

No refuge for persecuted neighbors: Human Rights and Asylum in the Americas¹

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“O! ye that love mankind! Ye that dare oppose not only the tyranny but the tyrant, stand forth! Every spot of the Old World is overrun with oppression. Freedom hath been hunted round the globe. Asia and Africa have long expelled her. Europe regards her like a stranger and England hath given her warning to depart. O! receive the fugitive and prepare in time an asylum for mankind!”

--Thomas Paine, *Common Sense* (1776)

Introduction

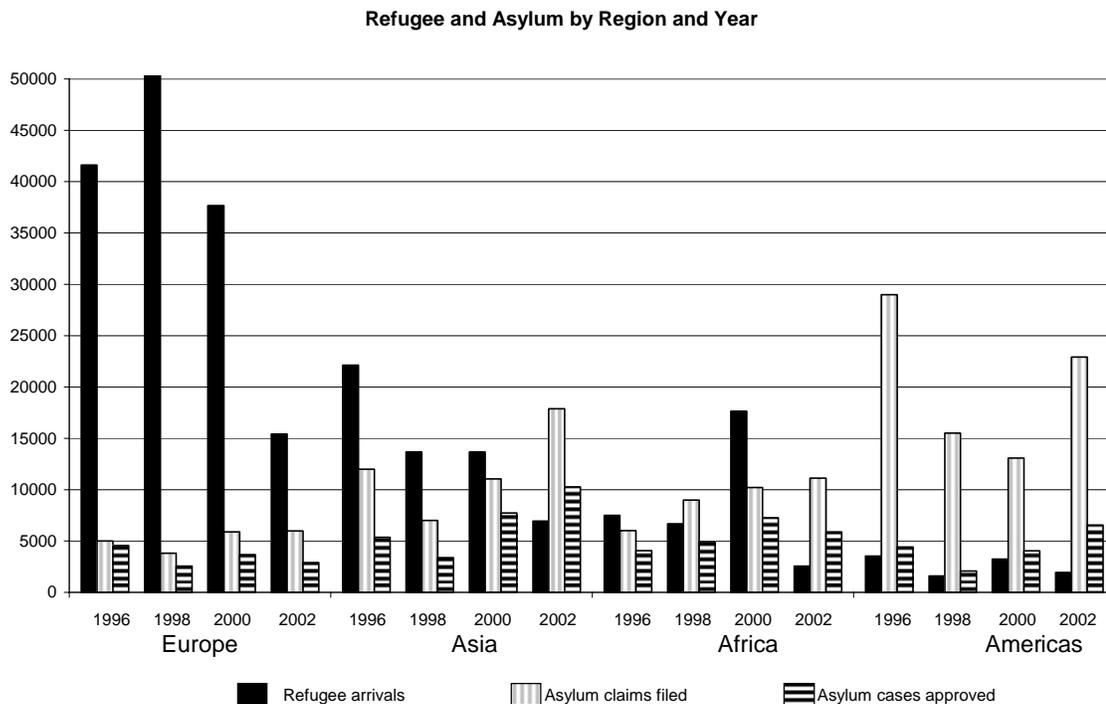
The ability to seek refuge and begin life anew in the United States has been a dominant narrative since even before the nation gained sovereignty. Emma Lazarus’s words from 1883 articulated the sentiment of the US as a home to all in need: “Give me your tired, your poor, your huddled masses yearning to breathe free.” With the creation of the United Nations in 1945 and the adoption of international human rights treaties, the ability to seek refuge in the US became a codified human right. The asylum and refugee system, however, has not equally dispensed this right. In 2002, applications from asylum seekers from throughout the Americas, whose absolute numbers were the fewest of all refugees, had the lowest approval rate of any region in the world. Specifically, of the 23,000 annual applications from women, men, and children fleeing from American nations, only 18 percent are approved.² By contrast, the percentages of approved asylum applications from other regions of the world are considerably higher: Europe 36%, Asia 49%, and Africa 49%. When one examines the situation in the Americas more closely, one finds that Central American nations (12% approval) and Mexico (0.3% approval) fare the worst of all.³ (See Figure 1)

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² United States Citizenship and Immigration Services [USCIS], *Yearbook of Immigration Statistics*. (2002) Section 4. Refugees and Section 5. Asylees, 49-81.

³ USCIS. 49-81.

Figure 1. Refugees and asylum seekers by region and year. Data from USCIS (2002) Yearbook of Immigration Statistics.



In order better to understand US asylum policy with respect to applicants from Mexico, Central America, and the Caribbean, we explore here the history of asylum legislation with a specific focus on international human rights documents. We suggest that a US asylum system more concordant with human rights law could contribute to a more equitable granting of asylum status and refugee resettlement. This paper discusses the current US practices in providing refuge and complying with human rights law. We illustrate that the US, a signatory to multiple international documents on asylum and refugee issues, has provided refuge to thousands of the world's citizens fleeing persecution. However, we illustrate the US governments use of asylum often contradicts international human rights law. Recent US trends in detaining asylum seekers, denying their applications, and immediately deporting them at their points of entry are particularly alarming.

We begin with a review of human rights documents that address the ability to seek refuge from persecution in other nations. We then review the international documents signed and ratified by the US government. In the second section, we address domestic law and practices in the treatment of asylum seekers. Finally, we hypothesize about the possible sources of the bias against certain regions in the Americas that seem to exist within the US asylum system. Case studies from the Atlanta Asylum Network, an organization providing medical and psychological evaluations for asylum seekers, will highlight challenges to the existing asylum process. Ultimately, we suggest that the

asylum system in the US, as an essential resource for persons fleeing persecution, might be improved in specific ways to allow for more equitable decisions about who receives asylum and who does not.

Human Rights

In the wake of World War II and the Jewish Holocaust, the world community was galvanized to define the ideals of human rights. The rights that were to be drafted not only intended to prevent another such tragedy but also to assure that the individuals displaced by the conflict could have their rights protected. Soon after the establishment of the United Nations, a committee chaired by Eleanor Roosevelt was charged with the drafting of the document that would become the Universal Declaration of Human Rights (UDHR).⁴ This non-binding declaration was approved unanimously by the United Nations General Assembly on December 10, 1948. Steiner states that the UDHR “has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole.”⁵ Since then, human rights have come to be understood as an arm of international law which includes the United Nations Charter, the 1948 Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This core set of documents is often referred to as the “International Bill of Human Rights.” Human rights consist of a set of beliefs about the societal basis of human well-being and describe the relationship between individuals and the state. These documents are especially important for asylees and refugees, groups often neglected under domestic law.

The covenants, conventions, and treaties that form the basis of international human rights law exist at both international and regional levels. The United Nations system has produced the vast majority of international human rights treaties. The Charter of the United Nations describes the purpose of the organization as follows: “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion...”⁶ Of critical importance is the recognition of the key principle that the “inherent dignity and of the equal and unalienable rights of all members of the human

⁴ United Nations, *Universal Declaration of Human Rights* (1948). G.A.Res 217A (III), UN GAOR, Res. 71, UN Doc. A/810.

⁵ Henry J. Steiner, “Securing Human Rights: The First Half-Century of the Universal Declaration and Beyond,” *Harvard Magazine* (Sept-Oct, 1998), 45; also in Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Oxford University Press, 2000), 139.

⁶ *United Nations Charter*, signed at San Francisco, 26 June 1945, entered into force on 24 October 1945, Article 1.

family is the foundation of freedom, justice, and peace in the world...⁷ These rights are not limited to a specific nationality but encompass all men, women, and children.

Secondly, the U.N. Charter establishes the responsibility of nation states and international bodies regarding the promotion and protection of human rights. Article 55 asserts that, "[w]ith a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁸ In further describing the responsibilities that states hold, Article 56 states that "[a]ll members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."⁹ The Charter of the United Nations, then,

- ❖ recognizes the fundamental importance of human dignity in modern society;
- ❖ establishes the key principle of non-discrimination; and
- ❖ identifies the promotion and protection of human rights as a worldwide endeavor to be undertaken by states individually and collectively.

In short, human rights are deemed universal and unalienable,¹⁰ as well as interdependent and interrelated.¹¹ The duties to respect, protect, and fulfill these rights falls upon all the nations that are party to international and regional human rights documents.¹² Specific rights include the right to life, liberty, and security of person (Art. 3), the right to be free from torture or other cruel, inhuman or degrading punishment (Art. 5), the right to equal protection under the law (Art. 7), and the right to asylum (Art. 14) among others. Many of these rights are central to the plight of asylum seekers and refugees, particularly article 13 and 14. Because the US is a signatory to the U.N. Charter and to the UDHR, it has an obligation to provide refuge for those fleeing from their home countries because their rights have been violated.

A number of other conventions and protocols further expand the protections for refugees and asylees, notably the Convention Relating to the Status of Refugees

⁷ *United Nations Charter*, Preamble.

⁸ *United Nations Charter*, Article 55.

⁹ *United Nations Charter*, Article 56.

¹⁰ United Nations, *Universal Declaration of Human Rights*, Article 2.

¹¹ *Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights*, Vienna, 14-25 June 1993, (United Nations General Assembly document A/CONF.137/23), paragraph 5.

¹² United Nations, *Universal Declaration of Human Rights*, Preamble.

(hereafter referred to as the Refugee Convention),¹³ the Protocol Relating to Refugees (hereafter referred to as the Refugee Protocol),¹⁴ and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT).¹⁵ These treaty documents are particularly relevant to asylum seekers. The Convention Relating to the Status of Refugees¹⁶ was developed shortly after World War II, defining a refugee as someone who, "owing to well-founded fear or being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence is unable or, owing to such fear is unwilling to return to it."¹⁷ States party to the Refugee Convention and the related Refugee Protocol agree to protect refugees in ways similar to those enjoyed by nationals of the host state; this includes access to the legal system, to gainful employment, to housing, education, and social security.¹⁸ The Refugee Convention and Refugee Protocol exist as safeguards against nation states that fail to promote and protect human rights inside their own borders, thus creating unjust and unsafe societies.

Many asylum seekers are survivors of torture or other maltreatment who leave their countries of origin to seek refuge elsewhere. Article 3 of the Refugee Convention goes on to state that states party to it should not expel or return (*refouler*) an individual to a situation where substantial danger, including torture, exists for him or her, including to countries with known patterns of human rights violations.¹⁹ In other words, nations that ratified the Refugee Convention cannot return asylum seekers and refugees to situations where their rights are endangered.

The above documents require national implementation. Nation states, sometimes referred to as the "rights-bearers," whereas individuals are "rights-holders," sign and

¹³ United Nations Convention Relating to the Status of Refugees, G.A. Res. 429(V), UN GAOR.

¹⁴ United Nations Protocol Relating to the Status of Refugees, G.A Res.2198 (XXI), UN GAOR.

¹⁵ *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res.39/45, UN GAOR, 39th Sess., Supp. No 51, at 197, UN Doc. A/39/51 (1985).

¹⁶ Refugee Convention, Article 33.

¹⁷ Refugee Convention, Article 1.

¹⁸ Refugee Convention, Chapter 3 and 4.

¹⁹ *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 3.

ratify regional and international human rights treaties. Nation states are accountable at three levels commonly known as the responsibilities to respect, protect, and fulfill human rights.²⁰ Respect for human rights means that the state agrees not to violate the rights of its citizens; protection entails that states will not allow non-state actors to violate the rights of their citizens; and fulfillment obliges the state to act positively to provide for its citizens.²¹

Regarding the transition from international doctrine to domestic law, once a state has signed a treaty, it must submit that treaty for approval within its own domestic system, which, in the case of the US, means ratification by Congress. Once a treaty has been ratified within the state domestic system, and it has been ratified by a sufficient number of member states, the treaty enters into force. States that are party to the treaty submit themselves to the accountability and monitoring systems outlined therein, which may include reports, field visits, an individual complaints procedure, an inter-state adversarial procedure, and procedures created through Economic and Social Council Resolutions.²² Regional and International bodies are responsible for holding states accountable for their actions.

As a founding member of the UN, the US has a long history related to the development and implementation of international human rights documents. All of the treaties the US has signed within the UN, once ratified by Congress, have equivalent legal status to that of the US Constitution. The US has signed and ratified the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,²³ and the US has acceded to the Protocol Relating to the Status of Refugees.²⁴

²⁰ S. Gruskin and D. Tarantola, "Health and Human Rights," in *The Oxford Textbook of Public Health* ed. Detels, McEwan, Beaglehole, and Tanaka, (New York: Oxford University Press, 1996), 8.

²¹ *Loc. cit.*

²² United Nations Economic and Social Council Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No.1) at 17, U.N. Doc. E/4393 (1967). United Nations Economic and Social Council Resolution 1503 (XLVIII), 48 U.N. ESCOR Supp. (No.1A) at 8, U.N. Doc. E/4832/Add.1 (1970).

²³ United Nations Office of the High Commissioner for Human Rights, "Status of Ratifications of the Principal International Human Rights Treaties," <http://www.unhcr.ch/pdf/report.pdf> (accessed October 22, 2004)

²⁴ United Nations Treaty Series, "Protocol Relating to the Status of Refugees," <http://www.unhcr.ch/html/menu3/b/treaty5.htm> (accessed October 22, 2004)

United States' policy for asylum seekers

The international documents scribed by the UN are not always upheld in US policy. Implementation of ratified UN conventions and protocols often deviates from or fails to meet the objectives set forth by international law. A review of the history of US policy and action toward refugees and asylees illustrates some of the strengths and weaknesses of the current system.

US immigration could be characterized as Paine's "asylum for mankind" until the end of the nineteenth century. Then, in 1891, under the auspices of defending national borders, Congress created the Immigration Act, which designed, among other things, set quotas to limit the entry of Asians.²⁵ After World War I, ten million displaced persons from Eastern and Southern Europe immigrated to the US, which precipitated the Immigration Act of 1924 that lowered the acceptable entry quota on Eastern Europeans, increased the quota for Western Europeans, and nearly eliminated Asians from entering the country. Until World War II, geography was the only criterion dictating entry; issues of persecution played no role.²⁶ After World War II, the 1948 Displaced Persons Act added religious discrimination to the existing geographic criteria, specifically restricting the number of Jews and Roman Catholics entering the country.²⁷

The immigration system was revised again under the 1952 Immigration and Nationality Act (INA), which still made no specific reference or provision for those fleeing persecution. A series of ad-hoc legislation followed (1953 Refugee Relief Act, 1960 Fair Share Refugee Act); however, no codification of asylum seeker rights was established. In 1956 the Attorney General's office employed parole authority to allow larger numbers of refugees to enter the country, and specific populations were allowed to remain in the US under parole authority, notably Hungarian (1958), Cuban (1966), and Indochinese (1977).²⁸

The INA Amendment of 1965, the first permanent clause addressing refugee immigration limited the meaning of 'refugee' to persons fleeing countries that were either

²⁵ Charu Newhouse al-Sahli, "A Brief History of the Use of Immigration Detention" *History of Immigration Detention, Detention Watch Network News*, (Summer 2001), 12.

²⁶ State of Florida's Internet Portal, "Health and Human Services, Refugee Services, Refugee Issues: Historical Perspectives", 2.
www.myflorida.com/cf_web/myflorida2/healthhuman/refugee/pdf/rshp.pdf (accessed October 22, 2004).

²⁷ Historical Perspectives, 2.

²⁸ Immigration and Naturalization Services Asylum Program [INS Asylum Program], "History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication." (Washington, D.C.: September, 1999) 1-14.

communist or located in the Middle East²⁹ and it restricted the number of refugees to 17,400. This legislation suggested US tacit acceptance of the definition of a refugee under international law; but by the same token the US actions violated the key principle of non-discrimination by limiting refugees based on political motivations.

During the Carter administration, the US saw its highest annual influxes of people fleeing persecution, peaking in 1980 at 350,000. In 1980, Congress also succeeded in bringing the US definition of 'refugee' into accord with the international UN definition.³⁰ This 1980 US Refugee Act was neutral with regard to geography and form of government. Furthermore, unlike the UN definition, which limits refugees to those who currently face persecution, the 1980 US definition also included persons who previously experienced persecution but were not currently at risk. The Act also specifically excluded "persons who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."³¹

Despite the 1980 Refugee Act's attempt to redefine asylum status based on persecution rather than the flavor of political regime, bias still permeated granting decisions. Cases filed by persons fleeing persecution from 'friendly' nations were dismissed in favor of those involving flight from communist nations. In 1985, this led to a lawsuit by refugee advocates and religious organizations against the US government and the INS, which focused on the denial of asylum cases for Salvadorans and Guatemalans because the governments participating in torture were allies of the US government. The ruling favored the humanitarian and religious organizations' claim of US discrimination in asylum policy and resulted in the 1991 American Baptist Churches (ABC) Settlement Agreement that allowed for people from these nations to reapply for asylum.³² The case below describes an asylum seeker from Guatemala who was able to reapply under the ABC settlement.

Asylum case #1: A middle-aged Guatemalan man (BR) sought asylum from violence experienced by him and his family. BR's father, uncle, and sister were killed by Guatemala Revolutionary Unity (URNG) guerillas. BR believes that his father's career as a policeman incurred the violence against his family from the guerrillas. In the mid-1980s, guerrillas came to the family's home in the middle of the night. The guerrillas tied ropes around the arms, legs, and necks of BR's father and other villagers. The ropes were twisted to the point of fatal

²⁹ Michael J. McBride, "Migrants and Asylum Seekers: Policy Responses in the United States to Immigrants and Refugees from Central American and the Caribbean" [Migrants and Asylum Seekers], *International Migration*, 37.1 (1999), 289-314.

³⁰ INS Asylum Program "History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication."

³¹ Immigration and Naturalization Authority "Refugee Act," Article 101(a) (1980), 42.

³² American Baptist Churches v. Thornburgh 760 F. Supp 796 (N.D. Cal. 1991)

strangulation. The guerrillas additionally beat and cut BR and his relatives. A few years later, BR's uncle was shot and killed by guerrillas. BR then moved to a nearby city. However, he felt his safety was still at risk so he fled to the United States. BR's was initially denied asylum. However, thanks to the ABC settlement he was able reapply for asylum status. In the process of reapplying, BR heard that guerrillas had killed his sister. Ultimately, BR's case was not approved so he is in the process of being returned to Guatemala.

As demonstrated by this case, which resembles many others filed at this time, the passage of the ABC settlement was not a guarantee for those persons persecuted in non-communist Central American countries. A medical exam of BR illustrated numerous physical and psychological findings corroborating the details of the torture, such as knife scars from his initial encounter with the guerillas, suggesting that this was a legitimate case for asylum. Because no specific reason was given for rejection of the case, it is not possible to determine whether bias against the case was due to Guatemalan origin or some other reason.

The case above also illustrates the need to verify the persecution. Persons arriving in the US claiming flight from persecution but without permanent residence documentation began undergoing *asylum* interviews in the 1980s. These interviews were intended to assess the credibility of persecution claims according to the five Convention criteria (race, religion, nationality, membership of particular social group, and political opinion), and required a select group of immigration officials to be trained in international human rights conditions and legal codes leading, in 1990, to the establishment of the Asylum Corps and Resource Information Center (RIC).³³ The Asylum Corps consisted of 82 specially trained personnel in eight national offices. The RIC was established to provide updates of human rights issues in each country with the intention of confirming the veracity of asylum seekers claims of persecution.³⁴

The asylum structure of 1990 was established to handle 70,000 asylum cases per year. However, the system was ill prepared for the large influx, which grew to 150,000 by 1993. A large portion of this influx were cases that had been unlawfully rejected in the 1980s and were now being re-filed under the ABC Settlement Agreement. The asylum system was under-funded and understaffed, leading to a backlog of cases and to the possibility of increased fraud, if only because genuine requests were not receiving proper adjudication.³⁵ The lack of an effectively operating asylum system culminated in two crimes in 1993, which further increased momentum toward a restrictive, punitive asylum

³³ INS Asylum Program "History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication."

³⁴ USCIS (2004) "Resource Information Center"
<http://uscis.gov/graphics/services/asylum/ric/>, (accessed October 22, 2004).

³⁵ INS Asylum Program "History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication."

process, the first case involved an asylum seeker killing two CIA agents and the second pertained to the car bombing of the World Trade Center.³⁶

To address the backlog and new security risks, the asylum process became increasingly restrictive, which led to a Presidential mandate in 1993³⁷ that instituted a delay for employment approval for 180 days after all asylum materials are submitted. Furthermore, whereas asylum officers could previously reject cases, now all cases not approved by asylum officers would be referred to immigration judges. Previously, rejected cases were given written explanations of asylum refusal and allowed to rebut the findings. Under the new mandate written explanations were no longer given and rebuttal was not allowed. In 1996, the Antiterrorism and Effective Death Penalty Act was passed according to which persons associated with terrorist organizations (designated by the US government) became ineligible for asylum.

The most significant restructuring of the asylum system occurred under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).³⁸ Under this law three additional restrictions were placed on asylum seekers: (1) claims must be filed within one year of arrival in the US; (2) previously denied asylum cases cannot file again without a material change in circumstances; (3) claims are restricted for persons who can be returned to “safe” countries which agree to accept US asylum seekers (currently, no such country relationships are established). Furthermore, identity checks by the Attorney General and Secretary of State are required for all claimants. Exclusions for persons with legal infractions were increased. Finally, the 1996 Act established the expedited removal process. Based on this clause, persons arriving at points of entry without documentation could be immediately deported if they can not establish that upon return to their home country they will be persecuted; this is considered to the establishment of the “credible fear” criteria.³⁹ The case below illustrates the effects of increased restrictions on asylum applications following the 1996 changes.

Asylum case #2: A young Guatemalan woman (LJ) sought asylum after members of the Guatemalan Armed Forces killed her brother. The woman’s older brother was involved in literacy programs for indigenous Guatemalans. He was initially kidnapped, tortured, and released for his activities in the literacy program. He then went into hiding. However, his body was later found decaying in a ditch. Documents recovered from the Guatemalan Armed Forces revealed that he had

³⁶ Gregg Beyer (1995) “A Walk Down Another Street” *Striking a Balance: The 1995 Asylum Reforms*, <http://uscis.gov/graphics/services/asylum/Beyer.pdf> (accessed 10/22/2004).

³⁷ 8 C.FR. 208.7, enacted 1995.

³⁸ Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208. Enacted September 30, 1996.

³⁹ INS Asylum Program “History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication.”

been kidnapped, tortured, and executed by agents of the State. Fearing for her own safety, LJ fled to the US after the government's involvement in her brother's death became known. She sought asylum from persecution by the Guatemalan government. However, while waiting for her asylum case to go to court she was cited by police because she left a store with the cashier's copy of her credit card receipt. Additionally, she was involved in an automobile collision of which she was at fault. LJ's asylum case was denied due to these criminal offenses. LJ was returned to Guatemala.

A psychological evaluation of LJ identified signs of depression and post-traumatic stress disorder consistent with her experiences. Furthermore, documentation from Guatemala verified statements about her brother's kidnapping. Prior to the 1996 legislation her criminal record would not have been as jeopardizing for the asylum claim. However, with the change in legislation, even non-violent crimes became grounds for denial of asylum.

In addition to the restrictions on granting individual cases, now the total number of persons granted asylum status who can adjust to permanent residence status has been restricted: per the 1996 act only 10,000 asylees can adjust status each year.⁴⁰ Current asylees thus have an expected wait of approximately 15 years. Finally, the asylum system is restricted with regards to precedent; opinions issued by immigration judges do not qualify as precedent decisions, and there exists no binding authority over asylum officers based on judicial findings.

Asylum in—post-IIRIRA and post-September 11, 2001—America

The implementation of the 1996 IIRIRA signaled increasing “criminalization” of the asylum seeker as viewed by the US government.⁴¹ Detention and deportation, which was common in the late 1990s, became ubiquitous in post September 11th US policy. The 1996 IIRIRA provided the legal ground for widespread detention in late 2001 while the PATRIOT (Utilizing and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act solidified a more penal approach to the asylum system.⁴²

The IIRIRA was a powerful legislation in that it allowed for retroactive punishment of asylum seekers. For example an asylum seeker that had committed a crime years earlier could now be detained and deported, even if the asylum seeker had already paid the necessary fine or served the required sentence for the crime.⁴³ Furthermore, the

⁴⁰ INS Asylum Program “History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication”.

⁴¹ Michael Welch, *Detained: Immigration Laws and The Expanding I.N.S. Jail Complex* (Philadelphia: Temple University Press, 2002), 2.

⁴² Welch, 191.

⁴³ Welch, 3.

IIRIRA and the 1996 US Welfare Reform Act restricted refugees' access to food stamps and prevented asylum seekers from pursuing work.⁴⁴ This is in direct violation of the United Nations High Commissioner for Refugees (UNHCR) Guidelines, which state that refugees are entitled to human rights protection, social welfare access, and material assistance.⁴⁵

The PATRIOT Act has expanded the definition of who is detainable under IIRIRA policies; specifically, the Attorney General's office can now classify any non-citizen as a "suspected terrorist".⁴⁶ Additionally, asylum seekers can be detained for up to 48 hours without specific charges.⁴⁷ Parole has also come under the direct control of the Attorney General's authority—harkening back to the 1950s US approach to persons fleeing persecution. This has resulted in the US administration overturning paroles originally granted by court officials. These changes have not been limited to asylum seekers from the Middle East; Haitians have seen increasing restrictions. US Attorney General John Ashcroft has employed detention and reversal of parole decisions to discourage Haitians from applying for asylum.⁴⁸ There are at least 5,000 asylum seekers in US detention centers due to these policies.⁴⁹ The current approach to detention is also violating United Nations guidelines, which prohibit the use of detention as a deterrent to asylum seekers.⁵⁰ A host of changing security measures from the Department of

⁴⁴ Gil Loescher "Humanitarianism and Politics in Central America" [Humanitarianism and Politics] *Political Science Quarterly*, 101.2 (1988), Page 297.

⁴⁵ UNHCR 'Guidelines on applicable Criteria and Standards relating to Detention of Asylum Seekers' (Geneva: Office of the United Nations High Commissioner for Refugees, February 1999), Guideline 34, article iv.

⁴⁶ Physicians for Human Rights & Bellevue/New York University Program for Survivors of Torture (2003). "Patriot Act." in *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. (Boston: Physicians for Human Rights, Pub. L. No. 107-65, 115 Stat. 272, 2001), 39.

⁴⁷ America's Values, 66 Fed Reg. 48334, INS No. 2171-01, "Custody Procedures," (Sept. 20, 2001), 47.

⁴⁸ Stanley Mailman and Stephen Yale-Loehr "Detaining and Criminalizing Asylum Seekers" *New York Law Journal*, (April 28, 2003), <http://www.twmlaw.com/resources/detandcrimasylum.html>, (accessed October 28, 2004)

⁴⁹ Physicians for Human Rights & Bellevue/New York University Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 3.

⁵⁰ UNHCR "Guidelines on applicable Criteria and Standards relating to Detention of Asylum Seekers", Geneva: Office of the United Nations High Commissioner for Refugees, (February 1999) Guideline 34, article iv.

Homeland Security, such as the short-lived “Operation Liberty Shield,” has further complicated matters more for asylum seekers.⁵¹

Current status of asylum seekers from Mexico, Central America, and the Caribbean

The current experience of asylum seekers is a difficult one. Practices and policies have hampered the system in general while certain practices have specifically threatened the well-being of asylum seekers from Mexico, Central America, and the Caribbean. Recent statistics illustrate the plights of asylum seekers in the Americas. Persons seeking asylum from Mexico, Central America, and the Caribbean have the lowest percentage of approved asylum cases and the lowest crude number of asylees. Although Mexicans and Haitians filed the 2nd and 4th most asylum claims in 2002, their approval ratings are among the lowest ten worldwide. Mexico has one of the lowest approval ratings of any nationality in the world (See Figure 2). Furthermore, Cuba is the only country in Central America and the Caribbean with a significant number of refugees; numbering around 2000 per year, Cubans comprise 99% of refugees from the Americas. The strong support for Cubans is in part due to carry-over from Cold War policies of offering “generous assistance” to Cubans abandoning Castro’s communist government.⁵² Furthermore, unlike other Hispanic groups, the conservative Cuban-American constituency has had significant political influence on US administrations. The conservative Cuban-American National Foundation has advocated for isolation of Cuba and promoted action to damage the Cuban government such as the \$15 million Radio Marti project in 1983 and the Cuba Democracy Act of 1992.⁵³ This combination of historical support for Cubans and the strong Cuban-American block of voters has engendered more support for refugees from Cuba.

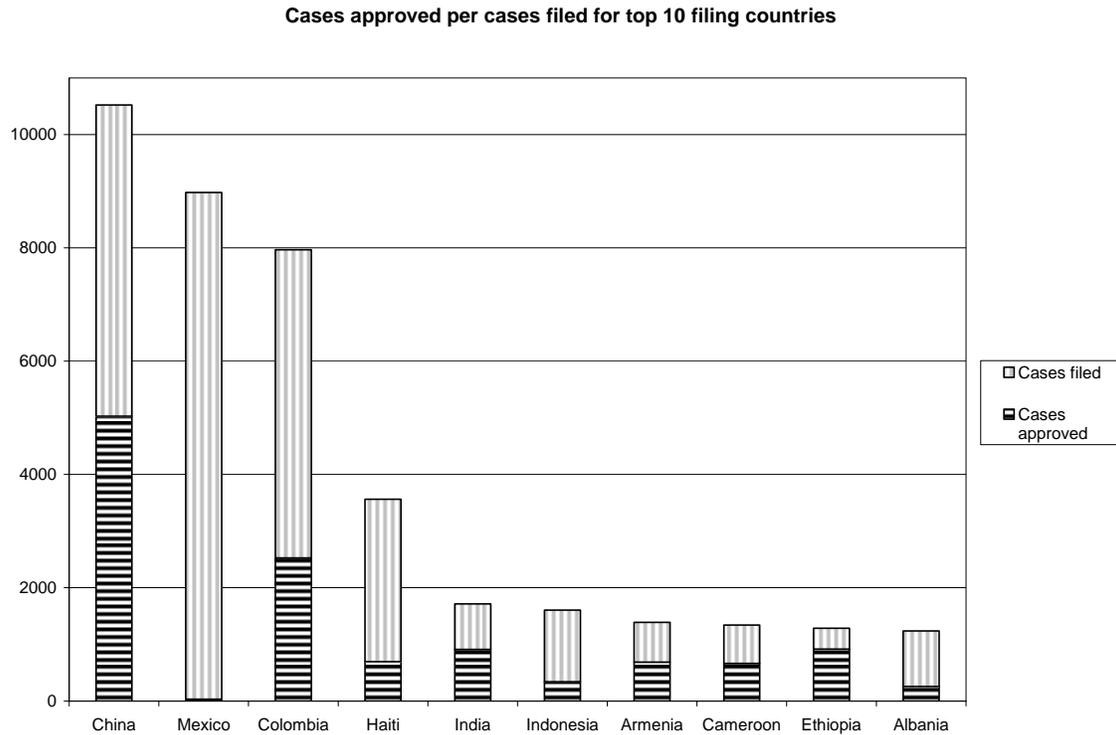
⁵¹ Physicians for Human Rights & Bellevue/New York University Program for Survivors of Torture *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 41.

⁵² Newland, Kathleen, “The Impact of US Refugee Policies on US Foreign Policy: A Case of the Tail Wagging the Dog?” in *Threatened Peoples, Threatened Borders: World Migration Policy*, ed. Michael S. Teitelbaum and Myron Weiner, (New York: The American Assembly, Columbia University, 1995), 204.

⁵³ Newland, 205.

Figure 2. Cases approved per cases filed for top ten filing countries. Data from USCIS (2002) Yearbook of Immigration Statistics.

<http://uscis.gov/graphics/shared/aboutus/statistics/RA2003yrbk/2003RA.pdf>. Accessed October 20, 2003.



The ability of Central Americans and Caribbean residents to more easily enter the US by sea or land compared with other world region citizens also has led to discriminatory legislation. Whereas persons arriving by air are given the opportunity to have a credible fear interview, Haitians and Cubans picked up at sea can be immediately returned to their countries without opportunity to plea for asylum. The situation is further biased in that a Cuban who arrives on land can remain in the country indefinitely thanks to the 1966 act, but a Haitian must undergo detention and prove credible fear of persecution. This policy was updated in 2002 to allow for expedited removal of Haitians arriving by sea, but accepting Cubans onto US soil.⁵⁴ Increasing controls of the US-Mexico border also prevent individuals from claiming asylum at the border itself.⁵⁵

⁵⁴ Notice Designating Aliens Subject to Expedited Removal Under Section 235 (b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924-26 (Nov 13, 2002), INS No. 2243-02.

⁵⁵ Loescher, 298.

Unsubstantiated explanations for conditions within the Americas

A number of researchers have investigated low approval ratings for asylum seekers and low numbers of refugees from Mexico, Central American, and the Caribbean. Possible reasons for the low number include the fallacious assumptions that there are few human rights violations in the Americas and that there are many border countries offering refuge to those who have been persecuted in different countries of the Americas.

In attempt to address the association between human rights violations and refugee/asylum issues, Mark Gibney has developed the Political Terror Scale (PTS) based on Amnesty International and US State Department human rights abuse reports.⁵⁶ Countries were ranked in a Likert fashion from one to five: (1) "... people are not imprisoned for their views, torture is rare..." (2) "... Limited amount of imprisonment for non-violent political activity," (3) "... extensive political imprisonment, execution or other political murders... may be common," (4) "Murders, disappearances, and torture are a common part of life... [primarily] affecting those who interest themselves in politics..." (5) "The violence of Level 4 has been extended to the whole population..." The US Department of State does not record human rights violations in the US, but according to the Amnesty International scores, Gibney records the US as '2' on the PTS.

An examination of Gibney's PTS scores against asylum and refugee records in the US reveals that there is little consistency between human rights violations and providing freedom from persecution for persons from Mexico, Central America, and the Caribbean. For example, Guatemala and Mexico, which have moderate human rights abuses (Level 3), saw only 19% and 0.4%, respectively, of asylum cases approved. Conversely, Cuba and Nicaragua, with only mild human rights abuses (Level 2), have 47% and 35% approval ratings respectively. Thus, the greatest approval percentage for asylum are persons originating in countries with human rights abuses at the same level as the US rather than those countries with higher rates of abuses. (See Table 1)

Table1. Central American Political Terror Scores (PTS) and Asylum Approval

Country	2002 PTS 1	Approved asylum ²	Filed cases approved (%) ²
Costa Rica	1	2	66.67
Cuba	2	53	47.32
El Salvador	1	75	27.37
Guatemala	3	184	19.29
Haiti	3	989	27.77
Honduras	3	24	42.86
Mexico	3	41	0.46
Nicaragua	2	11	34.84

⁵⁶ Mark Gibney, "Certain Violence, Uncertain Protection" in *Global Changes in Asylum Regimes*, ed. Daniele Joly, (New York: Palgrave Macmillan, 2002), 15-37.

¹ PTS Scores are based on Amnesty International reports. From Mark Gibney, Political Terror Scale. http://www.unca.edu/politicalscience/faculty-staff/gibney_docs/pts.xls, accessed October 22, 2003.

² Data from USCIS (2002) Yearbook of Immigration Statistics. <http://uscis.gov/graphics/shared/aboutus/statistics/RA2003yrbk/2003RA.pdf>. Accessed October 20, 2003.

Furthermore, Gibney has shown a robust association between human rights violations and refugee flight.⁵⁷ Violence within a country is intrinsically tied to flight to other nations, a finding that refutes the myth of factitious claims of persecution flight.⁵⁸ Thus the presence of large numbers of individuals from Mexico, Central America, and Caribbean attempting to flee to the US further corroborates the presence of persecution in their home countries, which suggests that “the theme of ‘bogus’ asylum seekers abusing the asylum system is being peddled repeatedly to justify restrictions.”⁵⁹

Gibney asserts, “The United States has not really had refugee policy as such, but a well-disguised immigration system masquerading as a refugee admission policy,”⁶⁰ and he shows that, on a worldwide basis, the majority of quota refugees and asylees admitted to the US come from countries with mild to moderate levels of human rights abuses. Although the majority of applicants are from the highest abuse countries, the majority of those admitted are from countries with mild human rights’ abuses.

The idea that persons fleeing persecution are finding refuge in other nations in the Americas is also fallacious. While it is true that many Guatemalans fled to the Chiapas region of Mexico, their livelihood was rarely more secure there as Mexican authorities refused assistance to new arrivals. Additionally, Mexico has attempted to repatriate significant numbers of refugees to their native countries in Central America.⁶¹ Guatemala has also established a 5-8 year prison sentence for citizens assisting undocumented aliens.⁶²

⁵⁷ Gibney, “Certain Violence,” 15.

⁵⁸ Mark Gibney, “In Search of the United States Refugee Policy”, in *The United States and human rights: looking inward and outward*, ed. David P. Forsythe, (Lincoln, Nebraska: University of Nebraska Press, 2000), 15.

⁵⁹ Daniele Joly, “Introduction” in *Global Changes in Asylum Regimes*, Daniele Joly, Ed. (New York: Palgrave Macmillan, 2002), 6.

⁶⁰ Gibney “Certain Violence,” 19.

⁶¹ Loescher. 298.

⁶² Melanie Nezer, “The Pueblor Process: US Migration Controls Move South of the Border”, *World Refugee Survey*, (US Committee for Refugees, 1999), 40.

New assertions for asylum conditions in the Americas

If the low approval rate for asylum cases and low number of refugees cannot be explained by lack of human rights violations or finding refuge in other countries, this supports motivation beyond humanitarian interest and international human rights law dictating who can enter the US. Loescher states that refugees and asylees have been used “both symbolically and instrumentally to serve larger American foreign policy concerns.”⁶³ Forces motivating asylum and refugee processes were to make communist nations appear weaker; now there is little benefit in such acts. Currently, there is a retreat from the values of universalism and solidarity.⁶⁴

The US viewed the refugee situation as symbolic of the problems of living under communism and saw the departure of refugees as a means of weakening communist regimes. A 1953 National Security Council memorandum cited the 1953 Refugee Act as a way to “encourage defection of all USSR nations and ‘key’ personnel from the satellite countries in order to inflict a psychological blow on communism and ...material loss to the Soviet Union.”⁶⁵

During the period of 1971-1980, 96.8% of refugees came from communist or Middle Eastern countries.⁶⁶ From 1980 to 1990 the percentage was 94.6%. While Nicaraguan asylum seekers could be hopeful of their claims being accepted in the 1980s, El Salvadorians and Guatemalans were not seen as legitimate persons fleeing persecution.⁶⁷ From 1984 to 1990, the US granted 26% of Nicaraguan asylum cases, 2.6% of Salvadoran cases, and 1.8% of Guatemalan cases. This led to the ABC settlement discussed above, however the settlement did not reverse the trend. In 1992 after the settlement was in place, 16.4% of Nicaraguan cases were approved versus 1.6% of Salvadoran and 1.8% of Guatemalan cases being approved. Currently, the US government maintains animosity toward Chavez and the Venezuelan administration. The strained relations affect an asylum seeker from Venezuela.

⁶³ Loescher, 295.

⁶⁴ Philip Rudge, “Reconciling State Interests with International Responsibilities: Asylum in North America and Western Europe”, *International Journal of Refugee Law*, 10(1/2), (January-April, 1998), 7.

⁶⁵ McBride, “Migrants and Asylum Seekers,” 292.

⁶⁶ McBride, “Migrants and Asylum Seekers,” 293.

⁶⁷ Aristide R. Zolberg, “From Invitation to Interdiction: US Foreign Policy and Immigration since 1945”, in *Threatened Peoples, Threatened Borders: World Migration Policy*, ed. Michael S. Teitelbaum and Myron Weiner, (New York: The American Assembly, Columbia University, 1995), 150.

Asylum case #3: A middle-aged woman (PC) from Venezuela is seeking asylum from government-sponsored persecution. The woman was a political activist with the 'Accion Democratic' party in Venezuela, one of the two dominant political groups. In April of 2002, members of Accion Democratic along with the confederation of trade unions, and other civil society groups took control of the presidency by force from democratically elected President Hugo Chavez. However, President Chavez quickly returned to power. PC was arrested for taking part in rallies against President Hugo Chavez. She was then detained and raped by members of Chavez's security forces. After her release she fled to the US fearing future persecution by government personnel. PC arrived with no documentation of either her imprisonment or rape.

A psychological evaluation of PC suggested that rape may have occurred but no physical signs were identified, as is common in many rape victims. PC's case has not yet been decided, but the antagonistic relationship between the US government and Chavez, increases the likelihood of PC's case being approved compared to someone lacking documentation and having a similar claim under a government more allied with the US. This case illustrates that politicking, which dominated the asylum and refugee system during the Cold War, still influences the system rather than sole reliance on human rights doctrines.

A second reason for low asylum approval and refugees from Mexico, Central America, and the Caribbean is a shift in the influences on the asylum/refugee systems. The US is among the high-income countries showing a greater reluctance to offer asylum, a behavior often motivated out of fear of economic burden.⁶⁸ Throughout the 1990s there was increased acceptance in Western nations for restrictions on asylum and refugee entry.⁶⁹ Matthew Gibney has described how the shift in Western nations since the end of the Cold War has led to increasing restrictions:⁷⁰ National security and the desire to weaken communist nations dictated the refugee/asylum system prior to the 1990s. In the last decade, however, the influx of refugees and asylees has become an issue of domestic policy because voters are concerned about the burden of immigrants on local economy, education, and welfare services. Refugees and asylees become lumped into general immigration as a threat for the local population, who unlike the newcomers are able to vote. Thus, Gibney concludes, constituents have become more active in voicing their distaste for immigrants to their representatives.

Although Gibney's work applies to the influx of asylees and refugees in general, in the US concerns over immigration are most focused on populations from the Americas.

⁶⁸ Daniele Joly, "Introduction" in *Global Changes in Asylum Regimes*, ed. Daniele Joly, (New York: Palgrave Macmillan, 2002), 5.

⁶⁹ Astri Suhrke, "Burden-Sharing During Refugee Emergencies: the Logic of Collective versus National Action," *Journal of Refugee Studies*, 11(4), (December 1998), 375.

⁷⁰ Matthew J. Gibney, "The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy" in *The Refugee Convention 50 Years On: Globalization and International Law*, ed. Susan Kneebone, (Burlington, Vermont: Ashgate, 2003), 29.

A recent issue of *Foreign Policy* illustrates the Hispanic-phobia of American academics, policymakers, and general citizens. Samuel Huntington, chair of Harvard Academy for International and Area Studies writes,

The single most immediate and most serious challenge to America's traditional identity comes from the immense and continuing immigration from Latin America, especially Mexico, and the fertility rates of these immigrants compared to black and white American natives... The impact of Mexican immigration on the United States becomes evident when one imagines what would happen if Mexican immigration abruptly stopped... The wages of low-income US citizens would improve. Debates over the use of Spanish and whether English should be made the official language of state and national governments would subside... And most important of all, the possibility of a de facto split between a predominantly Spanish-speaking United States and an English-speaking United States would disappear, and with it, a major potential threat to the country's cultural and political integrity.⁷¹

This sentiment may contribute to the cold reception of persons fleeing persecution from the Americas. Individuals from Mexico seeking asylum in the US have the lowest approval rate of any nationality (<0.1%),⁷² despite the fact that Mexico has as many human rights violations as Libya, Myanmar, Eritrea, Cambodia, and Turkey; and each of these countries have substantially higher percentages of approvals and crude numbers of ratified asylum cases.⁷³

Recommendations

A number of changes could improve the experience of persons fleeing persecution coming to America. First, asylum/refugee practices in the US need to be brought into line with international human rights documents. Although the US government has ratified numerous United Nations' conventions and protocols, the implementation is far from complete and consistent. By working towards the intentions of UN doctrine, there will be more equity for persons fleeing persecution.

New mechanisms could be established to assess the efficacy of the asylum and refugee systems, such as measuring the number of cases approved per nationality against

⁷¹ Samuel P. Huntington, "The Hispanic Challenge" *Foreign Policy*, March/April (2004), 32.

⁷² USCIS (2002) "Yearbook of Immigration Statistics" <http://uscis.gov/graphics/shared/aboutus/statistics/RA2003yrbk/2003RA.pdf> (accessed October 20, 2003).

⁷³ Mark Gibney, "Political Terror Scale" http://www.unca.edu/politicalscience/faculty-staff/gibney_docs/pts.xls, (accessed October 22, 2003).

the human rights abuses targeting that population.⁷⁴ A number of non-governmental organizations have missions promoting human rights, and more external or internal monitoring from these groups could improve objectivity in the asylum process. Physicians for Human Rights has been providing pro-bono physical and psychological evaluations of survivors of torture seeking asylum, which has led to a 92% approval rating of medically-evaluated cases⁷⁵ and facilitated the establishment of smaller networks of pro-bono healthcare professionals such as the Atlanta Asylum Network. Legal organizations such as Human Rights First also champion objective and consistent monitoring and use of legal codes according to human rights doctrines. Furthermore, the immigration officers and judges should employ a precedent system rather than relying on the caprice of the deciding official.

Third, the extended detention stays should be eliminated. Prolonged detention, often in jails with the criminal population, in and of itself constitutes a human rights violation, damages mental and physical health, and impairs agency to prove credibility.⁷⁶ Limited stays in transitional settings to address security issues and acquaint asylum seekers with the asylum process would be more beneficial. Modeling the transitional centers after some of the centers used for children would create the atmosphere of a humanitarian rather than a punitive asylum system. This recommendation is already part of UN conventions, but needs to be applied by the US government.

Most importantly, the underlying causes of why persons are being persecuted needs to be addressed. The US has played a major role in influencing persecutory practices in this hemisphere. Many of the asylum cases we have seen and are continuing to see are the legacy of US involvement with human rights abuses. Because the US is a signatory to the Universal Declaration of Human Rights and other human rights documents, it the government's obligation to protect human rights and prevent the abuses that create the need for the asylum/refugee systems.

Conclusion

Bias permeates the US asylum system. Persons from Mexico, Central America, and the Caribbean are at particular risk of having genuine persecution cases denied as a result of this bias. The low number of refugees and approved asylees from these regions is not due to fewer human rights abuses or other nations providing refuge. Rather, the political manipulation of persons fleeing persecution and hostility toward persons from Mexico, Central America, and the Caribbean contributes the flawed system.

Ultimately, the asylum and refugee system in the US is an essential component of international and domestic policy. Persons fleeing torture, loss of livelihood, and

⁷⁴ Gibney "Certain Violence," 19.

⁷⁵ Samantha Morse, Coordinator of Physicians for Human Rights Asylum Network, personal communication. (March 27, 2003.)

⁷⁶ Physicians for Human Rights & Bellevue/New York University Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. (Boston: Physicians for Human Rights, 2003), 193.

potential loss of life can regain stability by coming to the US. By working to improve the asylum and refugee system through adherence to human rights doctrines, we can protect and promote the human rights of thousands of women, men, and children throughout the Americas and throughout the world.