The Application of Refugee Laws to Central Americans in the United States

Carmen Carrillo

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THE APPLICATION OF REFUGEE LAWS TO CENTRAL AMERICANS IN THE UNITED STATES

CARMEN CARRILLO*

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1. INTRODUCTION

No one knows the exact number of refugees\(^1\) from Guatemala and El Salvador in the United States. Some estimate that there are currently over one million Central Americans within the U.S. who

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\(^*\)J.D., Ph.D.

would qualify for refugee status. They have fled their homelands as victims or relatives of victims of political repression manifested by disappearances, mutilated corpses, and torture.2

This situation has led to the development of numerous centers of assistance and self-help groups, particularly in California. Among these are CARECEN3 and El Rescate4 in Los Angeles, and CRECE5 and the Father Moriarty Central American Refugee Center6 in San Francisco. The proliferation of such organizations recently culminated in the formation of a national Central American Refugee Network (CARNET) with sixty member organizations.7

The need for such organizations has grown with the continuing influx of Guatemalans and Salvadorans to the U.S. Their illegal entry has flourished, despite U.S. policy seeking to distinguish “economic” from “political” refugees.8 Absent official U.S. government sanction, these refugees do not enjoy customary resettlement benefits.9

Local jurisdictions are unprepared to assimilate these refugees. Neither resettlement assistance, nor social or health benefits are available to them per se. Thus, charitable organizations and self-help approaches have emerged to assist the most needy.10

The context in which this situation has unfolded merits consideration. Examination of this context requires consideration of Central Americans as “refugees in orbit”11 due to historical developments and their regional impact. Latin American and U.S.

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3 This organization is located at 1434 W. Olympic Blvd., Los Angeles, CA 90015.
4 El Rescate is located at 1813 W. Pico Blvd., Los Angeles, CA 90006.
5 CRECE is a self-help organization based in San Francisco, CA, and supported interdenominationally by religious organizations. Its mailing address is P.O. Box 14214, San Francisco, CA 94164.
6 Father Moriarty Central American Refugee Center is located at 180 Fair Oaks St., San Francisco, CA 94110.
7 For further information on CARNET, contact any of the organizations referred to supra at notes 3 to 6.
8 See generally Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. PIT. L. REV. 165 (1982). See also Kurtzban, Restructuring the Asylum Process, 19 SAN DIEGO L. REV. 91 (1981).
10 Discussion of the Sanctuary Movement is beyond the scope of this article. For an excellent overview of the Sanctuary Movement, see Project on the Sanctuary Movement, 21 HARV. C.R.-C.L. L. REV. 495 (1986).
responses to the Central American crisis form a critical aspect of the context.

The term "refugees in orbit" was used by the United Nations High Commissioner for Refugees to describe unwanted asylum seekers, some of whom are flown back and forth between countries that refuse to admit them. For example, much attention has been focused on the Vietnamese "boat people" and Haitian refugees as being "in orbit." Central Americans would also seem to fit the description aptly, since they are unwanted in Mexico, and continue north to the U.S., where 97 percent of their asylum applications are denied, leading to their subsequent deportation back to their homelands. Reports indicate that many perish as a result of the repatriation.

II. THE HISTORICAL CONTEXT OF CENTRAL AMERICAN REFUGEES IN THE UNITED STATES

What has brought about this tremendous movement north from Guatemala and El Salvador? Why have over half a million people from those two countries sought refuge in Costa Rica, Honduras, Mexico, the U.S., and Canada with varying degrees of success? Why has the immigration emphasis shifted in Guatemala and El Salvador from migrants seeking opportunity, to refugees seeking haven? Consideration of these questions requires a brief review of the rise of democratic aspirations in those countries, the subsequent violence and civil insurrection, and the ensuing regional initiatives towards stabilization.

A. The Rise of Democratic Aspirations

The second half of the twentieth century brought about a political crisis in Guatemala and El Salvador. Guatemala's experiment in democracy was quashed by a U.S.-backed coup d'etat, and El Salvador's population density required immediate economic so-

16 The discussion is by necessity brief; it is intended to outline the significant events leading to exodus.
lutions.\textsuperscript{17} People’s aspirations were raised by the technological revolution that brought them world news and developments first by transistor radio and later via television. In the 1960’s, Guatemala’s civilian government could not address the country’s fundamental economic issues, giving rise to an active insurgency. The Central American Common Market did not provide a substantial and meaningful solution to the region’s problems. El Salvador’s population density grew, and its economic problems erupted in the “Soccer War” with Honduras, followed by the emergence of armed insurgents.

The governmental responses to popular unrest in both countries was a shift towards militarization and aggressive anti-guerrilla campaigns. These campaigns were accompanied by massive human rights violations, and the blatant activities of Death Squads in both countries.

Both countries have been cited for their human rights violations. Special Rapporteurs have been appointed by the United Nations Commission on Human Rights to conduct thorough studies of the human rights conditions in both countries. The Inter-American Commission on Human Rights of the Organization of American States has described violations of the right to life, liberty, security, and personal integrity in both countries. In August 1982, the Working Group on Enforced or Involuntary Disappearances of the United Nations named Guatemala among 22 countries where it had found that “disappearances” “served as a euphemism for terror campaigns often led by police, military, or para-military forces.” The report said that: “The victims are either never heard of again, reappear bearing the scars of torture, or are found dead, often with their bodies mutilated beyond recognition.”\textsuperscript{18}

The degree of violence in both countries endangers the survival of civilians. Accurate statistics are not currently available documenting civilian deaths, but some commentators and observers assert that virtually everyone is a target for death as a result of the unchecked violence.\textsuperscript{19}


\textsuperscript{18} See generally, Lawless Intervention, supra note 2.

B. Regional Approaches to Peace

The proximity of Guatemala and El Salvador to each other, the relatively small size of the Central American Isthmus, the Sandinista Revolution in Nicaragua, and Cuba's potential role in the political evolution of American States, have evoked concern in South and North America. Interestingly, the conclusions and proposed strategies for peace in the region emanating from South and North America have differed from each other dramatically. A brief review of the proposals follows.

1. The Latin American Proposals

The major proposals to emanate from Latin countries are the Contadora Plan, the Arias Proposal, and Cerezo's Active Neutrality. Much has been written about Contadora and its principle elements: a political solution, a negotiated peace, and covenants of regional cooperation and noninterference. President Arias of Costa Rica sought to take up the banner of the waning Contadora Group by authenticating essentially the same proposals with a Central American stamp. Recently elected President Cerezo of Guatemala has sought to establish his statesmanship by proposing a Central American Parliament to act as a mediating body in the region.

The weakness in these proposals is that they ignore the role of U.S. covert activities in the region, and the grave economic conditions which have led to the conflicts in each country. A strength of the proposals is their Latin origin, which provides Central American leaders the responsibility and authority in the eyes of the world to confront and address human rights issues in Central America.

2. U.S. Regional Strategy

The U.S. regional approach to peace in Central America is rooted in military strategy. Elements of this strategy include the proposed destabilization of Nicaragua's Sandinista government, the establishment of a U.S. military presence in the region on Honduran "training" bases, the support of moderate leadership in El Salvador and Guatemala (where the U.S.-backed Presidents Napoleon Duarte and Vinicio Cerezo, both Christian Democrats), and the

escalation of covert operations, including the so-called Iran-Contra affair. This approach is based on the related premises that the maintenance of status quo relationships between American business and Central American countries is possible and desirable, and that Central America is yet another arena for confrontation with the Soviet Union, which allegedly seeks to export revolution to the region through Nicaragua and Cuba.

This strategy is flawed in many respects. One commentator has pointed out that the U.S. interventionist policy in Nicaragua is disturbing both for its lack of attention to questions of international law and its unilateral approach. The U.S. Congress does not seem convinced that unconditional military funding of governments known for their human rights violations is the optimal policy option, judging from its voting patterns. Moderate leaders in the region are faced with demands for funds and arms from their armed forces, and demands for justice and human rights from their people. Americans may not be comfortable with extensive, expensive, and extralegal covert operations.

III. LEGAL CONTEXT

The harsh realities of the Central American experience have been briefly discussed in order to provide a backdrop for the issue of Central American refugees in the U.S. This backdrop is critical because most commentators have ignored the relationship between U.S. foreign policy and the creation of asylum applicants. Some have noted that asylees represent "the ghost of our foreign policy and the failure of the asylum process." Such perspectives further conclude that the term "economic vs. political refugee" has no meaning in relation to the Refugee Act.

Three sources of law can be applied to the Central American refugee situation. International law, U.S. law, and "developing" law provide the necessary analytical tools to assess the status of the Central American "refugees in orbit."

21 See Lawless Intervention, supra note 2, at 256.
23 See Kurtzban, supra note 8.
24 Id. at 94. The Act will be discussed infra.
25 "Developing" law refers here to recently enacted legislation, a recent Supreme Court decision, and a legislative initiative.
A. International Law

Refugee and humanitarian international law supports the contention that Central Americans fleeing their homelands are refugees and merit the granting of asylum by the U.S. Specifically, the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol\(^\text{26}\) outline the protections accorded refugees and the obligations of State signatories. Similarly, the Geneva Conventions of 1949 outline protections owed to civilians fleeing armed combat.\(^\text{27}\)

1. The 1951 Convention

The 1951 Convention explicitly recognizes illegal presence within a country of refuge\(^\text{28}\) due to difficulties in compliance with the conditions of entry,\(^\text{29}\) and resulting in legal problems within that country.\(^\text{30}\) Flight from persecution is seldom well-planned, meticulously thought out, or compulsively arranged. Usually a precipitating event, such as a death threat or the disappearance of a closely linked co-worker, friend, or relative spurs the impulse to flee as quickly as possible. Rather than preparing a portfolio of identifying documents and letters of introduction, the person in flight may seek anonymity so as not to be found. And there may simply not be time to gather documentation.

Further, Article 33 of the Convention and Protocol prohibits contracting States from returning asylum seekers to their country of origin.\(^\text{31}\) Article 33 was intended to be self-executing with no reservations allowed.\(^\text{32}\) Thus, contracting states are obligated to uphold the principle of nonrefoulement.

2. The Geneva Conventions

The amply documented dismal status of human rights in El Salvador and Guatemala\(^\text{33}\) would seem to prohibit repatriation of

\(^{26}\) See supra note 1.


\(^{28}\) See § 31(1), the 1951 Convention.

\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) See supra note 1.

\(^{32}\) See § 42, the 1951 Convention.

nationals of those countries by the U.S. under Article 45 of Convention IV. Article 45 specifically prohibits the transfer of protected parties to any country not honoring the Geneva Conventions. Both El Salvador and Guatemala are signatories to the Geneva Conventions, as is the U.S.

Further, the Conventions and the Protocols Additional I and II to the Conventions emphasize the protection of civilians and require that temporary refuge be given to civilians who are fleeing from armed combat. Armed conflict in small countries such as Guatemala and El Salvador has an impact on large segments of the population. Not surprisingly, many flee to save their lives.

3. United Nations Instruments

The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Declaration on Territorial Asylum are three United Nations instruments that can be applied to the matter at hand.

Article 14(1) of the Universal Declaration of Human Rights recognizes asylum as a human right. "[E]veryone has a right to seek and to enjoy in other countries asylum from persecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations." Central American "refugees in orbit" can justifiably assert the protection of 14(1). Some may be in the category of having suffered persecution for nonpolitical crimes. The vast majority would be able to demonstrate persecution from acts contrary to the purposes and principles of the United Nations, such as torture, summary execution, or disrespect of their civilian status by members of the armed forces.

Although Article 14(1) does not impose an obligation on states to grant asylum, Article 13 of the Covenant on Civil and Political Rights echoes the protections against summary repatriation pro-

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34 See supra note 27.
35 Although the U.S., Guatemala, and El Salvador have not ratified the Protocols, an argument can be made that temporary refuge is customary law. See Perluss and Hartman, Temporary Refuge: Emergence of a Customary Norm, 26 VA. J. INT'L LAW 551 (1986).
39 See supra note 36.
vided by Article 32 of the 1951 Refugee Convention. Article 13 states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority . . . .

If Central Americans were assured of their legal protections, many more would comply with the elements ascertaining refugee status, including presentment. With the current high asylum rate of application denial, it is a tribute to the refugees' law abiding nature that they have continued to apply.

Finally, the Declaration on Territorial Asylum prohibits forced repatriation, expulsion, or refoulement. Article 3 states: "... no person . . . shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution."

4. The American Convention on Human Rights

The American Convention on Human Rights (American Convention) provides for the right of asylum as well as supporting the fundamental principle of nonrefoulement. The American Convention explicitly grants individuals the right to asylum. It states: "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." It is ironic that the strongest language providing protection for asylees is American in origin. Perhaps the drafters, aware and knowledgable of the conditions in American countries, foresaw the need for definitive protections.

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40 See supra notes 1 and 37.
41 Id.
44 Id. at § 7.
45 "American" is used here in its generic sense, referring to all countries in the Americas.
Central and South America dislike the "hegemonic" use of the term "American" by the U.S.
5. Summary

International law provides an ample mantle of protection for Central American refugees. In addition to the 1951 Convention and the Geneva Conventions, three United Nations instruments and the American Convention support and enhance that protection.

B. U.S. Law

The applicable U.S. law is found in two instruments, the Refugee Act of 1980,46 and the Immigration and Nationality Act.47 Ideally these laws should be in harmony with each other, and should be applied neutrally to asylum applicants. The discussion below will point to problems in these two areas.

1. The Refugee Act

The Refugee Act of 1980 has been referred to as the first and most comprehensive federal statute relating to the admission and resettlement of refugees.48 In brief, the law incorporates the international definition of refugee as found in the U.N. Convention, eliminates geographical and ideological preferences and adopts a universal approach consistent with international standards and norms. The law places special emphasis on “humanitarian” concerns, establishes the legal status and statutory rights of asylum, and mandates that a uniform asylum procedure be established to evaluate asylum applications on a systematic and equitable basis. Commentators point out, however, that the Refugee Act flounders in its implementation by failing to apply “universal refugee standards” and in its refugee allocation process.49 Thus, individuals meeting the standards inherent in the definition of “refugee” are nonetheless increasingly denied asylum as a matter of discretion.50 Statistical analysis of actual admittees from Latin America (excluding Cuba) is infinitesimal.51 The rationale provided for this effective exclusion of Latin Americans from the allocation process is that Latin America

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47 8 U.S.C. § 1101 (1982), [hereinafter the INA].
49 See Ankner & Posner, supra note 48 at 69.
51 See Ankner & Posner, supra note 48 at 70.
has a regional tendency "to focus upon local resettlement." The existence of this "regional tendency" is refuted by the "orbital" movement of refugees from one country to another, finally reaching the U.S. Thus, some assert that the Refugee Act has fallen short of the commitment to human rights it was designed to reflect.

2. The INA

The Refugee Act was linked to the INA by the addition of § 208(a). Section 208(a) and § 243(h) have evolved into alternative procedural standards.

a. § 208(a)

This section vests the Attorney General with the discretion to grant asylum to a refugee unable or unwilling to return to his home country for fear of persecution or a "well founded fear" thereof. The "well founded fear" standard is viewed as generous, since it requires only a showing of past persecution or "good reason" to fear future persecution. The U.S. Supreme Court has described the § 208(a) standard as subjective, making the determination of eligibility partly dependent on the subjective mental state of the alien.

b. § 243(h)

A more stringent standard of proof is required by § 243(h). This section looks to a "more likely than not" standard, establishing "a clear probability of persecution." Section 243(h) requires objective evidence of persecution. It does not rely on subjective reports of "fear," as does § 208(a). This section also vests the Attorney General with the power to determine whether the alien's life or freedom would be threatened. The "would be threatened test" must be met with objective evidence. Unfortunately, Central Americans have found it virtually impossible to meet this test.
3. Summary

Federal statutes consistent with international law would seem to establish adequate mechanisms to provide asylum to refugees, whatever their origin. Empirically, however, the Board of Immigration Appeals has preferred to apply strict evidentiary requirements resulting in very few positive determinations for Central Americans. The "clear probability" test requires almost absolute proof of future persecution — a burden impossible to meet before persecution actually occurs.

C. Developing Law

Present and pending Congressional activity and a U.S. Supreme Court decision reflect ambivalence towards Central American refugees. The Immigration Reform and Control Act of 1986 (IRCA), the recent U.S. Supreme Court decision in Immigration and Naturalization Service v. Cardoza-Fonseca, and the DeConcini-Moakley Bill present a mixed bag of determinations.

1. The Immigration Reform and Control Act of 1986

The IRCA, as signed into law by President Reagan on November 6, 1986, does not include any provisions specifically addressing the plight of Guatemalans and Salvadorans. The Moakley amendment proposing a stay of deportation pending investigation of a refugee's situation was introduced, but was not a part of the final bill.

The legalization provision of the IRCA is not expected to embrace many Central Americans. The Association of Salvadorans and Guatemalans Against Deportation estimates that 80 percent of all Central Americans will not be able to qualify for the amnesty provisions of the new immigration law. Activists in the Sanctuary movement state that the January 1, 1982, cutoff date for eligibility under the amnesty program effectively cuts off large numbers of

58 Id. at 183.
61 See IRCA, supra note 59 at Title II.
potential applicants. Thus, the expected impact of the IRCA on Central Americans would seem to be limited.

2. Immigration and Naturalization Service v. Cardoza-Fonseca.

In contrast, Cardoza-Fonseca argues well for the plight of Central Americans. The respondent in Cardoza-Fonseca was a Nicaraguan citizen who failed to take advantage of an INS offer of voluntary departure. When the INS commenced deportation proceedings against her, she requested a stay of deportation pursuant to § 243(h), as well as asylum as a refugee pursuant to § 208(a). Although she had not been politically active in Nicaragua herself, she asserted that her brother’s overt anti-Sandinista activities would result in threats to her life or freedom, including torture, if she were forced to return to Nicaragua.

The Supreme Court opinion in Cardoza-Fonseca, written by Justice Stevens, rejects the government’s contention that the § 243(h) standard requiring an alien that she is more likely than not to be subject to persecution governs applications for asylum under § 208(a). The Court reasoned that Congress drafted both sections, intending a clear differentiation in standards to be applied concerning the relief to be granted and the classes of eligible aliens. In short, the Court concluded that the Congressional intent of § 208(a) “... mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.”

By affirming the application of the broad “well-founded fear of persecution” standard, the Court offers hope to many Central Americans. Many claimants that had previously found the INS application of the “clear probability” standard of proof insurmountable, may now meet the new test articulated by the Supreme Court.

Many factors contributed to this difficulty. Among them are the impossibility of gathering evidence of persecution before fleeing the country of origin, the lack of familiarity with U.S. legal procedures, and the psychological impact of civil war, torture, and displacement on memory and the effective presentation of facts. The Supreme Court thus offers a ray of hope to displaced Central Americans.

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64 Cardoza-Fonseca, 107 S.Ct. at 1209.
3. The DeConcini-Moakley Bill

This bill essentially calls for a study of the situation of displaced Salvadoran refugees. Further, it proposes a two-year stay of deportation for those Salvadorans during the study. A flaw in the bill is the exclusion of Guatemalans. Nonetheless, the refugee community's advocates are working for inclusion of Guatemalans in the bill and for passage on July 1987. The DeConcini-Moakley Bill is seen as the only alternative remaining, considering the expected limited impact of the IRCA and the shifts in Canadian entry policies.65

IV. Conclusion

U.S. foreign policy toward Central America has relied on a military analysis and focus which has intensified armed conflict in the region, fomented gross human rights abuses, and resulted in untold numbers of "refugees in orbit." Although both international and domestic law provide the mechanisms for the humanitarian granting of asylum to applicants fleeing their homelands, in practice less than four percent of Central American applicants are granted asylum. Many refugees, therefore, may opt for remaining underground, subject to exploitation and poverty.

Absent a change in foreign policy, it is imperative that U.S. and international law regarding refugees be harmonized in spirit and practice, as well as in legal writings. If not, the U.S. will increasingly be seen as "taking the law into its own hands" and creating conditions for internal dissent by citizens inspired to assist refugees on religious or humanitarian grounds.

65 See supra note 62 at 43.