THE END OF De Facto ASYLUM: TOWARD A HUMANE AND REALISTIC RESPONSE TO REFUGEE CHALLENGES

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This section of the symposium considers "Immigration and Refugees," with special attention to the latter half of the topic. That request bespeaks concern that we might forget about refugees in our understandable preoccupation with the new Immigration Reform and Control Act (IRCA). Indeed, the request has forced me to reflect on a likely linkage between IRCA and future refugee problems that has been obscured in the flurry or activity attending the new law. That linkage should command far wider understanding, so that wise policy may adjust our practices before the problems become acute.

I. MEXICO AND THE UNITED STATES: A BRIEF COMPARISON

It was puzzling at first, that today's topic included both immigration and refugees. Immigration plainly furnishes a worthy subject for the mutual deliberations of U.S. and Mexican lawyers. But refugees? To be sure, similarities exist between the refugee situations faced by the United States and by Mexico, primarily similarities that derive from geography. Both countries are located relatively close to Central America, a deeply troubled region that has generated many refugees and asylum seekers and will surely do so for years to come. Nevertheless, I expect that our two nations will have to look to sharply different responses in dealing with what appear to be similar problems.

One hasty example illustrates the point. Most of the officially recognized refugees in Mexico come from Guatemala. Some 40,000

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have crossed Mexico's southern border, and a majority still reside in camps along the boundary in the state of Chiapas. The United Nations High Commissioner of Refugees (UNHCR) coordinates aid to the refugees and helps run the camps. The Mexican government has also provided land in Campeche and Quintana Roo, in an effort to move many of the refugees toward self-sufficiency as farmers. But even those communities are operated, in many respects, in a camp-like fashion.  

Despite their apparent success in the Mexican context, camps are a most unlikely solution for any foreseeable refugee problems in the United States. Wealthy nations cannot easily justify providing such minimal accommodations to persons given haven. And in any event, camps are too closely associated with our shameful experience in interning Japanese-Americans during World War II. The United States is more likely to maintain its customary approach even if refugee flows expand: Recognized refugees here receive a secure status, full rights to employment, and free movement. But as a corollary, the United States enforces a policy of carefully scrutinizing individual asylum seekers' claims to refugee status, in accordance with the relevant United Nations treaties. This is something Mexico, by and large, has not yet felt compelled to do. 

II. De Facto Asylum

Despite these difficulties that may preclude addressing refugee issues entirely within the comparative-law framework of this issue, the topic remains of great importance. In particular, questions concerning political asylum should be claiming urgent attention here in the United States. Although few recognize the urgency, the matter


3. The United States is a party to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, and thus is derivatively bound by all the important operative provisions of the Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137, Geneva on July 28, 1951, even though it is not technically a party to the convention. Mexico, despite a long tradition as a country of asylum, is party to neither treaty. But my point in the text is not meant simply as a statement about the direct application of treaties. The definition of "refugee" and other principles or standards found in the treaties are often used even by nonparties. See generally G. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW 1-19 (1983). Mexico has generally avoided individualized determinations of refugee status, either by treating whole groups as refugees (Guatemalans) or essentially ignoring the situation of other migrant groups (Salvadorans). See generally Asylum in Mexico, supra note 2; Ferris, The Politics of Asylum: Mexico and the Central American Refugees, 26 J. INTER-AMERICAN STUDIES & WORLD AFFAIRS 357 (1984).
is pressing because of a little-appreciated link between IRCA and the Central American refugee situation.

Estimates of the number of Central Americans now in the United States run as high as one million. A few thousand are already recognized as refugees or otherwise enjoy legal status under the regular immigration provisions of our laws. A few thousand more are in processing of various kinds, having applied for political asylum. Statistically, their likelihood of success is low, judging from past treatment by the Immigration and Naturalization Service (INS) of the asylum claims of Salvadorans, Guatemalans, and even Nicaraguans. Approximately three percent of Salvadorans who have applied to INS have been granted political asylum. The figure is less than one percent for Guatemalans. Nicaraguans have been more successful, obtaining asylum in ten to fifteen percent of the cases in recent years. That level is still well below what one might expect, given the Reagan Administration's general position on the Nicaraguan government.

These calculations leave several hundred thousand Central Americans here, essentially underground, without legal immigration status. But consider the reality of their situation. They have achieved a kind of *de facto* asylum, with most of the opportunities they came north to seek. Their legal status is precarious, but most have found places to live and work in this country far away from the fighting and the human rights violations. As long as jobs have been available, *de facto* asylum constituted substantial success, because illegal immigrants traditionally have incurred little risk of discovery once they made it past the border. Moreover, the discouraging statistics from the formal asylum adjudication system doubtless have prompted many of them to rest content with *de facto* asy-

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5. The statistics are somewhat elusive, and vary (as one would expect) depending on the time period considered. I take these statistics from Refugee Reports, Dec. 12, 1986, at 14, which covers asylum decisions by INS District Directors from June 1983 to September 1986. More recent statistics show a dramatic rise in the approved rate for Nicaraguans, but some of the change may result from temporary aberrations in the way cases are reported from the Miami district office.

Unfortunately, all INS statistics leave out one important component of the overall United States record on asylum. Immigration judges also consider asylum applications, but the Executive Office of Immigration Review, which includes immigration judges, unfortunately does not compile asylum statistics by nationality. For the most comprehensive effort, to date, of a compilation overall statistics, see GENERAL ACCOUNTING OFFICE, *ASYLUM: UNIFORM APPLICATIONS OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED* (Jan. 1987).
lum and not risk an attempt at de jure status. 6

This situation produces the link between the 1986 immigration reform law and future refugee problems. If IRCA's employer sanctions provisions 7 are reasonably effective, people lacking legal status will have great difficulty securing jobs. As a result, many now enjoying de facto asylum will find it impossible to sustain this status. We may then see thousands, lacking other good alternatives, showing up to apply for de jure asylum. The human rights situations in most of the countries of Central America will lend initial plausibility to their claims. 8 And even if an application is ultimately unsuccessful, it can at least provide work authorization documents while the application is pending. 9

If this happens, the rush of new applications may well swamp our asylum adjudication system. The simple fact is that we are not well equipped to cope with any sharp increase in volume, whether it comes as an unforeseen and unintended result of IRCA or because of new arrivals. We need changes, and, if I am correct about IRCA's likely effect, we will need them fairly soon. 10

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6. Incidentally, Mexico faces a somewhat similar situation with Salvadoreans. Several tens of thousands, maybe several hundreds of thousands of Salvadoreans, almost all of them without any recognized immigration status, live out a similar underground existence there as well. See Salvadoreans in Mexico, Asylum in Mexico, supra note 2, at 30-31.


8. See DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986, 100th Cong. 1st Sess. (Jt. Comm. Print 1987). The Supreme Court's decision in INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), decided after the conference where these remarks were delivered, relaxed the governing standards somewhat and hence makes asylum an even more likely option.

9. Work authorization for asylum applicants used to be discretionary with INS district directors, and across the country, those officials differed widely in their exercise of such discretion. INS's new work authorization regulations (part of the package of regulations implementing IRCA) remove that discretion and guarantee employment authorization to those who file nonfrivolous asylum applications. The authorization lasts through the administrative and judicial appeals process. See 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a), as added by 52 Fed. Reg. 16220, 16226-28 (May 1, 1987).

10. In mid-1987, well after these remarks were delivered, the executive and legislative branches took steps that, if brought to full fruition, may reduce the need to apply for formal asylum. The executive ordered a policy of new generosity toward Nicaraguan asylum seekers. Although the full import of this policy remains to be seen, some have charged that it represents a decision not to deport anyone to Nicaragua. See Immigration Rules are Eased for Nicaraguan Exiles in U.S., N.Y. Times, July 9, 1987, at A8. But see also, Refugee Reports, July 10, 1987, at 7-10. Congress may also enact a broader measure temporarily blocking deportation of Salvadoreans as well as Nicaraguans. H.R. 618, 100th Cong., 1st Sess. (1987) (Popularly known as the Moakley-Decconcini bill), which so provides, passed the House in July 1987. See Walsh, House Would Ban Deportation of Some Refugees, Wash. Post, July 29, 1987, at A4, col. 1; 133 Cong. Rec. H6696-6720 (daily ed. July 28, 1987).
III. THE OPERATION OF THE ASYLUM SYSTEM

Before sketching some favored changes it may be worthwhile to clarify what the asylum adjudication system is meant to accomplish.

A. The Standards

The basic standards for deciding on an application for political asylum derive from an important treaty, the U.N. Convention relating to the Status of Refugees. They were expressly incorporated into U.S. law through the Refugee Act of 1980. To claim refugee status and thus qualify for asylum, an applicant must prove that he or she has a well-founded fear of persecution in the home country based on race, religion, nationality, membership in a particular social group, or political opinion.

In one sense, we could say that anybody from Guatemala, El Salvador, or Nicaragua has a well-founded fear of persecution upon return. Persecution definitely occurs in each of those countries, albeit selectively, following different patterns in each. The fear of persecution is thus well-founded, not fanciful or irrational. It is based on the reality of the human rights situation back home. That fact makes political asylum an agonizing political issue in the United States and in other Western nations.

The U.N. treaty standard, however, was not meant to authorize relocation of everyone from a country once the government or powerful groups within the country begin to persecute. Typically, asylum countries throughout the developed world require the applicant to show some greater and more individualized threat. Applicants for asylum must show some good reason to expect that they, or a group of which they are a member, will be targeted if they should return. Of course, controversy then arises in deciding just how much of a focused threat they must prove, particularly if they come

11. See supra note 3.
from a country where persecution demonstrably does occur. The Supreme Court has heard arguments on one aspect of this question, but I do not expect its decision to provide much assistance in clarifying the precise standards to be applied daily by adjudicators.\footnote{INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987) handed down on March 9, 1987, held that the more generous “well-founded fear” standard applies in asylum cases under INA § 208, rather than the standard the Board of Immigration Appeals had been using: whether persecution is “more likely than not.” See also INS v. Stevic, 467 U.S. 407 (1984) (permitting the Board to use the more stringent standard in the closely related setting of decisions under INA § 243(h)). For a critique of Stevic and Cardoza-Fonseca, see T. Aleinikoff & D. Martin, supra note 4, at 664-68. The Cardoza-Fonseca opinion emphasized, however, much was still left to be worked out in case-by-case application: “We do not attempt to set forth a detailed description of how the well-founded fear test should be applied.” 107 S. Ct. at 1221-22. For the Board’s efforts to work out a more detailed description, see e.g., Matter of Acosta, Interim Dec. No. 2986 (BIA 1985); Matter of Mogharrabi, Interim Dec. No. 3028 (BIA 1987).}

### B. The Challenge of Adjudication

Asylum adjudicators confront appreciable challenges in making the difficult decisions that we ask them to make, particularly in view of the high stakes that may ride on the outcome. Initially, an adjudicator may find it hard even to determine with assurance what happened to the applicant or to family or friends thereafter. Applicants may claim, for example, that they received specific threats that prompted their departure. They may claim that they were incarcerated, beaten, tortured, or that such a fate befell family members or close friends. They may claim involvement in certain political activities before they left, activities that called their government’s attention to them and make targeted sanctions more likely upon return. But are they telling the truth?

Establishing what really occurred, even at this basic level of retrospective fact finding, poses special challenges. The relevant facts may be less accessible in asylum cases than in any other administrative proceedings known in U.S. law. After all, we are talking about events that occurred in distant lands, often in remote portions of those distant lands. Other witnesses either to impeach or to confirm the applicants’s testimony, are usually unavailable. Much depends on skilled questioning of the applicants themselves.

Even if the adjudicator gains confidence in her understanding of past events, this retrospective fact finding provides only the starting point. The adjudicator must then move to a second step and predict what kind of threat those facts now represent should the individual return. Political conditions change. If the applicant was threatened
five years ago in El Salvador, how much of a threat can we expect that person will face upon return now?

Each of us, if we were going to try to make those judgments, would doubtless wish for considerably more information than is typically available. At a minimum, we would want a full opportunity to ask good, thorough questions, in order to test the claimant’s story and construct the best foundation possible to judge what really happened back home. Then, in order to make the required predictive judgment, we would probably prefer expert assistance. Even better, we might wish to be experts ourselves about current political and social conditions within the applicant’s country of origin. Such expertise would also help at the first stage, enabling us to pose exact questions that would help to evaluate the witness’s account.

IV. THE LIMITS OF THE ADVERSARIAL MODEL

Our current system does a poor job of promoting informed questioning or furnishing expertise to the decision-makers. Asylum decisions are initially made by examiners within the INS district office. Often these officials have rotated into the asylum examiner position only recently and will cycle out again after a year or two. Immigration judges also hear and decide asylum claims, but making asylum decisions is only one among a great many other responsibilities they shoulder in the course of their ordinary business. The State Department plays an advisory role, but its advice is based only on a cold record—the documents the applicant has filed, plus perhaps notes from the examiner’s initial interview. Of course, the State Department could be a source of useful expertise in judging the application. But only rarely does it have independent information about the applicant or the local events that underlie the claim. Moreover, there is a persistent risk that diplomatic considerations will skew the Department’s position. 17

Finally, the adversarial model to which the immigration court hearing conforms exacerbates the difficulties. For an adversarial system to function well, one needs expertise not only on the part of the adjudicator, who must ultimately evaluate the facts and the future risks, but also on the part of the parties’ advocates. These ad-

vocates play a crucial role in creating the record on which the evaluation will be based, a role that becomes more critical the more the adjudicator conforms his behavior to the classic model of the passive judge or referee. An adversary system, ideally, needs expertise from the applicant's advocate so that direct examination can effectively flush out the elements of the story presented, often inarticulately and with hesitation, by the asylum seeker. But expertise is also required of the government attorney doing the cross examination, in order to prove beyond the applicant's initial statement and expose any fraud or exaggeration—or indeed to reveal the strength and honesty of the account.

Here lies the great vulnerability of our current system, at least if it aspires to accuracy and reliability. The relevant expertise, detailed knowledge about conditions in source countries, is far too scarce. One cannot expect three participants (two advocates and one judge) to have it in any but unusual circumstances. Perhaps we should devote resources instead to making absolutely sure that at least one is thus equipped. If so, that one person must obviously be the adjudicator, who with a slight change to a less adversarial mode of procedure, could also pose questions of the supportive or testing type, as the situation requires. 18

Despite good-faith efforts on the part of many who are involved in our current system, this country cannot now provide consistently high-quality adjudications. We need exactly that sort of quality and reliability if we are to redeem our tradition as a nation of asylum, and also respond with confidence to any new asylum crisis.

V. THE EUROPEAN EXPERIENCE

A few years ago, I had an opportunity to study asylum adjudication systems in Western Europe. Many of those systems have serious problems of their own. Asylum applications are running at a

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18. Asylum proceedings in the district office already proceed in a nonadversarial fashion, at least in most districts. The examiner poses the questions and the applicant responds. If an attorney is present, his or her role is usually confined to consultation and advice. In the other asylum forum, immigration judges have the statutory authority to take the initiative in questioning. See I.N.A. §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b) (1982) (special inquiry officers, now called immigration judges, have authority in exclusion and deportation proceedings to "present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses"). Whether they do so varies from judge to judge, but the more passive, judge-like role has become increasingly common, particularly if both sides are represented by counsel or other advocate. See T. Aleinikoff & D. Martin, supra note 4, at 87-91. Courts have developed workable standards for assuring fairness in nonadversarial proceedings. See, e.g., Bluvband v. Heckler, 730 F.2d 886, 892, 895 (1st Cir. 1984).
per capita level far beyond what this country has ever experienced. In some countries applications are being filed at a rate twenty times the U.S. rate, causing substantial political strains. Asylum remains a highly controversial and volatile subject in nearly all Western European countries. Nearly all European systems that I studied, however, have one significant advantage over ours. The key decisions are made by specialists, officers whose only job is adjudicating asylum claims.

Most applications are judged on the basis of an interview where the specialist does the questioning. It is not an adversarial process; hence it is not dependent on the skill or training of two other players. The adjudicators are specially selected and then trained for their work, sometimes in extended programs that stretch over several months. Moreover, several European nations permit their adjudicators to specialize further, judging applications only from a particular region or a particular country. When this arrangement is possible, it offer obvious benefits for precision and accuracy. Some nations recruit their officers on this basis, seeking, for example, individuals with graduate training in South Asian studies to adjudicate asylum cases from that region. In several countries, adjudicators also receive impressive support from well-staffed documentation centers.

I attended on particularly impressive interview session in Switzerland. The applicant was Turkish, and the deciding officer's caseload consisted of nothing but Turkish asylum applications. The officer, I later learned, had lived in Turkey for three years and had done advanced graduate work in Turkish studies. Some of his questions were the kind that any skilled generalist lawyer could pose after studying the dossier, simply probing evident soft spots in the story. But other questions revealed a deeper knowledge. The adjudicator obviously knew, independently, many details about the particular events at issue in the region of Turkey from which the applicant came. Thus, he was able to ask precise questions that went well beyond the papers, questions that the applicant probably could not have anticipated.

CONCLUSION

Serious proposals have been offered to move the U.S. asylum system in this direction. They have yet to achieve acceptance. Perhaps such change will come only if more people appreciate the genuine need for high-quality adjudication in this elusive field. IRCA could unwittingly spread that feeling, although perhaps only after months or years during which a newly overloaded system functions poorly.

There is an alternative scenario. Constructive change could also come, in advance of crisis, through the efforts of the organized bar. Such efforts will need support from a broader spectrum than merely that subculture of the bar comprised of immigration lawyers. I am pleased that the ABA Standing Committee, which called us together for this symposium, sees these issues as relevant to "law and national security." That action may constitute one important step toward enlisting a wider audience in the quest for asylum reform.

21. For example, a proposal for somewhat greater specialization for asylum adjudicators was included in the early Simpson-Mazzoli bills, the precursors of IRCA, but the authors dropped this matter from the 1986 version of the legislation, in order to minimize controversy. See e.g., S. 2222, 97th Cong. 2d Sess., § 124 (1982). Just before this article went to press, INS also proposed new asylum regulations that would assign asylum decision-making to specialized asylum officers directly supervised by the INS central office, 52 Fed. Reg. 32552 (Aug. 28, 1987). Although generally quite progressive, the proposed regulations leave open several questions about the qualifications, training, and genuine independence of the asylum office.