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## Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure

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### I. INTRODUCTION

The executive branch has traditionally exercised tremendous discretionary authority in the area of immigration enforcement—articulating priorities within a framework of deportability and inadmissibility constructed by Congress and providing immigration relief to a broad range of groups in response to humanitarian and foreign policy concerns.<sup>1</sup> Among other things, the executive branch possesses the authority to award broad-based grants of temporary immigration relief under two nationality-based programs: temporary protected status (TPS) and deferred enforced departure (DED).<sup>2</sup> Though the former is statutory and the latter extra-statutory, both awards are grounded in a central discretionary decision that is not subject to judicial review.<sup>3</sup>

During the 25 years since the establishment of these two mechanisms, immigration advocates have often argued that TPS and DED should be made available to nationals of various Central American states.<sup>4</sup> Although they

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<sup>1</sup> See U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); *Johns v. Dep't of Justice*, 653 F.2d 884, 893 (5th Cir. 1981); *Krua v. Dep't of Homeland Security*, 729 F.Supp. 2d 452, 455 (D. Mass. 2010).

<sup>2</sup> INA § 244(a)(1) (8 U.S.C. § 1254(a)(1)); USCIS, “Adjudicator’s Field Manual,” § 38.2 (2014).

<sup>3</sup> INA § 244(b)(5)(A) (8 U.S.C. § 1254(b)(5)(A)) (“There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation” under TPS); USCIS, “Adjudicator’s Field Manual,” § 38.2(a).

<sup>4</sup> Baldini-Potermin, *A Step Forward and Back: The Border Crisis and Possible Solutions Focused on Fundamental Fairness and Basic Human Rights*, 91 No. 31 Interpreter Releases 1401, 1407 (2014).

have sometimes been successful, no Central American country has been designated under either program since 2001, and aside from El Salvador, none has ever been granted relief for any reason except environmental disaster. Today, with ever-increasing proportions of Central American migrants arriving at our borders in the face of widespread poverty and conditions of extreme violence, the question again arises: Do the countries in the “Northern Triangle” of Guatemala, El Salvador, and Honduras merit protection under TPS or DED?

In addressing this question, we need not argue that the executive *must* award such a grant. Indeed, there is no legal mechanism to force the president’s hand.<sup>5</sup> Instead, we need only consider whether such grants are *legally appropriate* forms of relief for the conditions currently existing in the Northern Triangle. The extensive memoranda accompanying President Obama’s recent deferred action announcements, as well as the furor over their implementation,<sup>6</sup> underscores the importance of grounding even such “discretionary” grants in legal precedent.<sup>7</sup>

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(arguing that, viewed in light of precedent, “it becomes clear that Guatemala” should be designated for TPS and El Salvador and Honduras redesignated). Others have noted that “[w]hether to grant blanket relief to nationals from neighboring Central American countries has perplexed policy makers for several decades.” LISA SEGHETTI ET AL., CONG. RES. SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 7 (2015).

<sup>5</sup> See *KRUA*, 729 F.SUPP.2D AT 455 (discussing the unreviewability of TPS and DED designations).

<sup>6</sup> See KARL R. THOMPSON, U.S. DEP’T OF HOMELAND SECURITY, THE DEPARTMENT OF HOMELAND SECURITY’S AUTHORITY TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS (2014) [hereinafter NOVEMBER 20TH MEMORANDUM]; see also Complaint at 5, *Texas v. United States*, 1:14-cv-00254 (Dec. 3, 2014). Although the resulting lawsuits have been deemed “long on politics [and] short on law” by the American Immigration Council, they reveal nonetheless the importance of establishing a firm legal basis for such discretionary grants—particularly in light of evolving Constitutional arguments under the “Take Care Clause.” AM. IMMIGR. COUNCIL, UNDERSTANDING THE LEGAL CHALLENGES TO EXECUTIVE ACTION: LONG ON POLITICS, SHORT ON LAW, 1 (2015).

<sup>7</sup> The core provisions of the November 20th Executive Actions involved grants of deferred action to two groups of people: those who would have qualified for the 2012 Deferred Action for Childhood Arrivals (DACA) program, but were over 30 and aged out, as well as undocumented parents of U.S. citizens and lawful permanent residents. See U.S. DEP’T OF HOMELAND SECURITY, EXTEND DEFERRED ACTION TO PARENTS OF U.S. CITIZENS AND LAWFUL PERMANENT RESIDENTS (2014). It is important to note that, even though the new deferred action grants may offer temporary protection to as many as 3.7 million undocumented migrants, it does little to provide relief for those who have arrived in the U.S. within the past five years or those who lack qualifying family connections to U.S. citizens and permanent residents. *Id.* See also Cindy Carcamo and Kate Linthicum, “Obama’s Action on Immigration Leaves Millions still Facing Deportation,” (Nov. 21, 2014). Most of all, it does little to address—or even recognize—the precarious situation of many Central Americans now in the U.S. and subject to deportation back to conditions of extreme violence and poverty. This includes, of course, the more than 51,000 unaccompanied minors who entered the U.S. in FY 2014 alone. See U.S. CUSTOMS & BORDER PROTECTION, SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN (2014).

## II. STATUTORY BASIS

### A. Temporary Protected Status

Temporary protected status, a product of the Immigration Act of 1990,<sup>8</sup> is “the statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations.”<sup>9</sup> It is not designed to admit migrants into the United States, but rather, to provide immigration relief for those who are already here at a time when return to their country of origin becomes especially difficult or dangerous.<sup>10</sup> For those who qualify, temporary protected status provides several significant benefits. Most importantly, it prevents such aliens from being removed from the United States until the grant expires, and it authorizes employment for the duration of the grant without a showing of need.<sup>11</sup> Unlike some other types of discretionary relief from removal, recipients of TPS cease to accrue unlawful presence for the purpose of the statutory 3- and 10-year bars to reentry under 8 U.S.C. §§ 1255 and 1258.<sup>12</sup> Courts have held this to be true even for those recipients who entered the country illegally.<sup>13</sup>

The threshold qualification for TPS is citizenship in a country specifically designated by the Department of Homeland Security<sup>14</sup> pursuant to the Act.<sup>15</sup> The usual panoply of inadmissibility grounds apply, but the only other criteria are (1) “continuous physical presence” in the U.S. since the moment of designation and (2) timely registration.<sup>16</sup> Because the designation itself is discretionary, a great deal of TPS-related litigation implicates these physical presence and registration requirements.<sup>17</sup>

The Secretary of Homeland Security’s ability to designate nations for TPS is closely circumscribed by the statute. In order to qualify, a nation

<sup>8</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 302(a) (Nov. 29, 1990) (codified as 8 U.S.C. § 1254a (INA § 244)).

<sup>9</sup> WASEM ET AL., CONG. RES. SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 2 (2011).

<sup>10</sup> De Leon-Ochoa v. Att’y Gen., 622 F.3d 341, 353–54 (3d Cir. 2010).

<sup>11</sup> 8 U.S.C. § 1254a(a)(1)(A)-(B).

<sup>12</sup> 8 U.S.C. § 1254a(f)(4); Memorandum from Paul W. Virtue, Acting INS Executive Associate Comm’r, to all field offices, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act*, File No. 96 Act 043, HQIRT 50/5.12 (June 17, 1997), reproduced in 74 Interpreter Releases 1046 (July 7, 1997); see also *United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005).

<sup>13</sup> *Orellana*, 405 F.3d at 366.

<sup>14</sup> WASEM ET AL., *supra* note 9, at 2. The text of the INA has not completely tracked the shift in authority from the Attorney General to the Department of Homeland Security following the abolition of the INS in 2003. *Id.* at 2, fn. 5.

<sup>15</sup> 8 U.S.C. § 1254a(c)(1)(A).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Largaespada v. U.S. Att’y Gen.*, 505 Fed. Appx. 846, 848–50 (11th Cir. 2013); see also *De Leon-Ochoa*, 622 F.3d at 355.

must be in the middle of an “ongoing armed conflict” or have suffered an environmental disaster causing “substantial, but temporary, disruption of living conditions.”<sup>18</sup> Alternatively, the Secretary of Homeland Security may make a finding of “extraordinary and temporary conditions” in the state that prevent the safe return of aliens.<sup>19</sup>

Under this rubric, the Attorney General and the Secretary of Homeland Security<sup>20</sup> have designated at least 18 countries for temporary protected status, many of which have been repeatedly redesignated.<sup>21</sup> Currently, nationals of eleven countries are protected by TPS, including both Honduras and El Salvador.<sup>22</sup> While South Sudan, Sierra Leone, Guinea, and Liberia have been designated as recently as 2014, however, Honduras has not been redesignated since 1999, nor El Salvador since 2001.<sup>23</sup> As such, only those Hondurans and Salvadorans present in the U.S. continuously for more than ten years—and who had the foresight to register at the time<sup>24</sup>—are protected.

### B. *Deferred Enforced Departure*

While TPS has a basis in statute, deferred enforced departure (DED) is an extra-statutory remedy available at the discretion of the executive branch under its power to conduct foreign relations.<sup>25</sup> U.S. Citizenship and Immigration Services notes that it evolved from the practice of Extended Voluntary Departure (EVD), which operated to admit foreign nationals on a humanitarian basis between from 1960 until the passage of the Immigration Act of 1990.<sup>26</sup> However, because EVD was tied to the Attorney General’s enforcement authority under § 103(a)(1) of the Immigration and Nationality Act of 1952,<sup>27</sup> rather than the president’s foreign affairs powers, the parallel

<sup>18</sup> 8 U.S.C. § 1254a(b)(1)(B).

<sup>19</sup> 8 U.S.C. § 1254a(b)(1)(C).

<sup>20</sup> 6 U.S.C. § 557. This shift in authority arose with the demise of the INS and the creation of the Department of Homeland Security. See STEPHEN R. VINA, CONG. RES. SERV., AUTHORITY TO ENFORCE THE IMMIGRATION AND NATIONALITY ACT (INA) IN THE WAKE OF THE HOMELAND SECURITY ACT: LEGAL ISSUES 2–3 (2003).

<sup>21</sup> WASEM ET AL., *supra* note 9, at 3–4; see also U.S. Citizenship and Immigration Serv., Temporary Protected Status (2015).

<sup>22</sup> USCIS, *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> 8 C.F.R. § 1244.2 (2015) lays out the limited conditions for late registration. “Failure to either apply during the initial registration period or satisfy one of the criteria for late registration is fatal” to a TPS claim. *Del Cid-Nolasco v. Holder*, 388 Fed. Appx. 18, 22 (2d Cir. 2010).

<sup>25</sup> USCIS, “Adjudicator’s Field Manual,” § 38.2(a) (2014). This is in spite of a provision in the INA which denominates TPS the “exclusive authority” available to the Attorney General to permit aliens of designated nations to remain in the U.S. 8 U.S.C. § 1254a(g). Importantly, as the Ninth Circuit pointed out in *Arizona Dream Act Coalition v. Brewer*, deferred enforced departure does appear expressly in federal law. 757 F.3d 1053, 1069 (9th Cir. 2014, Christen, J., concurring).

<sup>26</sup> USCIS, “Adjudicator’s Field Manual,” § 38.2(a) (“Note”).

<sup>27</sup> See VINA, *supra* note 20, at 1. § 103(a)(1) (8 U.S.C. 1103(a)(1) (1952) states: “The Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such other laws relate to the power, functions, and duties conferred upon the President, the Secretary of State, or diplomatic or

is inexact. In fact, the Board of Immigration Appeals has found that the Immigration Act of 1990, which established temporary protected status, was consciously intended to supersede the executive's authority to administer EVD as a humanitarian remedy.<sup>28</sup> It would be more proper, in that sense, to say that TPS evolved from EVD. By contrast, deferred enforced departure continues to be advanced under the president's foreign affairs authority. If it did evolve out of EVD, therefore, deferred enforced departure should nevertheless be considered to have a separate and distinct legal function.

Because of its grounding in the foreign affairs power, the individual qualifications for DED status are set by the President, and are usually relatively limited: citizens of designated nations will generally qualify unless they are ineligible for TPS (because of certain disqualifying crimes, for instance) or their presence would have "serious adverse foreign policy consequences" for the United States or their removal is "in the interest" of the U.S.<sup>29</sup> Benefits of DED are similar to those of TPS—deferral of deportation and employment authorization.<sup>30</sup> Unlike TPS, however, DED does not create an immigration status,<sup>31</sup> and one need not apply to receive its benefits upon the commencement of removal proceedings.<sup>32</sup> Since 1990, only five countries have been designated for DED status,<sup>33</sup> and only one, Liberia, retains the designation.<sup>34</sup>

### III. THE LOGIC OF TPS & DED

#### A. History & Legislative History

The first grant of temporary protected status—given to citizens of El Salvador then in the U.S.—was promulgated in 1990 as part of the very same law that created the status.<sup>35</sup> Indeed, TPS can largely be construed as a response to the "thoroughly debated" dilemma of what status to accord Central American refugees in the 1980s, the majority of whom fell outside

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consular officers; Provided, however, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Some also argued that the Attorney General's discretion was (or should have been) circumscribed by the Administrative Procedure Act of 1946. See Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 154 (1986).

<sup>28</sup> Matter of Maria Armida Sosa Ventura, 25 I. & N. Dec. 391, 394–95 (BIA 2010).

<sup>29</sup> USCIS, "Adjudicator's Field Manual," § 38.2(d).

<sup>30</sup> *Id.* at (b).

<sup>31</sup> *Id.*

<sup>32</sup> WASEM ET AL., *supra* note 9, at 3; USCIS, *supra* note 21.

<sup>33</sup> USCIS, "Adjudicator's Field Manual," § 38.2(a).

<sup>34</sup> *Deferred Enforced Departure*, USCIS, available at <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure> (last visited Nov. 25, 2014).

<sup>35</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, (1990).

the scope of “refugee” definitions afforded by the 1951 Geneva Conventions and the Refugee Act of 1980.<sup>36</sup>

For the purposes of this note, three characteristics of the period leading up to passage of the Immigration Act of 1990 are salient. First, those fleeing civil war in Guatemala and El Salvador in the 1980s—unlike Nicaraguan citizens, who were often given preferential immigration treatment<sup>37</sup>—were fleeing conservative regimes propped up in various ways by the U.S. government.<sup>38</sup> Second, because courts rarely granted refugee status to such individuals, extended voluntary departure (EVD) became ever more enticing as a mechanism for providing lawful status to fleeing Guatemalans and Salvadorans.<sup>39</sup> Third, the Reagan administration refused to exercise EVD on behalf of Guatemalan and Salvadoran migrants, in spite of repeated entreaties from Congress and others.<sup>40</sup>

Thus, when Congress passed the 1990 Act, it was, in part, responding to an intolerable *lack* of discretionary action on the part of the executive. At the same time, the legislative history makes it clear that it hoped to impose greater objectivity on the process by which these actions came about.<sup>41</sup> Importantly, the bill’s sponsors also indicated that a sense of national culpability in the devastation of El Salvador underlay the genesis of the bill.<sup>42</sup> Given these considerations, it is unsurprising that those in favor of the legislation tended to couch it in humanitarian, rather than foreign policy,

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<sup>36</sup> See Todd Howland et al., *Safe Haven for Salvadorans in the Context of Contemporary International Law—A Case Study in Equivocation*, 29 SAN DIEGO L. REV. 671, 672 (1992).

<sup>37</sup> Fernando Riosmena, *On the Legal Auspices of Latin America—U.S. Migration* 8, fn. 10 (University of Colorado at Boulder, Institute of Behavior Science 2008).

<sup>38</sup> See, e.g., Lee Tucker & Daniel E. Weiser, *Undocumented Salvadorans: Temporary Safe Haven as an Alternative to Deportation*, 3 HARV. HUM. RTS. J. 215, 218–219 (1990) (noting the many millions of dollars in military aid provided to El Salvador in the 1980s).

<sup>39</sup> Howland, *supra* note 36, at 679, 681; Tucker, *supra* note 38, at 221.

<sup>40</sup> Howland, *supra* note 36, at 683.

<sup>41</sup> Tucker, *supra* note 38, at 223; Howland, *supra* note 36, at 684, n.69; see also statements by Reps. Levine, Fish, and Richardson during deliberations for the Central American Studies And Temporary Relief Act Of 1989, 101 Cong. (1989): “Perhaps the most important aspect of this bill is that it will standardize the procedure for granting temporary stays of deportation. Refugees, spawned by the sad and tragic forces of warfare, should not be subject to the vagaries of our domestic politics as well.”; “[T]here is no clear statutory relief available to the individual who needs temporary protection for reasons unrelated to persecution. We all know the administrative relief of extended voluntary departure lacks statutory standards. This bill would provide these needed standards.”; “[W]e need to replace the current ad hoc, haphazard regulations and procedures that exist today.” (H.R., Oct. 25, 1989).

<sup>42</sup> Sen. DeConcini noted: “Along with our involvement in El Salvador, there come certain responsibilities. One of these responsibilities is humanitarian concern toward the Salvadorans whose lives have been violently disrupted and endangered by war.” Further Sen. DeConcini stated: “I do not believe that we should return these individuals to a country immersed in a civil war in which we are actively involved.” Immigration Act Of 1990—Conference Report (S., Oct. 26, 1986), p. s17105; see also Rep. Frank’s statements concerning the Central American Studies And Temporary Relief Act Of 1989, 101 Cong. (1989): “[I]n cases where there has been a particular tie between the United States and the country involved, in some cases where the United States is very directly involved in policy” or “where the people are already here in some cases, the compassionate thing for us to do is to welcome those people for an indefinite period.” (H.R., Oct. 25, 1989).

terms.<sup>43</sup> Moreover, doing so had the added benefit of moving the provision out of the sphere of exclusive executive discretion under the foreign affairs power<sup>44</sup> and into the realm of Congressional oversight. Thus, the passage of the 1990 Act reflected—and perpetuated—the tug-of-war over executive discretion that preceded the Refugee Act of 1980.<sup>45</sup>

Because DED, unlike TPS, proceeds directly from the executive branch's power to guide foreign policy, there is no legislative history that speaks directly to the issue of deferred enforced departure. Nonetheless, President Bush's decision not to renew El Salvador's original TPS designation and, instead, to roll its recipients over to DED status barely three years after passage of the 1990 Act, is significant. In doing so, his administration explicitly elided the difference between TPS and DED in the context of Salvadoran nationals, arguing that the protections were essentially the same.<sup>46</sup> Critics derided this response as an indication of a "regression" in U.S. refugee policy<sup>47</sup> and confirmation that "that safe haven remain[ed] a matter of politics rather than international law."<sup>48</sup> Although DED has been used relatively infrequently, countries have been renewed under both TPS and DED designations as recently as January of 2015 and September of 2014, respectively,<sup>49</sup> and it is clear that the executive retains broad discretion to implement immigration relief in various forms.<sup>50</sup>

#### B. TPS & DED in Practice: Patterns in Designation

This section will consider past grants of temporary protected status with a view toward identifying common characteristics for each of the three types of TPS articulated by the statute. Along the way, it will try to illuminate the significance of such vexed terms as "temporary" and "extraordinary." Finally, it will consider whether there are any unifying characteristics that explain the pattern of grants under deferred enforced departure.

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<sup>43</sup> Tucker, *supra* note 38, at 224; *see also* comments by Rep. Fish on the Central American Studies and Temporary Relief Act Of 1989 (H.R., Oct. 25, 1989). It is worth noting that in discussing legislation related to the 1990 Act, members often cited traditional refugee grounds, like the "politically-motivated violence that rages in El Salvador and Nicaragua." Central American Studies and Temporary Relief Act Of 1989 (H.R., Oct. 25, 1989, statement by Rep. Levine).

<sup>44</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

<sup>45</sup> *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through And Beyond Chevron*, 60 DUKE L.J. 1060, 1105–06 (2011).

<sup>46</sup> Howland, *supra* note 36, at 689.

<sup>47</sup> *Id.* at 672.

<sup>48</sup> *Id.* at 699.

<sup>49</sup> *Temporary Protected Status Notices*, <http://www.justice.gov/eoir/vll/fedreg/tpsnet.html#mostrec> (last visited Mar. 10, 2015).

<sup>50</sup> *See* Letter from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar, Clinical Professor of Law, Pa. State Univ. Dickinson Sch. of Law et al. to Barack Obama, U.S. President (Sept. 3, 2014) (discussing widespread acknowledgement of the president's prosecutorial discretion among immigration law professors).

### 1. *Temporary Protected Status*

As discussed above, temporary protected status arose in part from a perceived need to direct the exercise of executive discretion in certain humanitarian situations. This section will assess the contours of that discretion since the statutory inception of temporary protected status under INA § 244 in 1990.<sup>51</sup> In doing so, we look to the statutory language to organize our analysis. Under the statute, the Attorney General may designate a foreign state to receive the benefits of temporary protected status (i.e., immigration protections for nationals of that foreign state then residing in the United States) for three basic reasons: (1) “ongoing armed conflict” that would “pose a serious threat” to the “personal safety” of returning nationals; (2) “an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions” and the inability of the country to “handle adequately” the return of its nationals; or (3) “extraordinary and temporary conditions” that prevent nationals from “returning to the state in safety.”<sup>52</sup> Our inquiry tracks these three pathways to designation.

#### a. *“Ongoing Armed Conflict”*

At least twelve foreign states have been awarded temporary protected status based explicitly on the existence of an “ongoing armed conflict.” The list is dire—and predictable: it has included, at various points, Angola, Bosnia-Herzegovina, Burundi, Kosovo, Lebanon, Liberia, Rwanda, Sierra Leone, Sudan, South Sudan, Syria, and Somalia.<sup>53</sup> Most of these countries were not designated for TPS only under the “armed conflict” label. Some

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<sup>51</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), § 603(a)(24), 104 Stat. 5030, 5084 (1990) (codified as 8 U.S.C. § 1254).

<sup>52</sup> Immigration and Nationality Act, 8 U.S.C. § 1254(b)(1)(A)-(C) (2014).

<sup>53</sup> Designation of Angola Under the Temporary Protected Status Program, 65 Fed. Reg. 16,634 (Mar. 29, 2000); Designation of Bosnia-Herzegovina Under Temporary Protected Status Program, 57 Fed. Reg. 35,605 (Aug. 10, 1992); Designation of Burundi Under Temporary Protected Status, 62 Fed. Reg. 59,735 (Nov. 4, 1997); Designation of Province of Kosovo in the Republic of Serbia in the State of the Federal Republic of Yugoslavia Under Temporary Protected Status, 63 Fed. Reg. 31,527 (Jun. 9, 1998); Designation of Lebanon Under Temporary Protected Status Program, 56 Fed. Reg. 12,746 (Mar. 27, 1991); Designation of Liberia Under Temporary Protected Status Program, 56 Fed. Reg. 12,746 (Mar. 27, 1991); Designation of Rwanda Under Temporary Protected Status Program, 59 Fed. Reg. 29,440 (Jun. 7, 1994); Designation of Sierra Leone Under Temporary Protected Status, 62 Fed. Reg. 59,736 (Nov. 4, 1997); Designation of Sudan Under Temporary Protected Status, 62 Fed. Reg. 59,737 (Nov. 4, 1997); Designation of Republic of South Sudan for Temporary Protected Status, 76 Fed. Reg. 63,630 (Oct. 13, 2011); Extension and Redesignation of Syria for Temporary Protected Status, 78 Fed. Reg. 36,225 (Jun. 17, 2013); Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65,692 (Nov. 1, 2013). Although the early Lebanon and Liberia designations cite only generally to INA § 244(b), they include the specific language at stake, “ongoing armed conflict,” in support of their designation. Similarly, because the first designation of El Salvador under TPS was a legislative, rather than executive grant, it does not adhere to the same statutory framework, even though it was promulgated as the direct result of an ongoing armed conflict.



were originally designated under the “ongoing armed conflict” prong before being relabeled under some other designation. Bosnia-Herzegovina, for instance, lost the “ongoing armed conflict” designation some time after its initial grant of TPS.<sup>54</sup> Other countries migrated in the opposite direction—from an “extraordinary conditions” designation to an “ongoing armed conflict” designation—as conditions in their countries descended into outright conflict. For example, in its initial 2012 designation, Syria was awarded TPS based on “extraordinary and temporary conditions”; later, in 2013, it *also* acquired an “ongoing armed conflict” designation.<sup>55</sup>

Several preliminary conclusions can be drawn from the pattern of designation under the “armed conflict” prong. Most importantly, it tells us something about the *kinds* of “armed conflicts” that may qualify for TPS under the “ongoing armed conflict” designation. Under the Geneva Conventions, the term “armed conflict” encompasses both conflicts of international character and “non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only.”<sup>56</sup> The ICRC has suggested that such non-international armed conflicts must be “protracted”; that they must reach a “minimum level of intensity”; and that they must evince a “minimum of organization.”<sup>57</sup> Further Protocols to the Geneva Convention have clarified that such conflicts include “wars of national liberation” and “civil wars,” as well as *other* “conflicts not of an international character.”<sup>58</sup> In the U.S., some commentators find application of the Convention’s definition by the

<sup>54</sup> Extension of Designation of Bosnia-Herzegovina Under Temporary Protected Status Program, 63 Fed. Reg. 45,092, 45,092–93 (Aug. 24, 1998).

<sup>55</sup> Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19,026, 19,026, 19,028 (Mar. 29, 2012); Extension and Redesignation of Syria for Temporary Protected Status, 78 Fed. Reg. 36,223, 36,225 (Jun. 17, 2013).

<sup>56</sup> *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMMITTEE OF THE RED CROSS [hereinafter ICRC], available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. See Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 UST 3516, 75 UNTS 135 (notes the existence of “armed conflict[s] not of an international character.”). Additionally, Protocol II defines such conflicts as those between the armed forces of a High Contracting Party “and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 13(3), June 8, 1977, 1125 U.N.T.S. 609. See also David E. Graham, *Defining Non-International Armed Conflict: A Historically Difficult Task*, 88 INT’L L. STUDIES 43, 44 (2012) (noting that the ICRC “has traditionally been looked to as the principle source” for interpreting the Geneva Conventions).

<sup>57</sup> ICRC, *supra* note 56, at 5. Protocol II explicitly contrasts “armed conflicts” with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,” to which the protocol will not apply. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 1. Protocol II has never been ratified by the United States. See *Treaties and State Parties to Such Treaties: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, INT’L COMMITTEE OF THE RED CROSS, available at <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>

<sup>58</sup> Graham, *supra* note 56, at 48.

Department of State so lacking in consistency as to be “completely self-serving.”<sup>59</sup> Nonetheless, the U.S. Supreme Court has indicated that, at least for the purposes of identifying its humanitarian responsibilities, the U.S. must hew to the definition of non-international armed conflicts supported by the Convention.<sup>60</sup>

Just such a Convention-based interpretation seems to undergird the pattern of “ongoing armed conflict” designations in the context of TPS. Most designations under the “armed conflict” prong, INA § 244(b)(1)(A), have occurred in the midst of a recognizable civil war or substantial insurgency. In Angola, for instance, the Attorney General cited widespread fighting and a State Department finding that as much as 70% of the country was “outside effective government control.”<sup>61</sup> Likewise, in the year of its first “armed conflict” TPS grant, Rwanda was immersed in increasingly bloody ethnic conflict—one involving multiple organized armed groups and officially recognized, a month prior to the TPS designation, as “genocide” by the U.S. government.<sup>62</sup> In countries like Lebanon, Kosovo, Burundi, and Liberia, the conflicts in question have become well-known symbols of internecine strife.

By looking briefly at the states whose designations shifted over time—the cases of Bosnia-Herzegovina and Syria—we can begin to flesh out the type of “minimum organization” and the level of intensity required before a state can be seen as qualifying for TPS protections. In the case of Bosnia-Herzegovina, the initial “armed conflict” grant came in 1992, at which time intersectarian war was already fully underway and ethnic cleansing was “rampant.”<sup>63</sup> By 1999, however, four years after the signing of the Dayton Peace Accords and well into a robust UN & NATO peacekeeping mission, the Attorney General adjusted the designation to “extraordinary and temporary conditions.”<sup>64</sup> By this time, the UNHCR was praising the effectiveness of the peacekeeping mission and marking “substantial, though uneven progress in [Bosnia-Herzegovina’s] political, economic and social rehabilitation and reconstruction.”<sup>65</sup> At the same time, it anticipated needing

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<sup>59</sup> *Id.* at 53.

<sup>60</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

<sup>61</sup> Designation of Angola Under the Temporary Protected Status Program, 65 Fed. Reg. 16,634 (Mar. 29, 2000).

<sup>62</sup> William Ferrogiaro, *The US and the Genocide in Rwanda 1994: Evidence of Inaction*, THE NAT’L SECURITY ARCHIVE, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/#5>. *Rwanda: A Historical Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html>.

<sup>63</sup> *Bosnia-Herzegovina Timeline*, BBC NEWS (Jan. 12, 2012), [http://news.bbc.co.uk/2/hi/europe/-country\\_profiles/1066981.stm](http://news.bbc.co.uk/2/hi/europe/-country_profiles/1066981.stm).

<sup>64</sup> Extension of Designation of Bosnia-Herzegovina Under the Temporary Protected Status Program, 64 Fed. Reg. 43720 (Aug. 11, 1999); BBC NEWS, *supra* note 63.

<sup>65</sup> *UNHCR Global Appeal 1999—Bosnia and Herzegovina*, UNHCR (Dec. 1, 1998), <http://www.unhcr.org/3eaff43e9.html>.

to provide humanitarian assistance for nearly 1 million refugees and internally displaced persons over the course of the coming year.<sup>66</sup>

In the other direction lies Syria, which was awarded a supplementary “armed conflict” designation after 18 months of coverage under the “extraordinary conditions” prong. In designating Syria under the “extraordinary conditions” prong—that is, even before it was seen as meriting an “armed conflict” designation—the Secretary of Homeland Security recognized that several cities in Syria were “crippled” by “brutality and violence.”<sup>67</sup> Armed opposition groups were coalescing and unspeakable atrocities—including the targeted killing of women and small children—were being perpetrated by the government forces. Over 7,000 Syrians were already dead and over 100,000 internally displaced.<sup>68</sup> Syria was not officially designated under the “armed conflict” prong until 2013, at which point the Secretary noted the continuing use of “indiscriminate and deadly force” against civilians, the emergence of radical Islamist opposition groups, a death toll climbing above 70,000, and more than 4.5 million IDPs.<sup>69</sup>

These precedents suggest a number of things about the scope and organization required for recognition of “armed conflicts” under TPS. Most of the cited conflicts were highly developed, involving either structured inter-ethnic strife or a fully formed insurgency. As the example of Syria proves, moreover, even extraordinary state (or non-state) violence doesn’t mandate the label of “armed conflict.” Furthermore, a peace deal with some reasonable possibility of success may militate in favor of an “extraordinary conditions,” rather than “armed conflict,” grant.<sup>70</sup> Importantly, the intensity of a conflict cannot be measured in casualties alone: the effect of fighting on food security and infrastructure and the ability to distribute aid, as in Somalia, may also constitute grounds for an “armed conflict” grant even where the direct casualties rates are relatively low.<sup>71</sup> Even so, a humanitarian problem of enormous proportions does not necessarily call for an “armed conflict” grant, so long as that problem doesn’t threaten to erupt into organized violence.

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<sup>66</sup> *Id.*

<sup>67</sup> Designation of Syrian Arab Republic for Temporary Protected Status, 77 Fed. Reg. 19,026, 19,028 (Mar. 29, 2012).

<sup>68</sup> *Id.*

<sup>69</sup> Extension and Redesignation of Syria for Temporary Protected Status, 78 Fed. Reg. 36,223, 36,225–26 (Jun. 17, 2013).

<sup>70</sup> Sometimes such speculation is thwarted by reality. For instance, in spite of a clear-cut “armed conflict” involving not only domestic rebel groups, but also neighboring countries, Guinea-Bissau’s TPS grant (under § 244(b)(1)(C)) was awarded only at what seemed to be the conclusion of armed hostilities. Then, just months after the award and the installation of a new national unity government, the President was overthrown. See Jens Kovsted & Finn Tarp, *Guinea-Bissau: War, Reconstruction and Reform* 13 (U.N. World Inst. for Dev. Econ. Res., Working Paper No. 168, 1999).

<sup>71</sup> See, e.g., Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65,690, 65,692 (Nov. 1, 2013).

Another point should be made about the nature of the “armed conflict” designation. As the case of Bosnia-Herzegovina illustrates, there is extensive overlap between § 244(b)(1)(A), “ongoing armed conflict,” and § 244(b)(1)(C), “extraordinary and temporary conditions.” In the case of Bosnia, after initially recognizing TPS based on an “armed conflict” and recognizing the significance of “armed conflict” even in the 1998 extension,<sup>72</sup> the Attorney General chose in 1999 to “continue” to award Bosnia-Herzegovina protected status under INA § 244(b)(1)(C), “extraordinary and temporary conditions.”<sup>73</sup> Similarly, either by explicit statutory citation or by use of specific language (i.e., before the Federal Register began citing specifically to individual prongs of the statute), most countries carrying an “armed conflict” designation have also been determined to have “extraordinary and temporary conditions.”<sup>74</sup>

This overlap has led to some blurring of the distinct statutory requirements of each prong. Somalia’s latest notice, for instance, asserts that “the conditions . . . that prompted the TPS designation continue to be met” because “[t]here continues to be a substantial, but temporary, disruption of living conditions in Somalia based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Somalis who have TPS from safely returning.”<sup>75</sup> Similarly, many Federal Register notices articulate the temporary protected status directive as follows: The Attorney General (now the Secretary of Homeland Security) may designate states for TPS “upon finding that such states are experiencing ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions that prevent nationals from returning safely.”<sup>76</sup> Articulated this way, the suggestion is that each of the three prongs requires a finding of “temporariness.”

Yet the provisions are not coextensive. While the “environmental disaster” and “extraordinary and temporary conditions” prongs explicitly require a finding of “temporariness,” the “armed conflict” prong does not.<sup>77</sup> As we have seen, moreover, the Attorney General has, at times, carefully distinguished between the point at which a state merits both designations and the point at which it should receive only one. It is also a general rule of statutory construction that language should not be added to a statute unless

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<sup>72</sup> Extension of Designation of Bosnia-Herzegovina Under Temporary Protected Status Program, 63 Fed. Reg. 45,092, 45,092–93 (Aug. 24, 1998).

<sup>73</sup> Extension of Designation of Bosnia-Herzegovina Under the Temporary Protected Status Program, 64 Fed. Reg. 43,720 (Aug. 11, 1999).

<sup>74</sup> The list includes Burundi, Lebanon, Liberia, Rwanda, Sierra Leone, Sudan, South Sudan, Kosovo, Syria, and Somalia.

<sup>75</sup> Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65,690, 65,691 (Nov. 1, 2013).

<sup>76</sup> See, e.g., Designation of Republic of South Sudan for Temporary Protected Status, 76 Fed. Reg. 63,629 (Oct. 13, 2011).

<sup>77</sup> INA § 244(b) (8 U.S.C. § 1254(b)).

required to fill in a logical gap.<sup>78</sup> As such, both precedent and the plain language of the statute suggest that we should keep the distinct statutory requirements regarding “temporariness” separate: while the other two prongs do require a “temporary” condition, the armed conflict prong does not.

*b. Environmental Disasters*

According to the statute, the Attorney General may also award temporary protected status where “(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and (iii) the foreign state officially has requested designation.”<sup>79</sup> Such “disaster” grants have been awarded to only five countries, which are themselves readily divisible into two groups: the hurricane and earthquake victims and the volcano state.

The first group encompasses four countries struck by significant hurricanes or earthquakes over the past fifteen years, in some cases multiple times: El Salvador, Honduras, Nicaragua, and Haiti. To this group, Haiti is a relative newcomer: it was designated as recently as 2010, in the wake of an earthquake that leveled the capital and destroyed much of the country’s infrastructure.<sup>80</sup> The other three countries were granted TPS in 2001 and 1999, respectively.<sup>81</sup> There is little room to question the severity of the events precipitating these designations. El Salvador’s grant followed on the heels of an earthquake that displaced nearly one-fifth of the country’s population and destroyed over 200,000 homes.<sup>82</sup> Similarly, the original grants for Honduras and Nicaragua came in the aftermath of Hurricane Mitch, one of the strongest Atlantic hurricanes ever recorded. The storm is estimated to have caused over 11,000 deaths and \$5 billion in damages in the two countries, destroying 70 to 80 percent of Honduras’ transportation infrastructure and leaving up to 1.5 million people displaced.<sup>83</sup> The earthquake that struck Haiti in 2010 flattened Port-au-Prince and killed more

<sup>78</sup> See *Iselin v. United States*, 270 U.S. 245, 250 (1926).

<sup>79</sup> INA § 244(b)(1)(B) (8 U.S.C. § 1254(b)(1)(B)).

<sup>80</sup> Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476 (Jan. 21, 2010).

<sup>81</sup> Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (Mar. 9, 2001); Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524 (Jan. 5, 1999); Designation of Nicaragua Under Temporary Protected Status, 64 Fed. Reg. 526 (Jan. 5, 1999).

<sup>82</sup> Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (Mar. 9, 2001).

<sup>83</sup> National Climatic Data Center, *Mitch: The Deadliest Atlantic Hurricane Since 1780*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Jan. 23, 2009), available at <https://www.ncdc.noaa.gov/oa-reports/mitch/mitch.html>.

than 230,000 people, leaving 1.5 million displaced and a cholera epidemic in its wake.<sup>84</sup>

Nonetheless, three of the designees have now carried temporary protected status for nearly fifteen years and some might dispute the strength of their claim to continued protection, particularly in the face of acute disaster claims by countries like the Philippines, hit hard by Typhoon Haiyan in late 2013.<sup>85</sup> In support of its most recent extension of Nicaragua's designation, the Secretary recited the litany of floods and landslides that have afflicted the country over the past decade, impairing food security, slowing reconstruction, and damaging thousands of houses.<sup>86</sup> Noting a similar parade of compounding natural disasters, the recent extensions for Honduras and El Salvador have focused not only on housing and transportation infrastructure, but increasingly on the cost of these disasters to agricultural productivity and domestic labor markets.<sup>87</sup> Given the extraordinary damage to Philippines—and active consideration of relevant TPS legislation by Congress<sup>88</sup>—it is noteworthy that the Secretary seems reluctant to terminate TPS for these three Central American countries, even as he relies on *additional* events, beyond the catalytic event, to justify the designation. This reluctance suggests an unusual interpretation of “temporariness.” Here, the accumulation of discrete “temporary” events is used to validate the empirical longevity of the grants. The Honduran notice is “warranted because the disruption in living conditions in affected areas of Honduras resulting from the environmental disaster that prompted the January 5, 1999 designation persists.”<sup>89</sup> But, this confuses the causal relationship required by INA § 244(b)(1)(B), which ties “substantial, but temporary, disruption of living conditions” to a *particular* environmental disaster. In the case of Honduras, El Salvador, and Nicaragua, the Department posits an original *effect* (the “disruption”) that is sustained not by the environmental disaster in question, but by other, ensuing natural

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<sup>84</sup> *Haiti Earthquake Fast Facts*, CNN (Jan. 6, 2015), <http://www.cnn.com/2013/12/12/world/haiti-earthquake-fast-facts/>.

<sup>85</sup> The Filipino Temporary Protected Status Act of 2013, H.R. 3602, was introduced, and subsequently stalled, in the House. SEGHETTI ET AL., *supra* note 4, at 7. Typhoon Haiyan initially displaced as many as 4.1 million people and destroyed up to 1.1 million houses in the Philippines. *Typhoon Haiyan/Yolanda Fact Sheet* #22, USAID (Apr. 21, 2014), <http://www.usaid.gov/haiyan/fy14/fs22>.

<sup>86</sup> Extension of the Designation of Nicaragua for Temporary Protected Status, 79 Fed. Reg. 62,176, 62,178–79 (Oct. 16, 2014).

<sup>87</sup> Extension of the Designation of Honduras for Temporary Protected Status, 79 Fed. Reg. 62,170, 62,172 (Oct. 16, 2014) (citing extensive damage to the shrimp, melon, and cantaloupe industries); Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 895 (Jan. 7, 2015) (noting that “[i]n light of the highly problematic economic situation, a large influx of returning citizens at this time would overwhelm the labor market and the government’s fiscal ability to extend basic services to its citizens.”).

<sup>88</sup> SEGHETTI ET AL., *supra* note 4, at 7.

<sup>89</sup> Extension of the Designation of Honduras for Temporary Protected Status, 79 Fed. Reg. 62,170, 62,172 (Oct. 16, 2014).

disasters.<sup>90</sup> Given the Department's own characterization of these countries as "among . . . the most vulnerable to natural disasters, including those related to extreme weather events,"<sup>91</sup> this is a curiously lenient reading of the double mandate<sup>92</sup> for temporariness in the statute.

Indeed, the case of Montserrat provides an intriguing counterpoint to this leniency. Montserrat, a small island nation in the Caribbean, received its original grant of TPS as a result of volcanic activity that "forced the evacuation of more than half the island, closed the airport . . . and destroyed three-fourths of the infrastructure of the island."<sup>93</sup> By 2004, however, the Department decided that it could no longer renew the island's TPS grant, in spite of the fact "major eruption[s]" in 2003 and 2004 seriously damaged island infrastructure.<sup>94</sup> Indeed, the Department admitted that "many nationals . . . remain unable to return to their homes" in the island's southern "exclusion zone," and that recognized health risks "caused by ash that periodically covers much of the island" posed a threat to many returnees.<sup>95</sup>

In an early display of transparency,<sup>96</sup> the Department went to significant lengths to explain its decision. First, it described the nature of "temporariness" under INA § 244(b)(1)(B) and (C): "Under general rules of statutory construction, it is assumed that the legislative intent of Congress is expressed by the ordinary or plain meaning of a word . . . . The plain meaning of 'temporary' is 'lasting for a time only; existing or continuing for a limited time; not permanent.'"<sup>97</sup> After citing statistics suggesting that volcanic activity would likely continue for more than six months but less than 15 years, and possibly longer, the Secretary then concluded that "[b]ecause the volcanic eruptions are unlikely to cease in the foreseeable future, they can no longer be considered 'temporary' as required by Congress when it enacted the TPS statute."<sup>98</sup>

But consider again the position of the disaster-prone Central American states. Earthquakes aside, at least 25 hurricanes ravaged the Western

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<sup>90</sup> In the language of torts, the original disaster (e.g., Hurricane Mitch) is no longer the proximate cause of the disruption in living conditions because subsequent hurricanes and landslides and earthquakes have superseded it.

<sup>91</sup> *See, e.g., id.*

<sup>92</sup> The "environmental conditions" prong requires both a "temporary disruption of living conditions" and the state's inability "temporarily, to handle adequately the return to the state" of its nationals. *See* INA § 244(b)(1)(B)(i)–(ii) (8 U.S.C. § 1254(b)(1)(B)(i)–(ii)).

<sup>93</sup> Designation of Montserrat Under Temporary Protected Status, 62 Fed. Reg. 45,685, 45,686 (Aug. 28, 1997) (designating Montserrat for protection under both the "environmental disaster" and "extraordinary and temporary conditions prongs").

<sup>94</sup> Termination of the Designation of Montserrat Under the Temporary Protected Status Program; Extension of Employment Authorization Documentation, 69 Fed. Reg. 40,642, 40,643 (July 6, 2004).

<sup>95</sup> *Id.*

<sup>96</sup> The sparsely reasoned designations of the pre-DHS period have grown increasingly robust and informative in recent years.

<sup>97</sup> Termination of the Designation of Montserrat Under the Temporary Protected Status Program, 69 Fed. Reg. at 40,643 (July 6, 2004) (citations omitted).

<sup>98</sup> *Id.* at 40, 643–44.

Caribbean between 2000–2010.<sup>99</sup> The possibility that further environmental disasters will prevent Honduras, El Salvador, and Nicaragua from recovering enough to receive their nationals is not remote—and, indeed, the risk has been borne out by the long string of disasters that have pummeled the region since their initial grants. In this sense, it seems that the temporariness of the “disruption of living conditions” is not truly what is at stake. The Department seems attuned, instead, to whether the *original cause* of the disruption has concluded, or can be expected to conclude, within a reasonable amount of time. It also seems to understand “a reasonable amount of time” to be something less than 15 years.

*c. Other “Extraordinary and Temporary Conditions”*

The “extraordinary and temporary conditions” prong is the most elusive of the three types of temporary protected status grants. The statute provides that the Attorney General may award TPS if she finds “that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.”<sup>100</sup> In many cases, these grants are given simultaneously with grants of TPS under the other two prongs—as in the case of Somalia and Montserrat, for instance. In fact, the Attorney General has at times explicitly linked the “extraordinary and temporary conditions” to an underlying armed conflict or specific environmental event.<sup>101</sup> In this sense, it is sometimes reasonable to read “extraordinary and temporary conditions” as synonymous with the other two grants. Nonetheless, several countries have been awarded TPS based on “extraordinary and temporary conditions” for other reasons.

The most conspicuous group of “extraordinary conditions” designees is made up of three countries stricken by the recent Ebola epidemic: Guinea, Liberia, and Sierra Leone.<sup>102</sup> In September 2014, two months before the joint grant, the CDC estimated that Ebola cases in Liberia and the surrounding countries were doubling every 15–40 days, depending on location,<sup>103</sup> and as of March 15<sup>th</sup> of 2015, the disease has caused over 10,000

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<sup>99</sup> *Climatology of Caribbean Hurricanes: Western Caribbean Region*, CARIBBEAN HURRICANE NETWORK, [http://stormcarib.com/climatology/WCAR\\_all\\_car.htm](http://stormcarib.com/climatology/WCAR_all_car.htm) (last visited Mar. 12, 2015).

<sup>100</sup> INA § 244(b)(1)(C) (8 U.S.C. § 1254(b)(1)(C)).

<sup>101</sup> See, e.g., Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65,690, 65,691 (Nov. 1, 2013) (“[T]he Attorney General designated Somalia for TPS based on extraordinary and temporary conditions resulting from armed conflict.”).

<sup>102</sup> Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69,511 (Nov. 21, 2014); Designation of Liberia for Temporary Protected Status, 79 Fed. Reg. 69,502 (Nov. 21, 2014); Designation of Sierra Leone for Temporary Protected Status, 79 Fed. Reg. 69,506 (Nov. 21, 2014).

<sup>103</sup> Martin I. Meltzer, *Estimating the Future Number of Cases in the Ebola Epidemic—Liberia and Sierra Leone, 2014–2015*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 26, 2014), [http://www.cdc.gov/mmwr/preview/mmwrhtml/su6303a1.htm?s\\_cid=su6303a1\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/su6303a1.htm?s_cid=su6303a1_w).



deaths,<sup>104</sup> with a mortality rate of about 50%.<sup>105</sup> Given the recent and ongoing nature of the epidemic, it is impossible to speculate precisely about the point at which the grant will have outlived its temporariness. However, as the CDC notes, all epidemics do eventually come to an end—that is, epidemic cycles are inherently temporary.<sup>106</sup> It may also be worth noting the Secretary’s emphasis on the systemic failure of the health systems in the three countries, as well as the enormous financial burden the disease is placing on their economies.<sup>107</sup>

In a number of other cases, the “extraordinary conditions” prong has been used to address the humanitarian fallout remaining at the end of armed conflicts or environmental events. In this sense, it essentially *extends* an armed conflict designation into the ether somewhere beyond the bounds of a properly concluded armed conflict. This is particularly noticeable in the cases of Liberia and Bosnia-Herzegovina, where the Department found that an armed conflict no longer existed, but that extraordinary and temporary conditions persisted. In Liberia, for instance, the Department found that, in spite of a formal peace treaty, basic necessities—“food security, shelter, water, sanitation, and health care”—were “practically nonexistent.”<sup>108</sup> In other cases, like that of Kuwait, even though the armed conflict designation never officially existed, the need for TPS was clearly tied to a preexisting conflict.<sup>109</sup>

The same is true for Guinea-Bissau, but with a twist. Prior to Guinea-Bissau’s 1999 designation, the phrase “ongoing civil strife” was used interchangeably with “ongoing armed conflict” to describe the latter kind of TPS relief.<sup>110</sup> Guinea-Bissau’s civil war, however, was never recognized with an “ongoing armed conflict” TPS grant. As a result, when the Attorney General coopted the phrase “ongoing civil strife” to explain its designation of Guinea-Bissau under INA § 244(b)(1)(C), for “extraordinary and temporary conditions,” he seems to have meant something other than “armed conflict.”<sup>111</sup> The word “strife” may mean “bitter, sometimes violent, conflict

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<sup>104</sup> *2014 Ebola Outbreak in West Africa—Case Counts*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 13, 2015), <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html>.

<sup>105</sup> *Ebola Virus Disease*, WORLD HEALTH ORG. (Sept. 2014), <http://www.who.int/mediacentre/factsheets/fs103/en/>.

<sup>106</sup> Meltzer, *supra* note 103.

<sup>107</sup> *See, e.g.*, Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69,511, 69,513 (Nov. 21, 2014).

<sup>108</sup> Termination and Re-Designation of Liberia for Temporary Protected Status, 69 Fed. Reg. 52,297, 52,298 (Aug. 25, 2004).

<sup>109</sup> Designation of Kuwait Under Temporary Protected Status Program, 56 Fed. Reg. 12,745 (Mar. 27, 1991).

<sup>110</sup> *See, e.g.*, Designation of Burundi Under Temporary Protected Status, 62 Fed. Reg. 59,735 (Nov. 4, 1997); Designation of Sierra Leone Under Temporary Protected Status, 62 Fed. Reg. 59,736 (Nov. 4, 1997).

<sup>111</sup> Designation of Guinea-Bissau Under Temporary Protected Status, 64 Fed. Reg. 12,181, 12,182 (Mar. 11, 1999).

or dissension” or “an act of contention.”<sup>112</sup> Either way, it revolves around the notion of *active conflict*, rather than just the humanitarian desolation left *after* a conflict. Thus, under a plain-meaning analysis, the example of Guinea-Bissau suggests that designation under “extraordinary conditions” may also be appropriate for violent, or potentially violent, encounters that do not rise to the level required for recognition as armed conflicts.

Finally, it should also be noted that each kind of TPS grant entertains a slightly different notion of the acceptable level of threat to returning nationals of foreign states. Of these, INA § 244(b)(1)(C) takes the middle road. On the one hand, the “environmental disaster” prong requires only that the country be able “to handle adequately” the return of its nationals.<sup>113</sup> The focus there is on infrastructure first; the potential for harm is only secondary. At the other end of the spectrum, the “armed conflict” prong contemplates only “serious threat[s]” to the “personal safety” of returnees.<sup>114</sup> In the middle, the “extraordinary and temporary conditions” prong may be activated where nationals are unable to return “in safety.”<sup>115</sup> This is a phrase that suggests a broad definition of “safety”—including threats that are neither acutely serious nor exclusively personal—and one that does not depend on the inadequacy of governmental infrastructure.

## 2. *Deferred Enforced Departure*

Because there is no statutory basis for grants of deferred enforced departure<sup>116</sup>—and because there have been relatively few of them—our inquiry into precedent will necessarily be limited. Nonetheless, a number of conclusions can be drawn from a brief review of these grants. Because deferred enforced departure applies to specific nationalities,<sup>117</sup> it is unlike other grants of deferred action, which typically use the president’s prosecutorial discretion to target groups of persons who are similarly situated for reasons other than nationality.<sup>118</sup> Deferred enforced departure, as such, has been granted to nationals of only five countries or regions: China, the Persian Gulf, Haiti, El Salvador, and Liberia.<sup>119</sup> The first three of

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<sup>112</sup> *Strife Definition*, MERRIAM-WEBSTER.COM, <http://www.merriamwebster.com/dictionary/strife> (last visited on Mar. 12, 2015).

<sup>113</sup> INA § 244(b)(1)(C) (8 U.S.C. § 1254(b)(1)(B)(ii)).

<sup>114</sup> INA § 244(b)(1)(A) (8 U.S.C. § 1254(b)(1)(A)).

<sup>115</sup> INA § 244(b)(1)(C) (8 U.S.C. § 1254(b)(1)(C)).

<sup>116</sup> Adjudicator’s Field Manual, USCIS § 38.2(a). In fact, DED only came into use with the de facto end of extended voluntary departure (EVD) around 1990. *See id.*; *see also Executive Grants of Temporary Immigration Relief, 1956-Present*, AM. IMMIGR. COUNCIL 6–10 (Oct. 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf); *see also* NOVEMBER 20TH MEMORANDUM, *supra* note 6, at 12, n. 5.

<sup>117</sup> Memorandum from Joseph E. Langlois, Director, Asylum Division, Clarification of Procedures for Processing Applicants Covered by Deferred Enforced Departure Who Are Ineligible for Asylum 1, INS Memorandum (Nov. 2001).

<sup>118</sup> *See, e.g.*, NOVEMBER 20TH MEMORANDUM, *supra* note 6.

<sup>119</sup> AM. IMMIGR. COUNCIL, *supra* note 116.

these, at least, were rooted in ongoing foreign policy crises, while the final two grew out of expired TPS grants.

The first recognized grant of deferred enforced departure was to Chinese nationals in the wake of the Tiananmen Square massacre.<sup>120</sup> While the Bush White House declined to provide explicit rationale, the executive branch was highly sensitive to the delicacy of the political situation in China, as well as to the development of Sino-American relations following the incident.<sup>121</sup> The DED grant was quickly followed by legislation providing a streamlined path to citizenship for many of the grantees.<sup>122</sup> In this sense, given Congress' overt pro-student sentiment,<sup>123</sup> this can be seen as a kind of "bridge grant"—designed to provide temporary status for individuals anticipating legislative regularization by Congress.<sup>124</sup>

President Clinton's grant of deferred enforced departure to Haitian nationals in 1997<sup>125</sup> shared many of the same characteristics. It arose in the context of an international refugee crisis involving thousands of Haitians fleeing the country by boat<sup>126</sup>—a crisis that President Clinton had placed firmly within the purview of his foreign policy authority by ordering a military invasion of Haiti the year before.<sup>127</sup> In the associated presidential memorandum, moreover, Clinton explicitly cited his foreign affairs power as the basis for the grant.<sup>128</sup> Furthermore, the grant was made with the Haitian Refugee Immigration Fairness Act pending in Congress.<sup>129</sup> Because the

<sup>120</sup> AM. IMMIGR. COUNCIL, *supra* note 116, at 6; Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990). Policy Implementation with Respect to Nationals of the People's Republic of China.

<sup>121</sup> See, e.g., State Department Memorandum, *Themes*, U.S. DEP'T OF STATE 5-6 (Jun. 29, 1989), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB16/docs/doc34.pdf>.

<sup>122</sup> See Adjustment of Status; Certain Nationals of the People's Republic of China, 62 Fed. Reg. 63,249 (Nov. 28, 1997) (discussing implementation of the Chinese Student Protection Act of 1992).

<sup>123</sup> See State Department Memorandum, *supra* note 121. In fact, President Bush had already vetoed one piece of legislation, the "Emergency Chinese Immigration Relief Act of 1989." Howland, *supra* note 36, at 690.

<sup>124</sup> Charles Kamasaki argues that Congress has often gone on to ratify legislatively what the executive has done by discretion. Charles Kamasaki, *History Shows on Immigration: First Executive Action, Then Legislation*, NAT'L COUNCIL OF LA RAZA 3-4 (2014).

<sup>125</sup> Presidential Memorandum, *Memorandum on Deferred Enforced Departure for Haitians* (Dec. 23, 1997).

<sup>126</sup> See Patrick Gavigan, *Paper Prepared for the Conference on Regional Responses to Forced Migration in Central America and the Caribbean*, DEPARTMENT OF INT'L LEGAL AFFAIRS 1-2 (Oct. 1, 1997); see also RUTH ELLEN WASEM, CONG. RES. SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 2 (Jan. 21, 2005).

<sup>127</sup> Though there is some question as to the extent to which the invasion was a product of foreign, rather than domestic, politics and policy. See Philippe R. Girard, *Peacekeeping, Politics, and the U.S. Intervention in Haiti*, 24 J. CONFLICT STUD. 1 (2004), available at <http://journals.hil.unb.ca/index.php/jcs/article/view/290/461>.

<sup>128</sup> Presidential Memorandum, *supra* note 125. The power to conduct foreign relations is an implied power often seen as the amalgam of several constitutional grants. See Don Wallace, Jr., *The President's Exclusive Foreign Affairs Power Over Foreign Aid: Part I*, 1970 DUKE L.J. 293, 296 (1970); Kevin R. Johnson & Bernard Trujillo, *Immigration Law and the US-Mexico Border: Si se puede?*, 48, UNIV. OF ARIZ. PRESS, Tucson, 2011.

<sup>129</sup> Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti* 38 (Ctr. for Global Dev., Working Paper No. 255, 2011).

Haitian Refugee Act applied only to those Haitians who had been paroled into the U.S. or sought asylum by the end of 1995,<sup>130</sup> however, the intervening DED grant functioned as a “bridge” only for those already targeted to receive humanitarian assistance.

Another Bush-era grant arose in the wake of an invasion: deferred enforced departure for qualifying Persian Gulf evacuees in 1991.<sup>131</sup> In this case, rather than anticipating congressional action—but accomplishing much the same goal—the Bush administration allowed qualifying evacuees to apply for permanent residency.<sup>132</sup> As with the Haitian grant, it may be significant that the U.S. played a role in bringing the grant recipients to the country. This was the case with *all* Persian Gulf designees, though not with all Haitians.<sup>133</sup>

The remaining two grants illustrate a separate characteristic of DED, quite apart from its foreign policy rationale: the ability to continue protecting nationals of certain foreign states even when the conditions supporting their TPS grants no longer exist. El Salvador, for instance, was originally awarded deferred enforced departure in 1992, at the expiration of its special TPS grant.<sup>134</sup> According to President Bush, El Salvador could not “currently accommodate the repatriation of approximately 150,000 people.”<sup>135</sup> In extending the grant, President Clinton subsequently clarified that the return of so many people “would have a serious negative impact on the evolving situation in El Salvador.”<sup>136</sup> This rationale was articulated even in terminating the designation. There, the Clinton administration announced, first, that the political and human rights situation had improved, and second, that the *American Baptist Churches* class action settlement (expanding asylum review for Salvadorans)<sup>137</sup> would slow the pace of any return migration significantly.<sup>138</sup> As such, there would be no flood of returnees and no “serious negative impacts.”

Several additional things are noteworthy about the Salvadoran DED grant: first, it was unusually temporary; second, it evinces a tension between a stated concern for the “situation in El Salvador” (both a foreign policy and humanitarian concern) and for the “impact on members of the Salvador community in the United States who currently hold DED status” (just a humanitarian concern). As we have seen, the first kind of concern is typically outside the purview of TPS grants, while the second type of

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<sup>130</sup> WASEM, *supra* note 126, at 5.

<sup>131</sup> AM. IMMIGR. COUNCIL, *supra* note 116, at 7.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Deferral of Enforced Departure for Salvadorans, 57 Fed. Reg. 28,700, 28,701 (Jun. 26, 1992).

<sup>135</sup> *Id.*

<sup>136</sup> Extension of Deferral of Enforced Departure for Nationals of El Salvador, 58 Fed. Reg. 32,147 (Jun. 8, 1993).

<sup>137</sup> See *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

<sup>138</sup> Expiration of Deferral of Enforced Departure for Nationals of El Salvador, 59 Fed. Reg. 62,751 (Dec. 6, 1994).

concern fits squarely within the scope of TPS. Finally, some commentators have argued that Bush's initial use of DED was designed primarily to reassert executive authority in matters of deferred enforcement after the passage of the TPS statute.<sup>139</sup> While the foreign policy and humanitarian concerns expressed by President Bush may well have been a smoke screen for political motives *in this case*, it is nonetheless worth noting that this type of grant provides a certain degree of flexibility lacking in TPS. By applying the "adequate to handle" test of INA § 244(b)(1)(B) to the conditions of post-war "generalized strife" common to "extraordinary conditions" grants under INA § 244(b)(1)(C), it recognized that the infrastructural implications of generalized violence could be just as significant as the safety concerns it arouses.

Liberia's pattern of DED grants by three different presidents sheds additional light on the nature of DED.<sup>140</sup> Its grants have come at the (supposed) end of two armed conflicts—but at the point "where conditions have improved such that TPS is no longer factually warranted."<sup>141</sup> Importantly, as recently as 2014 and seven years after the termination of TPS protections, Obama again cited "compelling foreign policy reasons" to extend the grant.<sup>142</sup> While the rationale provided for these grants is even more sparse than usual, it is at least worth noting the conjunction of a pointed new standard ("compelling foreign policy reasons") with an explicit acknowledgement that DED may cover conditions less severe than would be necessary to warrant a TPS grant. At the same time, DED grants involve a heightened 'national interest' standard: whereas INA § 244(b)(1)(C), the TPS "extraordinary conditions" statute, mandates that grants not be "against" the national interest, DED affirmatively requires that the executive action be "in the foreign policy interest of the United States."<sup>143</sup> In this light, cases like Tiananmen Square make for easy DED analyses. What is more difficult to understand are grants involving ongoing humanitarian concerns in countries rarely considered central to the United States' foreign policy—countries like Liberia. Nonetheless, the case of Liberia suggests that the foreign policy goals of DED must, at least to some extent, be considered to include aims that are primarily humanitarian in nature.

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<sup>139</sup> Howland, *supra* note 36, at 691.

<sup>140</sup> AM. IMMIGR. COUNCIL, *supra* note 116, at 8–10; SEGHELLI ET AL., *supra* note 4, at 6.

<sup>141</sup> See, e.g., Press Release, U.S. Dep't of Homeland Security, Liberians Provided Deferred Enforced Departure (DED) (Sept. 12, 2007).

<sup>142</sup> Presidential Memorandum on Deferred Enforced Departure for Liberians 1 (Sept. 26, 2014) (on file with the Office of the Press Secretary).

<sup>143</sup> *Id.*

#### IV. APPLICATION: IS NATIONALITY-BASED IMMIGRATION RELIEF APPROPRIATE FOR THE NORTHERN TRIANGLE?

In light of our examination of precedent for broad-based humanitarian grants under TPS and DED, we now turn to the situation of three countries in Central America—Guatemala, El Salvador, and Honduras, commonly referred to as the “Northern Triangle.”

##### A. *An Overview of Current Conditions in the Northern Triangle*

Throughout much of the second half of the 20<sup>th</sup> century, Guatemala and El Salvador struggled through brutal civil wars.<sup>144</sup> Since the conclusion of those wars in the 1990s, patterns of violence have shifted: instead of political (and, sometimes, ethnic) violence placing the government in opposition to non-state militias, violence has become more general and widespread, dominated by organized gangs<sup>145</sup> and perpetuated by a complex array of factors.<sup>146</sup> Such violence has become pervasive throughout Honduras, as well. Thus, although there are significant historical, demographic, and political differences in the three countries, for our purposes, they may well be considered together.

The backdrop for any analysis of the human rights profile of the Northern Triangle is the continuing poverty and economic distress under which the region struggles. The United Nation’s Human Development Index ranks Guatemala (125) and Honduras (129) below Syria (118) and Iraq (120), with El Salvador (115) only slightly ahead; in the Western Hemisphere, only Haiti is less developed.<sup>147</sup> In real terms, that means more than 35% of the population of Honduras and Guatemala subsists on less than USD \$ 2.50 each day, with about the same percentage living on USD \$ 4.00 / day in El Salvador.<sup>148</sup> The “old” agrarian poverty of the 20<sup>th</sup> century, moreover, has developed increasingly into a “new” kind of urbanized

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<sup>144</sup> See Nicholas Phillips, *CARSI in Guatemala: Progress, Failure, and Uncertainty* 2 (The Woodrow Wilson Int’l Ctr. for Scholars, Working Paper, 2014). Given the overwhelming violence of Guatemala’s civil war, which extended through 1996, it is remarkable that the country was never awarded TPS on the basis of an “ongoing armed conflict”—especially considering the nearly parallel circumstances in El Salvador. See *El Salvador: 12 Years of Civil War*, THE CTR. FOR JUST. & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=199> (last visited Mar. 10, 2015).

<sup>145</sup> CYNTHIA J. ARNSON ET AL., THE WOODROW WILSON INT’L CTR FOR SCHOLARS ORGANIZED CRIME IN CENTRAL AMERICA: THE NORTHERN TRIANGLE 1–2 (2011).

<sup>146</sup> TANI MARILENA ADAMS, THE WOODROW WILSON INT’L CTR FOR SCHOLARS, CHRONIC VIOLENCE AND ITS REPRODUCTION: PERVERSE TRENDS IN SOCIAL RELATIONS, CITIZENSHIP, AND DEMOCRACY IN LATIN AMERICA 11–19 (2011).

<sup>147</sup> U.N. Dev. Programme, *Table 1: Human Development Index and Its Components*, available at <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components> (last visited Mar. 15, 2015).

<sup>148</sup> *Poverty and Equity Data: Latin America and the Caribbean*, WORLD BANK, available at <http://povertydata.worldbank.org/poverty/region/LAC> (last visited Mar. 14, 2015).

poverty, marked by extraordinary disparities in wealth and extreme levels of unemployment, particularly among youth.<sup>149</sup>

Compounding this general poverty is the region's susceptibility to natural disasters, and the burden that places on these states' already limited infrastructure. Indeed, certain environmental stressors affecting El Salvador and Honduras have been well documented by the U.S. government's TPS and DED extensions. Though not affected as dramatically by Hurricane Mitch or by a single seismic event in the past twenty years, it should be noted that Guatemala, too, has been afflicted by several significant natural disasters within the past few years.<sup>150</sup>

Poverty alone does not account for the present international concern over the conditions in the region, however. Unlike points south, including close neighbors like Nicaragua and Costa Rica, the Northern Triangle is home to extreme levels of generalized violence—that is, violence existing outside the context of international or civil wars.<sup>151</sup> As of 2010, Honduras carried the world's highest homicide rate, with those of El Salvador and Guatemala occupying the 2<sup>nd</sup> and 7<sup>th</sup> places, respectively.<sup>152</sup> Across the region, these rates rose steadily through the first decade of the new century, and although those of El Salvador and Guatemala have steadied or declined in recent years, they remain at critical levels.<sup>153</sup> Naturally, rates of non-homicidal violence are much higher.<sup>154</sup>

Such violence seems to have arisen, amidst weak institutional security frameworks, as a result of several factors. Some authorities emphasize the deportation of criminal gang members from the United States during the 1990s into countries ill-equipped to provide for their rehabilitation or to prevent replication of the gang structures developed in U.S. cities.<sup>155</sup> Others

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<sup>149</sup> See ADAMS, *supra* note 146, at 11; see also Esther Yu-Hsi Lee, *Why Kids Are Crossing the Desert Alone to Get to America*, THINKPROGRESS (Jul. 2, 2014), available at <http://thinkprogress.org/immigration/2014/07/02/3453051/push-factors-el-salvador-honduras-and-guatemala/>. The World Bank notes that in all three countries the richest quintile controls between 48% and 61% of the country's wealth, while the bottom quintile has between 2.6% and 5.7%. In Honduras, 60% of the population possesses only 20.1% of the country's wealth. WORLD BANK, *supra* note 148.

<sup>150</sup> Baldini-Potermín, *supra* note 4, at 1407.

<sup>151</sup> ARNSON, ET AL., *supra* note 145, at 2; JOAQUIN VILLALOBOS, RETHINKING THE "WAR ON DRUGS" THROUGH THE US MEXICO PRISM 64, 68 (Ernesto Zedillo & Haynie Wheeler ed., 2012).

<sup>152</sup> VILLALOBOS, *supra* note 151, at 64.

<sup>153</sup> U.N. Dev. Programme, *Regional Human Development Report 2013-2014: Citizen Security with a Human Face: Evidence and Proposals for Latin America* 1 (Nov. 2013), [http://hdr.undp.org/sites/default/files/citizen\\_security\\_with\\_a\\_human\\_face\\_-\\_executivesummary.pdf](http://hdr.undp.org/sites/default/files/citizen_security_with_a_human_face_-_executivesummary.pdf).

<sup>154</sup> ARNSON, ET AL., *supra* note 145, at 2.

<sup>155</sup> See, e.g., Margot Kniffin, Note, *Balancing National Security and International Responsibility: The Immigration System's Legal Duty to Asylees Fleeing Gang Violence in Central America*, 11 U. MD. L.J. RACE RELIGION GENDER & CLASS 314, 317-19 (2011); see also Corey Kane, *Fleeing Central America's Killing Streets*, AL JAZEERA (Sept. 9, 2014), <http://www.aljazeera.com/indepth/features/2014/09/fleeing-central-america-killing-streets-201497111434803189.html>; see also RAUL HINOJOSO-OJEDA & MAKSIM WYNN, FROM THE SHADOWS TO THE MAINSTREAM: ESTIMATING THE ECONOMIC IMPACT OF PRESIDENTIAL ADMINISTRATIVE ACTION AND COMPREHENSIVE IMMIGRATION REFORM 10 (Nov. 21, 2014), available at <http://naid.ucla.edu/uploads/4/2/1/9/4219226/>

point toward a culture of violence inculcated by years of civil war.<sup>156</sup> Still others note the rise in drug trafficking activity, which itself may be attributable to the power vacuum left at the conclusion of the region's civil wars.<sup>157</sup>

This violence has taken various forms. On the one hand, gang violence persists across the region, often involving the particularly developed and expansive Mara 18 and Mara Salvatrucha (MS-13).<sup>158</sup> The UNDP has estimated Guatemala's gang population at 22,000<sup>159</sup> and figures have risen as high as 39,000 in El Salvador<sup>160</sup> and 36,000 in Honduras.<sup>161</sup> Importantly, these gangs have a territorial component: they control entire zones of major cities throughout the region.<sup>162</sup> Some commentators distinguish gangs from family-based "organized crime," which is also widespread.<sup>163</sup> Often more directly and thoroughly linked to the drug trade, organized crime is frequently tied to institutional corruption and often builds upon social structures dating to the civil wars.<sup>164</sup> Such criminal institutions pose, as one USAID report noted, a "perpetual threat [of] extortion, intimidation, and violence."<sup>165</sup> In fact, one study notes that about 60% of Salvadoran children who fled the country in recent years cited "crime, gang threats, or violence" as one reason for leaving.<sup>166</sup> A UNHCR study that interviewed children who had fled from the Northern Triangle calculated that 38% of children from Guatemala, 57% from Honduras, and 72% from El Salvador met the criteria for international protection.<sup>167</sup> Even studies finding that the principle driver to emigration remains economic take care to point out that their conclusions should not "deemphasize the severity of the poverty, violence and

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[ucla\\_naid\\_center\\_report\\_estimating\\_the\\_economic\\_impact\\_of\\_presidential\\_administrative\\_action\\_and\\_comprehensive\\_immigration\\_reform.pdf](#).

<sup>156</sup> See, e.g., ADAMS, *supra* note 146, at 24; see also VILLALOBOS, *supra* note 151, at 68.

<sup>157</sup> ARNISON, ET AL., *supra* note 145, at 2–3, 9.

<sup>158</sup> James Racine, Note, *Youth Resistant to Gang Recruitment as a Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 459 (2011).

<sup>159</sup> Phillips, *supra* note 144, at 10.

<sup>160</sup> See Kniffin, *supra* note 155, at 318–19.

<sup>161</sup> RODRIGO SERRANO-BERTHET & HUMBERTO LOPEZ, WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA: A DEVELOPMENT CHALLENGE 15 (2011). Region-wide estimates have risen as high as 300,000 members. *Id.*

<sup>162</sup> VILLALOBOS, *supra* note 151, at 69; Phillips, *supra* note 144, at 10.

<sup>163</sup> VILLALOBOS, *supra* note 151, at 66–67. It should be noted that certain gangs, like Mara 18, are so well-developed that they tend to share many of the characteristics of traditional organized crime organizations. Racine, *supra* note 158, at 460.

<sup>164</sup> ARNISON, et al., *supra* note 145, at 6 (discussing the "transformation of ideological groups into criminal actors"), 10 ("Almost all institutions—civilian, military, and police—have shown some connection to organized crime and attempts to address this corruption have created unique challenges").

<sup>165</sup> Phillips, *supra* note 144, at 10.

<sup>166</sup> ELIZABETH KENNEDY, AM. IMMIGR. COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 1 (2014).

<sup>167</sup> U.N. HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 6 (2014).



humanitarian crisis in Central America.”<sup>168</sup> Indeed, a Wilson Center report compares the “brutality, arbitrariness and unpredictability” of violence in parts of Latin America, including the Northern Triangle, to the crimes against humanity perpetrated in Cambodia and Rwanda years ago.<sup>169</sup> Unsurprisingly, the UNHCR has found a 712% increase in asylum applications from nationals of the Northern Triangle who fled to the surrounding countries between 2008 and 2013.<sup>170</sup>

*B. Would a Grant of Temporary Protected Status Be Consistent with Statute and Precedent?*

In light of such extravagant levels of violence and poverty, it is reasonable to ask whether broad-based grants like TPS or DED are appropriate for countries in the Northern Triangle. Nor is this merely an academic exercise. Currently, no Guatemalan nationals benefit from TPS or DED. While relatively large numbers of Salvadorans and Hondurans do, their designations reach back to 2001 or earlier.<sup>171</sup> Because no one who has fled to the United States within the last 14 years qualifies for protection,<sup>172</sup> the number protected, about 265,000, pales in comparison with the total number of unauthorized migrants from these countries—estimated at 1,630,000 in 2012.<sup>173</sup> This section will consider whether the current conditions in the Northern Triangle justify a grant of temporary protected status based on the statutory guidelines and past precedent. Although there may be an argument for “environment disaster” designation (or redesignation), such conditions are already under examination by the government and we will not spend time considering them—except insofar as previous grants illustrate the principles of humanitarian aid and temporariness inscribed in the other prongs of TPS. Instead, this section will focus on the best arguments for designation under INA § 244(b)(1)(A) and (C). It will conclude with an assessment of the viability of those arguments.

*1. Armed Conflict*

As described in detail above, it is typically thought that two basic inquiries must be satisfied in order for a state to receive TPS based on an

<sup>168</sup> HINOJOSA-OJEDA, *supra* note 155, at 3.

<sup>169</sup> ADAMS, *supra* note 146, at 25.

<sup>170</sup> U.N. HIGH COMMISSIONER FOR REFUGEES, *Unaccompanied Minors: Humanitarian Situation at US Border*, available at <http://unhcrwashington.org/children> (last visited Mar. 12, 2015).

<sup>171</sup> SEGHETTI ET AL., *supra* note 4, at 3, Table 1. An estimated 204,000 Salvadorans are protected under TPS, along with 61,000 Hondurans.

<sup>172</sup> See, e.g., Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893 (Jan. 7, 2015).

<sup>173</sup> BRYAN BAKER & NANCY RYTINA, DEP’T OF HOMELAND SECURITY, OFF. OF IMMIGR. STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 5, Table 3 (Mar. 2013).

“ongoing armed conflict.” First, has existing civil strife reached the “minimum level of organization” required to support the designation? Second, has it reached a minimum level of intensity? This second question can be split in two: Is the conflict “ongoing,” and does it pose a serious threat to the safety of deportees? When considering these questions, the proper standard for measuring agency discretion in matters of immigration, to the extent that it is reviewable at all, is whether the agency’s determinations are “founded on considerations rationally related” to the statute being administered.<sup>174</sup>

“Minimum organization,” as we have seen, tends to look like civil war—or at least a very substantial insurgency—even in cases, like Rwanda and Bosnia-Herzegovina, where the conflict is closely tied to violence between recognizable ethnic groups. When compared to such precedents, civil strife in the North Triangle does not look very “organized.”<sup>175</sup> Nonetheless, the Geneva Conventions did leave open a third path: beyond “wars of liberation” and “civil wars,” they recognize as “armed conflicts” certain “*other* conflicts not of an international character.”<sup>176</sup> This imputes no political dimension, nor any particular *motive* of any kind to the conflict. There is no reason, for instance, that making money from drugs would not be an adequate structural principle.

Furthermore, there is reason to believe that the use of the term “armed conflict” in INA § 244(b)(1)(A) should be read somewhat differently than in international law. As the U.S. Supreme Court has recognized, the primary purpose of the Geneva Conventions was to “furnish minimal protections” to a broad array of actors.<sup>177</sup> As a result, the “minimum organization” test, as proposed by the Red Cross, requires that the parties to the conflict, whether state actors or not, “be under a responsible command and be capable of meeting minimal humanitarian requirements.”<sup>178</sup> This reading suggests that this section of the Geneva Conventions is primarily concerned with the conduct of the actors *participating in* armed conflicts. Temporary protected status, on the other hand, is not designed to govern *actions* so much as *effects*. That is, it is not about accountability and the practice of war but humanitarian protection. The organizational requirements inherent in the

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<sup>174</sup> *Fook Hong Mak v. Immigration & Naturalization Serv.*, 435 F.2d 728, 729 (2d Cir. 1970).

<sup>175</sup> El Salvador’s entire gang membership of 10,500 to only 4 gangs. SERRANO-BERTHET & LOPEZ, *supra* note 161, at 15.

<sup>176</sup> See 78 Fed. Reg. *supra*, note 55.

<sup>177</sup> *Hamdan*, 548 U.S. at 631.

<sup>178</sup> ICRC, *supra* note 56, at 5. Additional Protocol II requires “armed groups” to be “under responsible command.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, ¶ 1, Jun. 8, 1977, 1125 U.N.T.S. 609, 611. Article 3 articulates these responsibilities to include, *inter alia*, prohibiting “violence to life and person” of noncombatants, “outrages upon personal dignity,” and extrajudicial executions, and caring for the wounded. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 237.

“armed conflict” prong should be read to give effect to this significant distinction.<sup>179</sup>

In this sense, the “minimum organization” requirement can be understood to mean ongoing violence *caused by* more than one cognizable “armed group,” rather than violence *between* two or more entities. Such a reading places proper emphasis on the effects of the violence, rather than the actions causing it. It also opens up the “armed conflict” designation to the conditions of Northern Triangle, where powerful gangs and well-established crime syndicates vie with one another, with national governments, with citizens, and with international anti-trafficking initiatives, and which, in doing so, create a landscape awash with violence. Such conflicts are not structured according to traditionally recognizable antagonisms—dictatorship versus freedom fighters, embattled democracy versus insurgency, etc.—but they do exhibit levels of internal organization consistent with the requirements of “armed conflicts” for the purposes of TPS. In this sense, the existence of brokered peace deals between rival gangs<sup>180</sup> further suggests that we are dealing not with violence *per se*, but with a cognizable armed conflict. Similarly, the control of territory by armed gangs suggests the presence of some significant degree of organization, and has been cited previously as one fact leading to a finding of an armed conflict.<sup>181</sup>

The trickier question is that of intensity—a combination of duration and severity. Here, it is worth noting the plain meaning of “ongoing” “continuing to exist, happen, or progress; continuing without reaching an end.”<sup>182</sup> Importantly, this definition contemplates both a past and a future: the conflict has begun; it is going on presently; and it will continue at least for some time. Unlike the other two prongs of § 244(b), the “armed conflict” prong does *not* require a finding of temporariness, apparently under the assumption that such conflicts pass away eventually. Furthermore, given

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<sup>179</sup> Indeed, the refugee provisions of the Geneva Conventions – one part of the Conventions focusing on the *effects* of the armed conflict – *do not* make the existence of an armed conflict a prerequisite to the assertion of refugee status. See Convention Relating to the Status of Refugees art. 1, ¶A2, Jul. 28, 1951, 189 U.N.T.S. 150 & Protocol Relating to the Status of Refugees art. 1, ¶2, Dec. 16, 1966, 606 U.N.T.S. 267 (defining “refugee” as one who “owing 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”).

<sup>180</sup> Randal C. Archibold, *Gangs’ Truce Buys El Salvador a Tenuous Peace*, N.Y. TIMES (Aug. 27, 2012), available at [http://www.nytimes.com/2012/08/28/world/americas/in-el-salvador-gang-truce-brings-tenuous-peace.html?\\_r=0](http://www.nytimes.com/2012/08/28/world/americas/in-el-salvador-gang-truce-brings-tenuous-peace.html?_r=0); *El Salvador Gangs Announce the Re-Launch of 2012 Truce*, BBC NEWS (Aug. 30, 2014), <http://www.bbc.com/news/world-latin-america-29000158>. Formal peace processes have served as markers of the end of armed conflicts for the purposes of TPS. See Designation of Angola Under the Temporary Protected Status Program, 65 Fed. Reg. 16634, 16635 (Mar. 29, 2000).

<sup>181</sup> *Id.*

<sup>182</sup> *Ongoing Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/ongoing> (last visited Oct. 10, 2015).

the extraordinary longevity of “armed conflict”-based grants in Sudan and Somalia,<sup>183</sup> there is no reason to conclude that such conflicts must pass away quickly. Under this definition, violence in the Northern Triangle is certainly ongoing. More importantly, there is no reason to believe that its potential longevity should stymie a grant under the “armed conflict” prong.

The critical element, then, is whether these ongoing conflicts pose a “serious threat” to the “personal safety” of returning nationals. Here, the scale and nature of the threat is unlike that in Syria. There are, for instance, no reports of chemical weapons being deployed against civilian population centers.<sup>184</sup> Internal displacement<sup>185</sup> is less the norm than endurance in the face of inevitable violence. There are, however, many reports of targeted killings by gangs, including reprisals or punishments for refusing to join<sup>186</sup>; there are reports of extrajudicial executions by the military and police<sup>187</sup>; there are reports of extreme gender-based violence committed with impunity.<sup>188</sup> Homicide rates alone, however, do not compass the full scope of harm contemplated by a statute that focuses on “personal safety.” While death and rape and torture are certainly threats to one’s personal safety, our inquiry should also countenance those threats which are less severe individually, but equally serious as their frequency rises. That is, while the threat of a single assault or homicide is quite serious, so too is the threat of habitual robberies.

Given the elevated levels of violence in the region, a reasonable argument might be made that such threats exist for anyone in these countries. Although accurate statistics are difficult to come by (aside from the region’s extravagant homicide rates),<sup>189</sup> the personal safety indicators that are available raise serious concerns. One study in Costa Rica, generally considered the safest country in Central America, put the chances of falling victim to a violent crime at between 20 and 36 percent, depending on income.<sup>190</sup> According to a 2012 study by Vanderbilt’s Latin American Public Opinion Project, over 36% of respondents in Guatemala City and Tegucigalpa (Honduras) had been victims of crime during the preceding

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<sup>183</sup> Extension of the Designation of Somalia for Temporary Protected Status, 78 Fed. Reg. 65,690, 65,691 (Nov. 1, 2013) (documenting Somalia’s continuous designation since 1991); Extension of the Designation of Sudan for Temporary Protected Status, 79 Fed. Reg. 52,027, 52,028 (Sept. 2, 2014) (documenting Sudan’s continuous designation since 1997).

<sup>184</sup> Extension and Redesignation of the Syrian Arab Republic for Temporary Protected Status, 80 Fed. Reg. 245, 247 (Jan. 5, 2015).

<sup>185</sup> *Id.* (noting the U.N. estimate that 6.4 million Syrians are now internally displaced).

<sup>186</sup> Racine, *supra* note 158, at 459–60.

<sup>187</sup> See Jose Miguel Cruz, *Criminal Violence and Democratization in Central America: The Survival of the Violent State Author(s)*, 53 LATIN AM. POL. AND SOC’Y 1, 23 (Winter 2011).

<sup>188</sup> See, e.g., *Matter of A-R-C-G-*, 26 I&N Dec. 388, 388, 394 (BIA 2014) (recognizing “married women in Guatemala who are unable to leave their relationship” [sic] as a social group for purposes of asylum and discussing the prevalence of gender-based violence in Guatemala).

<sup>189</sup> See Caroline Moser & Ailsa Winton, *Violence in the Central American Region: Towards an Integrated Framework for Violence Reduction* 7 (Overseas Dev. Inst., Working Paper No. 171, 2002).

<sup>190</sup> SERRANO-BERTHET & LOPEZ, *supra* note 161, at 4.

twelve months.<sup>191</sup> More than 60% of respondents to an El Salvador-based study claimed they felt unsafe leaving work; 90% felt unsafe on public transportation; and 80% felt unsafe at the supermarket.<sup>192</sup> Significantly, although 18% of Salvadorans do want more police on the streets,<sup>193</sup> confidence in the authorities is low across the region.<sup>194</sup> Unsurprisingly, the number of Central Americans apprehended at the border who have claimed to fear returning to their home country has spiked in recent years.<sup>195</sup>

An additional fact is worth remembering: most returnees will be especially ill-positioned to isolate themselves from violence. These returnees are not the wealthy and the mobile—in fact, only about half of undocumented immigrants in the U.S. have even a high-school education.<sup>196</sup> According to the Pew Center, one-fifth of adult undocumented immigrants and nearly one-third of children with unauthorized parents live below the poverty line, and only 25% own houses.<sup>197</sup> It stands to reason, therefore, that an unusually large percentage of deported immigrants will end up in precisely the areas and under precisely the conditions that generate a heightened risk of victimization.<sup>198</sup>

## 2. Extraordinary and Temporary Conditions

A grant under INA § 244(b)(1)(C), the “extraordinary and temporary conditions” prong of TPS, must satisfy several conditions, as described above. Conditions must be “extraordinary”; they must be “temporary”; they must prevent nationals from returning “in safety”; and the grant must not contravene the national interest.

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<sup>191</sup> Orlando J. Perez et al., *Political Culture of Democracy in Honduras and the Americas, 2012: Towards the Equality of Opportunity*, USAID, Apr. 2013, at 103, available at [http://www.vanderbilt.edu/lapop/honduras/Honduras\\_Country\\_Report\\_2012\\_English\\_W.pdf](http://www.vanderbilt.edu/lapop/honduras/Honduras_Country_Report_2012_English_W.pdf).

<sup>192</sup> Instituto Universitario de Opinion Publica, *Victimizacion y percepcion de inseguridad en El Salvador: Consulta de Opinion Publica de Agosto de 2009*, 36, 37, 40, UNIVERSIDAD CENTROAMERICANA “JOSE SIMEON CANAS” (2009).

<sup>193</sup> *Id.* at 49.

<sup>194</sup> In Guatemala and Honduras, according to a 2011 survey, only 2.8% and 2.2% of people claimed they trusted the police “a lot.” 48.1% and 35.4% of respondents (as well as 25.3% in El Salvador) said they had “no” confidence in the police. See CORPORACION LATINOBAROMETRO, *Latinobarometro: Oleada de 2011*, available at <http://www.latinobarometro.org/latOnline.jsp> (last visited Mar. 14, 2015).

<sup>195</sup> U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 167, at 4.

<sup>196</sup> *Unauthorized Immigrants Today: A Demographic Profile*, AM. IMMIGR. COUNCIL, Aug. 19, 2014, at 7, available at <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-demographic-profile> (last visited Oct. 10, 2015).

<sup>197</sup> Jeffrey S. Passel & D’vera Cohn, *A Portrait of Undocumented Immigrants in the United States: IV. Social and Economic Characteristics*, PEW RES. CTR (Apr. 14, 2009), <http://www.pew-hispanic.org/2009/04/14/iv-social-and-economic-characteristics/> (last visited Oct. 10, 2015).

<sup>198</sup> One study of Guatemala was unable to correlate violence with poverty, but there the issue is compounded by the high poverty rates and low crime of the indigenous communities. See PROGRAMA DE SEGURIDAD CIUDADANA Y PREVENCION DE LA VIOLENCIA DEL PNUD GUATEMALA, *Informe Estadístico de la violencia en Guatemala* 29 (Dec. 2007). Other studies have posited an inverse correlation between household poverty and crime rates per capita, but they deal with *rates*, not absolute levels of crime. WORLD BANK, *supra* note 148.

As previously noted, certain grants under this section reflect the “extraordinary” nature of the other types of TPS—armed conflict and environmental disaster. Two other types of “extraordinary conditions” grants are also inapposite: those involving the Ebola-ridden states of Western Africa and those proceeding directly from “armed conflict” grants. Though it does have important economic impacts, generalized gang violence, however extraordinary, does not pose the same risk of contagion or the same threat to basic welfare systems as the Ebola epidemic. Nor can the current conditions be tied exclusively to the armed conflicts that existed now nearly twenty years ago—especially where those conflicts were never originally recognized for protection.

As noted above, however, Guinea-Bissau provides an example of an “extraordinary conditions” grant that did not proceed from any previous grant of TPS but, rather, under the rubric of “generalized civil strife,” an assessment of country conditions that seems to contemplate some state of violence that does not rise to the level of an “armed conflict.” This may, in turn, open the door to characterizing the sort of generalized and severe violence that plagues Central America as “extraordinary.” Indeed, the Guinea-Bissau designation tracks an important difference in the statutory language describing the threat levels necessary to award TPS: in place of the “severe threat” to “personal safety” language of the “armed conflict” designation, INA § 244(b)(1)(C) requires only that nationals not be able to return “in safety.”<sup>199</sup>

In dissecting this difference, it may be useful to briefly consider another area of immigration law that contemplates potential threats to personal safety, that of asylum under INA § 208. Safety inquiries for asylum claims are distinct from TPS in (at least) three important ways: they require individualized assessments of each case, they rely on a nexus between an individual’s fears and a protected status, and they depend to some degree on subjective fear.<sup>200</sup> At the same time, the “well-founded fear” inquiry also contains an objective prong—one that the Ninth Circuit has found may depend upon “conditions in the country of origin, its laws, and the

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<sup>199</sup> While it is possible that the phrase “prevent aliens . . . from returning to the state in safety” could refer to the *act* of returning them, rather than their safety after arrival, such a reading is inconsistent with both other prongs of the statute. There is no question that posing “a serious threat to their personal safety” does not refer to the process of return, but their situation upon arrival. On the other hand, the “handle adequately” provision of INA § 244(b)(1)(B) seems to refer directly to the *process* of return and reassimilation—which is an infrastructural concern, rather than a personal safety concern. Such statutory comparison of threat levels is endorsed by the Ninth Circuit’s assessment of the differences between withholding of removal and asylum. See *Bolanos-Hernandez v. Immigration & Naturalization Service* 767 F.2d 1277, 1282–83 (9th Cir. 1984).

<sup>200</sup> INA §§ 208(b)(1), 101(a)(42)(A) (defining refugee status as having, in part, “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”); *Morgan v. Holder*, 634 F.3d 53, 61 (1st Cir. 2011) (“Asylum cases, virtually by definition, call for individualized determinations.”); *Bolanos-Hernandez*, 767 F.2d at 1283 (finding both subjective and objective elements in the term “well-founded fear”).

experience of others.”<sup>201</sup> Interpretation of this objective prong forms a basis for comparing the asylum standard to the “return in safety” standard of § 244(b)(1)(C).

In defining the level of *objective threat* required by the asylum statute, the federal regulations require only “a reasonable possibility” that an individual will suffer the type of persecution expected if she is returned to her country of origin.<sup>202</sup> In fact, in order to activate immigration protections, the Supreme Court has interpreted the “well-founded fear” standard to mean as little as a 1 in 10 probability of persecution.<sup>203</sup> Because grants of TPS are not constrained by the nexus requirement of asylum claims, moreover, the threat calculus for such grants should incorporate *any kind* of safety issue resulting from a humanitarian crisis. In this sense, TPS’s “return in safety” standard could be thought of as a *lower* standard than that required for asylum. Given the statistics cited in the preceding section, there seems to be quite a strong argument that the level of violence in the Northern Triangle rises to the level statutorily mandated by the “extraordinary conditions” prong.

Of course, while the intensity of violence is less an issue here than for the “armed conflict” prong, temporariness is an active concern under the “extraordinary conditions” inquiry. The apparent standard here, imported from the situation of Montserrat, is whether the condition is “unlikely to cease in the foreseeable future”—that is, whether it is a “permanent” condition. In this regard, it is worth noting Vice President Biden’s recent observation that Colombia climbed out of a similarly disastrous situation over the course of about 15 years<sup>204</sup>—just about the upper limit of “temporariness” contemplated by the Secretary’s commentary on the Montserrat termination. While indicators of progress—that the situation is improving, rather than deteriorating—would be useful, even without such indicators, it would take a decidedly pessimistic outlook to condemn such extraordinary levels of violence as “permanent.” The pertinent question is, rather, whether there is some foreseeable point at which a *termination* of status could occur—and how to know it when it arrives. In this regard, a

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<sup>201</sup> *Garcia-Ramos v. Immigration & Naturalization Service*, 775 F.2d 1370, 1374 (9th Cir. 1985).

<sup>202</sup> 8 C.F.R. § 1208.13(b)(2)(ii).

<sup>203</sup> *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (“There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no “well-founded fear” of the event happening.”).

<sup>204</sup> Joseph R. Biden Jr., *Joe Biden: A Plan for Central America*, N.Y. TIMES (Jan. 29, 2015), [http://www.nytimes.com/2015/01/30/opinion/joe-biden-a-plan-for-central-america.html?\\_r=0](http://www.nytimes.com/2015/01/30/opinion/joe-biden-a-plan-for-central-america.html?_r=0) (last visited Oct. 10, 2015).

goal of bringing levels of violence in line with other countries in the region<sup>205</sup> could be a tangible—and achievable<sup>206</sup>—benchmark.

Finally, a blanket grant of TPS is in line with the current immigration enforcement priorities of the Obama administration, as well as those of Congress, both of which emphasize the deportation of serious criminals (especially aggravated felons or multiple misdemeanor offenders) over other categories of removable migrants and are intended to respond to humanitarian concerns.<sup>207</sup> In fact, TPS explicitly allows for the deportation of certain categories of criminals, those previously involved in persecution of protected groups, and those who are believed to be a danger to the United States.<sup>208</sup> Many studies have also recognized the economic benefits accruing to the United States from the work of the country's substantial undocumented population,<sup>209</sup> as well as the security benefits of providing a certain degree of immigration stability to migrants.<sup>210</sup> In this sense, at least, such a grant would hardly be “contrary to the national interest.”

### 3. *Conclusions*

What this analysis suggests is that a grant of TPS to countries in the Northern Triangle in response to the generalized violence wracking the region would not necessarily offend the language of the statute. There are good reasons, especially, to consider expanding the “extraordinary and temporary conditions” prong to encompass the type of civil strife seen in the region. At the same time, it would unquestionably be a significant expansion of the mandate when viewed in relation to past precedent. Even before Syria was designated under the “armed conflict” prong, for instance, there were already 4.5 million internally displaced persons and government snipers were firing on women and children. The nature and scale, if not the ferocity and humanitarian implications, of the conflict are markedly different in this case.

Moreover, because this is an area in which Congress has legislated with due regard to the relevant humanitarian purposes,<sup>211</sup> grants that do not align comfortably with administrative precedent may be susceptible to challenge

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<sup>205</sup> Homicide statistics, though an imprecise indicator of violence, could be a sufficient proxy measurement here. According to 2010 data, a “normalization” in comparison to Nicaragua would require between a decrease of between 37 and 52 homicides per 100,000 persons, depending on the country. See Cruz, *supra* note 187, at 3.

<sup>206</sup> See Cruz, *supra* note 187, at 1-2.

<sup>207</sup> NOVEMBER 20TH MEMORANDUM, *supra* note 6, at 8, 10.

<sup>208</sup> INA § 244(c)(2)(B)(i)-(ii) (8 U.S.C. 1254(c)(2)(B)(i)-(ii)).

<sup>209</sup> See, e.g., HINOJOSO & WYNN, *supra* note 155, at 3-5.

<sup>210</sup> See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 249 (2012).

<sup>211</sup> Igor I. Kavass & Bernard D. Reams, Jr., 15 *The Immigration Act of 1990: A Legislative History of Pub. L. No. 101-649 S*, S 17108 (1997) (comments of Mr. DeConcini).



under the Take Care Clause.<sup>212</sup> The recent lawsuit challenging President Obama’s expansion of deferred action eligibility<sup>213</sup>—in spite of the careful consideration of the Clause by DHS in its November 20<sup>th</sup> memorandum<sup>214</sup>—is a case in point. It is true that TPS is inherently free of some of the constraints on other deferred action programs (like case-by-case analysis). It is also true that that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”<sup>215</sup> TPS, however, is more than a decision not to prosecute that can be rescinded or revised at any moment. It entails certain, though limited, statutory rights. Moreover, while most TPS grants have been initiated by agencies of the executive branch—and therefore express only the agency’s understanding of the limits of TPS—that is not universally true. The initial grant of TPS to El Salvador might well be seen as establishing judicially reviewable limits on executive discretion.<sup>216</sup> If so, it is worth noting that the grant expired (transforming into DED) a mere six months after the end of El Salvador’s bloody twelve-year civil war.<sup>217</sup> This could place significant constraints on the ability of the executive to make parallel grants under §§ 244(b)(1)(A) and (C).

*C. Would a Grant of Deferred Enforced Departure to Countries in the Northern Triangle Be Consistent with Existing Precedent, Or Alternatively, an Appropriate Extension of Precedent?*

Because Congress has expressly and impliedly restricted the discretion of the executive under TPS,<sup>218</sup> and because a prospective grant to the Northern Triangle does not align neatly with past grants, it is necessary to consider the merits of deferred enforced departure under the circumstances. Since DED has no statutory constraints, our inquiry has only two prongs: Would a grant respect existing precedent? And does it align with the “compelling foreign policy reasons” standard articulated most recently by President Obama?

Here, too, precedent is unkind, but markedly less so. Unlike the situations in China, Haiti, and the Persian Gulf, the quandary of the Northern Triangle is not an acute foreign policy crisis. A grant of DED to Central

<sup>212</sup> U.S. CONST. art. II, § 3.

<sup>213</sup> Complaint at ¶ 1, in *Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex. 2014).

<sup>214</sup> NOVEMBER 20TH MEMORANDUM, *supra* note 6, at 6.

<sup>215</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>216</sup> *Id.* at 833–34.

<sup>217</sup> See *Deferral of Enforced Departure for Salvadorans*, 57 Fed. Reg. 28,700, 28,701 (June 26, 1992); see also Tim Golden, *Accord Reached to Halt Civil War in El Salvador*, N.Y. TIMES (Jan. 1, 1992), <http://www.nytimes.com/1992/01/01/world/accord-reached-to-halt-civil-war-in-el-salvador.html> (last visited Oct. 10, 2015).

<sup>218</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (Jackson, J., concurring) (pointing out that any action taken against the will of Congress places the president’s power at its “lowest ebb”).

American nations, that is, would not be in response to a particular inciting incident—like the invasion of Haiti by U.S. troops or the massacre at Tiananmen Square. There is nothing “new” to which U.S. policy needs to adapt.<sup>219</sup> Nor is legislation pending to regularize the status of nationals from affected countries, as it was for Haiti and China. Furthermore, both Liberia and Haiti are at the very bottom of the Human Development Index, well below even Honduras.<sup>220</sup> Finally, the grants of DED to both El Salvador and Liberia stemmed directly from TPS grants and were deemed appropriate as the severity of the conditions that called for the TPS grant waned. Today, although Honduras and El Salvador have long-standing TPS grants under the “environmental disaster” prong, there is no basis in precedent for a shift to DED protection for reasons other than those supporting the TPS grant. It is also true that neither country has been redesignated in at least 13 years; Liberia and El Salvador, at the time, had both been designated within the preceding three years. A DED grant intended to function as an extension of TPS would be quite different, therefore, than those DED grants that have performed that function in the past. Furthermore, no Guatemalans are (or have ever been) TPS beneficiaries.

There are, therefore, significant differences between previous grants of DED and the situation now contemplated. Nonetheless, there may be a stronger argument under DED than under TPS for extending past practices to encompass the situation in Central America. As noted above, the generally recognized bases for DED are the president’s power to direct foreign policy and his authority to exercise prosecutorial discretion. Moreover, the Supreme Court has repeatedly “recognized the primacy of the Executive in the conduct of foreign relations.”<sup>221</sup> Accordingly, even though Congress denominated TPS the “exclusive remedy” available to the Attorney General for providing nationality-based immigration relief,<sup>222</sup> President Bush noted, in his signing statement, that any reading of the provision as infringing upon the prosecutorial discretion of the executive branch would raise “serious constitutional questions.”<sup>223</sup> So far, that interpretation has not been challenged.<sup>224</sup> As such, it is proper to reconcile

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<sup>219</sup> One might argue that the influx of unaccompanied minors is a new, acute event, but we will not pursue that possibility here.

<sup>220</sup> *Human Development Index and Its Components*, UNITED NATIONS DEVELOPMENT PROGRAMME, available at <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components> (last visited Mar. 15, 2015).

<sup>221</sup> See, e.g., *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003).

<sup>222</sup> INA § 244(g) (8 U.S.C. § 1254(g)).

<sup>223</sup> Kavass & Reams, *supra* note 211, at 1947 (signing statement of George Bush for Public Law No. 101-649); see also Howland et al., *supra* note 36, at 672.

<sup>224</sup> This is true although some would construe the president’s foreign affairs power much more narrowly, as “limited to unusual, particular contexts where executive initiative is required to deal with unexpected problems and congressional acquiescence seems likely.” Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 751 (1989).

the two, seemingly opposed, readings.<sup>225</sup> The best way to do so in this case is to read the “exclusivity” clause to mean the ‘exclusive remedy for nations covered by the situations described in the temporary protected status statute’. This strengthens the idea that DED grants must not only be rooted in “compelling foreign policy reasons,” but should also be some category of thing that does not fit neatly into the parameters laid out in any prong of INA § 244.

That difference is easiest to see in the China, Persian Gulf, and Haiti grants for the clear policy reasons noted above. It is less clear-cut in relation to El Salvador and Liberia, where DED looks a lot like a slightly more relaxed form of TPS. One explanation might simply be that DED’s separate purpose is to alleviate those temporary “economic and political conditions”<sup>226</sup> that fall short of “extraordinary.” This does seem to be the case in Liberia, but one still wonders what the “compelling foreign policy reason” behind the determination was. Liberia is not a major trading partner of the U.S. and the return of the meager number of Liberians benefiting from the grant (4,000)<sup>227</sup> would hardly impact the country’s economic or political profile.

El Salvador’s DED grant, though perhaps rooted in ulterior motives, provides a more satisfying explanation. There, Presidents Bush and Clinton based DED “on the serious negative effects that a large repatriation would have had on the then evolving situation in El Salvador.”<sup>228</sup> While this is a humanitarian concern, it is *not* the type of humanitarian concern usually countenanced by §§ 244(b)(1)(A) and (C), which are concerned uniquely with the safety of the potential deportees.<sup>229</sup> In this sense, it represents a humanitarian concern that falls outside of the scope of the statute and within the scope of foreign policy: it contemplates the impact of U.S. action on other states, not on individuals.

Is this type of foreign policy concern present in Central America today? That is, would deportation pose a humanitarian problem *for the countries* of the Northern Triangle (as opposed to posing a problem only for deportable nationals of those countries currently residing in the U.S.)? In a certain sense, it clearly would. Unleashing a flood of more than 1.3 million returning nationals, including many who have lived abroad for years, would undoubtedly strain the region’s already meager support systems. This strain would come not only in the form of increased demands on regional infrastructure, but also the loss of up to 20% of national GDP in the form of

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<sup>225</sup> See *United States, v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.”).

<sup>226</sup> DHS Press Office, *Liberians Provided Deferred Enforced Departure* 1, DEP’T OF HOMELAND SECURITY (Sept. 12, 2007).

<sup>227</sup> SEGHETTI ET AL., *supra* note 4, at 3.

<sup>228</sup> See *Deferral of Enforced Departure for Salvadorans*, 57 Fed. Reg. 28,701 (Jun. 26, 1992).

<sup>229</sup> See discussion *supra* part IV(A).

remittances.<sup>230</sup> As the Department of Homeland Security has made clear, however, actions of such proportions—i.e., the complete removal of all illegal aliens—are beyond the capacity of ICE to administer and execute.<sup>231</sup> In 2014, for instance, ICE removed only 119,298 individuals from the Northern Triangle, citing the costliness and time involved as reasons for not removing more.<sup>232</sup>

Though still quite a large number,<sup>233</sup> it is possible that this is the sort of “gradual” return anticipated by the notice terminating El Salvador’s DED grant in 1994. If so, there would need to be a surge in the number of migrants from a particular place—for example, as in the case of El Salvador, during a civil war—in order to prompt a foreign-policy concern. With removals from the Northern Triangle up nearly 15% in the last year<sup>234</sup> and by as much as 110% since 2007,<sup>235</sup> it may be that such a surge is upon us. More importantly, the number of deportations today from the Northern Triangle *alone* is nearly three times the number of *total* deportations in 1994.<sup>236</sup> This suggests a far different foreign-policy equation than that contemplated by the 1994 termination notice—and one more in-line with the concerns that prompted the original award of DED to El Salvador. Unsurprisingly, the Congressional Research Service notes that “all three countries [in the Northern Triangle] have reported that their resources are strained trying to keep up with the demand for services resulting from overall increases in deportations.”<sup>237</sup>

Yet even if such concerns do not rise to the level of “compelling foreign policy” concerns, there may be other foreign policy concerns that do. U.S. foreign policy in the region, especially in the post-Cold War era, has long embraced economic stabilization and development aims.<sup>238</sup> Indeed, it is unquestionable that both the economic and security prospects of the United States in the region are damaged if these nations are unable to function

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<sup>230</sup> In 2009, the UNDP estimated that 10–20 percent of the GDP of El Salvador, Guatemala, and Honduras “is produced by remittances from citizens who have migrated to the United States, directly subsidizing 30 percent to 50 percent of these national populations.” ADAMS, *supra* note 146, at 12.

<sup>231</sup> NOVEMBER 20TH MEMORANDUM, *supra* note 6, at 1.

<sup>232</sup> U.S. DEP’T OF HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2014).

<sup>233</sup> Although Mexico leads the charts with 176,968 removals (most of which are merely cross-border removals), the next highest country, after the Central American trifecta, is the Dominican Republic, with 2,130. *Id.* at 12.

<sup>234</sup> *Id.* at 4.

<sup>235</sup> PETER J. MEYER ET AL., CONG. RES. SERV., R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS 8 (2015).

<sup>236</sup> See ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, *supra* note 232; see also U.S. IMMIGR. AND NATURALIZATION SERVICE, 1997 *Statistical Yearbook of the Immigration and Nationalization Service* 166 (1999). It is true that the practice of voluntary departure has been curtailed in current years, skewing the overall removal picture somewhat. See AM. IMMIGR. COUNCIL, THE GROWTH OF THE U.S. DEPORTATION MACHINE (2014).

<sup>237</sup> See MEYER ET AL., *supra* note 235, at 14.

<sup>238</sup> *Id.* at 3–8. See also Biden, *supra* note 204 (documenting the current administration’s recent proposal to significantly increase aid to Guatemala, El Salvador, and Honduras).

properly.<sup>239</sup> More recently, Central America has become a central player in regional anti-drug trafficking efforts.<sup>240</sup> In addition, though there have been certain fluctuations in aid over the years, the 2014 spike in unaccompanied children crossing the U.S. border has reinvigorated the current administration's focus on broad-based responses to the full scope of violence and poverty within the region.<sup>241</sup> Importantly, U.S. foreign-policy efforts have already embraced immigration action as one aspect of necessary relief,<sup>242</sup> and the response from the Central America has been overwhelmingly positive.<sup>243</sup>

One further foreign policy consideration is worth noting. As the case of Liberia seems to illustrate, there may be situations in which an appropriate foreign policy decision adopts a humanitarian posture simply because it is in the national interest to do so—not because the return of a limited number of individuals will severely strain the country's resources, but because it is politically expedient to appear to do “the right thing.” Today there is rising international concern at the growing prominence of immigration detention mechanisms in the U.S., as well as failures of due process in adjudicating asylum claims, many of which pertain particularly to Central American migrants.<sup>244</sup> There is also growing international consensus that the situation

<sup>239</sup> In 2010, the UNDP estimated that the cost of violence in Honduras was equivalent to 10.54% of GDP. Clark et al., *supra* note 153, at 6. A 2008 study put Honduras, Guatemala, and El Salvador's losses at \$885 million (7.7%), \$2.01 billion (10.8%), and \$2.29 billion (9.6%) respectively. SERRANO-BERTHET & LOPEZ, *supra* note 161, at 7. For information on the U.S.'s anti-drug trafficking actions in the region, see ARNSON, ET AL., *supra* note 145, at 10–15, 18 (noting that U.S. estimates put the percentage of drugs passing through Central America on the way to the U.S. at around 45%). See PETER J. MEYER & CLARE RIBANDO SEELKE, CONG. RES. SERV., CENTRAL AMERICA REGIONAL SECURITY INITIATIVE: BACKGROUND AND POLICY ISSUES FOR CONGRESS 1 (2013).

<sup>240</sup> See MEYER & SEELKE, *supra* note 239, at 56.

<sup>241</sup> See *id.* at 8–10; Biden, *supra* note 204, at 1.

<sup>242</sup> In September, before his November deferred action announcements, President Obama took the unusual step of reserving 4,000 refugee admissions for applicants from Latin America and the Caribbean, and designating Honduras, Guatemala, and El Salvador, along with Cuba, as the only Latin American countries where such applicants could be processed without having to leave their countries of origin. See Presidential Memorandum, *FY 2015 Refugee Admissions*, OFFICE OF THE PRESS SECRETARY (Sept. 30, 2014). It should be noted that such actions are woefully meager relative to the problem. With Cuban refugee admissions hitting 4,200 in 2013, it is unlikely that any processing through Central America could accommodate more than a handful of applicants. See Dara Lind, *The U.S. Wants to Help Central Americans—by Letting Fewer Refugees In*, VOX (Oct. 1, 2014, 3:40 PM), <http://www.vox.com/2014/10/1/6880803/refugee-program-central-american-children-guatemala-honduras-salvador>.

<sup>243</sup> See, e.g., Secretaria de Comunicacion Social de la Presidencia de la Republica, *Ejecutivo Expresa Beneplacito Por Medidas Sobre Migracion en EEUU*, GOBIERNO DE GUATEMALA (Nov. 21, 2014), available at <http://www.guatemala.gob.gt/index.php/2011-08-04-18-06-26/item/10347-ejecutivo-expresa-benepl%C3%A1cito-por-medidas-sobre-migraci%C3%B3n-en-eeuu> (responding to the deferred action expansion); Portal de Transparencia Presidencia de la Republica, *Honduras Saluda y Da la Bienvenida al Alivio Migratorio Concedido por el Presidente Barack Obama* GOBIERNO DE LA REPUBLICA DE HONDURAS (Nov. 21, 2014), available at [http://www.rree.gov.sv/index.php?option=com\\_content-&view=article-&id=1167:el-salvador-se-complace-ante-medida-de-alivio-migratorio-anunciada-por-ee-uu&catid=162:avisos-ciudadano&Itemid=793](http://www.rree.gov.sv/index.php?option=com_content-&view=article-&id=1167:el-salvador-se-complace-ante-medida-de-alivio-migratorio-anunciada-por-ee-uu&catid=162:avisos-ciudadano&Itemid=793); Ministerio de Relaciones Exteriores de El Salvador, *El Salvador Se Complace Ante Medida de Alivio Migratorio Anunciado por EE.UU.*, GOBIERNO DE EL SALVADOR, available at <http://www.presidencia.gob.hn/?p=4020>.

<sup>244</sup> See, e.g., Felipe Gonzalez, *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMMISSION ON HUM. RTS. (2010).

in the Central America *does* merit international humanitarian protections.<sup>245</sup> When faced with such evolving norms, there is a strong argument that it is well within the national interest to ease immigration enforcement for affected groups.

## V. A WAY FORWARD

The temporary protected status program has been roundly criticized for its lack of transparency and its inconsistency.<sup>246</sup> This analysis suggests, however, that there is at least enough consistency to make a TPS grant to the countries of the Northern Triangle seem out-of-sync with precedent. While a grant of deferred enforced departure, according to this analysis, would be more attuned to precedent, its use has also faced sharp criticism as an indication “that safe haven remains a matter of politics and not of international law.”<sup>247</sup> Such criticisms are not unfounded. It is in some ways deeply problematic that awards of TPS and DED are largely unreviewable. In the absence of congressional will to pass comprehensive immigration legislation or deal coherently with the crisis of Central American violence, however, the president’s discretionary authority under his foreign affairs power appears to us in an entirely different light—an opportunity to extend, rather than to arbitrarily restrict, benefits to a whole class of needy migrants.

Of course, there is reason to be concerned about the limitations, as well as the excesses, of TPS and DED. Much has been written, for instance, about the plight of migrants who have benefited for many years from TPS.<sup>248</sup> Such grants are time-limited and can be rescinded at any time.<sup>249</sup> More to the point, neither type of grant provides a path to citizenship.<sup>250</sup> While some categories of deferred action recipients—like VAWA self-petitioners, U-

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<sup>245</sup> MEYER & SEELKE, *supra* note 239, at 21; *see also Ley de Protección a Refugiados, Ley No. 655, ASAMBLEA NACIONAL DE LA REPÚBLICA DE NICARAGUA* (2008) (defining “refugee” to include those fleeing conditions of generalized violence); UNHCR, *supra* note 167, at 13; Howland, *supra* note 36, at 675 (discussing the expansion of the refugee definition in various regional agreements to encompass generalized violence).

<sup>246</sup> Eva Segerblom, Note, *Temporary Protected Status: An Immigration Statute That Redefines Traditional Notions of Status And Temporariness*, 7 Nev. L.J. 664, 680 (2007).

<sup>247</sup> Howland, *supra* note 36, at 699, 693.

<sup>248</sup> *See, e.g.,* Claire Bergeron, Note, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. Migration & Hum. Security 23, 31–33 (2014); Michelle M. Holmes, Note, *What About My Kids? Why Congress Should Amend Either NACARA or Temporary Protected Status to Extend Permanent Residency to Salvadorian, Guatemalan, and Honduran Children*, 14 Sw. J. L. & TRADE AM. 427, 434–36 (2008); Baldini-Potermin, *supra* note 4, at 1407. Note that the median length of residence for undocumented immigrants is 13 years. Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* 4 PEW RES. CTR. (Sept. 3, 2014), available at <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled>.

<sup>249</sup> AM. IMMIGR. COUNCIL, *Practice Advisories* 110 (Nov. 2013).

<sup>250</sup> U.S. Immigration and Customs Enforcement, Detention and Deportation Officer’s Field Manual Update: Chapter 1 (2006).

Visa applicants, and (perhaps) the parents of U.S. citizens—have a separate path to citizenship with deferred action serving to bridge the gap,<sup>251</sup> there is currently no such path for TPS or DED recipients.<sup>252</sup> Thus, in the case of long-time TPS recipients, whose deeper roots in the community arguably qualify them for additional solicitude, executive action solves an immediate problem only to create a more intransigent one somewhere down the road—the problem of a class of status-less grantees with little hope of adjusting to permanent status.<sup>253</sup> On the other hand, the time-sensitive character of the grants, while providing some relief to those currently in the U.S., does nothing to ameliorate the situation of migrants arriving at our shores.<sup>254</sup>

Nonetheless, there is good evidence to suggest that even short-term grants of relief from removal for defined groups have significant positive impacts on both the individuals who receive them and their communities.<sup>255</sup> Tellingly, a substantial majority of the U.S. Latino community prioritizes stays of deportation over the creation of routes to citizenship.<sup>256</sup> The benefits provided by TPS and DED also provide an incentive for migrants to come out of the shadows—which in turn creates stronger community-law enforcement relationships<sup>257</sup> and protects American workers.<sup>258</sup> Bringing workers into the taxable workforce, moreover, tends to increase wages and has the potential to create hundreds of millions of dollars in increased tax revenue.<sup>259</sup> Especially at a time of increasing asylum applications (and

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<sup>251</sup> NOVEMBER 20TH MEMORANDUM, *supra* note 6, at 15, 32.

<sup>252</sup> In fact, adjustment of status for a TPS recipient (who has no other avenue to status) requires supermajority approval in the Senate. INA § 244(h) (8 U.S.C. § 1254a(h) (2012)).

<sup>253</sup> See Bergeron, *supra* note 248, at 23. Courts are split as to whether a TPS grant even constitutes an admission for the purpose of adjustment of status. See *Serrano v. U.S. Attorney Gen.*, 655 F.3d 1260, 1265–66 (11th Cir. 2011) (deferring to DHS determination that aliens holding temporary protected status have not been admitted for the purposes of adjustment of status); *but see Flores v. U.S. Citizenship & Immigration Serv.*, 718 F.3d 548, 554 (6th Cir. 2013) (holding that a TPS grant is an “admission”).

<sup>254</sup> See, e.g., Segerblom, *supra* note 246, at 679–80 (discussing *Pieteron v. Ashcroft*, 364 F.3d 38 (1st Cir. 2004)).

<sup>255</sup> See, e.g., Zenen Jaimes Pérez, *How DACA Has Improved the Lives of Undocumented Young People*, CTR. FOR AM. PROGRESS (Nov. 19, 2014), available at <https://cdn.american-progress.org/wp-content/uploads/2014/11/BenefitsOfDACABrief2.pdf>.

<sup>256</sup> Mark Hugo Lopez et al., *Hispanic Trends, Chapter 5: Hispanics and their Views of Immigration Reform*, PEW RES. CTR. (Oct. 29, 2014), available at <http://www.pewhispanic.org/2014/10/29/-chapter-5-hispanics-and-their-views-of-immigration-reform/>. The National Council for La Raza has also pointed out that discretionary grants have historically been followed by congressional action providing status. Kamasaki, *supra* note 124, at 1–2.

<sup>257</sup> See Hing, *supra* note 210, at 249 (noting the perceived community-policing benefits of protective immigration policies); see also Mahwish Khan *Public Safety on ICE: How Do You Police A Community That Won't Talk to You?*, AMERICA'S VOICE EDUC. FUND (Aug. 2011), [http://americasvoice.org/research/public\\_safety\\_on\\_ice\\_how\\_do\\_you\\_police\\_a\\_community\\_that\\_wont\\_talk\\_to\\_you-2/](http://americasvoice.org/research/public_safety_on_ice_how_do_you_police_a_community_that_wont_talk_to_you-2/).

<sup>258</sup> See Tucker & Weiser, *supra* note 38, at 221.

<sup>259</sup> See Brief for Defendant at 4–6, *Tex. v. United States*, (S.D. Tex. 2014) (NO. 1:14-cv-00254). States of Washington, California, Connecticut, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, and Vermont, and the District of Columbia.

rapidly evolving asylum jurisprudence),<sup>260</sup> a deferral of departure would also benefit the nation in the form of decreased administrative costs,<sup>261</sup> a longer timeline for asylum review,<sup>262</sup> and less questionable detention practices.<sup>263</sup>

Finally, a regional grant of deferred enforced departure would also give the United States the opportunity to recognize, and take some degree of responsibility for, its complicity in the situation now facing Central America.<sup>264</sup> Such rationale is not foreign to immigration policy: indeed, the legislative history explicitly cites the moral culpability of the United States in El Salvador's civil war as a motive for issuing its first TPS grant.<sup>265</sup> For an administration that recognizes the need for compassionate, self-aware immigration policy,<sup>266</sup> these are not difficult moral questions.

They are, nonetheless, difficult political questions. The purpose of this Note has simply been to suggest that, should the administration choose to take nationality-based immigration action in this context, it would be on sound legal footing.

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<sup>260</sup> Asylum applications were up to 41,920 in 2014 from 32,830 in 2010, according to the Executive Office for Immigration Review. Applications by Guatemalan nationals, specifically, have risen from 1,726 to 4,257 over the same period. U.S. Dep't of Justice, Executive Office for Immigration Review, *Asylum Statistics FY 2010–2014* (Mar. 2014), available at <http://www.justice.gov/eoir/efoia/FY2010-FY2014-Asylum-Statistics-by-Nationality.pdf>. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), represents one of a number of recent developments in asylum law.

<sup>261</sup> See Oswald, *supra* note 27, at 158 (discussing similar benefits of EVD).

<sup>262</sup> The increased use of expedited removal processes, for example, has generated significant litigation. See, e.g., *M.S.P.C. v. Johnson*, Complaint for Injunctive and Declaratory Relief, Case 1:14-cv-01437, ¶¶ 50, 52, 184–85 (D.D.C. 2014).

<sup>263</sup> Gonzalez, *supra* note 244.

<sup>264</sup> SERRANO-BERTHET & LOPEZ, *supra* note 161, at 15, 19 (discussing the deportation of Los Angeles gangs in the 1990s and the impact of the wars in the 1980s); see *The Drug War Hits Central America*, ECONOMIST (Apr. 14, 2011) (noting U.S. political involvement in the 1980s, as well as the effects on the ongoing drug war on Central America), available at <http://www.economist.com/node/18560287>.

<sup>265</sup> See Immigration Act of 1990 Conference Report, *supra* note 51.

<sup>266</sup> See President Barack Obama's Immigration Address (Nov. 20, 2014) ("Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers."), available at <http://www.scribd.com/doc/247459319/President-Obama-s-Immigration-Speech>.