

1981

The Vietnamese Refugee and U.S. Law

Tang Thi Thanh Trai Le
Notre Dame Law School, traï.t.le.2@nd.edu

Michael J. Esser

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Other Law Commons](#)

Recommended Citation

Tang Thi Thanh Trai Le & Michael J. Esser, *The Vietnamese Refugee and U.S. Law*, 56 Notre Dame Law. 656 (1981)..

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/906

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The Vietnamese Refugee and U.S. Law

*Tang Thi Thanh Trai Le**

and

*Michael J. Esser***

I. Introduction

Since April 1975 approximately one million Vietnamese, Cambodians and Laotians have landed in neighboring countries to be resettled elsewhere, mainly in the West. An additional one million Laotians and about four million Cambodians have been displaced within their own country. These figures reveal only part of the human tragedy that has afflicted the refugees. According to one estimate, by 1979, 250,000 had died at sea through disease, starvation, drowning or piracy. About half of the total number of Indochinese refugees were Vietnamese.¹

The causes of the Vietnamese exodus are political and economic. Although the bloodbath which many feared would follow the Vietnam war did not take place, hundreds of thousands of former members of the South Vietnamese army, civil service, or intelligentsia were sent to "reeducation" camps.² According to Vietnamese authorities, the purpose of reeducation was not to punish but to help those who had been part of the overthrown "puppet administration" to "cleanse themselves of past wrongs" and "return to the nation." Actually, reeducation camps were penal environments where many died from starvation, disease or overwork. Those who survived and were released never regained full membership in the new society. They were ostracized and treated as second-class citizens.³

Economic factors also contributed to the exodus from Vietnam. After a short period of uncertainty following the fall of South Vietnam,⁴ the communist

* Associate Professor of Law, University of Notre Dame. Lic. en Droit, 1953; Doctorat en Droit, Université Aix Marseille, France, 1956; Ph.D., University of Chicago, 1967; J.D., University of Notre Dame, 1977.

** B.A., University of California, San Diego, 1978; J.D., University of Notre Dame, 1981.

The authors gratefully acknowledge the assistance of Thomas A. Crowley.

1 Accurate statistics on the number of Vietnamese refugees are difficult to establish because of the number of refugees who died in transit. It is estimated that by the end of August, 1979, 675,000 refugees had left Vietnam. See Osborne, *The Indochinese Refugees: Cause and Effects*, 56 INT'L AFF. 37, 38 (1980); Saigon Gia Dinh Municipal Military Management Committee radio announcement (June 10, 1975), reported in Foreign Broadcast Information Service, Daily Report, Asia & Pacific, June 11, 1975 at L₂ (South Vietnam). See also Young, *The Legality of Vietnamese Re-education Camps*, 20 HARV. INT'L L.J. 519 (1979).

2 Father Andre Gelinat, a French priest who left Saigon 15 months after the communist takeover, reported that official statistics placed 300,000 people in reeducation camps but that the actual count is closer to 500,000. A. Gelinat, *Life in the New Vietnam*, THE N.Y. REV. OF BOOKS, Mar. 17, 1977 at 21 (cited at Young, *supra* note 1, at 522 n.20). Other figures cited were 200,000, Chanda, *The Second Revolution*, FAR EASTERN ECON. REV., May 7, 1976, at 7, and 150,000, N.Y. Times, Nov. 13, 1977, § 1, at 10, col. 3. In the last few years, according to refugee accounts, a great number of detainees have been released. But it is generally believed that at least 50,000 "hard core" southerners are either being detained in the South or have been transferred to camps in the North.

3 Young, *supra* note 1, at 2.

4 During the months immediately following the takeover, reports emerged from Vietnam that the communists intended to maintain a separate South Vietnamese administration as long as it was necessary

leadership dramatically accelerated the reunification process and applied the North Vietnamese model of socialism to the South. A resolution issued at the end of the Twenty-Fourth Party Plenum of the Executive Committee in July 1975 set forth the Party's objective—to “advance fast, advance firmly, advance surely” to socialism.⁵ After the reunification of Vietnam, Le Duan, the Secretary General of the Vietnamese Communist Party, announced at the First National Assembly in July 1976 that Vietnam would completely orient itself to the economic objective of industrialization.⁶ Le Duan emphasized that Vietnam would apply the Marxist-Leninist dictatorship of the proletariat, achieve collective ownership by the labor class, and simultaneously accomplish the “three revolutions: production relationship, science technology and thought culture.”⁷ The Party led a campaign in the South against private ownership, denouncing private owners as exploiters and instruments of imperialism. The official press reported that in Saigon, Gia Dinh and other important cities of the South, “spontaneous” demonstrations had broken out demanding the punishment of the private merchants “who have conspired with the Americans and Thieu to exploit our people.”⁸

As a result of this forceful implementation of socialism, millions of people became unemployed. To reduce unemployment the government formed “New Economic Zones”—regions in underpopulated rural areas set aside for resettlement of the millions of refugees living in the major cities.⁹ New Economic Zones were set up throughout the South, principally in former resistance areas and in the mountainous and piedmont region north and northwest of Saigon. The Party planned a large scale movement of the population to carry out this program and projected that three million people would be “redeployed” between 1976 and 1980.¹⁰ The resettlement program was intended not only to relieve the unemployment problem, but also to develop new acreage for cultivation, reduce the strain on the food distribution system, raise food production levels, and break up old social and political groups in the South. But the program fell far short of government expectations. The lack of facilities and resources transformed the New Economic Zones into virtual concentration camps from which the inhabitants sought to escape.

The Party's attempt to collectivize the agricultural sector in the South also contributed to food shortages. As the Far Eastern Economic Review reported:

Individualistic peasants in the Delta . . . are often reluctant to grow more rice than necessary for their own requirements and tax. They see no benefit in producing large

to bring the political, social and economic system of the South into line with that of the North. It was feared that premature unification of the North and South would disrupt the established socialist system of the North. Reports quoting communist sources indicated that for an indefinite period, “defined informally in terms of years,” there would be two zones, two administrations. Interview with Terziano Terzani, reprinted in *DER SPIEGEL*, June 30, 1975, at 65. The president of the Provisional Revolutionary Government's Advisory Council, in an interview with a foreign correspondent, even went so far as to give assurances that the rights of the national bourgeoisie of South Vietnam would be respected. D. Gareth-Porter, *The Revolutionary Government of Vietnam*, in *CURRENT HISTORY* 232 (1975); *N.Y. Times*, May 18, 1975, at 2, col. 1.

5 HOC TAP (July, 1976) at 4 (official Socialist Republic of Vietnam publication).

6 *Id.* at 31.

7 *Id.* at 39.

8 Nhan Dan, Sept. 15, 1975, at 1 (official Socialist Republic of Vietnam publication).

9 Address by Secretary General Le Duan, Fourth Party Congress, HOC TAP (Dec. 1976).

10 Nhan Dan, Nov. 20, 1975, at 1.

surpluses that must be sold to the State at a low price or when there are few consumer foods available to be bought with the proceeds. Out of fear that excess family holdings of rice paddies would be collectivized, many farmers in the MeKong Delta divided their holdings among relatives and transformed paddies into ponds or orchards. . . . Recently, Vice-Premier Pham Hung also criticized some Delta peasants for using surplus rice to make wine or feed cattle rather than sell to the Government. In the North too, as the Party daily Nhan Dan complained, many cooperatives kept excess grain for their own purposes.¹¹

The economic problems caused by collectivization were compounded by natural disasters. Between 1977 and 1978, the country suffered a series of devastating typhoons, floods and drought.¹²

Despite these adverse conditions, aside from the 130,000 persons who fled Vietnam during the communists' advancement into Saigon in the last days of April 1975, there were no large-scale departures of Vietnamese refugees until 1978. Between 1975 and 1978 approximately 30,000 refugees left Vietnam and arrived in countries of first asylum. This figure pales when compared to the sudden flood of refugees in 1978 and 1979.¹³ By July 1979 approximately 204,000 refugees had landed in Southeast Asian countries of first asylum. Between June 1978 and July 1979 the average monthly rate of arrivals of "boat people" was nearly 12,500.¹⁴

International events produced this dramatic increase. By November 1978 it was apparent that the Socialist Republic of Vietnam (SRV) no longer maintained a policy of neutrality between the Soviet Union and mainland China. The SRV joined the Soviet-controlled Comecon group and signed a military assistance pact with the Soviet Union.¹⁵ In December 1978, following months of border skirmishes with Cambodia, Vietnamese troops advanced to the Cambodian capitol of Pnom Penh, drove the Pol Pot-led Cambodian forces into the jungle, and installed the Vietnamese-backed regime of Heng Samrin.¹⁶ Thousands of Vietnamese troops were required to maintain control of Laos and Cambodia, and many young Vietnamese fled their homeland to avoid being drafted.¹⁷ When China decided "to teach Vietnam a lesson" by deploying its forces along Vietnam's northern borders, the Vietnamese of Chinese descent, or Hoa, felt they had no future in Vietnam. The Vietnamese authorities encouraged and often forced the Hoa to take to the sea, requiring them to pay the equivalent of \$2,000 to \$3,000 in gold for the right to depart.¹⁸ Through this action, the SRV simultaneously disposed of potential "fifth column elements" within Vietnam and replenished with hard currency its badly depleted treasury.

11 Chanda, *Hanoi Comes Down to Earth*, FAR EASTERN ECON. REV., Feb. 4, 1977, at 28. See also Chanda, *Vietnam's Battle of the Home Front*, FAR EASTERN ECON. REV., Nov. 2, 1979, at 44.

12 Wain, *The Indochinese Refugee Crisis*, 58 FOREIGN AFF., 161 (1979).

13 Osborne, *supra* note 1, at 39.

14 *Id.* at 42.

15 Nhan Dan, Nov. 4, 1978.

16 N.Y. Times, Dec. 20, 1978, § A at 15, col. 1. For an analysis of the SRV's action see Osborne, *Cambodia: The Lessons of History*, FAR EASTERN ECON. REV., Feb. 2, 1979, at 18-21.

17 People also fled to avoid the compounded economic hardships brought by this new, different kind of war in which allies did not provide massive economic aid to alleviate the suffering and loss of life. The official publication of the Vietnamese Communist party, Tap Chi Cong San, admitted that in the existing situation the government had to spend more on defense and that people would have to face "difficulties and shortages." Chanda, *Vietnam's Battle on the Home Front*, FAR EASTERN ECON. REV., Nov. 2, 1979, at 44.

18 Interview of Vietnamese refugees by author (Summer, 1979).

The flood of new Vietnamese refugees greatly alarmed the Southeast Asian countries of first asylum. These countries compared the refugees to "waves of bombers" and "weapons of war," and believed that the SRV had deliberately created the crisis to purge Vietnam of undesirables, dump them on its neighbors and thereby create chaos.¹⁹ The West's reluctance to admit the refugees for permanent resettlement aggravated the feelings of the Southeast Asian countries. They were afraid to shoulder the ultimate burden of this mass influx because their resources were scarce, their ethnic problems volatile and their territory limited. Thailand, Malaysia and Indonesia adopted harsh measures to discourage refugees from crossing their borders or landing on their shores.²⁰ These harsh measures were widely publicized and focused the world's attention on the refugee crisis.

In response, a Conference on Refugees convened in Geneva on July 20, 1979. Representatives of 65 nations, including the SRV, were present. The participating governments pledged to increase resettlement offers from 125,000 to 260,000 and expressed a "general endorsement" of the principles of asylum and non-refoulement. At the end of the Conference the Secretary General announced that Vietnam had agreed "for a reasonable period of time [to] make every effort to stop illegal departures."²¹ The delegates endorsed the May 30, 1979 Memorandum of Understanding between Vietnam and the United Nations High Commission for Refugees, which outlined a program allowing Vietnamese to leave their homeland for family reunion and other humanitarian reasons. The Geneva Conference did not, however, produce a long-run solution to the Vietnamese refugee problem because it remained apolitical and disregarded the problem's roots. As the British delegates remarked: "[T]he refugees left because the policies of the Vietnamese government made it impossible for them to remain."

The number of Vietnamese refugees has recently fallen sharply due to Vietnam's slowing its program of forced departures of citizens of Chinese descent and its increased control of "illegal departures." However, the Vietnamese refugee crisis may flare up again. The SRV has made it clear that the moratorium on expelling its unwanted citizens will continue only if resettlement countries accept

19 New Strait Times, a Malaysian daily newspaper, wrote: "The crux of the issue is that the flow from Vietnam is no longer just a humanitarian problem. It has become as much a weapon of war as a softening up raid by waves of bombers." Wain, *supra* note 12, at 168.

20 They did this through "rejection" and "refoulement." Through rejection, the first asylum countries closed their shores to the refugees by preventing them from landing or by pushing them back to sea. The Malaysian officials themselves admitted that they towed away approximately 13,000 refugees in May, 1979, and another 12,000 in June. The number of refugees rejected between January and June, 1979 was approximately 47,667. On June 15, 1979, the Malaysian Deputy Prime Minister declared that Malaysia would tow all refugees presently in Malaysia back to sea and shoot any new arrivals on sight. N.Y. Times, July 26, 1979, § A, at 6, col. 2.

Refoulement is defined in article 33 of the 1951 Convention Relating to the status of Refugees, note 26 *infra*, as expelling or returning a refugee "to the frontiers or territories where his life or freedom would be threatened." In a one-week period in June 1979, Thailand sent more than 40,000 Cambodian refugees back to Cambodia, some of whom had already been accepted in the West for settlement. N.Y. Times, June 25, 1979, § A, at 1, col. 2. These drastic measures were contrary to Article 33 of the Convention which clearly prohibits rejection and refoulement except on national security grounds.

21 Recent Developments, 21 HARV. INT'L L.J. 290, 294 (Winter 1980). Article 1 of the United Nations Charter, requires all United Nations members to respect human rights. One of the basic human rights is the freedom to travel embodied in article 13(2) of the Universal Declaration of Human Rights. It is distressing to witness an international gathering under United Nations auspices approving a totalitarian state's deliberate policy of disregard for a human right recognized by the Charter to which all countries present were signatories.

expatriates directly from the SRV as well as those who qualify under such countries' normal immigration procedures. Refugee reports indicate that renewal of expulsion programs could resume at any time.²²

The United States has been a leader in admitting and resettling Vietnamese refugees. Approximately 332,000 Indochinese were admitted into the United States between April 1975 and March 31, 1980. By the end of fiscal year 1980, 416,000 had been admitted; half of these were Vietnamese.²³ The current authorized and proposed resettlement rate of 14,000 Indochinese per month is the product of President Carter's response to the refugee crisis in 1979. In its response to the crisis, the United States government has had to be extremely flexible in applying its own laws.

II. The Legal Status of the Vietnamese in the United States

The status of refugees under United States immigration law changed dramatically when, in 1968, the United States became a party²⁴ to the 1967 United Nations Protocol Relating to the Status of Refugees (the Protocol).²⁵ The Protocol, in turn, incorporated and expanded the terms of the 1951 Convention Relating to the Status of Refugees (the Convention).²⁶ As defined by the Convention and updated by the Protocol, a refugee is a person who, "[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"²⁷

The Refugee Act of 1980 (1980 Act)²⁸ was signed into law by President Carter on March 17, 1980, in response to the pressure caused by the influx of Indochinese refugees. The 1980 Act, which amended the existing Immigration and Nationality Act (INA),²⁹ defined "refugee" as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself . . . of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion³⁰

Part (B) of the definition provides that in circumstances specified by the President after consultation with Congress, any person still within his country of origin who is persecuted or who has a well-founded fear of persecution based on the

²² See UNITED STATES COORDINATOR FOR REFUGEES AFFAIRS, REPORT TO THE CONGRESS 76 (Apr. 15, 1980); [1980] WORLD REFUGEE SURVEY 16 (United States Committee for Refugees, Inc.).

²³ *Id.* at 73.

²⁴ 19 U.S.T. 6223, T.I.A.S. No. 6577.

²⁵ Protocol Relating to the Status of Refugees on 31 January 1967, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 40-44 (2d ed. 1979) [hereinafter cited as Protocol].

²⁶ Convention Relating to the Status of Refugees of 28 July 1951, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 10-39 (2d ed. 1979) [hereinafter cited as Convention].

²⁷ Protocol, *supra* note 25, art. I.

²⁸ Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter cited as 1980 Act].

²⁹ 8 U.S.C. §§ 1101-1503 (1976 & Supp. II).

³⁰ 1980 Act, *supra* note 28, § 201(a).

grounds set forth in part (A) also qualifies as a refugee.³¹

The 1980 Act was intended to incorporate into United States immigration law the definition of "refugee" embodied in the Protocol and Convention.³² Although the Act incorporates the Protocol, there is substantial evidence that Congress intended to broaden United States law beyond the Protocol's limits.³³ For example, the Senate Report amended the new definition "to include 'displaced persons' who are not technically covered by the United Nations Convention—to issue maximum flexibility in responding to the needs of the homeless who are of concern to the United States."³⁴ Although the House provision which was finally adopted did not contain the Senate Report's language, the definition incorporated in the 1980 Act explicitly broadens the scope of the Protocol. Paragraph 88 of the *United Nations Handbook* (the *Handbook*), referring to the Protocol requirements for refugee status, states: "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."³⁵ The 1980 Act, however, provides that certain presidentially specified persons who are being persecuted or who fear persecution within their country of origin may obtain refugee status without leaving their homeland.³⁶

The significant phrase in the Act's and the Protocol's definition of refugee is "well-founded fear of persecution." Its meaning and operation have been the subject of considerable debate. One definition of persecution within the scope of the Convention provides that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is *always* persecution."³⁷ Threats to life or freedom are not the only forms of persecution; they are simply forms that *always* amount to persecution. As the *United Nations Handbook* points out, "[o]ther serious violations of human rights—for the same reasons—would also constitute persecution."³⁸ In *Kovac v. Immigration and Naturalization Service*,³⁹ the United States Court of Appeals for the Ninth Circuit described persecution broadly in interpreting a related statutory provision:

No doubt "persecution" is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word "persecution" ordinarily conveys—the infliction of suffering or harm upon those who differ

31 *Id.*

32 The Senate Judiciary Committee clearly expressed the Act's purpose: "[T]he new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees . . . , and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol." S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979).

33 Nothing prevents a country which is a party to the Protocol from applying more liberal refugee standards or providing additional rights to refugees. Protocol, *supra* note 25, art. V.

34 S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979).

35 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 88 (1979) [hereinafter cited as HANDBOOK].

36 1980 Act, *supra* note 28, § 201(a).

37 HANDBOOK, *supra* note 35, ¶ 51 (emphasis added).

38 *Id.* See also 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 193-97 (1972).

39 407 F.2d 102 (9th Cir. 1969).

(in race, religion, or political opinion)⁴⁰ in a way regarded as offensive.⁴¹

The definition of persecution is not uniformly applied in actual practice. In part this is unavoidable because of the countless unique circumstances the Immigration and Nationality Service (INS) must face. The available judicial decisions provide little guidance. For example, *Kovak's* definition of persecution in terms of offensive infliction of harm begs the question, since "offensive" may mean different things in different contexts. Treatment which offends the applicant may not be sufficiently offensive to warrant granting refugee status.

The vestiges of former United States law also affect persecution requirement questions. For example, the Board of Immigration Appeals has occasionally reverted to the now outdated requirement of "physical" persecution,⁴² even in the face of congressional intent to liberalize asylum by amending the original section 243(h).⁴³ In *Kovac* the court stated that "it seems beyond argument that by deleting the word 'physical,' Congress intended to effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm."⁴⁴

The INS has tended to apply a stricter standard of review in analyzing the persecution requirement for asylum purposes when the government of the country of origin is ideologically "Western."⁴⁵ "Conversely, refugees from countries that are [the United States'] ideological adversaries, notably Eastern European states, generally meet with favorable treatment by the Board and the INS."⁴⁶

Before 1968, ideological and geographical restrictions on conditional entry were provided for by law.⁴⁷ Such restrictions were contrary to the Protocol ratified in 1968 and hence to our treaty obligations, which the United States Constitution declares to be "the supreme law of the land."⁴⁸ Nevertheless, INA section 203(a)(7) still contained explicit geographical and ideological distinctions until its repeal in 1980. The geographical and ideological restrictions often found their way into hearings under the INA, as was evident in the treatment afforded the Haitian Refugees.⁴⁹ The 1980 Act expressly repealed those restrictions.⁵⁰

One controversial topic concerns the time at which persecution or fear of persecution is deemed to begin for purposes of classifying a person as a refugee. Under the Protocol (as explicated by the *Handbook*) the alien seeking refugee status need not have fled his country of origin as a result of persecution or fear of

40 This definition is broadened in § 201(a) of the 1980 Act, *supra* note 28, to include persecution for membership in a particular social group.

41 407 F.2d at 107. The court refers to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1685 (1965).

42 See, e.g., *Moghianian v. United States Dept. of Justice, Bd. of Immig. Apps.*, 577 F.2d 141 (9th Cir. 1978). The INS has also argued that the physical persecution test was intended by the "life threatening" language of the Protocol. This seems to misread the original Convention. See A. GRAHL-MADSEN, *supra* note 39.

43 8 U.S.C. § 1253(h) (1964).

44 407 F.2d at 106.

45 See Gross, *Right of Asylum*, 80 COLUM. L. REV. 1125, 1132-33 (1980).

46 *Id.*

47 8 U.S.C. § 1153(a)(7) (1976).

48 U.S. CONST. art. VI.

49 See Deruis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27 (1976).

50 1980 Act, *supra* note 28, § 203(c)(3).

persecution; if he left that country to obtain refugee status, he may still qualify as a refugee "sur place."⁵¹ The following paragraphs from the *Handbook* are relevant:

94. The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "sur place."

95. A person becomes a refugee "sur place" due to circumstances arising in his country of origin during his absence. . . .

96. A person may become a refugee "sur place" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence.⁵²

"Constructive flight" involves the occurrence of conditions in a person's country of origin after his departure which create a well-founded fear of persecution should he return.⁵³ The requirement of flight is imposed to ensure that the intent to become a refugee existed at the time of departure and was not formed after exposure to the "good life" in the United States.⁵⁴ In *Matter of Zedkova*,⁵⁵ the applicant had left Czechoslovakia to visit the United States fully intending to return to her homeland. While she was in the United States, the Soviet Union invaded Czechoslovakia and she refused to return. The Board of Immigration Appeals found a satisfactory showing of the likelihood of persecution and allowed the applicant to stay.⁵⁶ Commenting on *Zedkova*, one observer noted that "[t]he concept of constructive flight thus appears to be limited to those aliens who left their homelands freely with the intention of returning and who face a risk of persecution on their return as a result of external events *not occasioned by their own conduct*."⁵⁷

The notion of constructive flight may conflict with the terms of the Protocol, which grants refugee status in some circumstances where the refugee "sur place" fears persecution because of his own actions—for example, "associating with refugees already recognized, or expressing his political views in his country of residence."⁵⁸

Those Vietnamese refugees who left South Vietnam before its fall but who are unwilling to return for fear of persecution will not likely have problems regarding time of persecution. Vietnamese residents who have received training in the United States, who are closely related to persons who fled Vietnam after the Communist takeover, or who have been included in resettlement programs due to their cooperation with voluntary agencies should also be eligible for refugee status, since such circumstances give rise to a "well-founded fear of persecution." Granting refugee status is appropriate, since under the Protocol such persons

51 See Protocol, *supra* note 25; HANDBOOK, *supra* note 35, ¶¶ 94-96.

52 HANDBOOK, *supra* note 35, ¶¶ 94-96.

53 Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528, 545 (1975).

54 See generally *id.* at 544.

55 13 Immig. & Natur. Dec. 626 (1970).

56 *Id.*

57 See Note, *supra* note 53, at 545.

58 HANDBOOK, *supra* note 35, ¶¶ 94-96.

may be entitled to status as refugees "sur place."⁵⁹

Related to the problems of constructive flight is the fear that an illegal departure itself may cause persecution upon returning to one's country of origin. Under the Convention, excessive punishment for illegal departure or unauthorized stay abroad may constitute persecution if the applicant's motive for leaving or for not returning to his country of origin is a well-founded fear of persecution for reasons enumerated in Article 1A(2) of the Convention.⁶⁰ It may be argued that when the punishment for illegal departure is excessive, all illegal expatriates constitute a special group and are persecuted for membership in that group. Theoretically, such illegal expatriates should be entitled to refugee status because persecution or fear of persecution for being a member of a social group entitles one to refugee status under both the Convention and the 1980 Act. However, acceptance of this view would open the flood-gates and require admission of virtually all illegal expatriates regardless of their motives for departure, subject to the usual exclusions of (for example) convicted criminals and persons threatening national security. To avoid this result, the INS might resort to its pre-1980 standard. One commentator has observed that

in its 1965 reforms, Congress evinced a general desire to protect aliens facing punishment for illegal departure. However, the case law suggests two requirements that an alien must meet to obtain asylum based on threatened punishment for illegal departure. The alien must show that the travel restriction is "political" and that his own flight was "politically motivated."⁶¹

Such a requirement may be contrary to the terms of the Protocol and, therefore, contrary to the 1980 Act's legislative intent. Furthermore, excessive punishment for illegal departures may violate the fundamental right to travel. This in itself would be contrary to international law⁶² and courts have granted asylum on the basis of a violation of that right.⁶³

At the close of the 1979 Convention on Refugees, Vietnam stated it would "make every effort" to stop illegal departures.⁶⁴ The SRV's definition of illegal departure was outlined in an order issued on January 15, 1975.⁶⁵ Under the order, individuals are not granted permission to depart if they (1) are of draft age, (2) possess military or governmental secrets or are irreplaceable in their present positions, or (3) are criminals or accomplices awaiting trial. Under these criteria the SRV can arbitrarily classify most departures as "illegal." For example, "criminals or accomplices" can easily embrace dissidents in a communist state—the very people most needing the protection that refugee status grants.

Many Vietnamese refugees left their homeland mainly for economic reasons.⁶⁶ These refugees fall into two groups: those who left as a result of government action (such as the creation of "New Economic Zones" or the promulgation

⁵⁹ *Id.*

⁶⁰ HANDBOOK, *supra* note 35, ¶ 61.

⁶¹ Gross, *supra* note 45, at 1143, *citing In re Janus & Janek*, 12 Immig. & Natur. Dec. 866, 876 (1968).

⁶² Universal Declaration of Human Rights, art. 13(2) [1948] Y.B. ON HUMAN RIGHTS (United Nations) 467.

⁶³ *See* *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

⁶⁴ *See* Recent Developments, *supra* note 21.

⁶⁵ Foreign Broadcast Information Service, Daily Report, Asia & Pacific, Jan. 15, 1975 (South Vietnam).

⁶⁶ *See* text accompanying notes 4-10 *supra*.

of decrees eliminating private ownership) and those who left as a result of natural disasters (such as typhoons, floods, and drought). The first group would qualify as refugees under the Protocol and the 1980 Act as victims of persecution based on membership in a "social group."⁶⁷ Such status comports with the standard adopted in *Dunat v. Hurney*.⁶⁸ In that case, the Third Circuit reversed a district court's summary judgment in favor of the Attorney General's denial of an application for a stay of deportation. The applicant had been denied employment in communist-dominated Yugoslavia because of his adherence to the Catholic faith and his refusal to join the Communist party. The court stated:

[T]here is no basis for thinking that "physical persecution" requires or even connotes the use of intense physical force applied to the body with all the dramatics of the rack and wheel. The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual.⁶⁹

In *Kovac v. Immigration and Naturalization Service*,⁷⁰ the applicant had not been denied all means of earning a livelihood, but had been forced to work as an unskilled cook despite his experience as a skilled chef. The Ninth Circuit indicated that this constituted persecution under the amended section 243(h) because it presented the probability of "deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion."⁷¹ Under *Kovac's* expansive criteria, Vietnamese refugee applicants who have been denied all means of earning a livelihood or who have suffered substantial economic disadvantage because of their past affiliations or their refusal to adhere to Communism may be able to establish a level of persecution entitling them to refugee status.

It could be argued that because the SRV's economic policies are general and not directed against a particular group, persecution would be difficult to prove. In such cases neither the Protocol nor the 1980 Act seems to provide much guidance. However, the Fifth Circuit has indicated it does not believe "that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression."⁷² Furthermore, a person in such a situation may be able to demonstrate that he faces persecution due to his membership in a particular social group—"because of his economic position (e.g., as a wealthy industrialist) or his social status (e.g., as an intellectual)."⁷³ In such cases, asylum may exist as of right on the basis of persecution threatened for membership in a particular social group, although this concept is still largely untested.⁷⁴

There remains the problem of determining what treatment to accord applicants who suffer economic hardship not resulting directly from any government action aimed at them. Such applicants include those who suffered from natural calamities and those whose standard of living deteriorated due to general eco-

67 Protocol, *supra* note 35, art. 1; 1980 Act, § 201(a).

68 297 F.2d 744 (3d Cir. 1961).

69 *Id.* at 746.

70 407 F.2d 102 (9th Cir. 1969).

71 *Id.* at 107.

72 *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977).

73 Gross, *supra* note 45, at 1140, 1146.

74 *See id.*

conomic conditions under the Communist regime. Under the Protocol and Convention, such people may not be refugees at all. The *Handbook* defines "migrant" as

a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.⁷⁵

Absent a showing of persecution for one of the required reasons, either before or after departure, the applicant's recourses under United States law are: (1) discretionary relief, under the Attorney General's parole power (although this discretion has been severely restricted under the new Act);⁷⁶ or (2) applying for admission under normal immigration procedures. Clearly, the latter procedure would be ineffective given the SRV's present policies.

The problem of the purely economic refugee can be solved by looking to the wording of the 1980 Act itself. While the language of the Protocol which the Act incorporates seems to require a "well-founded fear" upon leaving the country, the interpretation provided by the *Handbook* indicates that this is not a requisite for refugee status. Section 201(a) of the 1980 Act incorporates this interpretation into its definition of refugee. Thus, under the Act, the applicant for refugee status must show only that present conditions in his country of origin constitute grounds for a "well-founded fear of persecution" upon return to that country. Judicial notice can be taken of conditions in the SRV which will support the applicant's claim that SRV policies have created social groups which are persecuted and to which he would belong were he to return.⁷⁷ The applicant can also show that his departure itself places him in a group deemed hostile to the SRV and, therefore, subject to persecution. For example, a farmer who left Vietnam because of drought can claim that if he returned to his homeland he would be placed in a New Economic Zone or forced to work on a collectivized farm. By so doing he will have shown a well-founded fear of being persecuted for membership in a particular social group. Thus, if judicial notice were taken of SRV policies, the distinction between "political" and "economic" refugees would become meaningless in determining who deserves refugee status under the Protocol and the 1980 Act.

Section 201(a) of the 1980 Act adopts a broader definition of refugee than does the Protocol, allowing persons still in their countries of nationality to be declared refugees by the President after consultation with Congress.⁷⁸ This provision may benefit those held in Vietnamese "reeducation" camps or New Economic Zones, and all those discriminated against because of their political and religious beliefs. If the SRV eventually allows some of its citizens to depart as

⁷⁵ HANDBOOK, *supra* note 35, ¶ 62.

⁷⁶ The parole authority of the Attorney General is contained in 8 U.S.C. § 1182(d)(5). This parole power was amended by § 203(f) of the 1980 Act, *supra* note 28:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the U.S. rather than be admitted as a refugee under Section 207.

⁷⁷ Judicial notice was taken in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (E.D. Fla. 1980).

⁷⁸ See text accompanying notes 32-36 *supra*.

refugees, section 201(a) could allow these persons to enter the United States directly. This would benefit, not only the refugees, but also the Southeast Asian countries of first asylum which would not face the problems posed by the refugees' prolonged stay. Section 201(a) could also be used as leverage in future negotiations for normalization of relations between the United States and the SRV.

Unfortunately, the utility of section 201(a) is undermined by the universally recognized principle of state sovereignty. For the United States to declare that persons within SRV jurisdiction are refugees may be considered an impermissible interference into the domestic affairs of a sovereign nation.⁷⁹ The usefulness of section 201(a)'s expansive definition of refugee to those still in Vietnam thus remains uncertain.

III. Conclusion

Vietnamese refugees face a series of hurdles in entering the United States. Questions of fear of persecution, time of persecution and illegal departure face the refugees generally. Those leaving Vietnam for economic reasons and those displaced within Vietnam face additional difficulties. However, careful application of United States immigration law should accommodate the Vietnamese refugees as well as the policies behind the laws.

⁷⁹ See U.N. CHARTER art. 2, para. 7.