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## Temporary Protection: Towards a New Regional and Domestic Framework

Susan Martin

*Georgetown University*, Susan.Martin.ISIM@georgetown.edu

Andrew I. Schoenholtz

*Georgetown University Law Center*, schoenha@law.georgetown.edu

Deborah Waller Meyers

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# TEMPORARY PROTECTION: TOWARDS A NEW REGIONAL AND DOMESTIC FRAMEWORK

SUSAN MARTIN, ANDY SCHOENHOLTZ, AND  
DEBORAH WALLER MEYERS\*

## I. INTRODUCTION

During the past thirty-five years, the United States has seen the direct influx of thousands of individuals leaving politically unstable countries. While some seeking entry have proved themselves to be refugees and obtained permanent protection in the United States, far more, including a large number of people fleeing civil war, natural disasters, or comparable forms of upheaval in their home countries, have failed to demonstrate that they would be targets of persecution. Yet, their return to their home countries has been complicated by the very circumstances that led to their flight: conflict, violence, and repression. Over time, the United States developed a series of *ad hoc* responses that protected such individuals, culminating in the Immigration Act of 1990 (“IMMACT”),<sup>1</sup> which provided legislative authority for Temporary Protected Status (“TPS”). Nevertheless, after eight years, many problems remain in the application of the law. Solving these problems will contribute both to better immigration control and more humane responses to future crises.

Current policies fail on two accounts. First, the temporary protection provision in the law generally has failed to protect the vast majority of those in danger as a crisis develops and unfolds. If the United States government protects significant numbers at all, protection is provided outside the confines of the United States. Even so, the mechanisms for responding extraterritorially are not well developed.<sup>2</sup> Second, current policies regarding protection in the United States do not provide the control mechanisms to ensure that protection is not abused and that return, when appropriate, is effected.

The choice to admit people for temporary protection has been a difficult one for the United States for two main reasons: the lack of control over entry;

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\* The authors are, respectively, Director and Director of Law and Policy Studies of the Georgetown University Institute for the Study of International Migration, and Associate, International Migration Policy Program, Carnegie Endowment for International Peace. Earlier versions of this paper were prepared for consultations hosted by the United States Commission on Immigration Reform.

1. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

2. The absence of an effective regional protection system and the advantages of developing one are spelled out in U.S. COMMISSION ON IMMIGRATION REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP, 20-25 (1997), and FORCED MIGRATION PROJECTS, OPEN SOCIETY INSTITUTE, A PROPOSAL TO ESTABLISH A TEMPORARY REFUGEE SCHEME IN THE CARIBBEAN REGION FOR REFUGEE AND MIGRATION EMERGENCIES (1995).

and the inability to implement a fair but firm end game. These constraints together with the fear of litigation challenging domestic protection regimes have led policymakers to keep protection seekers offshore, such as on Guantanamo, or to return them directly to countries they fled without providing an opportunity for them to present requests for protection. But not having a fully developed regional or domestic capability for addressing these complex movements comes at a considerable cost. Estimates for the agency costs of handling the 1994 Cuban exodus through the use of offshore safe havens were more than \$500 million.<sup>3</sup> Further, an immigration system that cannot fairly and efficiently process protection seekers lacks credibility for which it pays a significant public cost.

The humanitarian argument for an improved temporary protection regime emphasizes three points. First, the United States has a strong humanitarian tradition of helping others in need. In matters of forced migration, this has resulted in significant assistance and resettlement programs, as well as a reluctance to send people back to dangerous conditions. Moreover, the images of civil war seen on television by the American public make it politically difficult to forcibly repatriate protection seekers regardless of their eligibility for asylum. For example, a grassroots sanctuary movement stimulated Congressional interest in Salvadorans, leading to statutory safe haven for this population.<sup>4</sup>

Second, United States foreign policy interests have been, and can be, well served by providing some form of temporary protection. This was true with respect to Haiti as well as El Salvador and Nicaragua.<sup>5</sup> The United States continues to show international leadership on issues of temporary protection where, for example, the populations being protected are in Europe, Asia, or Africa. The Bosnian experience is only the most recent one where the United States has urged our European friends to be generous. To underline that policy, the United States has resettled Bosnians afforded temporary protection in Croatia, Germany, and elsewhere and has made the Bosnian resettlement a centerpiece of the refugee admissions program.<sup>6</sup>

Third, scholars assert that the United States has an obligation under international law not to return protection seekers to dangerous conditions.

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3. This information came from high ranking officials responsible for the offshore safe havens who were interviewed by the authors. A complete list of persons interviewed on temporary protection is appended. Since interviews were conducted on the basis of anonymity, the text does not attribute statements to specific person(s).

4. Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, 5036.

5. In the case of Haiti, for example, the safe haven policy recognized the significance of the human rights abuses of the Haitian military regime and the efforts of that regime to stifle the fledgling democracy. Protection was provided until the United States restored the democratically-elected President of Haiti to that office through military intervention.

6. See DEPARTMENTS OF STATE, JUSTICE, AND HHS, REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1995; DEPARTMENTS OF STATE, JUSTICE, AND HHS, REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1996; DEPARTMENTS OF STATE, JUSTICE, AND HHS, REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1997; and DEPARTMENTS OF STATE, JUSTICE, AND HHS, REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 1998 (showing the United State's build up of the Bosnian resettlement program).

Professors Perluss and Fitzpatrick argue that there is a customary humanitarian norm of international law that prohibits states from forcibly returning aliens to countries in which their lives are threatened by armed conflict.<sup>7</sup> Other scholars have argued that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>8</sup> provides a right not to be returned to a country in which armed conflict would threaten one's life.<sup>9</sup> Further, the United Nations Convention on Torture obligates signatories, such as the United States, to protect individuals who would be in danger of being subjected to torture if returned to the country they fled.<sup>10</sup>

Immigration control also argues for a more effective and consistent temporary protection regime. As described below, the United States has resorted to a series of *ad hoc* policies over a long period of time to avoid returning individuals to war-torn countries. Each time one of these extraordinary statuses is invoked, the credibility of our immigration policy suffers. This is particularly true when people in similar circumstances are treated differently in the determination of whether or not to use administrative discretion in providing protection. The generous responses to Cubans and Nicaraguans, occurring at the same time most Haitians and Salvadorans were denied a formal temporary protection status, exposed the lack of fairness in United States immigration policy.<sup>11</sup>

The absence of an effective temporary protection policy also undermines the United States asylum system. Many individuals who apply for asylum fail to meet the criteria for refugee status (well-founded fear of persecution), but they come from war-torn countries in which they face real dangers, including a well-founded fear of death.<sup>12</sup> Though they may be denied asylum ultimately, their applications are far from abusive as they often come from societies that produce significant numbers of refugees. The average victim of a civil conflict has too little knowledge of international law to distinguish between persecution and other forms of endangerment. Further, the indi-

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7. See Deborah Perluss & Joan F. Hartman (now Fitzpatrick), *Temporary Refugee: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 554 (1985). The Board of Immigration Appeals ("BIA") has rejected such arguments in *Matter of Medina*, 19 I. & N. Dec. 734 (BIA 1988). Other commentators argue that the United States' obligation not to return applies only to refugees recognized under the U.N. Convention Relating to the Status of Refugees. See Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857 (1986).

8. Geneva Convention No. IV, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

9. T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY*, 1161 n.35 (4th ed. 1998).

10. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reprinted in *Human Rights, A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev.3 (1988), at 212-26.

11. See, e.g., ALEINIKOFF ET AL., *supra* note 9, at 1162-67 (describing the differential treatment of Salvadorans as compared to Nicaraguans in the 1980's, and the Haitians as compared to the Cubans prior to 1994, where the former were generally interdicted by the Coast Guard and returned to Haiti, while Cubans were "warmly greeted and put on a fast-track toward permanent residency"); NORMAN ZUCKER & NAIOMI ZUCKER, *DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA*, 45-46 (1996) (discussing the foreign policy and domestic constituency factors that influenced the differential treatment of Cubans and Haitians).

12. See Dennis Gallagher et al., *Temporary Safe Haven: The Need for North American-European Responses*, in *REFUGEES AND INTERNATIONAL RELATIONS* 333 (Loescher & Monahan eds., 1989).

vidual adjudicating the claim is often reluctant to deny asylum knowing the potential danger faced by the applicant if returned prematurely to a conflict situation. Unless the protection seeker comes from one of a few TPS-designated countries, however, there is little alternative: approve the application by stretching the refugee definition; or maintain the integrity of the asylum system by denying it and risk sending the applicant back to dangerous circumstances.

Too often, a third approach has been to effectively ignore the presence of these individuals so a decision is not needed. As a result, large numbers of individuals have been permitted to remain in the United States without legal status. Because they do not qualify for any legal status, no record is kept of who they are or where they live. Even if circumstances change in the home country and return becomes possible, finding these "tolerated" individuals is very difficult.<sup>13</sup>

The arguments against temporary protection stem largely from the difficulty of implementing policies that will not result in widespread abuse of immigration laws. There are two principal flaws in temporary protection regimes: temporary protection can become a magnet attracting individuals who might not otherwise have left their home countries and/or sought entry into the United States; and return of those granted temporary protection, not only in the United States but in other industrialized countries as well, has proved elusive. To the extent that temporary protection regimes become a backdoor to permanent immigration, policymakers will remain reluctant to invoke the status.

From a different perspective, even supporters of temporary protection for civil war victims worry that it will undermine the ability of refugees to seek asylum and thus the principle of first asylum.<sup>14</sup> This concern is prompted by a major tension in international law surrounding asylum issues. Individuals have a right to seek asylum, but the decision to grant them asylum is a decision made by the sovereign nation. The goal of deterring the entrance of large numbers of people may have the effect of deterring exit from the home country. Individuals whose only choice is indefinite detention in camps may well decide to remain in a dangerous circumstance within their own country, sometimes becoming internally displaced. The capacity to provide protection to those who remain at home is, at best, limited.

Nevertheless, providing temporary protection—but not permanent admission—has long been common in the international arena. The United Nations High Commissioner for Refugees ("UNHCR"), for example, believes that the first priority is to protect deserving individuals in the region until

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13. DENNIS GALLAGHER ET AL., REFUGEE POLICY GROUP, SAFE HAVEN: POLICY RESPONSES TO REFUGEE-LIKE SITUATIONS 5 (1987).

14. See generally, Joan Fitzpatrick, *Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13 (1994).

conditions change sufficiently to allow voluntary repatriation.<sup>15</sup> The next choice would be protection or resettlement in a nearby country, where there is less of a culture and climate change and voluntary return remains a possibility. Resettlement in a more distant third country is generally utilized only when other options are not possible.

This article reviews current temporary protection policies, particularly in the context of the responses to mass migration from Central America and the Caribbean, and then sets out a proposal for a regional and domestic protection regime that better balances the dual obligations of immigration control and humanitarian commitments.

## II. CURRENT TEMPORARY PROTECTION POLICIES

The number of statuses afforded to people who reach the United States in need of protection is almost as complicated as their reasons for flight. The Refugee Act of 1980 is the principal legislative framework for admitting individuals who meet the refugee definition—that is, those who have a well-founded fear of persecution on the basis of political opinion, race, religion, nationality or membership in a social group.<sup>16</sup> Those granted admission as a refugee or asylee (depending on whether they are outside or inside of the country) may adjust to permanent residence after one year. Short- and long-term parole or special entrant statuses have been used to permit people to enter the country prior to a full determination as to whether they will be permitted to remain.<sup>17</sup> Parole has also been used to admit individuals who do not meet the refugee definition but have some other humanitarian reason to be admitted.

Some of those whose asylum claims are rejected have been given another form of discretionary relief from deportation under either special legislative authority or administrative discretion. Individuals already in this country may be granted Temporary Protected Status (“TPS”) if the Attorney General has determined that they should not be required to depart because of a civil conflict, natural disaster, or comparable extraordinary conditions in their country of origin.<sup>18</sup>

### A. *Temporary Protected Status*

TPS was created to provide a legislative remedy for individuals fleeing civil conflicts.<sup>19</sup> TPS is invoked by the Attorney General when the Adminis-

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15. See UNHCR, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 169-75 (1993) [hereinafter *THE STATE OF THE WORLD'S REFUGEES*] (explaining UNHCR's mandate and policies).

16. See generally Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

17. See Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 *INTERPRETER RELEASES* 1637 (Dec. 12, 1994) (discussing the scope and purpose of parole power).

18. See Immigration and Nationality Act, ch. 477, § 207, 66 Stat. 163 (1952) (as amended by Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102).

19. TPS was enacted following a legislative effort to require the Executive branch to grant Extended Voluntary Departure (“EVD”) to Salvadorans who fled the civil conflict in that country. EVD was used

tration believes that conditions in a country meet the following IMMACT criteria:

- 1) There is an on-going armed conflict, and requiring return would pose a serious threat to personal safety;
- 2) There has been an earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions; the foreign state is unable, temporarily, to handle adequately the return of its nationals; and the foreign state officially has requested temporary protection for its nationals in the United States; or
- 3) There exist extraordinary and temporary conditions that prevent nationals from returning in safety, unless the Attorney General finds that permitting the aliens to remain temporarily is contrary to the national interest.<sup>20</sup>

The decision to provide TPS is a purely discretionary one, but once invoked it applies to all residents of that country (or a region of that country that is so designated) who arrived in the United States before a cut-off date specified by the Attorney General.<sup>21</sup> There is no judicial review of the decision to invoke TPS. Those granted TPS are permitted to work during the period the status is in effect.<sup>22</sup> Aliens with TPS are not considered to be permanently residing in the United States under color of law, and they may

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between 1960 and 1990 as a form of *ad hoc* protection invoked at the discretion of the Attorney General. It was essentially an exercise of prosecutorial discretion where the Attorney General elected, usually on the advice of the Department of State, to grant blanket EVD to nationals of a certain country. This action meant that INS would take no action to force departure for as long as the policy remained in effect. A 1982 INS staff study located sixteen occasions since 1960 in which EVD had been granted to aliens because of upheaval in the home country.

EVD has been granted to the following nationalities over the last twenty years: Ethiopians (1977-82, then on case-by-case basis); Ugandans (1978-86); Iranians (1979); Nicaraguans (1979-80); Afghans (1980-85, then on case-by-case basis); and Poles (1982-89). The Lebanese received two periods of EVD after TPS was terminated in April 1993.

In 1987, Congress enacted a special provision allowing certain EVD beneficiaries a twenty-one-month period in which to apply for temporary resident status and eventually for permanent resident status. This applied only to nationals of Poland, Afghanistan, Ethiopia, and Uganda. As originally introduced by Senator Helms, this legislation was meant to benefit only Poles; it was expanded during the course of congressional consideration. About 5,500 people applied for these benefits; some 70% were from Poland. See BILL FRELICK & BARBARA KOHNEN, U.S. COMMITTEE FOR REFUGEES, FILLING THE GAP: TEMPORARY PROTECTED STATUS 11-12, 28 (Dec. 1994); ALEINIKOFF ET AL., *supra* note 9, at 1158-66.

20. See Immigration and Nationality Act, ch. 477, § 244(b)(1), 66 Stat. 163, 216 (1952) (as amended by Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546).

21. See Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 210 (1952) (as amended by Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 304(a), 307(l)(5), 105 Stat. 1733, 1749-53, Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 219(j), (z)(2), 108 Stat. 4305, 4316, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

22. See Immigration and Nationality Act, ch. 477, § 244(a)(2), 66 Stat. 163, 214 (1952) (as amended by Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

be deemed ineligible for public assistance by states and localities.<sup>23</sup> While under TPS, they cannot be detained based on their immigration status.<sup>24</sup> The law includes strict procedures for allowing those protected to become permanent residents through legislation.<sup>25</sup>

An annual report is supposed to be provided to Congress detailing which countries have been designated for TPS, enumerating how many have been granted TPS, and explaining why countries were designated or had their designations terminated.<sup>26</sup> Apparently, the Executive branch generally has been unable to provide accurate data, so the annual reports usually are not issued.

To date, twelve countries have been designated for TPS by the Attorney General. These countries and information concerning their designation are listed in Table 1.

The current system provides a great deal of discretion to the Executive Branch in determining whether and to whom TPS should be granted. The designation of countries allows for group determinations and therefore potentially provides a speedy way to provide protection, particularly when a political crisis emerges in a home country.

TPS has been used to provide protection only to people already in the United States when it is authorized by the Attorney General, through the specification of a date by which applicants must have entered the United States to qualify. It has not generally been used as a means of handling an unfolding crisis abroad that forces people to flee. By limiting TPS to those already in the country by that date, the program cannot act as a magnet. However, the current application of TPS raises concerns since it permits the deportation of individuals who entered after the cut-off date, even though they would face substantially similar circumstances in the home country as would be faced by those granted protection.

A rolling cut-off date would provide a needed mechanism to respond to the humanitarian need of all aliens who would be endangered if returned to their home country. For the first time since the statute became law, TPS was re-designated in 1997 for a country in order to protect individuals who fled

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23. See Immigration and Nationality Act, ch. 477, § 244(f), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615). See *infra*, note 107 and accompanying text.

24. See Immigration and Nationality Act, ch. 477, § 244(d)(4), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

25. See Immigration and Nationality Act, ch. 477, § 244(h), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615). Passage of such legislation requires a supermajority vote of three-fifths in the Senate.

26. See Immigration and Nationality Act, ch. 477, § 244(i), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).



TABLE I—GRANTS OF TEMPORARY PROTECTED STATUS

COUNTRY	DATE OF DESIGNATED STATUS	DATE OF TERMINATION OF STATUS	ESTIMATED NUMBER (UNOFFICIAL)
EL SALVADOR	11/29/90	6/30/92 <sup>a</sup>	187,128
KUWAIT	3/27/91	3/27/92 <sup>b</sup>	343
LEBANON	3/27/91	4/9/93	9,214
LIBERIA	3/27/91 <sup>c</sup>	9/28/99	5,803
SOMALIA	9/16/91	9/17/99	347
BOSNIA	8/10/92	8/10/99	400
RWANDA	6/7/94	12/6/97	200
MONTSERRAT	8/22/97	8/27/99	300
BURUNDI	11/4/97	11/3/99	—
SIERRA LEONE	11/4/97	11/3/99	—
SUDAN	11/4/97	11/3/99	—
KOSOVO	6/9/98	6/8/99	—

<sup>a</sup> Following TPS, the Bush and Clinton Administrations granted Deferred Enforced Departure [DED] to Salvadorans and reissued work authorization until June 30, 1993 and December 31, 1994, respectively.

<sup>b</sup> Following TPS, Kuwaiti residents were granted DED which extended to December 31, 1993.

<sup>c</sup> On April 17, 1997, Liberia became the first re-designated TPS country so that the United States could extend protection to those who arrived on or before June 1, 1996, but missed the original designation's March 27, 1991 cut-off. In September 1998, Liberia was again re-designated, making TPS available to Liberians who arrived on or before September 29, 1998.

Source: Immigration and Naturalization Service.

the civil war and arrived in the United States after the initial cut-off date.<sup>27</sup> However, a rolling cut-off date that applied to all members of a nationality could precipitate mass migration, particularly from countries geographically close to the United States. Also at issue is whether those granted temporary status would return when the crisis is over.

### B. *Deferred Enforced Departure*

Deferred Enforced Departure ("DED") is an administrative stay of deportation ordered by the President.<sup>28</sup> It was first used in response to the

27. See Extension of Designation and Redesignation of Liberia Under Temporary Protected Status Program, 62 Fed. Reg. 16608 (1997).

28. See ALEINKOFF ET AL., *supra* note 9, at 1164.

Chinese government crackdown on the democracy movement in 1989, when the Bush Administration suspended forced departures of Chinese nationals.<sup>29</sup> Apparently, the administration inherited a concern of the Reagan Administration in connection with creating Extended Voluntary Departure (“EVD”) for nationals who had fled a left-wing regime (such as Nicaragua) that could be applied as precedent to nationals fleeing a right-wing regime friendly to the United States (such as El Salvador).<sup>30</sup> The Bush Administration avoided EVD terminology both in its policy announcements and when it formalized DED by Executive Order 12711 of April 11, 1990. The Chinese Student Protection Act of 1992<sup>31</sup> eventually allowed most DED beneficiaries to become lawful permanent residents.

In June 1992, President Bush directed INS to delay forced departure of Salvadorans who had registered for TPS until June 30, 1993.<sup>32</sup> President Clinton granted a further extension until December 31, 1994.<sup>33</sup> This policy covered a large number of Salvadorans (reliable data is unavailable), but considerably less than the number granted TPS because many Salvadorans thought the registry would be used to effect their deportation.<sup>34</sup>

In December 1994, after consulting with United States and Salvadoran government officials, the INS determined that the political and human rights situation inside El Salvador had improved significantly and could no longer serve as a basis for the continuation of DED.<sup>35</sup> Thus DED expired on December 31, 1994.<sup>36</sup> Recognizing that many Salvadorans would continue to have other legal protections and to ensure a smooth transition for those applying for other immigration benefits, the INS automatically extended the validity of DED employment authorization documents for nine months.<sup>37</sup>

### C. *Nonenforcement of Deportation*

Perhaps the most common form of protection has been the nonenforcement of deportation rather than the grant of a specific temporary status. A

29. See *id.*; FRELICK & KOHNEN, *supra* note 19, at 12.

30. See ALEINIKOFF ET AL., *supra* note 9, at 1164.

31. See The Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969.

32. See Deferral of Enforced Departure for Salvadorans, 57 Fed. Reg. 28700 (1992).

33. See Extension of Deferral of Enforced Departure for Nationals of El Salvador, 58 Fed. Reg. 32157 (1993). With respect to the repatriation of Salvadorans, the government of El Salvador specifically requested that the United States not deport massive numbers of their citizens as they feared a large influx of citizens coupled with a substantial reduction in remittances would have a destabilizing impact on the country. See FRELICK & KOHNEN, *supra* note 19, at 12.

34. See *INS Announces Salvadoran DED Extension*, 70 INTERPRETER RELEASES 707 (May 27, 1993).

35. See *INS, DEFERRED ENFORCED DEPARTURE FOR SALVADORANS EXPIRES DECEMBER 31, 1994* (Dec. 2, 1994).

36. See *Expiration of Deferred Enforced Departure for Nationals of El Salvador*, 59 Fed. Reg. 62751 (1994).

37. See *id.* The INS anticipated (correctly) that many affected Salvadoran would receive extensions of employment authorization based on asylum applications filed under the terms of a 1990 court settlement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991). In that case, Salvadoran and Guatemalan asylum seekers accused the Attorney General and the INS of using improper political considerations to deny asylum to those who fled El Salvador and Guatemala. Under the settlement, about 190,000 Salvadorans were permitted to pursue their asylum applications.

lengthy asylum backlog, for example, was tolerated in part to avoid returning people to a civil war (although bureaucratic delays must also be factored in). The asylum backlog grew to over 400,000 cases in the 1990's, the vast majority of the applicants came from three Central American countries: El Salvador, Guatemala, and Nicaragua.<sup>38</sup>

With respect to one national group (Nicaraguans applying in the mid-1980's), asylum approvals were officially recorded but denials often were placed in storage and "forgotten." (This occurred in the Miami District.) In other instances, District Directors simply have not acted on final orders of deportation; the individuals issued final orders have been considered to be very low priority and rarely have been apprehended or deported. For example, even when the Reagan Administration was resisting granting EVD to nationals of El Salvador, only 3,000 Salvadorans were deported each year out of the tens of thousands who might have been.<sup>39</sup>

### III. TEMPORARY PROTECTION AND MASS MIGRATION EMERGENCIES

Two back-to-back mass migrations toward United States territory during the 1990s—one from Haiti and one from Cuba—illustrate many of the issues arising from current temporary protection policies.

#### A. *Haiti*

In response to Haitian migrants taking to boats in the late 1970's and early 1980's, the United States entered into an agreement with Haiti in 1981 permitting the interdiction of illegal Haitian migrants and the return of all except those determined to be refugees.<sup>40</sup> According to Coast Guard statistics, the Coast Guard interdicted approximately 22,000 Haitians from 1981–1990.<sup>41</sup> Following the 1990 election of a new President, Jean Bertrand Aristide, with 67% of the popular vote, the number of Haitian migrants remained relatively low in the first seven months of the Aristide presidency; only 1,277 Haitians were interdicted by the Coast Guard.<sup>42</sup> After the September 30, 1991 overthrow of President Aristide in a military coup, Haitian interdictions dramatically rose and totaled approximately 36,500 from November 1991 through May 1992.<sup>43</sup> Those interdicted were brought to Guantanamo Naval Base. From there, some 33% were brought to the

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38. See *Tables F and 29*, 1995 STAT. Y.B. OF THE INS, 77, 86–87.

39. See *Table 64*, 1990 STAT. Y.B. OF THE INS, 173.

40. See *Agreement Between the United States of America and Haiti*, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241.

41. U.S. COAST GUARD, COAST GUARD HAITIAN RESCUE STATISTICS (Oct. 3, 1994) (attached in Table 2).

42. See *id.*

43. See *id.*

United States to pursue asylum claims. Those screened out were returned on Coast Guard cutters to Port-au-Prince.<sup>44</sup>

In response to the largest single monthly exodus that occurred in May 1992, when 13,053 Haitians were interdicted, President Bush issued Executive Order No. 12,807 (also known as the Kennebunkport Order) on May 24, 1992, instructing the Coast Guard to interdict Haitians and return them directly to Haiti without any determination of refugee status.<sup>45</sup>

This policy toward Haitian migrants was an issue during the 1992 Presidential campaign. Then-candidate Clinton promised to end the policy of direct return should he be elected.<sup>46</sup> In January 1993, President-Elect Clinton announced that the United States would temporarily continue the Kennebunkport Order and focus its efforts improving procedures to process claims within Haiti and on restoring the democratically elected President Aristide. Fearing mass migration into the United States, the new Administration was unwilling to risk ending direct return.<sup>47</sup>

It was not until May 8, 1994 that President Clinton announced the end of direct return of Haitian migrants interdicted at sea.<sup>48</sup> Among the factors contributing to this decision were increased domestic political pressures (such as lobbying by the Congressional Black Caucus and human rights advocates), increased reports of human rights violations in Haiti, and a strengthened foreign policy against the *de facto* military government.<sup>49</sup>

According to officials interviewed by the authors,<sup>50</sup> the President directed those involved to find a way to stop direct returns and guarantee refuge, without specifying the particular means of doing so. Senior government officials considered two major options. One was, in effect, a return to the pre-May 1992 policy of processing Haitian boat people to determine if they met the criteria for being granted refugee status. Those who met the criteria would be cleared for admission into the United States; those whose claims were rejected would be returned to Haiti. The second option involved the establishment of a safe haven for Haitians outside of the United States. Should Haitians wish to avail themselves of the protection afforded by the safe haven, they would be able to remain until conditions changed in Haiti. A third option was not seriously considered—permitting Haitians into the United States to press their cases for asylum or safe haven. The Administration recognized inadequacies in domestic laws, policies and resources that

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44. See INS, *Advocates Dispute Asylum Statistics*, 69 INTERPRETER RELEASES 1066 (1992).

45. See Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992).

46. See Thomas L. Friedman, *Haitians Returned Under New Policy*, N.Y. TIMES, May 27, 1992, at A1.

47. See Ruth Marcus and Al Kamen, *Aides Say Clinton Will Extend Policy on Returning Haitians*, WASH. POST, Jan. 14, 1993, at A25.

48. See Gwen Ifill, *President Names Black Democrat Advisor on Haiti*, N.Y. TIMES, May 9, 1994, at A1.

49. See Roberto Suro, *Dealing With Several Crises at Once: Clinton Tries to Address Haiti's Refugees, Its Rulers, and Its Democracy*, WASH. POST, May 10, 1994, at A3; Karen De Witt, *Hunger Strike on Haiti: Partial Victory at Least*, N.Y. TIMES, May 9, 1994, at A7.

50. See *supra* note 3.

precluded that option. With a backlog of over 400,000 asylum cases,<sup>51</sup> the potential for lengthy appeals, the high cost attributable to resettlement within the United States, and the difficulty in returning individuals when conditions permitted, entry into the United States appeared unworkable.

Some migration experts in the Administration argued that a safe haven would best protect those in need and discourage those who were looking for resettlement in the United States. Others, who thought that processing would be a more effective response, were convinced that only a relatively small number of Haitians would qualify for refugee status and that the quick return of the rejected asylum-seekers would serve as a better deterrent than safe haven to the flight of those with weak claims. Several officials pointed out that the safe haven option appeared counterintuitive to those unfamiliar with its use elsewhere in the world and who feared that safe haven would lead to an uncontrollable exodus if every Haitian had the opportunity to come under United States protection. After discussions with other high-level Administration officials, decision makers at the National Security Council reportedly determined to carry out the President's directive by initiating refugee processing outside the United States.

To lend credibility to the operation, the State Department entered into negotiations with UNHCR on establishing a viable process for refugee status determinations. While UNHCR participated in the refugee processing, it favored temporary safe haven rather than refugee processing, because the latter implied the return of those screened out. UNHCR felt, given the human rights problems and generalized violence under the *de facto* government, that no one should be returned to Haiti.

The United States, together with UNHCR, contacted governments in the region to find locations for processing the Haitians. Attempts to regionalize Haitian migration had been made during the Bush Administration, but a number of officials stated that these efforts did not involve the highest level of Administration officials. In contrast, the Clinton Administration's success in enlisting the support of some Caribbean countries to provide processing sites has been attributed to the direct intervention and genuine interest of high-level Administration officials, including the President and Vice President.

Even with this level of involvement, regional cooperation was limited. The Executive Branch first attempted to negotiate for a land-based processing facility in the region but obtained only one shipboard processing site. Some countries did indicate a willingness to provide limited safe haven facilities for Haitian migrants and possibly even resettlement, but the number of places offered were small or not immediately available.

Processing began on the USNS Comfort, a converted Navy hospital ship docked in Kingston, Jamaica, on June 16, 1994. Of the 2,294 people

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51. See Table 30, 1994 STAT. Y.B. OF THE INS, 85.

interviewed by INS during the next three weeks, 596 (26%) were granted refugee status. By early July, the outflow of migrants from Haiti sharply increased to over 3,000 per day and quickly overwhelmed the processing capacity of the United States Comfort.<sup>52</sup>

On July 5, 1994, the decision was made to provide safe haven for Haitians at the United States military base on Guantanamo Bay, Cuba.<sup>53</sup> Guantanamo could accommodate the greatest number of migrants and could be expanded as necessary. It should be noted, however, that this view of Guantanamo's expansion capacity was new. In 1992, the Executive Branch had claimed that no more than 12,500 people could be housed on Guantanamo.

The Coast Guard brought some 20,000 Haitians to Guantanamo.<sup>54</sup> Not long after the policy was changed from processing and resettlement to temporary safe haven, the numbers of Haitian migrants rapidly decreased. Whereas in July, more than 16,000 Haitians were interdicted, only about 300 were interdicted in August and even fewer thereafter.<sup>55</sup>

By the middle of July, voluntary repatriation of Haitians had begun. As a United States military intervention and the subsequent return of President Aristide appeared imminent, greater numbers of Haitians opted to return to Haiti. On September 19, 1994, United States military forces entered Haiti. One entire camp requested to be repatriated en masse upon President Aristide's return. President Aristide was returned to power on October 15, 1994. Most of the Haitians on Guantanamo opted to repatriate voluntarily. On December 29, 1994, the United States authorities told the remaining Haitians (less than 5,000) that they should return to Haiti by January 5, 1995. Only about 15% did so. Except for some 800 allowed to remain for humanitarian or protection reasons, including 300 unaccompanied minors, the rest were mandatorily returned to Haiti.<sup>56</sup>

## B. Cuba

For thirty-five years, United States policy was that those who fled Cuba and arrived on United States soil were paroled into the United States. All Cubans paroled into the country were then eligible for adjustment to permanent resident status after one year, according to the terms of the Cuban Adjustment Act of 1966.<sup>57</sup> Between 1961 and 1993, more than 600,000 Cubans entered the United States and became permanent residents.<sup>58</sup>

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52. See U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1995, 180; U.S. DEPT. OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, DAILY INTERDICTION OF HAITIAN BOAT PEOPLE BY U.S. COAST GUARD AND U.S. NAVY, 6/15/94-10/6/94 (1994) (attached at Table 3).

53. See *id.*

54. See COAST GUARD HAITIAN RESCUE STATISTICS, *supra* note 41.

55. See *id.*

56. See WORLD REFUGEE SURVEY 1995, *supra* note 52, at 180.

57. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

58. See Table 2, 1993 STATISTICAL Y.B. OF THE INS, 27-28.

The largest single group of Cubans—approximately 130,000—came through the Mariel boatlift in 1980.<sup>59</sup> During the remainder of the decade of the 1980's, smaller numbers continued to arrive by boat and raft. The number of Cuban rafters increased over the next few years, and in 1991–1993 the Coast Guard interdicted almost 8,500 Cuban refugees.<sup>60</sup> From April through July 1994, the Coast Guard interdicted over 3,600 Cubans, as many as it had in all of 1993.<sup>61</sup>

During the summer of 1994, civil unrest began occurring in Havana; in August, Fidel Castro responded by allowing Cubans to leave without restriction.<sup>62</sup> The numbers of interdicted Cubans increased dramatically, from 150 on August 13 to more than 500 August 17, with every indication that the numbers would continue to mount.<sup>63</sup> On August 18, the Administration held a “principals” meeting, where it was quickly decided that a major policy reversal toward Cuban rafters was necessary. On August 19, 1994, President Clinton announced that interdicted Cubans would be brought to a safe haven on Guantanamo and those who reached the United States would be detained.<sup>64</sup>

A number of factors contributed to this sudden change in policy, not the least of which was the timing of the Haitian and Cuban migrations that led many to compare the treatment of Haitians with the treatment of Cubans. Also, a new precedent had been set with the creation of safe haven for Haitians. Other factors which allowed the implementation of a once unthinkable policy included a shift in the views of the Cuban American community, concerted INS action to avoid another “freedom flotilla,” and the re-election campaign of Florida Governor Lawton Chiles.<sup>65</sup>

For many years, the Cuban-American community, particularly in Miami, had welcomed the illegal flow of Cubans, viewing it as an embarrassment to the Castro regime and as proof of the regime's problems.<sup>66</sup> After public signs of unrest in Cuba and the departure of greater numbers of rafters, however, some in the Cuban-American community felt that they did not want to continue to provide Castro with a safety valve, preferring mounting dissent within Havana.<sup>67</sup> Some also felt that those Cubans who were leaving did not oppose Communism as strongly as they themselves did, but simply were leaving for economic reasons.<sup>68</sup> Further, some in the Cuban-American

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59. See ZUCKER & ZUCKER, *supra* note 11, at 5.

60. See U.S. COAST GUARD, COAST GUARD CUBAN RESCUE STATISTICS (Nov. 10, 1994) (attached at Table 4).

61. See *id.*

62. See ZUCKER & ZUCKER, *supra* note 11, at 120–21.

63. See U.S. DEP'T. OF STATE, BUREAU OF POPULATION REFUGEES AND MIGRATION, DAILY INTERDICTIONS OF CUBAN MIGRANTS BY U.S. COAST GUARD AND U.S. NAVY, 7/15/94–10/6/94 (1994) (attached at Table 5).

64. See ZUCKER & ZUCKER, *supra* note 11, at 125–26.

65. See *id.* at 124–26.

66. See *id.* at 120.

67. See *id.* at 124–25.

68. See *supra* note 3.

community were concerned about the ability of southern Florida to absorb another influx of migrants as it had during the Mariel boat lift.<sup>69</sup>

The INS immediately initiated harbor patrol in the Miami area, sent a strong warning message to those who might use their boats to bring Cuban rafters to the United States, and seized boats headed toward Cuba to pick up rafters. The United States Attorney in Miami then prosecuted individuals who disregarded the warning.<sup>70</sup>

Governor Chiles was determined not to have a repetition of Mariel, particularly when he was trying to win re-election in a tight race.<sup>71</sup> Prior to the Administration's change in policy, he announced that all Cubans landing in Florida would be detained rather than processed and released. Thus, the Administration was faced with the prospect of a governor declaring a statewide immigration emergency and taking state action to resolve the situation, not a desired precedent given the number of other states grappling with migration problems. President Clinton and United States Attorney General Janet Reno, formerly State Attorney for Dade County, were also sensitive to concerns about a repeat of Mariel. Many political observers felt that the Mariel Cuban riots in Fort Chaffee, Arkansas contributed to then-Governor Clinton's re-election defeat.<sup>72</sup>

While the safe haven policy significantly decreased the number of Haitians who sought protection outside of Haiti, the number of Cuban rafters interdicted after the announced policy change continued to increase until the weather created rough conditions toward the end of August.<sup>73</sup> The number of rafters picked up again significantly when the weather permitted new boat departures, but began to decline in early September.<sup>74</sup> The flow stopped almost completely when the United States and Cuba entered into a migration agreement that included Castro reimposing constraints on departures and the United States promising to increase legal immigration channels for Cubans.<sup>75</sup>

Some 32,000 Cuban migrants were interdicted by the Coast Guard, in August and September 1994 and brought to the Guantanamo safe haven.<sup>76</sup> Thanks to the foundation laid during the Haitian crisis with respect to regional sites, about 9,000 of these Cubans were transferred to a United States military-run safe haven near Panama City.<sup>77</sup> As part of the United States—Cuban Migration Agreement, Cuba agreed in principle to accept those Cubans who requested voluntary return.<sup>78</sup>

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69. See ZUCKER AND ZUCKER, *supra* note 11, at 125.

70. See *supra* note 3.

71. See ZUCKER AND ZUCKER, *supra* note 11, at 124.

72. See *supra* note 3.

73. See DAILY INTERDICTIONS OF CUBAN MIGRANTS, *supra* note 63.

74. See *id.*

75. See ZUCKER AND ZUCKER, *supra* note 11, at 126–27.

76. See *id.* at 126.

77. See U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY 1996, 187.

78. See ZUCKER & ZUCKER, *supra* note 11, at 126–27.



On May 2, 1995, the Clinton Administration announced that most of the Cubans would be paroled to the United States, but that all rafters henceforth would be interdicted, provided an abbreviated shipboard screening procedure, and repatriated to Cuba unless they met the screening criteria.<sup>79</sup> The United States encouraged those seeking refuge to apply for recognition at the United States Interests Section in Havana.<sup>80</sup> In the end, most of the Cubans (28,450) on Guantanamo or in Panama were paroled into the United States. Only a few Cubans found a permanent home in other countries. Some 600 returned voluntarily through official channels, while about 1,000 Cubans jumped the fence at Guantanamo to return spontaneously to government-controlled Cuba. About 350 found ineligible for parole to the United States were returned involuntarily. Following the new policy announcement in May, interdictions at sea declined considerably.<sup>81</sup>

The Haitian and Cuban experiences taught a number of valuable lessons. The United States can provide protection to those fleeing conflicts, civil disturbances, human rights abuses, and repression even in the midst of a mass migration emergency with minimal risk of inflaming further mass movements. Moreover, the United States can engage regional neighbors in providing such protection. However, the time for such engagement is not during the height of the emergency. The United States should not wait for the next crisis. Rather, the federal government should negotiate the terms of regional cooperation now, when movements within the region are relatively quiet. And, as part of these negotiations, we should rethink our own temporary protection policies to improve our domestic responses to the presence of those seeking safe haven within United States territory.

#### IV. TOWARDS A NEW TEMPORARY PROTECTION REGIME

An effective temporary protection regime must meet a number of criteria. Above all else, it must ensure *protection*, that is, that migrants will not be returned to places where they face potential loss of life or liberty. The regime must work for the individual protection seeker as well as for those fleeing en masse during a migration emergency. In our view, temporary protection complements and supports asylum, which protects those fearing persecution, and, as such, it should not be seen as a substitute for a fair and effective asylum system.

Temporary protection should also not be seen as an avenue towards long-term admission. An effective capacity to repatriate those granted temporary protection when conditions permit would greatly enhance the willingness of nations to provide safe haven when needed. However, a fixation on the expected temporariness of the status should not blind governments to the

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79. See *id.* at 130.

80. See *id.*

81. See WORLD REFUGEE SURVEY 1996, *supra* note 77, at 187.

reality that some circumstances necessitating the grant of protection will continue for so long that return may not be feasible. Hence, a temporary protection regime must plan for the eventual end-game, whether repatriation, settlement in the country providing safe haven, or resettlement in a third country.

Below, we outline the framework for a new temporary protection regime. First, we detail the elements of a regional protection system. Then, we outline a new set of temporary protection policies for the United States.

### A. *Regional Temporary Protection*

Regional temporary protection has proven to be a new, and, in many ways, promising instrument for handling migration emergencies. As referenced above, the key to a regional safe haven is protection. The form and the location can vary depending on the circumstances. A safe haven can be a camp outside the country of origin, a safe area inside the country, or some form of protected status in a third country.

#### 1. *Goals of the Regional Temporary Protection Policy*

Regional temporary protection serves a dual goal for the United States: protecting individuals who are or fear that they will be endangered in their home country while deterring entrance into the United States. A regional safe haven simultaneously permits the United States to balance its obligations under domestic and international law with the responsibility of protecting its borders. From the international point of view, a regional temporary protection regime facilitates the sharing of responsibility for mass migration emergencies. A number of Latin American and Caribbean nations, in addition to the United States, have provided temporary protection to persons fleeing civil wars, political repression, and human rights abuses.<sup>82</sup> Mexico, the Bahamas, Costa Rica, and other countries in the region have simultaneously been the destination or transit point for unauthorized migrants. A regional protection regime would spell out the rights of and responsibilities toward migrants within a humanitarian framework that recognizes the need for immigration controls.

#### 2. *Who Should be Protected?*

The regional temporary protection regime would seek to protect those fleeing civil upheaval and repressive governments, not just those who qualify under the strict definition of a refugee. Many of the Haitians and Cubans given safe haven in Guantanamo and elsewhere would not meet the 1951 Refugee Convention definition since they would probably be unable to

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82. See, e.g., THE STATE OF THE WORLD'S REFUGEES, *supra* note 15, at 117–20 (discussing the ways in which the Central American countries, Mexico, and Belize responded to refugee flows from El Salvador, Guatemala, and Nicaragua).

demonstrate a well-founded fear of persecution. One of the justifications for providing temporary protection rather than access to refugee processing was the unacceptable human rights situation in Haiti with its high level of generalized violence that mitigated against anyone's return.

The shift in defining who is eligible for protection—from purely refugee to safe haven criteria—reflects changes in international norms. Most of the people in need of assistance and protection internationally do not fit neatly into the 1951 Convention definition of refugee as fleeing because of a well-founded fear of persecution. Rather most are leaving unsettled conditions in their country of origin and are eager to repatriate as soon as conditions permit.

Forty-two African governments and ten Latin American governments have signed regional agreements which expand the refugee definition. In 1969, the Organization of African Unity ("OAU") developed a Convention which expanded the UN definition to include individuals displaced by general conditions of violence, complex or natural disasters, external aggression, foreign domination, or events that seriously disturb the public order.<sup>83</sup>

The Cartagena Declaration, adopted by ten Latin American countries in 1984, expands the refugee definition to include those who flee their country because their "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."<sup>84</sup> The General Assembly of the Organization of American States ("OAS") approved this definition in 1985.<sup>85</sup> Both the OAU and Cartagena declarations contain a commitment to the voluntary and individual character of repatriation under conditions of absolute safety.

In addition, there are persons outside Africa or Latin America considered by UNHCR to be of international concern and who receive international protection and assistance from the international community through UNHCR and individual states. UNHCR is often asked to use its "good offices" in providing assistance and protection to displaced persons, including internally displaced persons, who may or may not meet the strict refugee definition.<sup>86</sup>

The capacity to provide regional safe haven would be enhanced if there were a regional agreement, with the United States as a signatory, that would spell out who should receive such protection. The Cartagena Declaration with its expanded refugee definition is one possible model. By providing safe haven to Haitians and Cubans, many of whom would not be recognized as

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83. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

84. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS 19-20* (1991) (quoting *Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 190-93).

85. See *id.* (citing UNHCR, *OAS General Assembly: An Inter-American Initiative on Refugees*, 27 REFUGEES 5 (1986)).

86. See UNHCR, *THE STATE OF THE WORLD'S REFUGEES 1997-98: A HUMANITARIAN AGENDA 2* (1997) [hereinafter *THE STATE OF THE WORLD'S REFUGEES 1997-1998*].

refugees by UNHCR, the United States has accepted, at least *de facto*, the Cartagena definition, especially in regard to Haitians. The United States already recognizes this concept in domestic law by establishing temporary protected status for individuals who cannot be returned to their home countries because of unstable conditions.

### 3. *Responsibility-sharing*

Another aspect of regional safe haven is responsibility-sharing during a mass migration. Under such responsibility-sharing, the United States would receive assistance from other Western Hemisphere countries when migrants are heading toward the United States and would assist these other countries should the situation be reversed.<sup>87</sup> Such responsibility-sharing is viable only if the United States assumes significant leadership and shares part of the burden, both in terms of monetary contributions and program initiatives. In addition, because of its international leadership role, the United States must be aware of its responsibilities in setting a precedent for other nations. The United States cannot, for example, criticize nations for returning asylum seekers without itself practicing and protecting the right of first asylum.

The principle of responsibility-sharing is already well established, but the mechanisms to trigger cooperation are less well developed. One of the main reasons that the United States was able to attract participation of other countries in receiving Haitians and Cubans was the direct interest and involvement at the highest levels of the White House. The negotiating was done on an *ad hoc* basis *after* the decision had already been made to change the United States policy of direct return. While some countries were willing to share the burden of mass migration (albeit in relatively small numbers) out of simple good will and a desire for strong relations with the United States, other countries did request development assistance and other aid.

Now is the time to expand on the existing bilateral Memoranda of Understanding ("MOUs") and also begin multilateral regional discussions on safe haven issues. Such agreements in principle could facilitate the decision making and implementation of a plan, as well as prevent last minute scrambling by the Executive Branch. The Inter-governmental Consultations on Asylum, Refugee, and Migration Policies have often been mentioned as an example of successful ongoing multilateral discussions and could be a model for regional cooperation on migration issues. The Puebla Process, through which the United States, Canada, Mexico and the Central American countries discuss common immigration interests, could also be expanded to include discussion of regional safe haven mechanisms.

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87. As the Open Society Institute explains, a goal of the regional protection system is "to regulate the burdens experienced by particular countries." The system "may be considered a kind of insurance policy for governments that must cope with refugee and migration emergencies." A PROPOSAL TO ESTABLISH A TEMPORARY REFUGEE SCHEME, *supra* note 2, at 6.

Perhaps the most fitting forum for these discussions is the Organization of American States. While this regional organization seems to have had no involvement in the 1994 bilateral discussions or with the safe haven, the OAS has been active in the arena of democracy and human rights. Moreover, as noted above, the OAS General Assembly endorsed the expanded Cartagena definition of refugee in 1985. In the fall of 1997, the OAS co-hosted a meeting on regional protection, signaling a potential interest in the issue.<sup>88</sup> Strengthening the OAS and engaging its political officials in such discussions would be worthwhile.

The role of international and regional organizations must be carefully discussed in developing a regional temporary protection regime for responsibility-sharing. In the 1994 Haitian crisis, UNHCR played a key role in negotiations with foreign countries and monitoring of shipboard screening and the safe havens. The presence of this international organization lent humanitarian credence to the United States plan. The involvement of the International Organization for Migration ("IOM") as well as the roles of non-governmental organizations should be explored.

#### 4. *Operational Issues*

Identifying sites to house those granted temporary protection is the key operational issue to be resolved in negotiating a regional agreement. Various sites may be needed depending on the size of the movements, their proximity to the source country, and geopolitical sensitivities regarding a particular emergency. To the extent possible, the migrants would be released into local communities and be provided employment opportunities while awaiting return to their home countries. When the size of the protected group, their impact on the local population, or other factors make release impossible, camps may be a necessary alternative. The negotiations on establishing the regional protection system should address minimum requirements in terms of overall conditions, access to medical and other services, presence of nongovernmental organizations, specific policies related to unaccompanied minors and women at risk, and other similar issues.

The negotiations should also set criteria for use of safe haven sites within the country of origin. These should be used only as a last resort when all else has proven ineffective in responding to the humanitarian emergency. The risks to life for both protected and protectors have so often outweighed the potential benefits of such in-country protection that only in the most extraordinary circumstances can they be justified.

There is little disagreement that the United States military is best able to establish safe haven camps during an emergency, whether they are located on

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88. See General Secretariat of the OAS, Open Society Institute, Inter-American Institute of Human Rights, and UNHCR, Conference on *Regional Responses to Forced Migrations in Central America and the Caribbean*, Sept. 30-Oct. 1, 1997.

a military base, such as Guantanamo, or inside another country, such as the safe area in northern Iraq. In addition, there is little disagreement, even within the military, that management of the camps should be turned over to civilians as quickly as possible. There is also little disagreement that a military base is far from an ideal site for temporary protection. Guantanamo was not the first choice for a safe haven site, but despite high-level Administration efforts, no site as large as Guantanamo was found that could provide a safe haven for the Haitians and Cubans. Although other countries offered sites, these could not accommodate enough migrants or were not available for a sufficient period of time.

The use of a military base can cause tensions between the military, who has military as well as humanitarian missions to fulfill, and civilian agencies, who are not concerned with security except as it affects the migrants. While most respondents interviewed in this study spoke to the need for handing-off responsibility from the military to civilian agencies, it did not occur on Guantanamo. There was no consensus on whether a civilian government agency should manage the safe haven camps after hand-off from the military or whether this function should be contracted to a nongovernmental organization. Refugee camps throughout the world are run in a variety of ways, depending on the location. In camps under UNHCR auspices, the day-to-day management of the camp is often contracted to nongovernmental organizations (“NGOs”), with external security usually provided by the local military.<sup>89</sup>

In Guantanamo, certain services within the camp were performed by the Community Relations Service (“CRS”), a Justice Department agency. Voluntary agencies’ presence on Guantanamo has been limited. While NGOs such as World Relief and the International Rescue Committee worked at the Guantanamo and Panama safe haven camps during the height of the crisis, difficulties remain in terms of responsibilities; ability to function effectively with limited space, supplies, and staff; relations with the military; and access by other NGOs that also wanted to be involved.

Quality of life issues—housing, administration of justice, food, medical care, education, recreation—must also be considered in defining responsibility for camp management. Military personnel on Guantanamo were concerned with the absence of a civilian justice system in the camps. Other important issues are access and communication. As a military base, Guantanamo had few procedures for allowing outside human rights and refugee organizations, as well as family members, to visit the camps. Nor were there outlets for communication with a large civilian population that spoke little or no English. Since camps thrive on rumors and misinformation, there are advantages to permitting as much hard news as possible to make its way into the camps (through newspapers, radio, mail, etc.) and ensuring that misinfor-

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89. See UNHCR, HANDBOOK FOR EMERGENCIES: PART ONE: FIELD OPERATIONS 2–3 (Dec. 1982).

mation is corrected as quickly as possible. Reliable information about conditions in the country of origin is also necessary to enable those granted temporary protection to make informed assessments about returning home.

Further operational issues pertain to the participation of the protected population in decisions about and implementation of programs. For example, migrants can operate schools and small businesses, assist in food preparation, administer community and supply centers, and be involved in the administration of the camps through their elected leaders. Education and training programs can pave the way for productive return and reintegration. However, they can also raise expectations that cannot be readily fulfilled. In 1994, many Haitians volunteered for police training with the expectation that jobs would be available upon return to Haiti. The news that these jobs were not readily available caused widespread dissatisfaction.

### 5. *Durable Solutions*

While the hope always exists that safe havens will be temporary, they are often around much longer than anticipated. The need for protection often continues to exist years after the initial establishment of a safe haven because of unchanged conditions in the country of origin. Migrants often find themselves unable to return home on a specific timetable and within the humanitarian attention span of the international community.

What are the alternatives for those unable to return after a significant period of time? One option is to maintain them in a safe haven indefinitely, not a particularly attractive solution, although one encountered in many refugee situations internationally. An option more in keeping with the humanitarian nature of this proposal is coordinated action to find durable solutions aside from repatriation. Local integration and third country resettlement should be considered for individuals whose continued presence in protection sites cannot be sustained.

Under some circumstances, a regional framework for protection can serve as an impetus for safe return. Certainly, the decision to provide safe haven to Haitian boat people bolstered the United States and regional resolve to restore President Aristide to Haiti. The military intervention then provided the security necessary for return.

Even without such intervention, regional and international cooperation on the return of refugees and displaced persons can help create favorable conditions for repatriation. For example, under the Comprehensive Plan of Action, Vietnamese in first asylum countries in Asia, especially in Hong Kong, were required to return to Vietnam if their claims to refugee status were rejected.<sup>90</sup> Through the international negotiations, Vietnam agreed to accept the return of the "screened out" without persecution and without

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90. See THE STATE OF THE WORLD'S REFUGEES, *supra* note 15, at 26-27.

prosecution for illegal departure.<sup>91</sup> Vietnam also agreed to the presence of outside human rights monitors to oversee the situation of returnees. Returnees were provided with monetary help, and the Vietnam government received some international assistance to help with reintegration. In-country monitoring by the United Nations High Commissioner for Refugees and non-governmental organizations has not revealed any patterns of persecution against boat people who returned to Vietnam. Further, Vietnam's increased economic ties with Western countries, including the United States, will help to encourage greater respect for human rights.

The Concerted Plan of Action adopted by the International Conference on Central American Refugees ("CIREFCA") is another potential model for coordinated regional action.<sup>92</sup> The CIREFCA plan is particularly relevant because it involved many countries in the Americas and succeeded in managing the return of Salvadorans, Nicaraguans, and Guatemalans from camps in the region.<sup>93</sup> While the Central American peace process began prior to the conference, CIREFCA helped institutionalize the political and economic developments in the region that supported an end to the civil conflicts. Some of the economic development programs adopted by CIREFCA could also be adapted to conditions in other countries recovering from the circumstances that provoke the need for temporary protection. For example, Quick Impact Projects ("QIP") provided resources to communities where there was substantial displacement resulting from warfare. QIPs supported rehabilitation of local roads, water systems, community health centers, schools, housing, and other forms of infrastructure affected by warfare. QIPs employed both the resident population and the returnees, thereby making the local population more receptive to the return of its residents while providing needed transitional income for both groups.<sup>94</sup>

## 6. *Financing Plan*

The temporary protection system will entail numerous costs, including maintenance of the protection sites in between crises and their utilization and operation if and when an emergency occurs. For example, if the United States were to use Guantanamo, the military would face costs greater than normally required to maintain the base. However, certain costs would be incurred regardless of the presence of aliens seeking protection. Reimbursement formulas need to be developed that take into account the marginal additional costs incurred. As part of their advance planning, the countries involved

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91. Vietnam's non-prosecutorial agreement did not extend to crimes, such as murder, committed in Vietnam prior to departure.

92. See *Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons, Report by the Secretary-General, Office of the United Nations High Commissioner for Refugees: International Conference on Central American Refugees, 44th Sess., Agenda Item 110(b), at 3, U.N. Doc. A/44/527 (1989).*

93. See THE STATE OF THE WORLD'S REFUGEES, *supra* note 15, at 120.

94. See *id.* at 115.



would have to project what the total costs could be and clarify who would pay which costs and from which budget items.

### B. *Protection in the United States*

A regional temporary protection regime does not obviate the need for the United States to have credible temporary protection policies of its own. If the United States is to take leadership in negotiating a regional agreement, our own policies should set an example for others. Even when the regional regime is established and triggered, some migrants are likely to reach United States shores. Their treatment in the United States should be in accordance with the principles of protection discussed above. Moreover, the United States will continue to receive individual applicants who do not meet the criteria for asylum but have a well-founded fear for their lives if returned prematurely to their home countries.

As discussed in the first part of this article, the domestic temporary protection system and, more specifically, TPS has been criticized from two directions, as lacking in both humanitarian and immigration control elements. From the humanitarian point of view, the general TPS authority has been used only for countries with small numbers of nationals in the United States and at such a distance that fewer still would be likely to come to the United States. With only one exception to date, TPS has provided protection only to those who were fortunate enough to escape a civil conflict or natural disaster before the TPS designation date, even though later arrivals were fleeing the very same, or sometimes worse, conditions.<sup>95</sup>

On the control side are significant problems in enforcing the departure of individuals granted TPS. In addition, the repeated reinvocations of TPS (or other similar statuses, such as DED or EVD) even after the conditions in a home country have changed raise serious questions about its credibility as a temporary program.

Finally, the Executive Branch's use of other temporary statuses to provide protection remains troubling. IMMACT states that TPS should be the exclusive remedy to permit aliens who are or may be otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality.<sup>96</sup> Nevertheless, as discussed above, a number of other statuses have been granted to individuals under these circumstances. While such statuses provide flexibility to the Executive Branch, the protection system lacks credibility when a complicated range of statuses is used as political winds direct.

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95. See Table 1, *supra*.

96. Section 302(c) of IMMACT did qualify "exclusive" authority in order to exempt Executive Order 12711 of April 11, 1990, which directed the Attorney General to defer until January 1, 1994, the enforced departure of certain nationals of the People's Republic of China.

A meaningful proposal to reform our temporary protection policies should answer the following questions:

- 1) What policies would allow the United States to provide temporary protection to those in genuine need without the program:
  - (a) attracting large numbers of those who do not deserve such protection,
  - (b) adversely affecting local communities, and
  - (c) becoming a back route to permanent residence?
- 2) Given these significant constraints, who can the United States protect and what rights and privileges can they be granted?
- 3) If the conditions that caused flight improve to the point that repatriation is possible, what return policies would be appropriate for this kind of humanitarian program?
- 4) If return is not possible, should integration policies, such as adjustment of status, be put into place, and if so, when?

In our view, a case-by-case determination process that screens applicants for both asylum and temporary protection best serves the humanitarian and immigration control interests. Although there remains a role for group designations, particularly at the start of an emergency when the personnel may not be in place for individual screening of claims, a case-by-case procedure more effectively addresses the weaknesses in current temporary protection policies.

### 1. *Eligibility Determination*

In the past, protection seekers have arrived in two very different ways. Individuals of some nationalities trickled into the United States, a small group arriving each day until large numbers were present. This type of movement was the most common for Central Americans, with the exception of the large influx occurring in 1985 as a result of a change in United States policy that deferred deportation of Nicaraguans. Others have arrived in large numbers during a relatively short period. The entry of Cubans in the Mariel boatlift in 1980 and Haitians and Cubans in the 1990s reflect this type of movement.

When people fleeing civil conflict arrive in the United States either as individuals, but even more *en masse*, policymakers immediately face issues of control. Policymakers first need to decide what process should be used to determine eligibility for protection. How can such a process fairly and efficiently discern those who truly require temporary protection from those whose only reason for applying is to gain entry into the United States labor market?

Current law entitles aliens to request permission to remain in the United States affirmatively through the INS asylum system or to present their request

during a removal hearing before an Immigration Judge.<sup>97</sup> Pursuant to the expedited removal provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that became effective on April 1, 1997, aliens who present themselves at ports of entry without valid documents or with faulty documentation are no longer entitled to such a hearing.<sup>98</sup> The new summary process provides the inspections officer with the final authority to remove such aliens, with the exception of asylum seekers who establish a "credible" fear of persecution in an interview by an Asylum Officer. Those who establish a "credible" fear of persecution in the interview are often held in detention pending an asylum hearing before an Asylum Officer. Asylum Officers order those who do not establish a "credible" fear in the interview removed, subject to the exclusive review by an Immigration Judge within seven days of the removal order. The law does not permit judicial review on the merits of the asylum claim. Under the new law, the Attorney General must provide information concerning the asylum interview to aliens who may be eligible, and an eligible alien may consult with persons of his or her choosing before the interview. Such consultation, however, "shall be at no expense to the government and shall not delay the process."<sup>99</sup>

Under the new legislation, there is no exception for individuals who would face forms of danger other than persecution. Judging from prior experience, however, it is not clear if expedited removal will and, even more importantly, should work in quickly deporting individuals who flee civil conflicts and other violence. Among those determined to have a credible fear of persecution will be individuals who do not ultimately qualify as refugees, but who may fit the TPS-type of criteria. Expedited removal delays, but does not solve, the question of what to do with these individuals. Others subject to immediate removal will be screened out on the credible fear standard but will fit the TPS profile. Public opinion may not accept large-scale deportations of individuals into such situations. Further, the countries of origin may not have the will or the capacity to receive back those who flee in the midst of conflict.

What alternatives are available when immediate return is inhumane or infeasible? Governments generally rely on a group designation, which has the advantage of being relatively easy to administer. However, as evidenced by the minimal number of designations under the current TPS law (in comparison with the unfortunately significant number of crises in various parts of the world) and the difficulty in terminating DED in the Salvadoran

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97. See Immigration and Nationality Act, ch. 477, § 208, 66 Stat. 163 (1952) (*as added by* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546, 3009-690).

98. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, § 302, 110 Stat. 3009-546, 3009-579. The new law allows the Attorney General to apply this as well to individuals apprehended in the interior who originally entered without inspection. The Attorney General has not done so to this point.

99. See Immigration and Nationality Act, ch. 477, § 208, 66 Stat. 163 (1952)(*as added by* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546, 3009-690).

case, foreign policy and politics play an important role when an entire nationality is determined to be eligible for temporary protection. The asylum system has made considerable strides in respecting the nonpolitical nature of the international refugee concept and making determinations based on individual persecution. Our temporary protection system cannot be meaningful and credible if its eligibility criteria are not applied in a similar principled manner.

One reason that the group designation is rarely used for nationals fleeing from nearby countries, however, is the magnet concern. A group designation may draw out people who are not, in fact, in danger in their home countries. Even countries with civil wars have safe zones in which citizens live in safety. Experience teaches that people will take great risks, including the dangers of small boat voyages, if there is any possibility for permanent residence in an economically more advantaged country. To the extent that temporary protection is seen as an avenue towards such permanent residence, there remains a serious reason to be concerned about the magnet effects of this designation.

In order to address concerns that group designation with no cut-off date could act as a magnet with respect to those who do not deserve protection and that group designation with a cut-off date fails to protect similarly circumstanced individuals, we propose that TPS be granted on a case-by-case basis.<sup>100</sup> Under this proposal, an alien could apply for asylum and temporary protected status at the same time. If the individual failed to meet the refugee standard, but met the TPS standard (*i.e.*, the individual's country of origin was in the midst of civil war or other circumstances that would make return dangerous), he or she would be granted TPS for a specified time. This process could be implemented within the regional protection system, if appropriate, or on a unilateral basis. If implemented as part of the regional system, those granted TPS may be permitted to remain in the United States or sent to a regional site, depending on numbers, likelihood of magnet effects if permitted to remain in the United States, and other similar factors.<sup>101</sup>

This proposal provides greater flexibility in determining the appropriate status for an individual. It permits protection of those who truly fear return not only because of persecution, but also because of civil wars and other extreme violence. It does not require the Executive Branch to designate all members or even a subpart of a particular national group for TPS. Instead, case-by-case determinations would be made against agreed-upon criteria. For example, individuals from certain geographic areas might be safely returned to a country with a civil war while others would face grave danger.

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100. Group designations could still be used where decisions can be made expeditiously in order to protect those already in the country when an emergency occurs.

101. The United States Commission on Immigration Reform recommended an expedited proceeding during mass migration emergencies in the United States. Applicants meeting a credible fear of persecution standard would be admitted into the United States, under the Commission's proposal; those meeting a TPS standard would be protected elsewhere in the region; and those meeting neither standard would be repatriated. U.S. COMMISSION ON IMMIGRATION REFORM, *supra* note 2, at 20-23.

Thus, the temporary protection seeker would be required to establish two primary elements: (1) a civil war, natural disaster, or comparable form of upheaval has occurred in the home country and its effects are ongoing; and (2) requiring the return of this individual to that country would pose a serious threat to his or her personal safety. If the determination system were implemented well, a case-by-case system could separate those in genuine need of protection from those who could be immediately returned.

The timing of such a process must balance the importance of providing protection seekers a fair opportunity with the significance of quickly sending a message to those who do not deserve protection that only the *bona fide* need apply. The evidence to date of the streamlined affirmative asylum process suggests that such balances can be made in setting up the process.<sup>102</sup> A system that allows the non-governmental community to play a significant role—as the Joint Voluntary Agencies do in the resettlement process, the Qualified Designated Entities (“QDE”) did in the legalization process, and NGOs do in legal representation and education projects—could help balance the fairness and efficiency demands.

An individualized determination system also would reduce the political and foreign policy pressures on determining what nationalities would be eligible and how long temporary protection is needed. It could be both generous and credible. The latter in terms of applying consistent criteria outside of the political context as well as by ferreting out those who are not in genuine need of protection.

As with the regional protection system, a number of operational issues arise, as discussed below.

## 2. *Decisionmakers*

The officers most capable of making TPS determinations are those familiar, or able to become familiar, with conditions abroad—Asylum Officers. Asylum Officers are charged with understanding conditions abroad, and some now go overseas to make refugee determinations for the resettlement program. They lend credibility to a humanitarian program at the same time that such expert adjudicators expedite the process. Of course, it is likely that such use of Asylum Officers would require shifting expert resources away from the normal asylum workload. Other trained personnel who could be called on to supplement Asylum Officers for making TPS determinations include former Asylum Officers and Immigration Judges.

## 3. *Costs*

Such a system comes with administrative costs. But those costs may not be substantially higher than the current system in which many of those who

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102. See U.S. COMMISSION ON IMMIGRATION REFORM, *supra* note 2, at 29; U.S. COMMISSION ON IMMIGRATION REFORM, REFUGEE AND HUMANITARIAN ADMISSIONS: APPENDIX 270–79 (1997).

require temporary protection apply for asylum either during or after the grant of TPS or DED. With respect to extensions, it may not be necessary to readjudicate individual claims. Instead, the analysis and decision making as to whether conditions permit a lifting of temporary protection could be put into the hands of a workgroup of experts.

#### 4. *Detention/Release*

Given the degree of illegal migration into the United States, fairly quick reception into the community may act as a magnet for those who are not fleeing dangerous conditions but simply are seeking a better economic life. From an immigration control point of view, it may be necessary to detain those who receive temporary protection for the duration of protection, that is, until conditions in the home country permit return. Such controls would be needed to lessen any magnet effect by helping to ensure that those who do not deserve protection do not come. Support for this line of reasoning comes from the rapid reduction in boat departures from Haiti and Cuba when the United States offered protection in Guantanamo but no entry into the United States.<sup>103</sup> Initial detention would also help ensure that disruptions of local communities are minimized when large numbers of migrants enter in a short period.

Currently, there is insufficient capacity to hold significant numbers of people seeking temporary protection in the United States, even if the detention were limited to the initial determination phase. Possible holding facilities include closed military bases, where barracks still stand or other forms of shelter could be raised quickly. If the flow of those seeking temporary protection is concentrated in significant numbers, immediate response teams may need to include the military in order to establish the infrastructure for holding centers.

From the humanitarian point of view, detention unfairly punishes those who genuinely need protection. Other forms of control over the protected population can be devised. In several European countries, open camps are used that do not restrict the movement of those provided protection, but restrict their access to work and other benefits. In Denmark, for example, those protected were initially allowed to stay in special centers administered by the Danish Red Cross. Ultimately, private accommodations were allowed, as long as the cost did not exceed that of the Red Cross center.<sup>104</sup>

A middle ground would be a system of reporting to a third party so that the whereabouts of those provided temporary protection is always known. In the early 1980s, certain Haitian migrants who were initially detained were ultimately released into the community under an arrangement whereby they

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103. See DAILY INTERDICTIONS OF HAITIAN BOAT PEOPLE, *supra* note 52, and DAILY INTERDICTIONS OF CUBAN MIGRANTS, *supra* note 63.

104. See SECRETARIAT OF THE INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEE, AND MIGRATION POLICIES IN EUROPE, NORTH AMERICA, AND AUSTRALIA, REPORT ON TEMPORARY PROTECTION IN STATES IN EUROPE, NORTH AMERICA, AND AUSTRALIA 83 (1995).

regularly reported to voluntary agencies that forwarded such information through Fordham University to the INS. Reportedly, the compliance rate was very high. The Vera Institute, under contract with the INS, currently is studying various tracking mechanisms based on an alien's close community ties in order to increase appearance rates at immigration proceedings while providing alternatives to detention.<sup>105</sup> Their pilot program, it is hoped, will develop creative solutions to address the government's interests in preventing absconding while using detention only for those who pose dangers to the community. The results of the Vera Institute pilot may also provide some guidance with respect to such populations as the temporarily protected.

What is clear is that a single detention/release policy is unlikely to fit for all temporary protection situations. The federal government should have the flexibility to base release decisions on specific criteria—the number of applications, their geographic concentration, and the likely duration of the crisis causing the flight, among others. In the final analysis, protection must be the guiding determinant. Although seldom desirable, detention will be preferable to return to life-threatening situations.

### 5. *Work Authorization/Eligibility for Public Benefits*

Another major issue regarding the rights of those temporarily protected in the United States concerns authorization to work and eligibility for public benefits.<sup>106</sup>

Work authorization has been favored over public financing in the United States, and recent laws have sought to grant work authorizations in a manner that does not create a magnet for those who do not deserve an immigration benefit.<sup>107</sup> Now, the asylum system generally authorizes work only for those granted asylum, a process that takes several months, whereas in the past, that benefit attached to the asylum seeker during the application process. If policymakers continue to favor employment authorization over public funding, they will need to determine when work would be permitted based on a number of questions:

- 1) How soon might the conflict in the home country end and repatriation be safe?
- 2) Should work authorization be delayed for some period (six months,

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105. See VERA INSTITUTE OF JUSTICE, THE APPEARANCE ASSISTANCE PROGRAM, INS CONTRACT # COW-6-C-0038.

106. This may be dependent on the resolution of the detention issue, but not necessarily.

107. In 1995, the regulatory asylum reforms decoupled work authorization from the asylum application, such that asylum applicants receive work permits only after asylum is granted or five months pass after the application is filed without a decision, whichever occurs first. 8 C.F.R. § 208.7(a) (1996). In 1996, section 640(a) of the Illegal Immigration Reform and Immigrant Responsibility Act barred the INS from granting work authorization until six months pass without a decision or asylum is granted, whichever occurs first. See Immigration and Nationality Act, ch. 477, (208, 66 Stat. 163 (1952) (*as added by Refugee Act of 1980*, Pub. L. No. 96–212, (201(b), 94 Stat. 102, 103, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104–208, (604(a), 110 Stat. 3009–546, 3009–690).

for example) to discourage individuals not deserving of protection from taking advantage of a humanitarian program?

3) How many workers within a specified period of time can enter the local workforce without causing serious adverse consequences to the already-resident workers?

The impact of new workers depends on a range of factors, including the state of local economies, the availability of similarly-skilled workers, and the duration of temporary protection. Such workers may cause an adverse impact on already-resident workers in the local economies, or they might make a positive contribution to the state of the local economy. While a labor market analysis of the impact of any new population on a community may be difficult to make with any certainty, the issue needs to be considered. First, though positive and negative effects of new labor may be a challenge to measure in a quantitative way, some directions may be observable. Second, choices as to where a new population is initially settled can take into account what is known about current local labor markets.

Under one option, service providers could be involved in an effort to place those with temporary protection in local areas where work is available. Based on their work in connection with the refugee resettlement program, such organizations may be able to provide an informal assessment of labor market conditions in determining where to place those granted temporary protection. The data that the Department of State requires from service providers with respect to job placements may prove useful in understanding local job markets. A similar approach had some success with Vietnamese and Cambodian refugees and Cuban boat people. While many of each group relocated to areas where large numbers of their nationality lived, a significant proportion remained in the more favorable economic environment.

With respect to benefit eligibility, recipients of TPS were eligible for a limited range of benefits even before the 1996 welfare reforms, including: emergency health care; food and other help for women, infants, and children; school lunch and breakfast programs; public education; unemployment insurance; and job training if eligible under the state's job training and partnership program.<sup>108</sup> They have not been eligible for Aid to Families with Dependent Children (or its successor, TANF), Supplemental Security Income, food stamps, or Medicaid. Under the new welfare law, these restrictions continue and additional ones are added (no job training or federal share of unemployment insurance, for example) because TPS beneficiaries would be treated as "nonqualified aliens" for purposes of public benefits.<sup>109</sup>

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108. See Immigration and Nationality Act, ch. 477, § 244(f), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

109. See JOYCE C. VIALET & LARRY M. ENG, CONGRESSIONAL RESEARCH SERVICE, ALIEN ELIGIBILITY FOR BENEFITS UNDER P. L. 104-193, THE NEW WELFARE LAW 2-3 (Aug. 30, 1996).



As with other nonqualified aliens, the federal government must consider what aid might be appropriate to mitigate the fiscal burden on local communities in providing the services for which they retain eligibility. The size of the school-age population, for example, would be known, so that education costs could be calculated with some accuracy. Depending on what kind of healthcare would be authorized by the federal government, local facilities could be reimbursed for covered costs. This would require a workable method for accurately establishing actual costs.

Although the new welfare reform legislation would appear to settle the issue of benefits eligibility, it well may come back in the event of a mass influx of individuals seeking temporary protection. If sizable numbers arrive in crisis circumstances, they are likely to require some transitional assistance before they obtain employment. When such movements have occurred in the past, special legislation was enacted to provide benefits similar to those available to refugees. Under the welfare reform legislation, as amended, refugees and Cuban-Haitian entrants retain eligibility for assistance during the first seven years after their entry. Unlike refugees, the temporarily protected would not need other types of integration services (since they are not expected to remain in the United States), but they may require short-term cash and medical assistance.

## 6. *The End Game*

The upheavals that cause people to flee their homelands are varied and often complex. Conditions must improve to the point that people can safely return home before temporary protection is no longer needed. What happens when temporary protection ends is key to the credibility of protection policies in the United States. Until we are able to be firm when firmness is possible, we will not be able to be generous in providing protection inside this country.

If conditions improve within a reasonable period of time, most people will be able to return home. If conditions do not improve within such a period, questions will arise as to the continued viability of a temporary protection regime. This section discusses various end game issues, including repatriation, access to the asylum system when temporary protection is ended, cancellation of removal, and administrative/legislative adjustment of status to permanent residence.

### *i. Return*

Return of those granted temporary protection could be accomplished in a number of ways. Removal under our existing immigration laws could be used. Once temporary protection status is ended, those who remain in the country would be here illegally. Notices to appear would be issued against such over-stayers, initiating the removal process. If deportation is carried out,

it removes the concern some have of providing protection at all. On the other hand, carrying out deportations in large numbers may create destabilizing conditions in the home country. Moreover, deportation is a costly process, requiring INS officers and Immigration Judges to handle large numbers of cases. Some believe that it is simply wrong to return *forcibly* those who have fled civil wars and other emergencies that significantly damage a country, noting that the humanitarian impulse that justified temporary protection needs to be matched by a humanitarian return approach.

A more fitting end game is to plan for return as a part of the larger political and economic reconstruction processes in the home country. Return of those granted temporary protection could be accomplished by voluntary means with a combination of individual financial and home country development aid incentives. For UNHCR, the standard criteria for return are “voluntary repatriation in safety and dignity,” preferably in an organized fashion and with the cooperation of the governments of both the host country and the country of origin.<sup>110</sup> Organized plans commonly include assurances of safe passage, material assistance to help those returning to reestablish themselves, and provisions for an international presence of some kind to monitor their safety.<sup>111</sup>

Under an option emphasizing humanitarian return, people would be assisted in returning voluntarily. Such assistance could include direct financial assistance targeted to communities to which people return, similar to the QIPs described above. The International Organization for Migration runs a number of programs assisting individual returnees going from developed back to developing countries. Under some of these programs, IOM helps returnees find employment in their home countries and pays the differential in salary for a limited time.<sup>112</sup> Several Western European countries have negotiated return agreements with Eastern European nations that provide assistance for the reintegration of returnees.

Funding any return policy is critical. Financial assistance from taxpayers requires sufficient public support for the policy. Another option would be to set aside Social Security payments made by those temporarily protected in a special fund to be distributed only upon return. The employee Social Security contributions would go directly to the individual, while the employer contributions could be targeted to the communities to which nationals are returning.

Providing financial incentives and aid to returnees and local communities may encourage the return of a good number of people. However, it is difficult to assist the home country communities enough to ensure that returnees will not be simply added to high unemployment rates and subject to rising crime

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110. See THE STATE OF THE WORLD'S REFUGEES 1997-98, *supra* note 86, at 147.

111. See *id.* at 164-81.

112. See, INT'L ORG. FOR MIGRATION, *Policies and Practices with Respect to Rejected Asylum Seekers*, 1992, MC/INF/222, at 17-18, and Annex II, 1-2.

rates where a civil war or other emergency has just ended. If people believe that conditions at home will not allow them to provide food, shelter, and clothing for their families, they will opt to stay illegally in the United States.

Our reform proposal, therefore, combines voluntary and mandatory elements. Return of those granted temporary protection could be accomplished first through voluntary means with assistance; but, if that does not work, removal under existing immigration laws would proceed. Under this proposal, people would be given a period of time to avail themselves of repatriation benefits, such as those described above. Those who do not opt for that form of return during the period when it is offered would be subject to removal as well as to possible penalties regarding future immigration to the United States.

This proposal gives people a chance to return home in safety and dignity. If the Social Security special fund constituted the financial assistance given to those who return, United States taxpayers would not be funding that assistance. If the QIPs and development aid are well funded and implemented, this option reduces the risk that return will create instability in the home country. The mandatory removal process may ensure that a large number of people return and that the United States public supports protection in the first place. While the ideal return policy is a voluntary one, we would prefer a firm policy at the end of the period of protection if that is the only way to have temporary protection in the first place.

#### *ii. Access to the Asylum System*

As noted above, when temporary protection ends within a reasonable period of time, most individuals are expected to return home. For a small number of individuals, a question remains as to their eligibility at the end of the temporary period to apply for asylum.

As with other TPS issues, the arguments for and against access to asylum proceedings have some merit. Immigration control argues for limited access: those offered temporary protection generally should be precluded from applying for any other form of protection or relief at the end of the temporary period. More expanded access might attract those who simply want to find a way to stay in the United States permanently. On the other hand, humanitarian interests require access to asylum proceedings, at least when there are changed circumstances in the home country—for example, when a new regime coming to power could give rise to a well-founded fear of persecution for an individual on the outs with that regime. Domestic law should protect Convention refugees from return to a country of persecution whatever their prior status.

An advantage of the individualized determination process described above is that it permits an asylum review and decision at the beginning of the process rather than after temporary protection ends. Those granted temporary protection instead of asylum already will have been determined to be

non-refugees. Unless they could show that a specific, subsequent change in home country conditions alters the validity of the original asylum decision, there would be no grounds for reopening their asylum application.

*iii. Cancellation of Removal and Adjustment of Status*

When the United States permits certain individuals or groups to enter or remain in the United States in emergency circumstances, that permission is generally intended to be a temporary one. The United States expects forced migrants to return home when circumstances improve and the emergency ends. But emergencies do not always end before such individuals become part of the United States community.

Under current policy, those who enter the United States when fleeing dangerous conditions at home enjoy varying benefits regarding if, and when, they can become permanent residents. Those who qualify for asylum already may have suffered such persecution that it would be inhumane to return them to their home countries even when the persecuting regime falls. Asylees currently are able to apply for permanent residence one year after they are granted asylum.<sup>113</sup>

Congress required that those granted TPS generally cannot adjust status through Congressional action unless a supermajority in the Senate supports such a measure.<sup>114</sup> At the time the TPS legislation passed, the principal mechanism for adjustment was suspension of deportation.<sup>115</sup> Available to all migrants in the United States for more than seven years, suspension required a showing of “extreme hardship” to the individual or his or her family if deportation took place.<sup>116</sup> The TPS statute specifically provided that if the Attorney General determines—with respect to an alien granted temporary protected status—that “extreme hardship” exists, then the temporary protection period can be counted as part of the seven year physical presence requirement.<sup>117</sup> This policy recognized that individuals become part of their

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113. See Immigration and Nationality Act, ch. 477, § 209, 66 Stat. 163 (1952) (*as amended by* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103, Immigration Act of 1990, Pub. L. No. 101-649, § 104(a)(1), § 603(a)(4), 104 Stat. 4978, 5082, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 307(l)(1), 105 Stat. 1733, 1756, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(g)(3)(A), (4)(A), § 371 (b)(2), 110 Stat. 3009-546, 3009-622, 3009-645).

114. See Immigration and Nationality Act, ch. 477, § 244(h), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

115. See Immigration and Nationality Act, ch. 477, § 244, 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615).

116. See *id.*

117. See Immigration and Nationality Act, ch. 477, § 244(b)(1), 66 Stat. 163 (1952) (*as amended by* Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978, 5030, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-546, 3009-615). This language differs from the language in the old suspension of deportation provision, which

local communities over time and that deportation becomes increasingly more difficult. Without a potential for adjustment, these individuals remain in limbo.

In 1996, Congress significantly raised the requirements for this type of adjustment such that very few, if any, are likely to qualify for this type of relief, now called "cancellation of removal." The new cancellation of removal provisions heightened the standard to "exceptional and extremely unusual hardship" for all; restricted its application to United States citizen or permanent resident children, spouses, or parents, not to the alien himself or herself; and raised the time period of continuous residence and good moral character to ten years.<sup>118</sup>

The TPS statute envisioned suspension of deportation proceedings in the immigration courts. It is likely that many individuals protected over long periods of time would have been able to meet the extreme hardship test and thus could have clogged up the courts in costly and tedious hearings. For this reason, prior to Congress' shift in policy, some observers had called for an administrative suspension of the deportation process that could be efficiently implemented by immigration officers, much like the current affirmative asylum system is now.

The various weaknesses in the policies available to adjust status have often led Congress to pass special legislation. In June 1989, the Chinese government cracked down on dissidents during demonstrations in Tianamen Square.<sup>119</sup> The Bush Administration suspended forced departures of Chinese nationals and then, in 1990, provided Chinese students in the United States at the time with DED.<sup>120</sup> In 1992, Congress enacted the Chinese Student Protection Act enabling most DED beneficiaries to adjust to permanent residence.<sup>121</sup> Previous administrations had granted various nationalities EVD to allow such nationals to remain in the United States, including Ethiopians (1977–82, then on a case-by-case basis), Ugandans (1978–86), Afghans (1980–85, then on a case-by-case basis), and Poles (1982–89).<sup>122</sup> In 1987, Congress enacted a special provision allowing EVD beneficiaries from these four nationalities to apply for temporary resident status and eventually

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required a determination that deportation would result in extreme hardship "to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." See 8 U.S.C. § 1254(a)(1) (1992) (*repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 308(b)(7)).

118. See Immigration and Nationality Act, ch. 477, § 245, 66 Stat. 163 (1952)(*as amended by* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 413(d), 110 Stat. 1214, 1269, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(f)(1)(O), 2(C), (g)(10)(B), § 375, §.376(a), § 671(a)(4)(A), (5), 110 Stat. 3009-546, 3009-621, 3009-648, 3009-721).

119. See ALEINIKOFF ET AL., *supra* note 9, at 888.

120. See EXEC. ORDER NO. 12711, 55 Fed. Reg. 13897 (1990).

121. See Chinese Student Protection Act, Pub. L. No. 102-404, 106 Stat. 1969 (1992).

122. See FRELICK & KOHNEN, *supra* note 19, at 28.

permanent resident status.<sup>123</sup> This adjustment legislation occurred in the context of the 1986 legalization program and addressed certain inequities in that program. Most recently, Congress legislated a range of benefits in 1997 to resolve the status of Central Americans and Eastern Europeans: from immediate adjustment for Nicaraguans to the old suspension of deportation standards and process for Salvadorans, Guatemalans, and Eastern Europeans.<sup>124</sup> Conspicuously absent from any form of relief were Haitians. President Clinton has endorsed legislation that would provide leniency for Haitians, and in December 1997 extended DED on their behalf pending the outcome of that legislative initiative. In October 1998, Congress provided adjustment relief to Haitians by enacting the Haitian Refugee Immigration Fairness Act.<sup>125</sup>

We propose a more consistent approach that would provide for automatic adjustment to permanent residence, regardless of nationality, if the grant of temporary protection continues for a very lengthy period. The potential for return diminishes over time and the United States should recognize this fact in its policies. Rather than require statutory authority or a lengthy judicial process to address the inevitable problems in returning people so long after they left their home countries, this approach enables a more streamlined administrative process. If the federal government determines that the conditions for return have not been met within the specified period (*e.g.*, seven years), recipients of TPS would be eligible to become legal immigrants unless they failed to meet the usual tests regarding public charge, criminal behavior, and related grounds of inadmissibility.

Whatever the means to permanent residence at the end of TPS, there is some concern that such a policy would act as a magnet. In particular, migrants may be willing to risk departure to the United States if there is only a limited possibility of permanent residence. Since many civil wars last for the time likely to be included in any such trigger, the migrants would have reason to believe that TPS is indeed a route not only to enter, but also to remain in, the United States. We believe that these concerns are best addressed by instituting individual TPS adjudications that ferret out those who do not deserve protection and returning such persons right at the beginning. Such firmness will limit any magnet effect, along with related actions regarding initial detention and a waiting period for work authorization.

At the end of the day, if return is not possible and these individuals have lived in the United States and become Americanized, policymakers face a

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123. See Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331 (1987).

124. See Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, § 201, 111 Stat. 2160, 2193 (1997).

125. See Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277, § 101(h), 12 Stat. 2681 (1998).

choice between leaving them in limbo or regularizing their status. Without legal status, such individuals are exploitable and will not be able to integrate into American society. Such an *ad hoc* policy harms the interests of society as well, contributing to the growth of an underclass that will remain politically marginalized without the chance to become a part of the polity. Regularizing the status of those who will remain in the United States through a consistent policy applicable to all would overcome those problems and enable a humanitarian program to end in a noble way.

## V. CONCLUSION

There is a new imperative for considering significant reform of TPS along the lines we have proposed. The new expedited asylum system raises many concerns, not least of which is the potential harm that expedited review poses for bona fide refugees whose credibility is questioned. Equally disturbing is the absence of any exception for individuals who would face forms of danger other than persecution. Will expedited removal result in deporting individuals who flee civil conflicts and other violence? Will the American public tolerate large-scale deportations of people who fit the TPS profile, but who are screened out on the credible fear standard and immediately removed?

Our proposal protects those who fear death or other dangers, and does so by building on the success of the asylum reforms that occurred in recent years. At a minimum, an asylum officer and an immigration judge should be able to adjudicate claims both to asylum as well as TPS on an individual, case-by-case basis before expedited removal is permitted to conditions of civil war and other extreme violence. If fully implemented, our proposal would establish a clear, consistent basis for temporarily protecting persons fleeing such dangerous situations. Further, this proposal provides a framework for United States involvement in the regional protection system described above and offers an example to other countries that will be called upon to address mass migration emergencies. The proposal is both firm and fair, and would result both in better immigration control and a more humane response to these crises.

TABLE 2—COAST GUARD HAITIAN RESCUE STATISTICS

Source: Seventh Coast Guard District Public Affairs Office (305) 536-5641. <i>Numbers include all Haitians migrants rescued within the Seventh District as of 03 Sep 98</i>								
By Year								
1981	1982	1983	1984	1985	1986	1987	1988	1989
64	158	687	2,951	2,327	3,176	3,588	4,699	3,368
1990	1991	1992	1993	1994	1995	1996	1997	1998
1,131	9,941	31,401	2,329	24,917	1,969	700	587	270

By Month												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1982	106	0	12	0	13	0	8	0	0	0	0	19
1983	0	13	0	44	29	153	90	6	33	142	60	117
1984	30	326	26	74	250	187	43	58	393	149	872	543
1985	104	20	67	682	256	24	0	294	548	44	16	272
1986	261	470	160	545	180	92	0	1,255	7	8	37	161
1987	218	27	250	31	187	165	606	602	544	369	419	170
1988	497	0	739	328	526	401	402	172	348	452	392	442
1989	340	141	1,533	417	0	136	150	70	423	121	0	37
1990	54	90	0	101	0	123	207	0	136	95	94	231
1991	246	0	0	717	70	127	198	43	163	19	6,012	2,346
1992	6,477	1,401	1,158	6,144	13,053	473	160	252	84	714	712	772
1993	1,363	9	10	3	0	96	26	23	371	148	60	220
1994	78	347	274	612	1,448	5,603	16,019	319	130	20	110	0
1995	0	0	0	240	0	41	148	428	0	10	1,102	14
1996	195	179	235	0	2	66	0	10	0	13	0	0
1997	0	1	0	0	0	0	19	147	0	0	420	0
1998	0	0	0	55	90	103	22	0	0			



U.S. Department of State  
Bureau of Population, Refugees, and Migration



### DAILY INTERDICTIONS OF HAITIAN BOAT PEOPLE

by U.S. Coast Guard and U.S. Navy

6/15/94 - 8/2/94

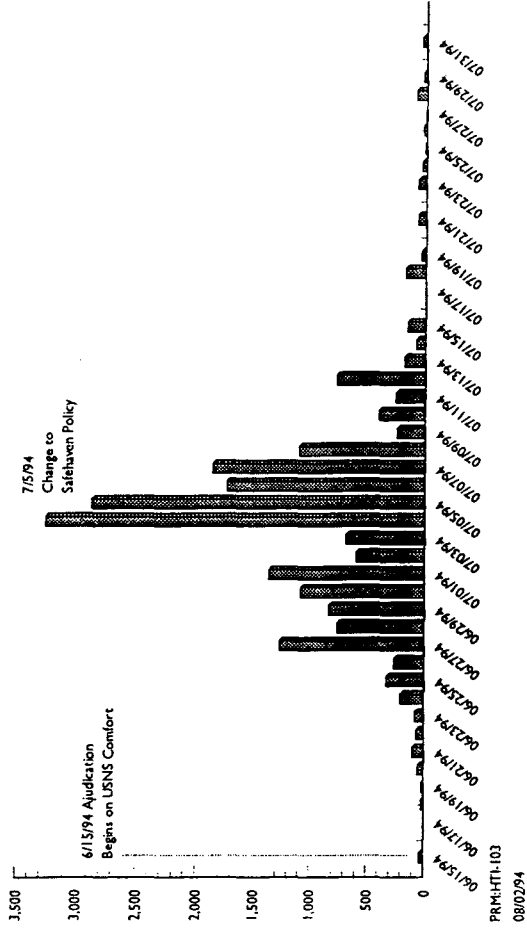


TABLE THREE

TABLE 4—COAST GUARD CUBAN RESCUE STATISTICS

Source: Seventh Coast Guard District Public Affairs Office (305) 536-5641.  
Numbers include *all* Cuban migrants rescued within the Seventh District as of  
03 Sep 98

By Year								
1981	1982	1983	1984	1985	1986	1987	1988	1989
NA	NA	47	19	43	27	44	59	391
1990	1991	1992	1993	1994	1995	1996	1997	1998
467	2,203	2,557	3,656	37,139	626	393	406	712

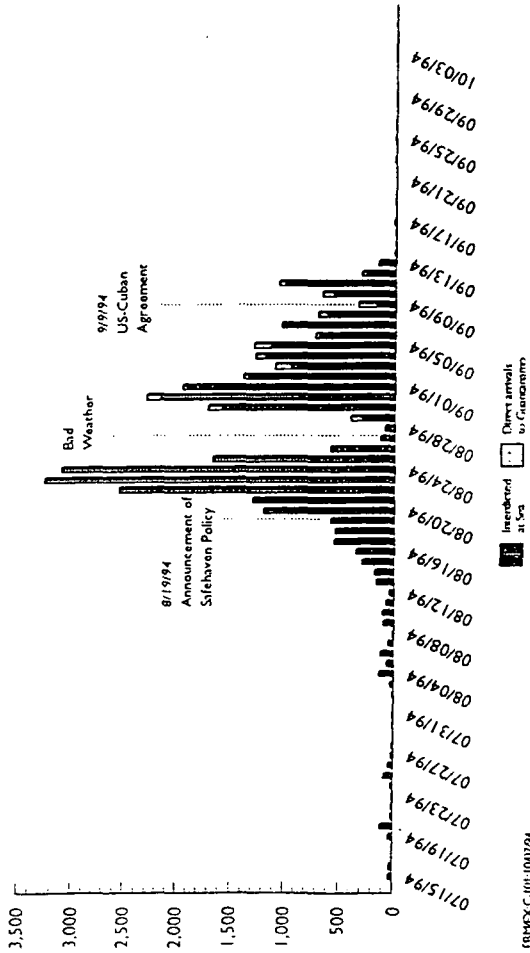
By Month												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1990	42	24	18	47	40	25	22	55	84	30	9	71
1991	53	13	116	272	378	390	190	204	252	175	69	91
1992	80	53	144	153	191	93	293	485	468	263	191	143
1993	158	143	153	172	243	188	240	441	522	609	429	358
1994	248	384	474	726	716	1,173	1,010	21,300	11,085	20	3	0
1995	0	123	35	191	51	40	13	43	16	13	66	35
1996	27	21	40	1	43	17	30	50	87	40	3	42
1997	5	15	35	19	42	13	98	43	74	4	15	43
1998	57	22	48	62	93	161	131	108	30			

U.S. Department of State  
Bureau of Population, Refugees, and Migration

### DAILY INTERDICTIONS OF CUBAN MIGRANTS

by U.S. Coast Guard and U.S. Navy

7/15/94 - 10/06/94



FRM45C (11/10/93)794

TABLE FIVE



**TEMPORARY PROTECTION: INTERVIEWS AND MEETING  
WITH GOVERNMENT OFFICIALS AND OTHER INTERESTED  
PARTIES\*\***

UNITED STATES GOVERNMENT REPRESENTATIVES

*T. Alexander Aleinikoff*, General Counsel, Immigration and Naturalization Service; Executive Associate Commissioner for Programs, Immigration and Naturalization Service

*Lt. Commander John Allen*, United States Coast Guard, Guantanamo Naval Base

*General Ayres*, Commanding General, Guantanamo Naval Base

*R. Rand Beers*, Director, Global Issues and Multinational Affairs, National Security Council

*Dan Cadman*, District Director, Miami, Immigration and Naturalization Service

*Phyllis Coven*, Deputy Associate Attorney General, Department of Justice; Director, International Affairs, Immigration and Naturalization Service

*Joel Danies*, Haiti Working Group, Department of State

*Richard Day*, Chief Counsel, Senate Subcommittee on Immigration

*Diane Dillard*, Deputy Assistant Secretary for Visa Services, Department of State

*Morton Halperin*, Special Assistant to the President and Senior Director, Global Issues and Multinational Affairs, National Security Council

*Col. Hendricks*, Guantanamo Naval Base

*Douglas Hunter*, Director, Office of Policy, Bureau of Population, Refugees and Migration, Department of State

*Janelle Jones*, Deputy Director, Refugees Bureau, Office of International Affairs, Immigration and Naturalization Service

*David Kornbluth*, Senior Migration Policy Officer, Bureau of Population, Refugees and Migration, Department of State

*Kenneth Leutbecker*, Associate Director, Immigration and Refugee Affairs, Community Relations Service, Department of Justice; Coordinator, Humanitarian Affairs, Office of International Affairs, Immigration and Naturalization Service

*Commander Luke*, United States Coast Guard, Miami

*David Martin*, General Counsel, Immigration and Naturalization Service

*Marie McGlone*, Counsel, House Subcommittee on Immigration and Claims

*Brunson McKinley*, Senior Deputy Assistant Secretary of State, Bureau of Population, Refugees and Migration, Department of State

*Doris Meissner*, Commissioner, Immigration and Naturalization Service

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\*\* The titles and organizations provided are the ones that were current at the times these interviews occurred.

- Commander Morrison**, United States Coast Guard, Miami
- Michael Myers**, Policy Director, Humanitarian and Refugee Affairs, Department of Defense; Counsel, Senate Subcommittee on Immigration
- Phyllis Oakley**, Assistant Secretary for Population, Refugees and Migration, Department of State
- Col. Michael Pearson**, Guantanamo Naval Base
- Gene Pugliese**, Counsel, House Subcommittee on Immigration
- Geri Ratliff**, Counsel to the Deputy Attorney General, Department of Justice
- Grover Joseph Rees**, Staff Director, House Subcommittee on International Operations and Human Rights
- Terry Rusch**, Director, Office of Refugee Admissions, Bureau of Population, Refugees and Migration, Department of State
- Glenn Schmidt**, Counsel, House Subcommittee on Immigration
- Eric Schwartz**, Special Assistant to the President and Senior Director, Democracy, Human Rights and Humanitarian Affairs, National Security Council; Director, Global Issues and Multinational Affairs, National Security Council
- Lt. Col. Ed Seely**, Civil Affairs, Guantanamo Naval Base
- David Stewart**, Assistant Legal Adviser, Human Rights and Refugees, Department of State
- Cordia Strom**, Counsel, Senate Immigration Subcommittee; Chief Counsel, House Subcommittee on Immigration and Claims
- Kathleen Sullivan**, Counsel, Senate Subcommittee on Immigration
- Lt. Col. Len Tatum**, Guantanamo Naval Base
- Kathleen Thompson**, Director, Refugees Bureau, Office of International Affairs, Immigration and Naturalization Service
- Jeffrey Weiss**, Director, Immigration and Refugee Affairs, Community Relations Service, Department of Justice
- Captain Wilder**, United States Coast Guard, Miami

#### STATE GOVERNMENT REPRESENTATIVES

- Debbie Kilmer**, Director, Washington Office, State of Florida
- Mark Schlakman**, Special Counsel to the Governor of Florida

#### INTERNATIONAL ORGANIZATION REPRESENTATIVES

- Kofi Asomani**, Special Envoy for Haiti, United Nations High Commissioner for Refugees
- Anne Willem Biljeveld**, Washington Representative, United Nations High Commissioner for Refugees
- Hans-Petter Boe**, Chief of Mission, Washington Office, International Organization for Migration
- Rene van Rooyen**, Washington Representative, United Nations High Commissioner for Refugees

**Cy Winter**, Operations Officer, International Organization for Migration,  
Guantanamo Naval Base

PRIVATE ORGANIZATION REPRESENTATIVES AND RESEARCHERS

**Angela Brown**, World Relief, Guantanamo Refugee Project

**Guarione Diaz**, President, Cuban American National Council; Ombudsman  
for Cubans on Guantanamo

**Patricia Weiss Fagan**, Consultant

**Elizabeth Ferris**, Executive Director, Church World Services

**Joan Fitzpatrick**, University of Washington Law School

**John Fredriksson**, Lutheran Immigration and Refugee Service

**William Frelick**, Senior Policy Analyst, United States Committee for Refu-  
gees

**Dennis Gallagher**, Executive Director, Refugee Policy Group

**Lucas Guttentag**, Director, Immigrant Rights Project, American Civil Liber-  
ties Union

**Arthur C. Helton**, Director, Forced Migration Projects, Open Society Institute

**Carl Hampe**, Paul Weiss, Rifkind, Wharton & Garrison

**Rosemary Jenks**, Center for Immigration Studies

**Michael Lempres**, Akin, Gump, Strauss, Hauer & Feld

**Cheryl Little**, Florida Rural Legal Services

**Charles B. Keely**, Georgetown University

**Jack Martin**, Director of Research, Center for Immigration Studies; Federa-  
tion for American Immigration Reform

**Jana Mason**, United States Committee for Refugees

**Jocelyn McCalla**, Executive Director, National Coalition for Haitian Refu-  
gees

**Kathleen Newland**, Senior Associate, Carnegie Endowment for International  
Peace

**Rosemarie Rogers**, Tufts University

**Rick Swartz**, Swartz and Associates

**John Swenson**, Executive Director, Migration and Refugee Services, United  
States Catholic Conference

**Barry Stein**, Michigan State University

**Carol Wolchok**, Director, Center for Immigration Law and Representation,  
American Bar Association

