resettlement to the United States to be resettled with that refugee if it is in the best interest of the child.41 S. 744 also does not include provisions in the Refugee Protection Act that would eliminate a two-year deadline for refugees and asylees to file family reunification petitions for their spouses and minor children or that would require DHS to adjudicate family reunification applications filed by refugees and asylees in the US for their family members abroad in 90 days.42

34 Ibid.
36 Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2013, H.R. 3163, 113th Cong. §186 (2013), also repeals the deadline. The “CIR ASAP Act” was first introduced in 2009 during the 111th Congress. The current bill has 37 Democratic co-sponsors.
Designation of Groups of Humanitarian Concern for Refugee Processing

S. 744 would allow the president, in consultation with the secretary of state and DHS, to designate certain groups “whose resettlement in the United States is justified by humanitarian concerns or is otherwise in the national interest” as meeting the requirements for refugee status.\(^{43}\) A similar provision is included in the Refugee Protection Act.\(^{44}\) S. 744 would also extend for a year after enactment the Lautenberg Amendment, which allows certain religious minorities from Iran and the former Soviet Union to be admitted as refugees under expedited procedures, and would authorize the president to extend the provision thereafter.

This provision, if enacted, would help the United States to process more efficiently some groups of refugees for resettlement. Allowing the administration to determine that certain categories of refugees have been persecuted before a resettlement program begins would permit DHS interviewers to focus on admissibility and security issues during the refugee interview, rather than on re-establishing whether each individual member of a group meets the refugee definition.

Granting Authority to Asylum Officers to Conduct Asylum Hearings and Grant Asylum after a Finding of Credible Fear

Since 1996, asylum officers have been required to refer asylum seekers identified at or near a US border who demonstrate a credible fear of persecution to immigration courts, rather than adjudicating the cases themselves (as they do in affirmative asylum cases).\(^{45}\) This significantly lengthens the asylum process, wastes scarce government resources, exposes asylum seekers to additional trauma, and, in some cases, prolonged detention.

S. 744 would allow an asylum officer to grant asylum to an applicant who demonstrates a credible fear of persecution at or near a US border, after conducting a non-adversarial asylum interview and seeking supervisory review.\(^{46}\) The Refugee Protection Act also includes this provision.\(^{47}\)

Legal Status for Stateless Individuals

“ Stateless” individuals are those who lost their nationality when their country of origin ceased to exist, were arbitrarily stripped of their nationality, or have been without a nationality since birth because of unclear nationality laws or laws that discriminate based on gender or ethnicity. Many stateless individuals in the United States have no legal status. Because they have no citizenship anywhere, stateless persons with removal orders can remain in detention for prolonged periods of time and have no legal status when released. Without a path to permanent legal status in the United States, many stateless individuals

cannot work, travel, or reunite with family members.

S. 744 would provide new protections for stateless persons in the United States, including authorizing the secretary of Homeland Security or the attorney general to grant conditional lawful status (leading to lawful permanent residence after one year) to certain groups of designated stateless persons. The Refugee Protection Act also contains these provisions.

**Improved Overseas Refugee Processing**

Refugee applicants who are denied resettlement by DHS have no meaningful opportunity to challenge the negative decision, in large part because refugees are not given enough information to reveal the basis for the rejection. Denied refugee applicants are sent only a form letter with a list of checkboxes citing the general reasons that the applicant was denied (one of which is “Other”). As a result, it is extremely difficult for a refugee to prepare a Request for Review (RFR) of the denial (there is no appeal process for refugee denials) or clear up any misunderstandings or miscommunications that may have occurred during the refugee interview.

S. 744 would allow an attorney or accredited representative, at no expense to the government, to represent an applicant for refugee status at the refugee interview. The bill would also require that denials of refugee applications be issued in writing with a detailed explanation of the reason for the denial. At the end of 2013, Congress enacted the National Defense Authorization Act of 2014, which included these provisions, but limited them to certain refugee applicants, and Iraqi and Afghan Special Immigrant Visa applicants.

**Security Checks**

Before entering the US, refugee resettlement applicants must pass a series of security and health screenings. While efficient and effective security screenings are a critical element of the refugee resettlement program, the security clearance process can take years, during which time a refugee may remain at risk of persecution. Because the numerous required checks, interviews, and screenings are only valid for certain defined time periods, by the time later checks are concluded, the first checks have expired and must be redone. The refugee resettlement process has become for many a loop of clearances that will never be completed.

S. 744 contains a provision offered by Senator Feinstein (D-CA) and adopted during the mark-up that prohibits an individual from being admitted as a refugee or asylee until the person’s identity has been checked against all appropriate databases to determine any national security, law enforcement, or other grounds under which the alien may be admitted.

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The Strengthening Refugee Resettlement Act would direct the secretary of Homeland Security to work with the heads of other relevant federal agencies to conduct a review of refugee processing with the goal of streamlining processing, consistent with maintaining security.54

Termination of Refugee Status for Return to Home Country

S. 744 includes a provision offered by Senator Graham (R-SC)\(^55\) and adopted during the mark-up that would terminate the refugee or asylee status of an individual who “without good cause” returns to his or her country of nationality (or country of last residence, for those who are stateless).56 The provision does not apply to Cubans eligible for legal permanent residence under the Cuban Adjustment Act of 1966. There are already provisions in current law that permit DHS to revoke refugee and asylum status from individuals who return.57

Employment Authorization for Asylum Seekers

Since 1996, asylum seekers have been subject to a 180-day waiting period to apply for work authorization.58 DHS and the Department of Justice have determined that the “clock” that counts this 180-day period stops if there is any delay in the adjudication process that is requested or caused by the asylum seeker.59 There have been numerous problems with the implementation of this provision, known as the “asylum clock,” including “a lack of transparency in the management of the clock; a lack of clarity and comprehensiveness of the government’s clock policy; misinterpretation of the regulations governing the clock; improper implementation of the government’s clock policy; and problems associated with the Executive Office for Immigration Review’s case completion goals” (Saucedo and Rodriguez 2010). When an immigration judge erroneously stops the clock, asylum seekers must wait longer than 180 days before they are eligible to obtain work authorization, and some may have to wait indefinitely.

During the S. 744 mark-up, the Judiciary Committee adopted a provision offered by Senator Coons (D-DE) that requires that an asylee be granted employment authorization 180 days after filing his or her asylum application.60 This would minimize the impact of the clock by allowing all asylum applicants to receive work authorization if their asylum application has

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57 Immigration and Nationality Act, §§207(c)(4) and 208(c)(2) (1952) (enacted).
59 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).
been pending for 180 days.

Iraqi and Afghan Special Immigrants

S. 744 contains provisions to extend the Iraqi and Afghan Special Immigrant Visa (SIV) programs and increase access to the programs by allowing applicants to be represented by counsel at no expense to the government at visa interviews and improving transparency and access to review of denied cases. A version of these provisions was enacted into law in the National Defense Authorization Act for Fiscal Year 2014. Congress extended the Iraqi SIV program through September 30, 2014, when the Afghan SIV program will also expire without additional congressional action.

Tibetan Refugees

S. 744 makes 5,000 immigrant visas available to individuals who were born in Tibet and have been continuously residing in India or Nepal prior to enactment of the legislation. Senator Feinstein (D-CA) offered the provision during the mark-up of S. 744 and it was adopted by the Judiciary Committee. Representative Sensenbrenner (R-WI) introduced similar legislation in the House. This legislation has been introduced during the past several sessions of Congress. The measure is largely a show of congressional support for Tibetan refugees in Nepal and elsewhere who have not been resettled in large numbers for reasons involving China’s resistance to having displaced Tibetans recognized as refugees.

Legislative Provisions Included in Pending Legislation, Not Passed by the House or Senate

The Terrorism Related Inadmissibility Grounds (TRIG)

In 2001, Congress enacted the USA Patriot Act, which expanded the terrorism-related grounds of inadmissibility (“TRIG” bars to admission). The goal of the legislation was to prevent individuals who have engaged in acts of terrorism from being granted admission to the United States. However, due to the extremely broad definition of “terrorist activity” in the law and the expansive legal interpretations adopted by the Bush and Obama administrations, victims of oppression seeking refugee protection have been mislabeled as supporters of “terrorist organizations” or participants in “terrorist activity.” As a result, thousands of refugees who do not pose a threat to the US have had their requests for

64 Tibetan Refugee Assistance Act of 2013, H.R. 2080, 113th Cong. (2013), makes 3,000 visas available. 65 Introduced in the 111th Congress as H.R. 1340; see also110th as H.R. 6536.
refugee or asylum protection or other status delayed or denied (Hughes 2009).

Early efforts to address the problems created by the TRIG bars were bipartisan. In 2006, Representative Pitts (R-PA) and 21 cosponsors evenly split between the parties introduced a bill “to amend the Immigration and Nationality Act to protect vulnerable refugees and asylum seekers.”66 However, when a bipartisan amendment to remedy some aspects of the TRIG problem was offered to the Senate Comprehensive Immigration Reform bill in 2006, it was tabled by a large bipartisan vote.67

In 2007, Congress enacted a provision sponsored by Senator Kyl (R-AZ) and Senator Leahy (D-VT) to expand executive authority to issue exemptions for individuals unjustly excluded from immigration benefits because of the broad TRIG bars.68 However, bipartisanship on this issue seems to have significantly diminished after this provision was enacted, as there has been no bipartisan legislative action since.

From 2007 to 2014, the administration used the discretionary authority granted by Congress in 2007 to exempt certain individuals and groups from the TRIG bars.69 These exemption announcements were printed in the Federal Register or in policy guidance from DHS. Typically, a few members of Congress would issue statements in support, and no one would issue objections. However, House Judiciary Committee Chair Robert Goodlatte (R-VA) publicly criticized an Obama administration announcement in March 201470 that authorized new exemptions for individuals who provided “insignificant” or “incidental” support to non-designated terrorist groups (Preston 2014).

The Refugee Protection Act would revise the definition of “terrorist activity” for purposes of inadmissibility, define “material support” as support that is significant and directly relevant to terrorist activity, and expressly exclude activity committed under duress from the terrorism definition.71 The Refugee Protection Act is the only pending legislation that would directly amend the TRIG provisions in existing law.

The SAFE Act would bar from a finding of good moral character and naturalization anyone who is subject to the TRIG bars, possibly including refugees and asylees who obtain exemptions from the bars from DHS.72

67 See Senate Amendment 4177 to S.2611 (109th Congress), tabled by a vote of 79-19 on May 23, 2006. For debate, text of amendment, and vote tally, see Congressional Record page S4938-52 (May 23, 2006).
“Particular Social Group” and REAL ID Act Requirements

To qualify for asylum, an applicant must show he or she was persecuted or fears persecution “on account of” one of the five grounds enumerated in the Immigration and Nationality Act. It can be difficult for some asylum applicants asserting persecution based on their “membership in a particular social group” to show that the harm they suffered was “on account of” their membership in that group. Refugees fleeing gender-based violence in particular can face difficulty proving persecution because their persecutors may not articulate the reasons for inflicting harm, and evidence can be difficult to obtain (Acer and Magner 2013).

The Refugee Protection Act would define “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it” as a particular social group. It would also amend the REAL ID Act by no longer requiring asylum applicants to show “one central reason” for their persecution and amending its provisions relating to credibility and corroboration. These provisions, enacted in 2005, increased the burden of proof for asylum applicants, making it more difficult for them to demonstrate that they were persecuted or have a well-founded fear of persecution.

Changes to Detention and Removal

The Refugee Protection Act proposes significant changes to detention procedures for asylum seekers. These include: making detention discretionary for arriving asylum seekers; requiring the secretary of Homeland Security to establish an alternatives to detention program to increase the use of supervised forms of release and reduce the detention of asylum seekers; improving the conditions of detention; and requiring DHS to provide notice of immigration charges to the immigrant and the immigration court closest to the place of apprehension within 48 hours of detention. The bill would also establish procedures to ensure the accuracy of statements taken by DHS in the course of expedited removal proceedings.

The Refugee Protection Act would authorize (but not require) the attorney general to appoint counsel to represent an individual in removal proceedings. The bill would also establish a brief stay of removal for immigrants ordered removed. It would prohibit an individual from being removed during the 30-day window for filing for review of a removal order with an appellate court.

73 Immigration and Nationality Act, §208.
77 The Refugee Protection Act of 2013, S. 645, H.R. 1365, 113th Cong. §9 (2013); S. 744, 113th Cong. §3715 (2013), also includes a provision direction DHS to develop secure alternatives to detention.
Interdiction at Sea

The US intercepts and returns Haitians who flee by boat without offering them meaningful access to an asylum interview. Under current policy, Haitians are given access to an asylum screening only if they physically or verbally resist return by the US Coast Guard, a procedure known as the “shout test.” The “shout test” is ineffective as a screening tool and does not meet international legal standards. The US uses more thorough screening mechanisms for Cuban migrants at sea that include informing them of the ability to raise persecution concerns with a US officer (UNHCR 2013).

The Refugee Protection Act would require an asylum interview for any migrant intercepted at sea who has expressed a fear of return. It would also require DHS to establish a uniform asylum screening procedure that provides the interdicted individual a meaningful opportunity to express a fear of return through a translator and provides that person information about their ability to inform US officers about a fear of return. The Refugee Protection Act would also require that asylees be given the opportunity to seek protection in a country where he or she has family or other ties or, absent such ties, to be resettled in the United States.83

Admitting Refugees in Legal Permanent Resident Status

Current law requires refugees to wait one year after arriving in the United States before they can apply to adjust their status to become a lawful permanent resident (LPR), but also mandates that refugees adjust their status within one year of arrival. Advocates have argued that admitting refugees as LPRs would fix this legal impossibility. Admitting refugees as LPRs would increase efficiency and significantly reduce costs by eliminating the additional step of adjudicating petitions for adjustment of status from refugees. Whereas adjustment of status is a process that is paid for by applicants for other immigration benefits, refugee adjustment applications require no fee.

The Strengthening Refugee Resettlement Act would permit refugees and their spouses and children to be admitted to the United States as lawful permanent residents, and allow asylum seekers to apply for lawful permanent resident status immediately after being granted asylum status. It also would allow the spouse and children of asylum seekers to be admitted to the United States with lawful permanent resident status.84

While this provision was not included in S. 744 or the 2013 version of the Refugee Protection Act, the version of the Refugee Protection Act that was introduced in the 111th Congress did contain the provision.85

Although the 2013 version of the Refugee Protection Act would not allow refugees to arrive in the United States with LPR status, the bill repeals a statutory provision that requires a refugee to “return or be returned to the custody of the Department of Homeland Security” one year after admission to be considered for adjustment of status.86 The Refugee Protection Act replaces this requirement with a provision that makes refugees eligible for adjustment

86 Immigration and Nationality Act, §209(a) (1952).
one year after admission (rather than being required to adjust status), and permits refugees to file their applications for adjustment of status three months before becoming eligible, making it more likely that a refugee can adjust status close to one year after admission.\footnote{The Refugee Protection Act of 2013, S. 645, H.R. 1365, 113th Cong. §29 (2013).}

**Indonesian Asylum Seekers**

The Indonesian Family Refugee Protection Act authorizes a qualifying Indonesian citizen whose asylum claim was denied solely upon a failure to meet the one-year filing deadline to file a motion to reopen such claim.\footnote{Indonesian Family Refugee Protection Act, H.R. 665, 113th Cong. (2013); S. 295, S. 4. Introduced in the in the 112th Congress as HR. 3590 and S.3339.} The bill is an effort to assist a group of Indonesian Christians who came to the United States in the late 1990s on tourist visas but did not file their asylum claims before the one-year filing deadline.

**Liberians in Temporary Protected Status/ Deferred Enforced Departure**

Several thousand Liberian refugees have been in temporary protected status (TPS) or deferred enforced departure (DED) status since 1991. TPS and DED are administrative remedies that allow noncitizens to legally remain in the United States for a period of time if their country has been affected by war, natural disaster, or other emergency making it unsafe for them to return. The group fled Liberia during the country’s late 1980s civil war, during which at least 150,000 people died and more than half the population fled the country or became internally displaced.

Senator Reed (D-RI) has led efforts for many years to provide permanent legal status to this group of Liberians. The Liberian Refugee Immigration Fairness Act of 2013 would allow Liberians present in the United States since January 2013, as well as their spouses and unmarried children, to apply for permanent resident status.\footnote{Liberian Refugee Immigration Fairness Act of 2013, S. 527, 113th Cong. (2013). Introduced in the House as H.R. 1087.}

**Refugee Resettlement**

The president, in consultation with Congress, decides how many refugees the United States will resettle each year. For fiscal year 2014, President Obama recommended that the United States resettle 76,000 refugees. Historically, refugee admissions have been as high as 207,000 in 1980 and as low as 27,000 in 2002 (when admissions plummeted after the September 11 attacks). The typical range for refugee admissions has been between 60,000 to 90,000 per year.\footnote{“Refugee Admissions,” Department of State, http://www.state.gov/j/prm/ra/index.htm .}

The State Department’s Bureau of Population, Refugees, and Migration (PRM), the Department of Health and Human Services’ Office of Refugee Resettlement (ORR), and the Department of Homeland Security’s US Citizenship and Immigration Services (USCIS) are
the leading government agencies involved in the US refugee resettlement program. PRM coordinates the US Refugee Program and is responsible for recommending to the president the overall number of refugees to be admitted each year, subject to available funding and the needs of refugees worldwide. ORR is responsible for services to refugees after the initial resettlement period. USCIS is responsible for screening all refugees to determine if they qualify for admission to the United States and do not present a security risk.91

S. 744 does not contain provisions relating to the US Refugee Admissions Program. However, several bills pending in Congress address longstanding problems of the program, which Congress has not amended in any significant way since the Refugee Act of 1980 was enacted nearly 35 years ago.

**Funding:** PRM manages the “Reception and Placement” or “R&P” program for arriving refugees through funding agreements with the nine nonprofit agencies. The R&P program is intended to welcome arriving refugees, provide the essential services they need during their first 90 days in the United States (including housing, clothing, food, and referrals to medical and social services), and provide a link to longer-term services funded by ORR. In January 2010, PRM announced the doubling of the R&P grant, from $900 to $1,800 dollars per refugee. This amount was increased to $1,875 dollars for FY 2013. At least $1,125 dollars is allocated directly to the refugee to pay for housing, household goods, food, and other immediate material needs for the first month, and up to $750 dollars is used by the affiliate agency to pay staff and other agency expenses incurred in providing services to the refugees.92 Prior to 2010, the per capita level had not kept pace with inflation or cost of living. The Refugee Protection Act and the Strengthening Refugee Resettlement Act would require the per capita amount to be adjusted each year for inflation and the cost of living, and make other changes that would help agencies to maintain capacity if a lower than anticipated number of refugees is admitted in a fiscal year.93

ORR provides funding to help refugees during the eight months following their arrival in the United States. The current ORR funding formula was devised in 1980, when unlike today there was no way to project future arrivals accurately and projections for future arrivals could only be made based on past years’ admissions numbers. The Domestic Refugee Resettlement Reform and Modernization Act states that “ORR funding formulas are retroactive in nature, using refugee admission data from up to three prior years, so that large increases in refugee admissions are not adequately reflected in the amount of resources provided by ORR.” The Refugee Protection Act, the Strengthening Refugee Resettlement Act, and the Domestic Refugee Resettlement Reform and Modernization Act would all adjust the formula for providing refugee funding to states and allow ORR to consider both past and projected refugee arrivals to determine funding levels to reimburse states for services provided to refugees. This provision was also included in prior versions of the Strengthening Refugee Resettlement Act and the Domestic Refugee Resettlement Reform and Modernization Act.94

94 The Refugee Protection Act of 2013, S. 645, H.R. 1365, 113th Cong., §27 (2013); see also the Strengthening
The Strengthening Refugee Resettlement Act would establish a “Domestic Emergency Refugee Resettlement Fund” to meet unanticipated resettlement needs. This type of fund has been under serious discussion by the Administration in recent months as the number of “unaccompanied alien children” (UACs)—unauthorized immigrant children who arrive in the United States without their parents and are transferred to the custody of ORR after apprehension by DHS—has climbed and funding for ORR services, even with an increased appropriation, is likely to fall short. The president’s fiscal year 2015 budget includes a proposal for the creation of a contingency fund for providing resources to serve UACs in the future.96

**Studies, Reports, and Data:** At its inception, the US refugee resettlement program provided up to three years of support to refugees to promote integration. Since the mid-1990s, however, eligibility periods for support have been reduced and early self-sufficiency has become the chief priority of the program. The State Department notes that “the US refugee resettlement program has found that people learn English and begin to function comfortably much faster if they start work soon after arrival,”97 and the Refugee Act of 1980 includes an emphasis on early employment. A 2013 Government Accountability Office (GAO) report on refugee resettlement stated that the federal government evaluates refugee resettlement programs based on early employment and self-sufficiency and not long-term integration (GAO 2012).

The Refugee Protection Act and the Domestic Refugee Resettlement Reform and Modernization Act direct the GAO to conduct a study of ORR’s domestic refugee resettlement program, including how the ORR defines self-sufficiency, the effectiveness of the resettlement program in helping refugees achieve self-sufficiency, and the amount of resources needed to address the unmet needs of refugees.98 It also directs the GAO to recommend statutory changes to improve the US resettlement program.

The Refugee Protection Act and the Domestic Refugee Resettlement Reform and Modernization Act would also direct ORR to collect, analyze, and share data on refugees who arrive in the United States with serious mental and physical conditions needing treatment, refugee housing needs and homelessness, and refugee employment and self-sufficiency.99

**Secondary Migration:** “Secondary migration” refers to refugees who move out of the communities in which they are resettled to secondary locations. Because the secondary locations had not planned for the refugees’ arrival, they may be unprepared to serve them. The Refugee Protection Act and the Domestic Refugee Resettlement Reform and Modernization Act would direct the assistant secretary of Health and Human Services

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Pending Asylum and Refugee Legislation in the US Congress

for Refugee and Asylee Resettlement (HHS) to report to Congress regarding states experiencing secondary migration, its impact, the availability of social services in those states, and the needs of the secondary migrants. The two bills would also require HHS to provide assistance to refugees who are secondary migrants.100

Coordination of the US Refugee Resettlement Program: The US refugee resettlement program involves the work of many agencies, including DHS, HHS, the State Department, as well as various security agencies, but no one agency is responsible for coordinating all aspects of the program to ensure joint planning, information sharing, and problem solving. The Strengthening Refugee Resettlement Act expresses the sense of the Congress that the president should appoint a White House Coordinator on Refugee Protection.101 The Domestic Refugee Resettlement Reform and Modernization Act aims to address some of the coordination problems by elevating the ORR director position to assistant secretary of Health and Human Services for Refugee and Asylee Resettlement, appointed by the president and reporting directly to the secretary.102

Strengthening Refugee Assistance Programs: Under current law, refugees are eligible for up to three years of cash and medical assistance, job placement, and social services. However, ORR provides cash and medical services for only eight months. The Strengthening Refugee Resettlement Act would require ORR to provide services for one year, subject to the availability of funds, and to provide services to the elderly, sick, and those with “extraordinary” challenges to integration for three years.103 The bill would increase cash assistance to refugees104 and provide grants to nonprofit agencies to help refugees become integrated in their communities by providing naturalization services, employment training and professional recertification.105 The Strengthening Refugee Resettlement Act would also expand eligibility for the refugee matching grant program, a federal-private refugee assistance program.106

Refugee Eligibility for Social Security Income (SSI) Benefits: Social Security Income (SSI) provides elderly, blind, and disabled persons a monthly stipend. Prior to 1996, SSI was available to refugees without any time limitation as long as they remained impoverished and disabled or elderly. However, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 mandated that refugees naturalize within seven years of arriving in the United States to maintain eligibility for SSI.107 Some elderly refugees, particularly those who do not have high levels of literacy in their native language, face difficulty learning English in order to qualify for citizenship.

The Refugee Protection Act would extend the eligibility for SSI assistance to asylees,  

refugees and trafficking victims to 10 years. The Strengthening Refugee Resettlement Act would make asylees, refugees and other humanitarian migrants eligible for benefits indefinitely.

S. 744 would not extend SSI benefits for refugees, but would amend the requirements for naturalization to exempt from the English language and civics requirements individuals who cannot meet the requirements because of a physical or mental disability, as well as those who are over 65 years old and have lived in the United States for at least five years after being lawfully admitted for permanent residence. The bill would also exempt additional applicants over the age of 55 from the English language requirements by lowering the time in LPR status required to obtain an exemption.

**English Language and Work Orientation for Approved Refugees:** The Strengthening Refugee Resettlement Act directs the secretary of state to establish English language and work orientation programs for refugees approved for resettlement prior to their departure for the United States. This would expand an existing State Department pilot program that provides English-as-a-Second Language classes for some refugees in Kenya, Thailand, and Nepal. As noted by the State Department, “By introducing the study of English overseas, these classes are intended to provide basic English competency and promote continued language learning after arrival in the United States.”

**Conclusion**

Advocates for refugees in Congress historically have worked together on a bipartisan basis. In 2003, Ileana Ros-Lehtinen (R-FL), Christopher Smith (R-NJ), John Conyers, Jr. (D-MI) and Zoe Lofgren (D-CA) formed the Bipartisan Congressional Refugee Caucus (USCCB 2003). The purpose of the caucus was “to lift up those refugee issues requiring congressional attention— including Iraqi and Afghan refugees, re-figuring the resettlement numbers for the United States, the effects on refugees of the worsening economy, protection of Darfur refugees, and the need for increased protection of refugees, especially women and girls” (Disciples Home Missions 2009). The bipartisan caucus also served to give greater visibility to refugees, internally displaced persons, and asylum seekers around the world and to mobilize support within the House of Representatives for refugee resettlement and overseas protection and assistance (ibid.). In a March 2003 “Dear Colleague” letter to their fellow representatives, the co-chairs stated that the caucus “will be dedicated to affirming the United States’ leadership and commitment to the protection, humanitarian needs, and compassionate treatment of refugees and persons in refugee-like situations throughout the world” (USCCB 2003).

The Bipartisan Congressional Refugee Caucus was formally renewed through the 111th

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Congress, which ended in 2010, but was not renewed after that (That's My Congress! 2011). During the 113th Congress, the approach to asylum and refugee issues in the House of Representatives has been partisan. The bills offered by House Democrats (the Refugee Protection Act, the Strengthening Refugee Resettlement Act, and the Domestic Refugee Resettlement Reform and Modernization Act) and the bill offered by House Republicans (the SAFE Act) have no provisions in common and only the Domestic Refugee Resettlement Reform and Modernization Act has bipartisan support.

While it is difficult to imagine in this partisan climate how any of these provisions could be enacted into law, some of the provisions have been reintroduced over a number of sessions of Congress and have a history of bipartisan support. Legislation focused on a group of particular interest or concern to members of Congress could gain some traction. The Iraqi and Afghan Special Immigrant Visa legislation, the Lautenberg Amendment for Iranian and Former Soviet Union religious minorities, and the Kyl-Leahy TRIG provision, were of interest to members of Congress because they resolved problems faced by particularly compelling groups in need of protection. Legislation framed by how it could help a particular population could be an effective approach and a good tool for education and outreach efforts in Congress. A more comprehensive legislative approach framed by the need generally to improve the system could be less effective, particularly in the context of the years-long stalemate on comprehensive immigration reform.

While legislation is unlikely in the near future, it remains important for members of Congress who believe in a fair, effective, and humane asylum system and refugee resettlement program, to introduce and build support for asylum and refugee legislation. Provisions in bills that have already been introduced, like those in S. 744, are more likely to be included in legislation that is moving through Congress. In addition, these bills demonstrate the continued interest of members of Congress in these issues and the need for reform, and they provide an important tool for advocates for education and outreach to Congress and the public.
**Provisions of Pending Asylum and Refugee Legislation in the US Congress**

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REFERENCES


Author Biographies

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Claire Bergeron is an associate in the Washington, DC office of WilmerHale. Previously, she worked as an associate policy analyst at the Migration Policy Institute, where she researched and wrote about US immigration enforcement issues. Ms. Bergeron also previously worked as a paralegal and Board of Immigration Appeals accredited representative at the National Immigrant Justice Center in Chicago. She holds a bachelor of arts in anthropology and legal studies from Northwestern University and a law degree from Georgetown University Law Center.

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Anastasia Brown was formerly the director of resettlement services for the Department of Migration and Refugee Services at the United States Conference of Catholic Bishops. She has over 22 years of experience with refugee resettlement and is versed with both overseas and domestic resettlement issues. Ms. Brown’s responsibilities included supervision of all services to refugees resettled through the Catholic network in the United States.

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Katharine M. Donato is a professor and chair of sociology at Vanderbilt University. Her research interests include the consequences of US immigration policy; the health consequences of migration; immigrant parent involvement in schools in New York, Chicago, and Nashville; deportation and its effects for immigrant incorporation; and the gender composition of international migration flows across time and space. Professor Donato has published many articles and co-edited special volumes in the *International Migration Review* and *The Annals of the American Academy of Political and Social Science*. Between 1996 and 2002, she was the principal investigator of a binational project that examined how the processes of health and migration unfold during the life course. Earlier this year, Professor Donato completed a book manuscript about global patterns and shifts in the gender composition of international migrant populations (with Donna Gabaccia at the University of Minnesota), published by the Russell Sage Foundation. Other work in progress includes collaborative manuscripts that examine shifts in the ways that Mexican children and adolescents cross the US border, how the Great Recession affects Mexican men’s employment, and how gender influences human capital effects on US migration from Mexico and Colombia.

**Maryellen Fullerton**

Maryellen Fullerton is a professor of law at Brooklyn Law School. Her research focuses on comparative refugee law and the empirical and normative aspects of the worldwide effect of the Common European Asylum System. In 2013, Professor Fullerton was appointed to the distinguished chair in law at the University of Trento in Italy through the US Fulbright program. This appointment followed an earlier Fulbright Scholar Award to the University of Louvain, Belgium. She has also been a German Marshall Fund Fellow in Budapest and a Visiting Scholar at the Juan March Institute’s Center for Advanced Studies in Social Sciences in Madrid. Professor Fullerton is one of the founding editors of the *Refugee Law Reader*, a comprehensive online resource. She has co-authored two casebooks, *Forced Migration: Law and Policy* and *Immigration and Citizenship Law: Process and Policy*, which are used by more than 100 law schools and universities throughout the United States. In addition to teaching and researching, Professor Fullerton has headed several human rights missions in Germany for Human Rights Watch, has been a consultant for the United Nations High Commissioner for Refugees, and has been active in projects providing support to refugee law clinics in Eastern Europe and Latin America. She is also affiliated with the Dennis J. Block Center for the Study of International Business Law and the Brooklyn Law School International Human Rights Fellowship Program.

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**Donald Kerwin**

Donald Kerwin directs the Center for Migration Studies (CMS), a New York-based educational institute/think tank devoted to the study of international migration, to the promotion of understanding between immigrants and receiving communities, and to public policies that safeguard the dignity and rights of migrants, refugees, and newcomers. CMS was established in 1964 by the Congregation of the Missionaries of St. Charles, Scalabrinians. It is a member of the Scalabrini International Migration Network (SIMN), which consists of more than 270 organizations that serve, safeguard, and advocate for migrants throughout the world.

Mr. Kerwin worked for 16 years at the Catholic Legal Immigration Network, Inc. (CLINIC), serving as that agency’s executive director for 15 years. CLINIC, a subsidiary of the US Conference of Catholic Bishops, is a public interest legal corporation that supports a national network of charitable legal programs for immigrants. He also worked for three years as vice president for programs at the Migration Policy Institute (MPI).

Mr. Kerwin has also served as interim executive director at CLINIC; a non-resident senior fellow at MPI; an associate fellow at the Woodstock Theological Center and co-director of Woodstock’s Theology of Migration Project; on the American Bar Association’s Commission on Immigration; the Council on Foreign Relations’ Immigration Task Force; the board of directors of Jesuit Refugee Services-USA; the board of the Capital Area Immigrant Rights Coalition; and on numerous advisory groups. He currently serves on the board of directors for the Border Network for Human Rights in El Paso, Texas.

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**Mark R. von Sternberg**

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Sanjula Weerasinghe

Sanjula Weerasinghe is an Australian attorney based in Geneva, Switzerland. She is a non-resident senior fellow at the Institute for the Study of International Migration at Georgetown University. Ms. Weerasinghe is engaged with the Migrants in Countries in Crisis Initiative, co-chaired by the governments of the United States and the Philippines and is a co-editor of Humanitarian Crises and Migration: Causes, Consequences and Responses, Routledge (2014).
The *Journal on Migration and Human Security* (JMHS) is a peer-reviewed, public policy publication of the Center for Migration Studies of New York devoted to the US and international policy debates on migration. The journal draws upon the knowledge, expertise, and perspectives of scholars, public officials, faith communities, community-based organizations, nongovernmental organizations, corporate leaders, and others. The journal’s theme of “human security” is meant to evoke the widely shared goals of creating secure and sustaining conditions in migrant sending communities; promoting safe, legal migration options; and developing immigration and integration policies that benefit sending and receiving communities and allow newcomers to lead productive, secure lives.

The Center for Migration Studies of New York (CMS) is an educational institute/think tank devoted to the study of international migration, to the promotion of understanding between immigrants and receiving communities, and to public policies that safeguard the dignity and rights of migrants, refugees, and newcomers (www.cmsny.org). CMS was established in 1964 and formally incorporated in 1969 by the Congregation of the Missionaries of St. Charles, Scalabrinians, an international community of Catholic priests, nuns, and lay people dedicated to serving migrants and refugees. CMS is a member of the Scalabrini International Migration Network (SIMN), a global network of more than 270 entities that provide services to migrants, including shelters along migrant corridors and welcoming (integration) centers in receiving communities. In fulfillment of its mission, CMS: publishes journals, including the *International Migration Review* and the *Journal on Migration and Human Security*, books, conference proceedings, and other papers; sponsors conferences, meetings, briefings, symposia, and dialogues; produces evidence-based, policy-relevant research; provides expert support to local, national, and international institutions, particularly faith-based institutions; and maintains extensive archives on the history of immigration in the United States.
Protection of those fleeing or at-risk of persecution, torture, or extreme danger represents a centerpiece of international law and US humanitarian commitments. The US refugee protection system, broadly understood to encompass refugees, asylum seekers, and noncitizens in need of short-term protection, has ambitious goals and diverse responsibilities. It seeks to screen, admit, and promote the integration of refugees; to adjudicate political asylum cases; and to offer temporary protection to persons from designated countries. It also seeks to detect and prevent the admission of persons who present national security, public safety, and fraud concerns. Over the last 20 years, particularly since the 9/11 terrorist attacks, national security and immigration enforcement concerns have driven and, in many ways, have weakened the US refugee protection system.

To address the need for concentrated academic and policy attention to this pillar of US immigration and humanitarian programs and the broader international system of refugee protection, the Center for Migration Studies of New York (CMS) commissioned this series of papers as part of a broader process of engagement with a working group of scholars, former government officials, and practitioners. The collection, which is released on the 35th anniversary of the Refugee Act of 1980, aims to offer the most comprehensive assessment of the US refugee protection system in recent years. In June 2014, CMS hosted a symposium in New York City which featured presentations by some of the authors and other experts on challenges and recommendations related to access to protection, refugee resettlement, political asylum, temporary protection, the stateless, migrants in crisis situations, unaccompanied minors, and other populations at particular risk. A video of these talks is available at: http://cmsny.org/researchprojects/refugeeproject/.