

REFUGEE REDEFINED: AN INQUIRY INTO MEXICAN LEGAL STANDARDS RELATING TO ASYLUM AND NON-REFOULMENT

I. INTRODUCTION

The purpose of this paper is to identify and resolve a failure in the Mexican legal system which narrowly defines who is entitled to refugee status. The analysis begins with an examination of Mexico's historical treatment of refugees. An examination of the current Mexican procedural and substantive rights afforded refugees follows, demonstrating the inadequacy of those standards that address the plight of Central American refugees. Next, a proposed solution is discussed which calls for Mexico to adopt a broader definition of refugees and suggests that Mexico grant these individuals rights of non-refoulement and asylum. Finally, the justification for Mexico's adoption of these standards is addressed, and the benefits Mexico should derive from such an adoption.

II. BRIEF HISTORY

Mexico has a strong tradition of providing asylum to victims of persecution and oppression. Throughout Mexico's history as an independent country, it has opened its border to thousands of persecuted and oppressed people.¹ Individuals such as Leon Trotsky before World War II and Hector Campora, the deposed president of Argentina, in 1976 have benefitted from this Mexican tradition. Mexico, in turn, has benefitted from the presence of these refugees as well as numerous other refugees.

For example, the assimilation of approximately twenty thousand Spanish refugees after the Spanish Civil War in 1939 benefitted Mexico's economic and educational systems. Many Spanish refugees became prominent faculty members at leading universities such as the Colegio de Mexico and started academically demanding secondary schools.² Many other Spanish refugees became successful entrepreneurs while others proved to be valuable employees.³

1. Van Praag, *Asylum in Mexico a Proud Tradition*, REFUGEES, October 1986, at 19. The first provisions pertaining to asylum were written into Mexican law in the 1820's, shortly after independence.

2. Sarmiento, *Spanish Exiles, 45 years Later*, REFUGEES, February 1986, at 35.

3. *Id.* at 36. The refugee aid organizations such as SERE and JARE fostered the

The arrival and refuge granted to thousands of South Americans in the early 1970's has also enriched the economic and educational systems in Mexico. These South American refugees escaped political persecution after military coups overthrew the constitutional regimes of their countries.⁴

The contribution made to the Mexican economy and educational system by the Central Americans seeking asylum since the late 1970's can only be described as minimal. The reason is simple: Mexico has classified most Central Americans as "economic migrants who are displacing Mexican workers and causing social pressures."⁵ Thus, very few are granted asylum and given the opportunity to legally reside and work in Mexico.⁶

III. OVERVIEW OF GUATEMALANS IN MEXICO

Since the late 1970's, the Mexican government has been faced with a growing influx of Central Americans fleeing the violence of their homelands. The first wave of Central Americans that arrived seeking refuge were the Nicaraguans in 1978.⁷ Then in the early 1980's, thousands of Salvadorans and Guatemalans settled in Mexican cities.⁸ Most of the Guatemalans who settled in Mexico were Indian peasants who crossed into the southern state Chiapas.⁹

Guatemala has the largest and most distinctive population in Central America. There are over 9 million Guatemalans living in Guatemala and over half of them speak little, if any, Spanish because of their indigenous background.¹⁰ Furthermore, between 1954 and 1985 Guatemala was continuously and exclusively gov-

process by providing financing for the establishment of enterprises by members of the Spanish community.

4. J. FRIEDLAND & J. RODRIGUEZ Y RODRIGUEZ, *SEEKING SAFE GROUND: THE LEGAL SITUATION OF CENTRAL AMERICAN REFUGEES IN MEXICO* (1987).

5. Krauth, *The Other Border*, MEXICO JOURNAL, August 21, 1989, at 23, 25. Quote attributed to Mexico's Minister of the Interior when describing Guatemalans residing in Mexico. Mexico deports between 600 and 1,000 Central Americans a day without determining whether they are seeking refuge from persecution or are in fact "economic migrants".

6. Once granted asylum, the extent of the contributions that the Central Americans as a collective group will make is unclear. It is important to note that the Central Americans' level of education is less than that of the Spanish and South American refugees who were granted asylum and eventually permanent residence. See J. Friedland, *supra* note 4. But see FRANK BEAN, JURGEN SCHMANDT & SIDNEY WEINTRAUB, *MEXICAN & CENTRAL AMERICAN POPULATION AND U.S. IMMIGRATION POLICY* 15 (1989). Studies indicate that most Salvadorans come from urban background educations—a level of education equivalent to at least a tenth grade United States education.

7. FRIEDLAND & RODRIGUEZ, *supra* note 4.

8. FRIEDLAND & RODRIGUEZ, *supra* note 4, at 8.

9. AMERICA'S WATCH COMMITTEE, *GUATEMALAN REFUGEES IN MEXICO 1980-1984* 11, 17 (1984).

10. BEAN, *Supra* note 6.

erned by military dictatorships.¹¹ The present situation of Guatemala is characterized by a repressive military government based on the rule of a small wealthy minority over a poor majority.¹² The vast majority of the impoverished people of Guatemala are Indians from the twenty-two different ethnic groups which account for approximately 60 percent of the total population.¹³

During the past ten years, the military government has shifted from selective to massive repression.¹⁴ The government's intent has been to eliminate the support that the guerrillas may have developed in many Indian communities. This "counter-insurgency" plan is intended to uproot the Indian in areas where the guerrillas might operate or have operated.¹⁵ By seeking to deny the guerrilla the support of the rural population, the Guatemalan government has fundamentally changed the nature of politics in the country and violated numerous basic human rights.¹⁶ Some commentators suggest that the destruction of the indigenous communities stems from both a racist desire to eliminate indigenous culture and from the greed of certain military officers who wanted Indian lands.¹⁷

As a result of the Guatemalan government's massive repression, millions of Indians and peasants have been forced to flee from

11. *Serrano Next President of Guatemala*, L.A. TIMES, Jan. 8, 1991, at A1. In 1985 and 1990, democratic elections were held in Guatemala.

12. *Conclusion: History and Revolution in Guatemala* in GUATEMALAN INDIANS AND THE STATE 1540-1988 (Carol A. Smith ed., 1990). The Civilian government is "closely in line with military policies: due in part from numerous military coup attempts including attempts made in May of 1988 and May of 1989.

13. See AMERICA'S WATCH COMMITTEE, *supra* note 9, at 11, 20. The Indian languages spoken vary depending on the ethnic group. Among the more frequently spoken languages are Kanjobal, Mamadn Chuj.

14. In order to understand the economic and political situations in Central America, recent United States policy in that region should be closely examined. United States foreign policy began to change after the Sandinistas gained control in Nicaragua. The Reagan Administration's primary objective in Central America became two-fold: supporting the Contras in their attempt to overthrow the Sandinistas and preventing the spreading of Marxism into other nations in the region. Thus, the amount of military aid provided to Central American governments increased drastically during the 1980's. See Cynthia Arnsen, *The Reagan Administration, Congress and Central America: The Search for Consensus*, in CRISIS IN CENTRAL AMERICA 35-52 (Nora Hamilton et al. eds., 1988).

This increase in military aid provided the government regimes in El Salvador and Guatemala with the means to become more aggressive in their fight against leftist guerrillas. For example, the helicopters and airplanes provided by the United States resulted in aerial bombings that killed thousands of innocent women and children in remote villages. This type of destruction also displaced thousands of people. The social and economic costs associated with such displacement cannot be fully measured. However, one major consequence was the flight of hundreds of thousands of Guatemalans and Salvadorans into Mexico seeking refuge in a less violent environment. ELIZABETH FERRIS, *THE CENTRAL AMERICAN REFUGEES* 28 (1987).

15. See G. Peralta, *The Hidden War: Guatemala's Counter-insurgency Campaign*, in CRISIS IN CENTRAL AMERICA 153-54, 160 (Nora Hamilton et al. eds., 1988).

16. *Id.* at 158-59.

17. Ferris, *supra* note 14, at 27.

the central and western highlands and go to the southern part of the country or to Guatemala City. Other Indians chose to remain closer to their villages and make the treacherous journey into Mexico through Lacondona and Marques de Comillas Jungles and settle in the state of Chiapas.¹⁸ The number of Guatemalans who have died making the trek is estimated to exceed 8,000.¹⁹

IV. MEXICAN SUBSTANTIVE AND PROCEDURAL IMMIGRATION STANDARDS APPLICABLE TO ASYLUM OF POLITICAL REFUGEES

A. *Procedural Standards*

Guatemalans seeking refuge in Mexico usually enter the country without proper documentation.²⁰ These refugees are often undocumented because they are either unaware of the existing Mexican asylum laws or aware of the barriers presented by the asylum laws. The refugees who do take the necessary steps for political asylum must comply with a vast number of stringent procedural standards.

A refugee must first make a formal request for political asylum at the port of entry. The Mexican Immigration officials will then make a provisional decision as to whether the applicant should be admitted.²¹ If the applicant is admitted, the Ministry of the Interior will then determine from the evidence provided whether the "facts" are sufficient to grant political asylum. The "facts" must prove that the applicant's persecution in his country of origin was individualized. The persecution must also have been based on the applicant's

18. See Krauth *supra* note 5, at 22. In order to avoid detection the "coyotes", people who illegally sneak people across borders, cross mountainous paths in the jungle that most people without first hand knowledge would not be able to successfully cross. Merely crossing the less treacherous Suchiate River at the border does not really require the assistance of a *coyote*, but, the corrupt practices of immigration agents and police officers significantly increase the demand for the "safer" services of the *coyotes*. *Id.* at 22. See also Friedland *supra* note 4, at 46-48. Corruption among immigration and police agents is endemic in Mexico although the government reports that the corruption is under attack. Central Americans and even Mexicans stopped for visa checks, report widespread extortion by Mexican immigration agents throughout the network of immigration checkpoints. Foreigners must often pay to enter the country whether legally or illegally. Central Americans are also reportedly taken off buses or other transport and forced to pay bribes to continue their passage. Bribes are reportedly higher for Central Americans detained at airports in the north because they are thought to have more money than those travelling by bus. Hotel personnel and taxi drivers also, reportedly, extort money from Central Americans and cooperate with immigration agents. There are also widespread reports of immigration agents taking valid documents away from Central Americans as soon as they enter Mexico.

19. AMERICA'S WATCH COMMITTEE *supra* note 9, at 11, 17.

20. The total number of undocumented Central Americans in Mexico ranges from 175,000 to 400,000. See Robin E. Miller, *Demystifying "Safe Haven": The Case of Salvadoran and Guatemalan Refugees Who Have Lived in Mexico*, 3 GEO. IMMIGR. L.J. 45 (1989).

21. See Krauth, *supra* note 5.

political beliefs; thereby, preventing the applicant from obtaining assistance from his country of origin's government.²² The Ministry of Interior will also continue to play a significant role in the applicant's future after admittance is granted. The Ministry will determine: where the asylee will reside; activities that the asylee can engage in²³; whether the asylee may leave Mexico temporarily; whether asylee parents are also to be admitted²⁴; and any other rules as circumstances may dictate. Furthermore, permits to stay in the country are granted for one year and may be extended upon proof that the stay is necessary.²⁵ When the need for political asylum disappears, the asylee and his family must leave the country within 30 days, and the asylee's paper work must be surrendered as the port of exist.²⁶

The Ministry of the Interior also has the discretion to deny political asylum to admitted applicants or qualified first time applicants under certain circumstances. These circumstances include: applicant's country of origin has no international reciprocity agreement with Mexico; Mexico's demographic equilibrium so demands; pre-established immigration quotas are filled; applicants deemed harmful to the financial interests of nationals; applicant has not observed good conduct or violated immigration laws or regulation while in Mexico; applicant is not physically or mentally healthy; and as other legal rulings provide.²⁷

Furthermore, the Ministry of Interior is empowered to suspend or forbid the admittance of foreigners whenever national interests so require.²⁸ The Mexican Constitution also empowers the Federal Executive to compel any foreigner whose stay he deems inexpedient to leave immediately and without the need of previous legal action.²⁹

B. *Substantive Standards*

Mexican Law has no written criteria for assessing whether to grant applicants asylum.³⁰ Additionally, commentators have argued there is no information pertaining to whether asylee applicants

22. U.N. Convention Relating to the Status of Refugees, July 28, 1951, ch. 1, art. A(2), 152, 189 U.N.T.S. 137.

23. Asylees may apply to the Central Immigration Service to change the activities permitted.

24. An asylee's minor children and spouse are admitted.

25. *Doing Business in Mexico*, Chp. 17A, Additional Categories of Non-immigrants, Lic. Salvador Rangel, § 17A.03, p.17A-3-17A-5. (SMU 1987).

26. *Id.* at 17A-5.

27. Mexican General Population Law, ch. III, art. 37 (December 1, 1973).

28. *Id.* at art. 38.

29. MEX. CONST. art. 13.

30. AMERICA'S WATCH COMMITTEE, *supra* note 9, at 35.

have a right to appeal adverse determinations of their status.³¹ Mexico, however, has an informal practice for granting asylum. The Mexican practice is to limit a grant of asylum to those who can prove that they were actually persecuted. Furthermore, applicants must have been persecuted for their political beliefs.³² As previously noted, however, any rights, either procedural or substantive, can be denied at the discretion of the Federal Executive or the Minister of the Interior.

The procedural and substantive rights afforded applicants for political asylum under Mexican Law are inadequate in protecting the rights of refugees fleeing generalized violence or from a well founded fear of persecution.³³ Mexico should make changes in order to formulate standards which ameliorate the current shortcomings which accurately address the current plight of refugees. The current Mexican statutory scheme requires an unreasonable burden of proof, provides no process for appeal, and vests an excessive amount of discretion to government officials. Adopting a broader definition of refugee, agreeing to provide for rights of asylum and non-refoulment for those who satisfy that definition, and providing for an appellate process for those denied asylum will result in greater protection. The international community has held a number of conferences that provide models addressing possible alternatives.

The political asylee status granted under Mexican law is narrower than that recognized by the United Nations.³⁴ This criterion differs from outdated United Nations' declarations in two material respects.³⁵ First, the United Nations Protocol Relating to the Status of Refugees defines a refugee as a person who flees his country of origin due to a well-founded fear of persecution.³⁶ Second, the

31. Miller, *supra* note 20, at 65.

32. *Id.* at 64.

33. As previously noted, the current influx of refugees from Central America would be the immediate beneficiaries of changes in Mexican law. However, it should be mentioned that any changes in Mexican law suggested by this article with respect to the rights of applicants for asylum would also benefit, notwithstanding that they come from countries other than those in Central America.

34. Miller, *supra* note 20, at 64.

35. The United Nations Convention Relating to the Status of Refugees is the foundation of modern refugee law. That convention, however, was held in 1951, and sought to provide relief for refugees fleeing persecution in Eastern Europe. As will be argued in this article, the 1951 convention is not sufficiently current to effectively address and solve the plight of refugees from Central America. Refugees from Central America frequently have difficulty even sustaining the "well-founded fear" standard of proof, notwithstanding the fact that they often flee environments of generalized violence. Symposium, *Legal Immigration Reform. The New Refugees*, 4 GEO. IMMIGR. L.J. 221, 222-23 (1990).

36. As previously noted, Mexican law grants refugee status only if the applicants prove that they were actually persecuted for their political beliefs. See Miller, *supra* note 32, at 64.

United Nation's definition of refugee includes a person who has been persecuted because of his race, religion, nationality, membership in a particular social group or political opinion.³⁷

V. INTERNATIONAL LEGAL STANDARDS THAT MEXICO SHOULD ADOPT

The international legal standards relating to the treatment of refugees consist of various regional and United Nations accords. Most of these standards were developed before the current flood of Central American migration began and thus are insufficient to protect current Central American refugees.³⁸ The refugee population in Mexico ranges from the official government figure of 40,000³⁹ to unofficial United Nations estimates of 175,000 to 400,000.⁴⁰

37. *Id.*

38. The principle instruments of international refugee protection are the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. Under the Convention and the Protocol, a refugee is defined as any person who, owing to:

[W]ell-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable, or owing to such fear is unwilling to return to it.

United Nations Protocol Relating to the Status of Refugees, art. 1, para. 2 (1967).

The original convention in 1951 limited its definition of refugee to those individuals who were outside their home country because they experienced a well-founded fear of persecution as a result of events that occurred before January 1, 1951. The time limitation was a compromise for signatory nations that were not prepared to take on "open ended" obligations for the indefinite future. By 1967 this concern had ended and the 1967 Protocol was drafted without the dateline limitation which created a treaty of a more universal scope. David A. Martin, *The New Asylum Seekers*, THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S, THE NINTH SOKOL COLLOQUIUM ON INTERNATIONAL LAW 16, n.3 (David A. Martin ed., 1988).

The 1967 Protocol definition, however, is also inadequate to deal with the current flow of Central American refugees. Mexico must undertake individualized investigations to corroborate claims of persecution. The problem is that between 175,000 to 400,000 refugees already in Mexico might seek to prove that they were actually persecuted for their political or religious beliefs or associations. See Miller, *infra* note 40, at 102. Mexico does not have the resources to conduct up to 400,000 individual investigations. The net effect is that few people are processed and the majority remain undocumented. See Miller, *infra*, note 40, at 66.

Additionally, the 1967 definition of refugee is inadequate because it is underinclusive. This definition does not cover people seeking a safe haven from generalized violence in their country of origin. For example, Salvadoran and Guatemalan refugees may not be able to prove specific persecution, but the fact that an estimated 75,000 people have died from internal strife in each of those countries in the past ten years evidences a climate of generalized violence. See N. Hamilton and M. Pastor, Jr., *Introduction to CRISIS IN CENTRAL AMERICA* 6 (Nora Hamilton et al. eds., 1988); see also, Peralta, *supra* note 15, at 158. Yet, under the 1967 definition Salvadorans and Guatemalans who have not specifically been persecuted for their beliefs or associations cannot qualify as refugees.

39. Phil Davison, *Despite Changes in Guatemala, Refugees Fear Return*, REUTERS, Dec. 4, 1986, available in LEXIS, Nexis Library.

40. U.N. Executive Committee of High Commissioner's Programme, 37th Sess., pt.

Mexico should adopt a more expansive definition of refugee that includes as refugees people who flee their country of origin because of generalized violence and that definition should apply when determining whether to grant asylum or to refoul an applicant. Such a definition is found in the Cartagena Declaration of 1984.⁴¹

The Cartagena Declaration should be adopted because it expands the traditional definition of refugee in a manner that is applicable to Central Americans who are, or wish to be, within Mexico's territorial borders.⁴² This definition covers people who have fled 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 which have seriously disturbed the public order.⁴³ This definition is different from the definition of refugee embodied in Article 22(7) of the American Convention on Human Rights which limits refugees to people being "pursued for political offenses or related common crimes." Additionally, this definition should be contrasted with definitions previously addressed that require a showing of individualized persecution. Thus, under the Cartagena Declaration, people who have not committed political crimes or otherwise, but fear for their lives because of generalized violence, are considered refugees.

The need for a broader scope is that the definition of refugee has a direct bearing on the scope of the rights of asylum and non-refoulement. Asylum is a permanent solution which grants resident status to the refugee by the country of refuge. Non-refoulement, on the other hand, prohibits a country from returning a refugee to a country where his life or freedom is threatened once he is within that country's territorial borders.⁴⁴

Whether non-refoulement is the equivalent to a right to asylum, therefore, rendering the distinction moot, is debatable.⁴⁵

4. U.N. Doc. A/AC. 96/677 (1986). Most sources, however, acknowledge that any estimate will be far from precise and that it is impossible to do so. See also, THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, CENTRAL AMERICAN REFUGEES: REGIONAL CONDITIONS AND PROSPECTS AND POTENTIAL IMPACT ON THE UNITED STATES, 24, 26 (1984), cited in Robin E. Miller, *Demystifying "Safe Haven": The Case of Salvadoran and Guatemalan Refugees Who Have Lived in Mexico*, 3 GEO. IMMIGR. L. J. 45, 62 nn. 99, 102 (1989).

41. The Cartagena Declaration of 1984 discussed and modified the 1951 Convention and the 1967 Protocol to provide, among other things, for a more expansive definition of refugee.

42. Cartagena Declaration, art. III, para. 3. Mexico was a signatory to the Cartagena Declaration but refused to adopt the Declaration's recommendations regarding the expanded definition of "refugee".

43. Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L., 897, 901 (1986).

44. Fernando M. Olguin, *Guatemalan Refugees in Mexico: International Legal Standards*, 13 FLETCHER FORUM OF WORLD AFFAIRS, 327 (1989).

45. Atle Frahl-Madsen, *Territorial Asylum* (Stockholm: Almqvist & Wiksell International 1980) 43. Non-refoulement actually creates an obligation to grant asylum to

Many scholars argue, however, that at the very least non-refoulement translates into temporary refuge until the violence the refugee fled from ceases to exist.⁴⁶ Asylum, on the other hand, could extend beyond the cessation of generalized violence in the country of origin.

If Mexico were to adopt the Cartagena Declaration's definition of refugee, it would serve as a "first step to fill a vacuum between the Central American reality and the applicability of existing refugee instruments; between actual practice by refugee-receiving countries in the region and an over-political and somewhat narrow legal notion of [the scope of who should be granted] asylum."⁴⁷ Currently, whether a person will be granted asylum is determined at the unbridled discretion of government officials of the prospective host country.⁴⁸ Adoption of a standard should at a minimum serve to guide the official's discretion. Additionally, if Mexico should adopt the Cartagena Declaration's notion of refugee, rights whose vesting depends on the classification of refugee, such as asylum and non-refoulement, would no longer remain tenuous.⁴⁹

Mexico,⁵⁰ almost all countries of Eastern Europe, Asia, and the Near East have consistently refused to ratify refugee agreements containing non-refoulement clauses.⁵¹ Commentators, however, have argued that the principle of non-refoulement has become part of the customary international law⁵²; therefore, it is binding on

persons entitled to invoke it, provided that no third "State is either obliged or willing to receive them."

46. See Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980's, THE NINTH SOKOL COLLOQUIUM ON INTERNATIONAL LAW 123, 127-28* (David A. Martin ed., 1988); Olguin, *supra* note 44, at 334; Goodwin-Gill, *supra* note 43, at 913-14.

Temporary refuge has been described as, "[P]rohibition against a state from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by internal armed conflict within their own state." Deborah Perluss and Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA.J. INT'L L. 551, 554 (1986).

47. Maria Siemens, *Asylum and Protection in Latin America: The Cartagena Declaration of 1984, REFUGEES*, Oct. 1987, at 32.

48. "Now the so-called right of asylum [currently] is certainly not a right possessed by the alien to demand that the State into whose territory he has entered with the intention of escaping prosecution in some other State should grant protection and asylum . . . At present it is probable that the so-called right of asylum is nothing but the competence of every State to allow a prosecuted alien to enter, and to remain on, its territory under its protection, and thereby to grant asylum to him." LASSA OPPENHEIM, *INTERNATIONAL LAW*, at 677-78 (Sir Hersch Lauterpacht 8th ed. 1955).

49. Olguin, *supra* note 44, at 333.

50. *Id.* at 342.

51. Hailbronner, *supra* note 46, at 129.

52. For example, both the American Convention on Human Rights of 1969 in Article 22 (8) and the Caracas Convention on Territorial Asylum of 1954 in Article 3 contain provisions stating the principle of non-refoulement. *See also*, Olguin, *supra* note 44, at 334.

all nations notwithstanding the fact that they are not signatories to documents containing this right.⁵³ Whether this view finds sufficient support in a virtually uniform and extensive state practice accompanied by the necessary *opinio juris* is doubtful.⁵⁴ Thus, it would be necessary for Mexico to change its current position and formally adopt a United Nations or Regional Declaration that includes a non-refoulement clause.⁵⁵

The principle of non-refoulement protects refugees whose lives or freedom would be endangered if they were returned to their country of origin. Non-refoulement obligates a state not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened.⁵⁶ The intent is to guarantee the refugees a limited but fundamental protection, short of asylum, residence or other durable solution.⁵⁷ Non-refoulement should be granted by Mexico pending a resolution of the validity of the applicant's claim for asylum or until it is established by an advisory panel as safe for the refugees to return home. Recognition of the right to non-refoulement is essential to give refugees an incentive to avail themselves of the Mexican legal process without fear of being refouled to their country of origin.

The scope of non-refoulement during the past 30 years has been broadened by international state practice to include measures such as rejection at the frontier and even extradition.⁵⁸ The principle of non-refoulement has traditionally applied to all people who have been persecuted in their country of origin on the basis of their race, religion, nationality, membership in a particular social group, or political opinion⁵⁹ and people who do not enjoy the protection of the government of their country of origin.⁶⁰ Additionally, non-refoulement applies to all nationals who have entered the country of

53. *Id.*

54. Hailbronner, *supra* note 46, at 128.

55. Mexico could have its choice of Declarations: Under the Cartagena Declaration the principle of non-refoulement is substantially the same as under the Caracas Convention on Territorial Asylum of 1954 and the American Convention on Human Rights of 1969. The Cartagena Declaration ratified the 1951 Convention and the 1967 Protocol which contained provisions relating to refoulement. Article 33 of the 1951 Refugee Convention provided for an obligation of contracting states not to expel or return a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a social or political group. Hailbronner, *supra* note 46, at 126.

56. Refugee Convention of 1951, art. 33.

57. Goodwin-Gill, *supra* note 43, at 901.

58. Convention on Refugee Problems in Africa, Organization for African Unity, Sept. 10, 1969, 1001 U.N.T.S. 45.

59. United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 1, para. 2, 189 U.N.T.S. 137.

60. Goodwin-Gill, *supra* note 43, at 903.

refuge either legally⁶¹ or illegally.⁶² If Mexico adopts the Cartagena Declaration's definition, people fleeing generalized violence in their home land would be protected by non-refoulement.

The right of non-refoulement under the Cartagena Declaration, however, is not unqualified. Exceptions to non-refoulement permit a state to refoul an individual where the host state has reasonable grounds to believe that the refugee is a security risk, or when the refugee has been convicted of a serious crime; or because the refugee poses a danger to the community of the host country.⁶³

VI. THE REASONS WHY MEXICO SHOULD ADOPT THESE INTERNATIONAL NOTIONS OF ASYLUM AND NON-REFOULEMENT

Mexico's best interest is served by adopting and implementing the international standards previously addressed in this comment. The reasons are as follows: First, Mexico has recently begun to play an important role in the international political development affecting Central America.⁶⁴ By adopting these recommendations, Mexico would continue this leadership trend. Secondly, by making these adoptions, Mexico would strengthen its bargaining position regarding funding from the international community for the increased costs Mexico would incur by providing asylum to refugees.⁶⁵ Lastly, if Mexico adopted and carried out the recommendations suggested in this comment, Mexico's human rights record would improve and possibly secure a free trade agree-

61. See Summary Record of the 16th Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 6, U.N. Doc. A/CONF.2/SR.16 (1951).

62. P. Weiss, *Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees*, 30 BRIT. Y.B. INT'L L. 478, 482-83 (1953).

63. Olguin, *supra* note 44, at 333.

64. AMERICA'S WATCH COMMITTEE, *supra* note 9, at 31. See also *Mexican President to Discuss Region, Refugees in Guatemala*, REUTERS, Apr. 7, 1987, (available in LEXIS, Nexis library.) (Mexican President Miguel De La Madrid's Administration along with Panama, Venezuela, and Columbia formed the Contradora Peace Group, initiating peace talks between Nicaragua's Sandinista Government and the United States backed Contras). Although Mexico and Guatemala have recently initiated talks to repatriate at least 35,000 Guatemalan refugees in Mexico, the recommendations of this article are not rendered moot. The political turmoil that drove refugees into Mexico initially could possibly reoccur. See also *International Relationships*, IBC USA INC., Aug. 1, 1989 (available in LEXIS, Report Library, Mexico). Mexico extended aid to the Noriega Regime in Panama, including a guarantee of oil supply on generous payment terms.

65. In response to the constant flow of Guatemalan refugees into Mexico, the Mexican Government created the Commission to Aid the Refugees (hereinafter "COMAR") in 1980, as the official governmental agency in charge of providing an adequate supply of food, clothing, health care, and basic education. Another function of the COMAR is to channel funds and supplies from the United Nations High Commissioner for Refugees (hereinafter "UNHCR") for development assistance in organizing refugee settlements. AMERICA'S WATCH COMMITTEE, *supra* note 9, at 26, 47.

ment with the United States.⁶⁶

A. Leadership

Although Mexico has historically refrained from engaging in Central American affairs, Mexico has recently begun asserting a leadership role in that region.⁶⁷ Mexico's growing international presence has been made evident by a variety of leadership roles it has undertaken.⁶⁸

Mexico's government was among the first nations to recognize and support the Nicaraguan Sandinista government after the overthrow of Anastio Somoza.⁶⁹ Mexico also helped organize and then assumed a leadership role in the Contadora Group of eight Latin American nations seeking to end the fighting in Central America.⁷⁰ On June 19, 1990, Mexico held the opening peace talks between the Faribundo Marti Libracion Frente (FM LN) and the El Salvadoran Government.⁷¹

Another example of the active leadership role Mexico has begun to play, is when the Mexican government announced that it would guarantee oil supplies to Panama's Noriega regime despite United States attempts to put financial pressure on Panama's administration.⁷² Mexico, additionally, agreed to waive immediate payment on petroleum shipments, lower interest rates on the credit lines extended to complete the transactions, and postpone indefinitely the collection of \$23 million for previous petroleum shipments.⁷³

Furthermore, despite Mexico's underdeveloped economy, Mexico has extended credit to its less developed Central American neighbors. For example, Mexico extended loans to Guatemala for \$75 million and the Mexican Petroleum Company (PEMEX) has extended credit exceeding \$66 million.⁷⁴ Mexico has also officially

66. See, *Human Rights in Mexico*, 1990 INTERNATIONAL REPORTS, July 3, 1990. (LEXIS, Report Library, Mexico). Mexico historically has opted for form over substance in the promotion and protection of human rights and that impediments to trade liberalization might be removed by an exemplary Mexican human rights record.

67. AMERICA'S WATCH COMMITTEE, *supra* note 9, at 31.

68. Esther W. Hannon, *A Review of 150 Years of U.S. Mexican Relations*, THE HERITAGE FOUNDATION REPORT, Oct. 31, 1988.

69. *Id.*

70. Michael G. Wilson, *The Security Component of U.S./Mexico Relations* (pt. 2), THE HERITAGE FOUNDATION REPORTS, Jan. 26, 1989.

71. Henry Tricks, *Salvadorans, Rebels, Open Peace Talks in Mexico*, Reuters, June 19, 1990, (available in LEXIS, Nexis Library, Omni File). The FMLN is the largest leftist guerilla group currently struggling to overthrow El Salvador's government.

72. *Id.*

73. David Gardner, *Mexico Offers Panama a Helping Hand*, FINANCIAL TIMES, Apr. 27, 1988, at 4.

74. Henry Tricks, *Mexican, Guatemalan President to Meet on Economy, Refugees*, Reuters, July 17, 1990, (available in LEXIS, Nexis Library, Omni File).

"housed" thousands of Guatemalan refugees.⁷⁵

B. *Bargaining Position Enhanced to Secure Funding*

Mexican policies that intend to protect and house Guatemalan refugees were formulated with the expectation that the Central American refugees within its territorial borders would be repatriated.⁷⁶ The Mexican Government's reluctance to adopt a permanent solution in large part may be attributed to the expected high costs of implementation.⁷⁷ Protecting the rights of refugees is a global responsibility, and it would be unjust for a single nation to solely bear the costs associated with refugees within its borders. The Mexican government should recognize that adoption of a permanent solution will strengthen its ability to secure financial aid from international refugee assistance organizations and countries such as the United States whose policies contributed to the refugee flight.⁷⁸

C. *Improvement of Human Rights Record to Aid Securing Free Trade Agreement*

1. *Mexico's Record on Human Rights*

America's Watch recently reported that Mexico is among the

75. *Refugees: Mexico: The New Mayans*, THE ECONOMIST, Jan. 1988, at 40. According to this article, 48,000 Guatemalan refugees are officially housed in Mexico. See also AMERICA'S WATCH COMMITTEE, *supra* note 9, and Candice Hughes, *Guatemalan Exiles Languish in Mexico as Dreams of Return Home Fade*, N.Y. TIMES, Nov. 25, 1990, at A3.

76. *Guatemalan City Conference: Nearly 2 Million Central Americans to Get Refugee Aid; International Conference on Central American Refugees*, 26 U.N. CHRON. 3, at 14 (1989) (available in LEXIS, Nexis Library, Omni File).

77. *Refugees: Mexico: The New Mayans*, THE ECONOMIST, Jan. 1988. The Mexican labor force increases at an estimated rate of one million per year. See also BEAN, *supra* note 6, at 191.

78. The United States appropriated 370 million dollars for refugee migration and relocation to the United States and internationally. See *Fiscal Year 1990-91 State Department Budget Request: Hearing of the International Operations Subcomm. of the House Foreign Affairs Comm.*, 101st Cong., 1st Sess. (1989) (statement of James Baker, Secretary of State). From this fund Mexico receives nothing. See *Fiscal Year 1990-91 Foreign Assistance and State Department Budget: Hearing of the Senate Foreign Relations Comm.*, 101st Cong., 1st Sess. (1990) (statement of James Baker, Secretary of State). Mexico receives at least 4.5 million dollars per year from the United Nations High Commissioner for Refugees, for expenses related to refugees. Davison, *supra* note 39. The refugees that have fled into Mexico tend to originate from countries whose governments are supported or receive military assistance from the United States. *Refugees: Mexico: The New Mayans*, *supra* note 75. These governments, such as Guatemala, have practiced "scorched earth" campaigns in an effort to flush out leftist guerrillas. See Smith, *supra* note 12. In the process of exposing insurgents, however, thousands of civilians have been killed. Since the refugees in Mexico were fleeing generalized violence in their homelands, which was assisted by the United States, the United States bears some responsibility. Further, since the United States has devoted funds for the care of refugees, Mexico has a strong case in arguing that the United States should finance, at least in part, the expenses for permanent relocation of refugees in Mexico.

world's most notorious violators of human rights.⁷⁹ That report concluded that rather than moving toward improvements in human rights conditions, Mexico may be heading for a period of increased violent abuses. That report cataloged among the abuses, torture, extra judicial killings by both state and federal law enforcement agencies, jailings without warrants, and disappearances. The extent to which these violations are perpetrated against refugees is not clear. Violations against refugees that have been recorded include: detentions without warrants, extraction of bribes to proceed to points of destination.⁸⁰

Although the administration of Carlos Salinas De Gortari has attempted to rectify Mexico's previous record of abuse, America's Watch points out that Mexico's history of emphasizing form over substance, and the absence of evidence demonstrating a clear political will to truly solve abuses, indicates that abuses in Mexico are likely to continue.

2. *Adopting These Proposals Would Contribute to the Enhancement of Mexico's Status on Human Rights*

A country's treatment of foreign nationals seeking refuge from political violence indicates the measure of respect that nation has for human rights.⁸¹ Linking a country's human rights record to trade talks is an important part of the United States national policy.⁸² The United States government is concerned with the direct relationship between the amount of repression within a country and its political instability.⁸³ The United States does not want to encourage American multi-national corporations (MNC) to invest in countries unless those countries have a clearly stable political future.⁸⁴

United States opponents to trade liberalization, such as labor

79. See generally *Human Rights in Mexico*, 1990 INTERNATIONAL REPORTS, July 3, 1990.

80. *Id.*

81. AMERICA'S WATCH COMMITTEE, *supra* note 9. Americas's Watch, a highly respected international human rights organization has discussed in great length the refugee problem in Mexico.

82. See *United States-Mexico Relations, 1990: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong., 2d Sess. (1990) (statements of Carla Hills, United States Trade Representative, and Representative Frank Guarini). See also *Fiscal Year 1990-91 State Department Budget Request: Hearing of the International Operations Subcomm. of the House Foreign Affairs Comm.*, 101st Cong., 1st Sess. (1989) (statement of James Baker, Secretary of State). See also *Fiscal Year 1990-91 Foreign Assistance and State Department Budget: Hearing of the Senate Foreign Relations Comm.*, 101st Cong., 2d Sess. (1990) (statement of James Baker, Secretary of State).

83. *Id.*

84. Furthermore, public pressure may occasionally result in suspension of trade if human rights violations become public knowledge (e.g., China's Tianamen Square incident and subsequent suspension of trade).

unions, may argue Mexico's dismal human rights record in order to sabotage any free trade agreement between the United States and Mexico.⁸⁵ Labor unions fear that liberalization of trade barriers will simplify access by United States manufacturers to the lower cost labor in Mexico; thereby, decreasing the number of jobs available in the United States.⁸⁶ Therefore, Mexico's lack of respect for human right provides labor unions in the United States with an additional argument that could be used to persuade members of Congress from supporting a United States and Mexican free trade agreement.

Human rights advocates through political pressure, on the other hand, may use the potential trade agreement between the United States and Mexico as leverage to bring about substantial structural changes in the protection of human rights within Mexico.⁸⁷ The United States is in a good position to extract concessions from Mexico regarding human rights practices during trade talks because the Mexican economy stands to benefit substantially: real wages and employment opportunities for the labor force, which is currently increasing by approximately 1 million per year, should increase significantly.⁸⁸ Therefore, Mexican interests are probably best served by taking the initiative in softening the potential human rights obstacle rather than risking substantial internal structural changes as part of a free trade agreement with the United States.

VII. CONCLUSION⁸⁹

Although some domestic resistance could arise within Mexico from adopting this proposal, Mexico is in a position to protect Mexican nationals' interests and assert a significant international leadership role. Mexico could set a world-wide precedent inspiring other countries to update their legal standards regarding refugee rights. Mexico's rigorous enforcement of these updated legal standards regarding asylum and non-refoulement would enhance Mexico's international standing while improving its human rights record with "actions of substance."

Furthermore, certain domestic fears within Mexico to the ambitious adoption of this proposal should be quelled because existing

85. *Human Rights in Mexico*, *supra* note 79.

86. Opponents of a free trade agreement between the United States and Mexico would be less likely to persuade Congress, and certainly not President Bush, by simply relying on economic arguments, given the strength of counter-economic arguments that can be made.

87. See *Human Rights in Mexico*, *supra* note 79.

88. *Refugees: Mexico; The New Mayans*, *supra* note 75.

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Mexican legal standards regulate the domestic labor market. Under Part 1, Section 7 of the Mexican Labor Code the number of foreigners that can be employed by companies operating in Mexico is restricted. For example, under that section, 90% of every enterprise's work force must be Mexican nationals except for 100% of employees in technical and professional categories must be Mexican. When Mexican nationals are unavailable to fill technical and professional positions, an employer may give temporary employment to foreigners. Additionally, Article 32 of the Mexican constitution requires that all pilots, machinists, captains, masters, and all personnel aboard any vessel or airship protected under the Mexican insignia to be Mexican by birth. Thus, Mexico's existing legal structure could be employed to minimize the impact on the labor market from an influx of refugees.

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