

## U.S. ASYLUM POLICY AND THE NEW WORLD ORDER

■ Vernon M. Briggs, Jr

As with most nations of the First World, refugee and asylee policies did not emerge as formal components of the immigration system of the United States until after World War II. Initially, refugee policy was designed as an *ad hoc* response to the problem of displaced persons in Europe. But with the advent of the Iron Curtain in Eastern Europe and the fall of the Nationalist government in China all within four years following the end of that war, the emergence of refugee policy was quickly engulfed by the political posturing associated with the East-West struggle between the free world and the communist world.<sup>1</sup> Despite its humanitarian implications, it became a foreign policy tactic to be manipulated in the context of the Cold War political struggle.

It was not until 1980 that the United States formally adopted an asylee policy in legislative forum. When it did, it too became ensnarled in the Cold War political conundrum that perverted its idealistic and humanitarian intentions.

With the dismantlement of the Berlin Wall in 1989 and the subsequent breakup of the Soviet Union in 1991, however, the dynamics of refugee and asylee issues have been radically altered. In the new world order, differences in political ideology have given way to differences in economic conditions between nation states as the prompting force for the outflow of would-be refugees and asylum seekers. In part, these pressures are associated

with the political disintegration of the poorer republics of the former Soviet Union and its former satellite nations into ethnic enclaves. But the most endemic of the new contributory pressures are emanating from North-South economic differences between the 'have' and 'have-not' nations. Refugee and asylee pressures are increasingly being linked with the broader worldwide issues of population growth, unbalanced economic development, and migration pressures.

In many countries of the Third World, the causes of their governmental instability are as much social as they are political. The rapid rate of population growth is a persistent and negative influence on efforts to stimulate economic development. Population growth is often the source of political turmoil and violence in these countries because it is linked to ancillary problems of health, housing, education, nutrition, and land use. As long as the population growth issue is unaddressed, emigration becomes an ever appealing option. But to do this, the would-be emigrants must find a way to gain access to a First World nation. Political asylum policy, although not intended to do so, has increasingly become the means to accomplish this purpose.

### THE CREATION OF AN ASYLUM POLICY

Since the United States first enacted an asylum policy, persons who actually arrive on the shores of the United States and who, at the time of entry, say that they have been persecuted or

that they have 'a well-founded fear' of being persecuted if they return home on any one of five grounds specified in the Act, may make a claim for political asylum.<sup>2</sup> If a subsequent hearing conducted by the Immigration and Nationalization Service (I.N.S.) on the merits of the case leads an examiner to support the claim, the individual may remain in the United States and, eventually, be able to adjust his or her status to that of a permanent resident alien and, after five years, become a naturalized citizen.

If the applicant receives a negative decision at the hearing level, it may be appealed at the administrative level and, subsequently, through the entire appeals procedures of the nation's judicial system. The protracted process can take years to reach a conclusion. As for the unsuccessful applicant who receives a negative decision at any point, he or she may decide simply to 'disappear' into the ranks of the nation's illegal immigrant population. The vast majority of asylum seekers of the 1990s have chosen this last alternative.

#### **THE ISSUE OF MASS ASYLUM**

Little thought was given to the long term implications of asylum policy when it was added to the U.S. immigration system by the Refugee Act of 1980. It was anticipated that asylum would be used by individuals who were political dissidents or defectors from totalitarian regimes and who somehow were able to make it to U.S. soil.

**The 'Mariel' Experience:** It was simply not foreseen that the United States would ever become a nation of 'first instance' for the mass arrival of asylee applicants. But this is precisely what happened within only weeks of its enactment. The 'Mariel boatlift'

experience in the Spring of 1980 witnessed 130,000 persons from Cuba and Haiti arriving in the United States within a two month period and requesting political asylum. Not wishing to set a precedent, the Carter Administration refused to grant blanket asylum to all of those who arrived. It did, however, initiate a process for reviewing each case individually. Ultimately, the eligibility issue was rendered moot when the subsequently enacted Immigration Reform and Control Act of 1986 granted an amnesty to all of these persons if they applied for such adjustment of status. Expediency took precedent over principle.<sup>3</sup>

When the Reagan Administration took office in 1981, it initiated two major steps to avoid any replication of the mass asylum experience. During the presidential campaign, it had used the entire 'Mariel Boatlift' experience as an indictment of the inability of the Carter Administration to properly govern the country. Accordingly, the Reagan Administration adopted a policy of intercepting boats with such human cargoes on the high seas and returning them, if possible, to their original ports. A treaty was actually signed by the United States and Haiti in 1981 whereby Haiti agreed to take back such persons without penalty. It was also announced that any mass arrivals that did occur would result in the persons aboard such vessels being placed in detention camps.

In the years that followed, this policy was tested as individuals and groups continued, on a sporadic basis to flee by sea from Haiti and Cuba. But their treatment was not equal. Haitian boats were turned around; Cuba boats brought ashore. Likewise, persons who somehow avoided interdiction and who arrived from Cuba (by whatever means) were given

refugee status almost automatically while Haitians were often put into detention or deported. Given the Cold War dynamics of the 1980's, the Cubans (leaving a communist government) were viewed as fleeing their homeland for political reasons; the Haitians (fleeing a right wing dictatorship) were usually considered to be fleeing for economic reasons. Charges of differential treatment in the administration of the law were vigorously denied and such charges were not sustained by a subsequent U.S. Supreme Court ruling.<sup>4</sup>

**The Central America Debacle:** Meanwhile, the Reagan Administration took counter productive steps when it politicized its human rights position in Central America during the 1980s.<sup>5</sup> Persons who fled from a civil war in Nicaragua (with a 'socialist' government) and sought political asylum were perfunctorily approved; those fleeing from 'death squads' and guerilla fighting in El Salvador and Guatemala (with right-wing governments) had their asylum applications rejected almost routinely.<sup>6</sup> Charges of misapplication of the law not only spawned a grass-roots protest movement (i.e., the 'Sanctuary movement') but, ultimately, led the U.S. Department of Justice to concede the validity of the charge in an out-of-court settlement in 1990 of a class action suit that the government knew it would lose.<sup>7</sup> The settlement required that hearings had to be offered to 350,000 persons from El Salvador and Guatemala who, it was alleged, did not file for asylum during the 1980s because they may have felt that the procedures were stacked against them. Another 150,000 cases were required to be re-opened where similar individuals from these two countries had been ruled to be illegal aliens.

**The Haitian Saga:** When the Cold War abruptly and unexpectedly ended, efforts by the Bush Administration to establish a coherent policy to address mass asylum situations reverted back to the principle of deterrence like that which the Reagan Administration had first enunciated.

The first test of the Bush policy came when the duly elected government of Haiti headed by Jean-Bertrand Aristide was overthrown by a military coup on 30 September 1991. In protest, the United States and other countries in the region imposed a trade and oil embargo with Haiti. By the end of October 1991, a number of ships from Haiti filled to capacity with human beings, were intercepted in international waters by the U.S. Coast Guard. Initially, the Haitians were taken aboard the Coast Guard's ships and simply held there. As their numbers increased, more Coast Guard cutters were sent to the area. The policy of routinely returning Haitians was temporarily suspended in light of the uncertain political conditions on Haiti. Interviews, however, were conducted by immigration officials on the ships to ascertain whether any such persons had a possible claim for political asylum.

The Bush Administration, however, considered most of those picked up at sea to be fleeing the deteriorating economic conditions on Haiti, not political persecution *per se*. Moreover, the Administration feared that, if those picked up at sea were all taken to the U.S. mainland, it would trigger a mass exodus of persons from the island on only marginally seaworthy ships. It was thought likely that many would perish in the attempt.

Meanwhile, the Administration sought a regional solution while negotiations continued for the return of

Aristide to power. Working with the United Nations High Commissioner for Refugees, efforts were made to see if other regional nations would agree to provide a temporary safe haven for the Haitians held on U.S. ships. For the most part these efforts failed. The Bahamas and the Dominican Republic declined such requests. Honduras, Venezuela, Belize, Trinidad, and Tobago agreed to participate but, in total, they indicated that they would only take 550 Haitians.

By mid-November 1991, there were 2,200 Haitians in custody and all of the available cutters were at capacity. It was decided, therefore, to begin a repatriation of those screened aboard those ships who were deemed not to have a valid claim for asylum and to take the remainder to a U.S. naval station located at Guantanamo Bay, Cuba. There they would be given temporary safe haven and the screening process could be completed for those not yet interviewed.

Hardly had the repatriation process begun on 19 November 1991 than it was enjoined from continuing on the next day by a court order issued by a district judge in Miami. He held that repatriation should not continue while the issue of the legality of interdiction itself was being challenged in the courts by refugee advocate groups.<sup>8</sup> The judge held that the 'threatened injury' (i.e., to the Haitians) of their return 'outweighs the potential harm that an injunction would cause the defendants' (i.e., the U.S. government). The judge, however, did not order that the Haitians on the ships or those living at the new tent city that had been hastily constructed at Guantanamo Bay be brought to the U.S. mainland. The decision was appealed by the federal government. On 31 January 1992 the U.S. Supreme

Court, by a 6-3 vote, lifted the injunction issued by the district court although it gave no written reason for its action.<sup>9</sup> The decision, while permitting the repatriation process to be renewed, allowed the actual legal challenge of the interdiction process to continue to work its way through the nation's judicial system.

By this time, there were about 10,000 Haitians at the naval base and another 1,500 were still aboard a Naval troop ship and Coast Guard cutters anchored off shore. On 3 February 1992, the process of repatriation commenced. In total, about 14,000 Haitians had been involved in this since it began in late October, 1991. Of this number, about 1,400 Haitians had been found during the screening process to have a plausible case for asylum and had been transported to Miami to formally make their case. Another 2,000 Haitians at the naval base had also been determined to be eligible to make a formal asylum application and were awaiting transfer to Miami. Another 350 Haitians had been transferred to the other regional countries that had agreed to provide temporary safe haven for them.

As for the interdiction process, it continued to be in effect. Additional boats were intercepted and the new detainees were brought to Guantanamo. On 24 May 1992, however, President Bush issued an Executive Order that formally ended the process of taking Haitians picked up at sea to Guantanamo and initiated a process whereby all subsequent Haitians picked-up would be returned directly to Haiti without giving them the chance to appeal for safe protection or asylum. Such persons were instructed to take their requests directly to the U.S. Embassy in Haiti. When

questioned about the efficacy of this action a few days later, President Bush stated 'I will not, because I have sworn to uphold the Constitution, open the doors to economic refugees from all over the world. We cannot do that.'<sup>10</sup> The U.S. Supreme Court upheld the Bush policy of direct return in August, 1992. By then, over 37,000 Haitians had been picked up at sea by the interdiction process.

The final closing of the tent city at Guantamano, however, was complicated by the fact that about 10 per cent of the Haitians who had been found to have a legitimate basis on which to make an asylum request on the mainland were diagnosed as having the H.I.V. virus that causes AIDS. Under existing immigration law, such persons are not permitted to enter the United States regardless of circumstance. These individuals, therefore, remained in a legal state of limbo until a federal district court in New York City in early June, 1993 ordered their release and their admission to the United States thereby ending the use of the naval base as a detainment center.<sup>11</sup> The Clinton Administration chose not to appeal the order so these Haitians were flown to the United States a few days later.

On 21 June 1993, the U.S. Supreme Court issued its opinion on the legality of the interdiction policy. The court, by an 8 to 1 vote, upheld the policy of intercepting Haitian 'boat people' in international waters and returning them to their homeland. The court stated that 'we are not persuaded that either one (i.e., U.S. immigration law or U.S. duties under international refugee treaties) places any limit on the president's authority to repatriate aliens interdicted beyond the territorial waters of the United States.'<sup>12</sup>

**The Chinese Dilemma:** Roughly paralleling the same time span that the Haitian drama was being played out, a new form of mass asylum was taking place on the West Coast of the United States. Large freighter ships were found to be transporting human beings from the People's Republic of China to the United States. Initially, these ships were met by smaller boats or yachts several miles off shore where the people were transferred and brought ashore in a clandestine manner. It was essentially a process to smuggle illegal aliens into the country. Typically these persons had paid large sums for this service and were obligated upon arrival to work-off these sums under terms of virtual bondage in Chinese-owned business enterprises. How many such drop-offs have occurred is, of course, unknown. But when boats were intercepted by the Coast Guard and the people brought ashore, they typically requested political asylum and usually were released.<sup>13</sup> In most instances, they simply disappeared into the large illegal immigration population of the Chinatowns of San Francisco, Los Angeles, and New York City. From 1991 to mid-1993, twenty-two boats and freighters were intercepted by the U.S. Coast Guard. What appeared to be isolated events were soon recognized as being an organized and on-going phenomena. The issue received national attention when in early June 1993 another ship with over 300 Chinese persons aboard ran aground on a beach near New York City. Those aboard were forced to jump into the water and eight died. The others were rescued but, as they came ashore, they all asked for political asylum. Unlike those caught on the West Coast, these persons were put into detention camps (at least for the time being). In early July 1993, three

more small freighters crammed with over 600 persons from China were intercepted in international waters south of San Diego, California. Prevented from entering U.S. territorial waters, the government of Mexico — after much coaxing from the U.S. government — agreed to allow the ships to be escorted to its waters where it would then allow the ships to dock; it would immediately transport those aboard to the airport at Ensenada; and they would be flown directly back to China.<sup>14</sup> In explaining the willingness to perform this task, an official of the Mexican government explained: 'We know very well that none of these people who are coming here are being persecuted. The U.S. knows that, too. The only difference is that in the United States the only thing you have to do is to step on American soil and cry asylum and you get a hearing.'<sup>15</sup>

Indeed, U.S. asylum policy has been roundly criticized for actually encouraging people from China to abuse its terms because of the liberal way it has been implemented. In November 1991 the Bush Administration issued a directive that expanded the definition of political asylum to include anyone adversely affected by any kind of forced family planning. Since that time, most asylum seekers from China arriving on the U.S. mainland have been granted political asylum. In 1992 their success rate was 85 per cent (three times the rate of asylum seekers from other countries). It is also acknowledged that those who are unsuccessful in this application simply vanish into the illegal immigrant communities of urban Chinatowns.

**Asylum Requests at Airports:** Although it has been the mass asylum issues involving Haitians and Chinese that have gained prominence in both

the courts and the media of the United States, a far more insidious trend in asylum requests has slowly emerged in the 1990s. This has been the gradual accumulation of individual requests for asylum, largely from persons from Third World countries, at the nation's ports of entry. The situation involves individuals who show up at border entry points — usually airports — with false documents, or stolen documents, or, increasingly, no documents at all but who claim they will be killed or tortured if they are returned home.<sup>17</sup> By 1993, their numbers were averaging almost 10,000 persons a month. In the overwhelming number of situations, the individuals are released because there is no available detention space locally available to hold them.

Under prevailing procedures, if a person arrives at such an entry point and makes a request for asylum, the individual is entitled to a protracted legal process to determine the validity of the claims. As one frustrated immigration official said in 1993, 'it is so easy to defeat the system that a 10 year-old kid could do it.'<sup>18</sup>

#### **PENDING POLICY REFORMS**

Amidst a backlog of almost 300,000 political asylum applications as of mid-1993, public hearings have been held by the relevant congressional committees responsible for the design of immigration policy. A number of legislative proposals have been drafted. Although the outcome of these efforts is unknown as of this writing, it is useful to at least mention some of the key provisions under consideration.

One proposal would establish pre-inspection screening stations to be staffed by I.N.S. officials in several foreign airports that have a high volume of U.S.-bound air traffic. These officials would have the authority to

examine travel documents for their authenticity and to assure that all persons on board possess such documents before departure to the United States. There is no legal barrier to stop the I.N.S. from doing this now if the appropriate permissions can be negotiated with the designated countries. It would, however, require additional funds and the I.N.S. has been a traditionally under funded agency relative to its duties. Moreover, I.N.S. officials feel that pre-inspection will be a costly procedure and that it is unlikely to have much effect. They feel that asylum abusers will simply shift their departures to airports in other countries where pre-inspection stations do not exist.

Another proposal would grant immigration officials at U.S. airports the authority for summary exclusion of anyone arriving at any airport without a document or with stolen or forged documents. Such persons would be immediately returned to the country from where they came. Their only chance to make an appeal for asylum would be if they could convince the immigration officer at the time of entry that they have a credible fear of persecution.

Still another proposal would require each applicant for political asylum first to obtain 'non-refoulement' status (i.e. official acknowledgment that he or she would be in danger if sent back to the home country). To do so, the applicant would have to give notice within seven days of arriving in the United States and file within 30 days an application for such status. The individual would then have to appear before a member of a specially trained corps of non-refoulement officers who would be required to issue a decision within seventy-five days. Only one appeal on the merits of the claim

would be permitted. It is not clear, however, how this procedure would cope with the problem of the large number of persons who vanish as illegal immigrants once they are in the country or during the procedural stages of the appeal process. There is no mention of any plan to keep such individuals at detention centers while the procedures are being implemented.

On 27 July 1993, President Clinton offered his Administration's proposals to address the problem of asylum abuse. He linked his efforts to the issue of illegal immigration as well as to the fact that political asylum had been used as a means for terrorists to enter the country for nefarious purposes. He said that the changes he proposed are intended to address 'the kinds of practices that are manifest in who can get into this country on an airplane, what kinds of smuggling (of human beings) can go on, and the fact that our borders leak like a sieve: those things cannot be permitted to continue in good conscience.'<sup>19</sup> Among his proposals is a call for new procedures for on-the-spot administrative hearings to determine whether immigrants seeking political asylum at a port of entry have legitimate claims. An I.N.S. official, specially trained in asylum issues, would determine at the port of entry whether the individual applicant had 'a credible fear of persecution' if returned to his or her homeland. Those with a valid claim would be given protection and allowed to pursue their claim at a later formal hearing. Those whose claims are not upheld would be given the opportunity to make one appeal to other officials of the U.S. Department of Justice. If the appeal is denied, they would be immediately deported. During the appeals procedure, the applicant would be held in detention. If the appeal is

upheld, the applicant will presumably be freed until a formal hearing on the individual's request can be scheduled. The Clinton plan also calls for use of the pre-inspection of documents program at foreign airports (but presumably not in every country where U.S. bound planes originate).

Whether any or all of the pending reforms or other proposals are adopted and, more importantly, whether they will be effective remains to be demonstrated. It is an uncontested fact, however, that the present political asylum system is being massively abused. It is providing a new entry channel for illegal entry.

#### CONCLUDING OBSERVATIONS

With the end of the Cold War, the issues of population growth, human migration, and refugee accommodation are converging. Unable to qualify for admission as legal immigrants (because such entry is largely restricted to persons with family ties to citizens or who have needed occupational skills), the refugee system provides a means of access for many persons wishing to flee the poverty, unemployment and destitution of their homeland. Asylum policy is the most vulnerable element of refugee policy for exploitation. To alleviate the economic forces that lie at the core of the asylum abuse dilemma will require more fundamental policies than the procedural changes currently under consideration by Congress or those proposed by President Clinton. Among these must be policies that promote family planning and provide the means for its practice; expand commitments to economic development assistance; and link trade access to the U.S. marketplace and the receipt of foreign aid to the strict adherence to internationally specified human right practices.

New refugee and asylum policies are required in the new world order that are not predicated on the need to respond to communism. Rather, these policies must be reserved for truly persecuted individuals. Purging the present asylum system of abusers will be a difficult task for policy makers. It is past time, however, to remove the element of subterfuge from what is supposed to be a policy of refuge.

#### References

- <sup>1</sup> See, Vernon M. Briggs Jr., *Immigration Policy and the American Labor Force*, The Johns Hopkins University Press, Baltimore, 1984, Chapter 6.
- <sup>2</sup> These grounds are race, religion, nationality, membership in a group, or political opinion. For details of the development of U.S. asylee policy, see *ibid.*, pp. 203-204.
- <sup>3</sup> Vernon M. Briggs, Jr., *Mass Immigration and the National Interest*, M.E. Sharpe, Inc., Armonk, N.Y. 1992, pp. 129-133.
- <sup>4</sup> *Jean v. Nelson*, No. 84-5240 (1985), 105 *Supreme Court Reporter* 2992.
- <sup>5</sup> Charles Maechling, Jr. 'Reagan's anti-human rights policy,' *New York Times*, 4 Sep. 1983, p. E-15.
- <sup>6</sup> For details, see Briggs, *Mass Immigration...*, *op. cit.*, pp. 137-142.
- <sup>7</sup> *American Baptist Churches, et. al., v. Thornburgh*, Civ. No. C85-3255 19 December 1990), Stipulated District of California.
- <sup>8</sup> Barbara Crossette, 'Forced return of Haitians fleeing by boat to U.S. is halted by judge,' *New York Times*, 20 Nov. 1991, p. A-1 and Howard W. French, 'Haitians win stay on forced return,' *New York Times*, 5 Dec. 1991, p. A-10.
- <sup>9</sup> Al Kamen, 'Supreme Court clears way for forced return of Haitian boat people', *Washington Post*, 1 Feb. 1992, p. A-3.
- <sup>10</sup> Barbara Crossette, 'U.N. official rebukes U.S. on Haitians', *New York Times*, 21 May 1992, p. A-3.
- <sup>11</sup> Garry Pierre-Pierre, 'Liberated from detention, but prisoners still', *New York Times*, 16 July 1993, p. B-1.

- <sup>12</sup> *Sale v Haitian Centers Council, Inc.*, (1993), [Vol. 509, U.S.... complete citation not yet available].
- <sup>13</sup> E.g., see 'U.S. seizes yacht carrying 85 aliens', *New York Times*, 28 Feb. 1992, p. A-12
- <sup>14</sup> Tim Golden, 'Mexico, in switch, decides to accept stranded Chinese,' *New York Times*, 15 Jul. 1993, p. A-1 and A-18.
- <sup>15</sup> *ibid.*, p. A-18.
- <sup>16</sup> Malcolm Gladwell and Rachel Strassen-Berger, 'U.S. policy seen encouraging

wave of Chinese immigration,' *Washington Post*, 13 Jun. 1993, p. A-25.

- <sup>17</sup> Donatella Lorch, 'A flood of illegal aliens enter the U.S. via Kennedy', *New York Times*, 18 Mar. 1992, p. B-12.
- <sup>18</sup> Tim Weiner, 'Pleas for asylum inundate system for immigration,' *New York Times*, 25 Apr. 1993, p. A-1.
- <sup>19</sup> Thomas Friedman, 'Clinton seeks more power to stem illegal immigration,' *New York Times*, 28 Jul. 1993, p. A-13.

## REFUGEE-STATUS PROCEDURES AND THE BOAT PEOPLE

### ■ Katharine Betts

Six hundred and fifty-two boat people, 316 of whom were Cambodians and 269 Chinese, arrived unannounced and unauthorised in Australia between November 1989 and October 1991. Eventually, almost all applied for refugee status. One hundred and forty have been granted asylum and more than 200 have returned home.<sup>1</sup> It is the story of the remaining 300 which has dominated the recent news about immigration.

After exhaustive investigations these 300 have been found not to be refugees. But some have spent over three years in detention waiting for the authorities to reach this conclusion. Many critics have been disturbed by the practice of keeping them in detention. Given the experience of other western countries where asylum-seekers vanish without trace into the community (see the article by Vernon Briggs in this issue), this policy is defensible. But it does make the questions raised by the delay more urgent.

Why has it taken so long? Is the delay the result of bureaucratic ineptitude? Or was it caused by manipulative lawyers conniving with the applicants to draw out the process and buy more time? (In this way they could say that their clients must be allowed to stay because the heartless bureaucrats have made them wait so long.) Whose fault is it?

The procedures for assessing on-shore applications for refugee status have evolved rapidly between 1989 and 1993 in the face of a sharp increase in numbers. (Few of these growing numbers were boat people. Most, though not all, were Chinese nationals who had come in legally on student visas.) In essence, the procedures applied to the boat people were as follows. They were first given 'compliance interviews' by officers of the Immigration Department to determine their nationality, port of departure and so forth. Then, after they had lodged applications for refugee status they were re-interviewed, again by officers of the department. These officers, on