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## Accountability, Asylum, and Sanctuary: Challenging Our Political and Legal Imagination

### Keywords

Asylum, International Law: History, Refugees, Repatriation, Futures

# MYRES S. MCDUGAL DISTINGUISHED LECTURE

## Accountability, Asylum, and Sanctuary: Challenging our Political and Legal Imagination

RICHARD FALK\*

### I. THE MCDUGAL PRESENCE

Professor Ved Nanda and others here at the University of Denver College of Law deserve our gratitude for establishing an annual lecture bearing the name of this country's most distinguished international lawyer, ever. It is especially impressive that we are moved to acknowledge Professor McDougal's distinction while he is still very much with us as a live, active force. Myres McDougal is a teacher and scholar of extraordinary range and power who has inspired by now several generations of students of the most diverse national, cultural, and ideological background. All over the world one finds influential individuals who can pass the McDougal loyalty test by reciting the 8 base values in their proper order no matter what their state of sobriety. Many of us who have been strongly influenced by the depth and character of McDougal's overall approach often disagree with the foreign policy implications drawn by the master himself, or by some of his more conservative disciples. No matter. Far stronger than these disagreements are certain shared features of the McDougal orientation: above all, a commitment to the creative role of law and lawyers in carrying out their professional roles in such a way as to promote the values at stake, an attachment to law as a process that works toward a humane society for all of its members; and a realization that the final normative test of adequacy for any legal system is the ways in which it deals with issues of justice and freedom, especially as pertaining to the status and rights of individuals.

I am confident that Professor McDougal would be enthusiastic about

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a conference theme devoted to issues associated with the flow of refugees across international borders. McDougal has always encouraged legal analysis at the cutting edge of societal process, in settings of fundamental choice, where clashes of interests and policies are at stake.

## II. POSING THE PROBLEM

In general, increases in refugee flows express rising tides of distress in countries of origin. Individuals seldom cut their roots unless escaping from something — poverty, repression, the absence of opportunity. Of course, the pattern is not invariable. Individuals, even segments of a whole society, are sometimes lured by the image of a promised land elsewhere, and leave the country of birth to fulfill dreams and ambitions, and possibly merely a quest for adventure and change. But we think of such persons as immigrants, not refugees; that is, as individuals who have acted out of a discretionary spirit rather than in response to some sort of felt necessity.

There is one category of refugee that brings joy to the hearts of many — the deposed dictator who flees from his country of origin to escape prosecution, imprisonment, and possibly, execution. It is the one kind of refugee for which, in general, an increase in volume can be taken as a sign of ameliorating world conditions, a reflection of democratizing tendencies.

There are two important types of states in the world these days that have opposed preoccupations with walls — those that build walls to keep people within (Berlin Wall); those that build walls to keep people out (the chainlink fences and patrolled areas of U.S./Mexico border). Neither kind of wall is pleasant, although the conditions of daily existence tend to be more attractive for those who are walling others *out* because they want to enjoy the benefits of getting *in*. Often the experience of the homeland is vividly dismal, but the image of the promised land is romanticized and apocryphal. The film *El Norte* explores this reality, contrasting the magical lure of the United States (the land of the North) for poor, persecuted Guatemalans with the humiliating and disillusioning rite of passage undergone by an Indian brother and sister who act on this imagery of emancipation and go North, bypassing the wall intended to keep them out, but then finding a far more disquieting reality on the other side than they had anticipated.

Nevertheless, the admission of illegitimacy that accompanies a wall to keep people in is a far more humiliating expression of political impotence on the part of reigning authorities, as it involves holding captive one's own citizenry. Both kinds of walls are constructed to coincide with the outer limits of territorial sovereignty and are complementary expressions of unhappiness and despair in the world. Ultimately, overcoming the challenge of refugees is to work toward a world order system where neither kind of wall is needed, where freedom of movement is assured, and no one is either denied entry or held captive. Obviously, such a goal is remote in a world of gross inequality and unevenness with respect to

human rights and the material conditions of life. So long as sovereignty combines with inequality, the issue of refugees is bound to arise, especially under conditions of crowding relative to resources. That is, the invisible influence of population pressures is one important background factor that leads individuals to move from one society to another.

I would like this evening to focus on an aspect of this problem that arises when United States official policy admits one kind of dubious alien seeking asylum and expels another kind who has not satisfied our government that refugee status or asylum are warranted. The deposed dictator is a kind of dubious alien who comes here after plundering his homeland and is fleeing for safety, often accompanied by a retinue of followers and a pile of wealth. An ill-considered receptivity to such victims of history generated the inflamed atmosphere that produced the Iranian Hostage Crisis in 1979-81 and is again presented in a more ambiguous form by the 1986 arrival and actions of the Marcos family in the state of Hawaii.

The other cluster of issues arises when individuals manage to reach our country to gain safety, especially these days from the war zones of Central America, particularly El Salvador, and then by the operation of government procedures these individuals are ordered to be returned to their country of origin. In this setting, individuals and communities have been intervening to provide refuge by reestablishing the ancient religious practice and tradition of "sanctuary." When Churches and their congregations confer "sanctuary" they are interposing their bodies and lives between the government and these beleaguered individuals from overseas. The government has reacted by charging criminal interference with the implementation of "the law," by claiming, in effect, that only the state is entitled to determine who is entitled to qualify as a legitimate refugee.

### III. EXPLORING THE ISSUE OF ACCOUNTABILITY AND ASYLUM

The struggle for human rights and political democracy has over centuries centered upon the struggle by social movements to impose limits on the exercise and abuse of power by rulers. The most dramatic step occurred in 1215 when the English nobility, joined by some farming elements, moved England to the brink of civil war in its effort to place limits on King John's ability through royal prerogative to tax and commit the country to war -- this was a dramatic step in the direction of establishing constitutional order, formalized in the Magna Carta. In retrospect, the overall process of limiting the state has not been fully successful, although the principle of hereditary dynasty has been widely challenged.

After World War II another important innovation was introduced: the defeated leaders of Germany and Japan were prosecuted and held responsible for crimes of state committed in their official capacity. Sovereignty was no longer a shield behind which an individual, whether Head of State or policy-maker, could hide and obtain immunity. One category of crime prosecuted was Crimes against Humanity, an innovation, that was restricted to patterns of behavior somehow connected with illegal

warmaking, but which could theoretically be extended to include abuse of one's own citizenry in times of peace. Those carrying out these prosecutions claimed at the time that they were creating precedents for the future that would govern the victors as much as those judged in defeat. These promises were reinforced by the unanimous adoption by the United Nations General Assembly of the Nuremberg Principles as constituting an authoritative expression of legal obligation.

As often is the case with revolutionary legal principles, the seeds of Nuremberg have sprouted in expected ways. The main seed has not taken root as anticipated — the states that dominate international society have engaged in activity that would appear to constitute crimes of state in the Nuremberg sense, and have refused even to consider establishing procedures of accountability to judge allegations against their civilian and military leaders. The state has shut tight the Nuremberg door, and does not even invoke notions of criminal accountability against its most bitter adversaries, or even risk such a taunt for propaganda purposes. Nevertheless, the notion that international law binds governments and their leaders has struck a responsive chord in the moral sensibility of modern society, and a variety of efforts have been made to fill the institutional vacuum created by the withdrawal of governments from the scene.

During the Vietnam War, the famous British philosopher, Bertrand Russell, established "a tribunal of distinguished citizens" to inquire into the legal, moral, and political status of the American involvement in Vietnam (late 1960s). In the last ten years or so, inspired by this model, the Permanent Peoples Tribunal (PPT) has been established with its headquarters in Rome, and operating within a constitutional framework set forth in the 1976 Algiers Declaration on the Rights of Peoples.

The PPT was brought into being by an Italian parliamentarian named Lelio Basso, claiming its authority through spontaneous creation by citizens and jurists from various countries, through the quality of its proceedings and publications, and by its willingness to stand apart from partisan East-West geopolitics. The PPT, quite significantly, investigated and denounced both the Soviet intervention in Afghanistan and the United States intervention in Central America. Beyond this the PPT considered a number of grievances against governments, policies, and specific individuals. It assessed, for instance, Indonesia's conduct in East Timor, Armenian allegations of Turkish genocide in 1915-16, and Marcos' repressive rule in the Philippines. The proceeding was held in a third country. The accused government was invited to participate but never has, the defenses available to the accused government were put before the Tribunal, but perhaps not in a completely satisfactory manner. The Judgment of the Tribunal is not the outcome of a criminal proceeding against individuals, but is rather, in effect, a validation of a prospective criminal indictment, based on evidence of governmental wrongdoing.

We are now in the midst of two further dramas — the insistence by the new leadership in Haiti and the Philippines that Duvalier and Marcos face up to their crimes of state — and in Marcos' case that the property

plundered be returned. With apparent reluctance, France has accepted Duvalier, U.S. has accepted Marcos, (although it has sought a more serene place of asylum for the former Filipino leader, but without either any show of willingness by Marcos or receptivity by foreign governments.)

We extradite lesser criminals, but offer the prospect of a lavish life style to deposed dictators. Marcos, in a monumental display of imprudence, held a party for 1000 guests in Hawaii shortly after his U.S. arrival, inviting a reaction of fury by those victimized by his 15 years of plundering rule, but unlike the Khomeini government in Iran, the Aquino leadership has not played upon Marcos' criminal culpability during his period of Filipino rule.

In the case of Marcos and the Shah, the U.S. Government shielded rulers whom it has earlier supported, and even helped to remain in power. In the case of Iran, the CIA facilitated the disruption of the constitutional process by facilitating Mossadegh's overthrow in 1953; to many Iranians, even those outside the religious movement, the decision to admit the Shah was interpreted as a refusal by Washington to accept the outcome of the Iranian revolution. This interpretation enabled Ayatollah Khomeini to mobilize enormous popular enthusiasm about the retaliatory seizure of the American Embassy and the holding hostage of those of more than 80 Americans associated with the diplomatic facility. Such a development became an ordeal for those held hostage and for the United States generally. It revealed the anti-American fury that lay at the base of the Iranian revolutionary process. These events unfolded in reaction to the American grant of asylum, but they might have occurred in any event.

The Fernando Marcos case is quite different in many respects. True, he was our man in Manila, yet his ascent to power was perceived to be based on his own capabilities, including a ruthless attitude toward adversaries. Furthermore, the United States distanced itself from some of his abuses of state power and opposed his retention of power at the end in the face of a manifestly fraudulent election, mass civil disobedience, and large-scale mutiny in the armed forces. The United States was less implicated, and also had given to the Philippines a kind of political independence after World War II. What is more, by removing Marcos to this country at the time of deepening crisis, the United States enabled the transition to Aquino leadership without bloodshed, a major contribution to the new order in the Philippines dedicated to social justice and political democracy. What is more, the U.S. Government seems to be cooperating in the early efforts to impose accountability on the Marcos family for its vast economic plunder during its period of autocratic rule. This cooperation has taken various forms, including giving over evidence, freezing assets, and allowing the new leadership to pursue their claims in our courts. Of course, separation of powers here means that the courts are substantially free to determine their own rules of procedures, and those pose large obstacles. There is a need for both an international convention and domestic legislation that mandates assistance from banks and other fiduciary entities to public claimants of assets expropriated during prior

periods of dictatorial rule. In the early period of Marcos residency, U.S. officials tried to arrange a less inflammatory place of asylum, exploring without success, the willingness of Panama, Spain, and others to give secure asylum. In the light of the experience after the Shah's admission the United States naturally associated political risks with granting asylum to a former friendly dictator deposed by angry, populist action. Developments in the Philippines, as well as in Haiti, and even Argentina, suggest that the anti-American backlash in Iran that followed upon the admission of the Shah (and was invoked to justify the seizure of the U.S. Embassy and hold hostage its residents for more than a year) was a special case rather than a general pattern.

That, then, is the proper approach for the United States to adopt toward the grant of "asylum" to deposed dictator? What is the best overall approach for the world community? It is a complicated matter: it is desirable to have beleaguered dictators leave rather than stay behind and fight in the belief that they have no alternative. Jacopo Timmerman during the last years of Argentinean military rule told me that "the ghosts of Nuremberg" kept the generals in place long after they lost the will to govern. It is difficult to assess the impact of the Argentinean trials of former officials on the Chilean dictatorships. It might provide Chile with relief from repressive rule if Pinochet could be offered attractive asylum somewhere. But where? Do we want to make this country a center for extremist exile movements and politics? Experience with Batista exiles from Cuba and Somoza exiles suggests the destabilizing impacts on the host country. Johnny Carson, although not normally acknowledged as a noted political analyst, had a practical proposal — establishing an international island haven called *Fled* where deposed dictators could live out their years in slumber, being punished by the disagreeable company of their former colleagues. My own view is that we need a flexible approach that balance the importance of personal accountability for crimes of state against the desirability of promoting peaceful and rapid transitions to democracy. In effect, a case-by-case approach based on Executive discretion.

From the viewpoint of potential asylum-granting country that priority be given to peaceful transition, as was done in the instance of Marcos, but once the transition has occurred, or it is evident that it will not be democratic in any event, then it is important not to poison relations with a successor government by protecting a former tyrant from efforts to inflict punishment for crimes of state. Here, too, the issues are confused, and no rigid set of guidelines will suffice. A country should neither want to insulate a former ruler from inquiry and even prosecution for former wrongs, nor to deliver such a person to a legal process that offers no reasonable prospect of due process. Such a dilemma is made more acute if the former ruler acted in a repressive and dishonest manner, and yet was a close ally. This situation is made even more serious if the asylum country has been perceived by the new leadership as having practiced interventionary diplomacy that led to the installation of the displaced leadership in past years. All these elements were present in the aftermath of



the Shah's fall from power, as well as efforts by special banking interests and by such influential figures as Henry Kissinger and David Rockefeller to push for the Shah's admission, partly to provoke the crisis that ensued. Only by a crisis between post-Shah Iran and the United States did those with heavy credits gain the leverage needed to collect their debts. Perhaps, it would be helpful to draw a general distinction between *provocative asylum* to be avoided and *constructive asylum* to be granted, although in a specific instance a delicate judgment may be required.

In general, while accountability is important, the possible adverse consequences of refusing asylum in some instances seem paramount. Hence, the prospects of accountability should be subordinated at this stage of international relations whenever a grant of asylum contributes to a peaceful transition. It remains an option to impose responsibility *symbolically* by a legal process held in the country where the individual committed crimes of state. Furthermore, it should be a strict policy that the asylum state limit the activities of a deposed leader and his entourage (i.e. avoid *provocative asylum*) by forbidding the practice of exile politics. The asylum state could also extend friendship and aid to a new leadership that seemed committed to democratic governance and the restoration of human rights.

There are some additional issues. It is important to refrain from intervention in foreign societies on behalf of dictatorial political forces. The relation of the CIA to such rulers as the Shah and Pinochet creates resentment and suspicions on the part of democratic forces. If the United States renounced such covert operations on behalf of dictatorial rule the whole issue would largely disappear. Finally, there is a problem connected with counter-democratic movements that bring reverse considerations into play. Suppose that Ms. Aquino is deposed by military forces and is placed in a position of seeking asylum. In such a political setting, the grant of asylum would be appropriate even if it had some adverse repercussions on bilateral relations. Further, the considerations that militate against exile politics in the instance of a deposed dictator work in reverse if the deposed leader has been committed to democratic practices and human rights. Such "discrimination" is not meant to endorse pro-democratic intervention as a matter of foreign policy.

#### IV. SANCTUARY, CONSCIENCE, AND LAW

It might seem as if dealing with the vulnerability of the weak should be simple . . . or is it? In a world of mass poverty, ethnic persecution, and ideological strife, grounds of persecution are numerous and severe. The humanitarian case for easy admission of the persecuted seems strong, but so are the problems. The U.S. already feels its integrity and prosperity threatened by a flood of immigrants, many of whom are illegal. Furthermore, by granting asylum from persecution or conferring refugee status we pass a kind of judgment on the foreign government that may undermine foreign policy efforts to support that government. As might be expected during the period of Cold War, refugee laws have been loosely ap-

plied in relation to those who flee Communist rule because we seek to emphasize and manifest disapproval, and are rigidly applied in relation to anti-Communist regimes because we have not wanted to erode their claims of legitimacy, or to lessen grounds for support.

The issue of Sanctuary Movement represents an extremely determined attempt to wrest the initiative away from the State on these issues of rights of entry in a context of unusual harshness. The main context arises from official policies that have led to the return of refugees by deportation to Guatemala and El Salvador in circumstances where they face hardships and severe punishments and abuses. In effect, citizens relying on religious tradition challenge the monopoly of legal authority over issues of admission and exclusion. Ever since Antigone defied the Theban ruler Creon by burying her brother slain in battle has the issue of individual conscience and tradition versus state authority been posed in Western civilization. This issue is posed by civil disobedience and conscientious objection to unjust laws, as well as by performance of so-called "Nuremberg Actions."

Religious institutions have a particular role in acting as guardians of conscience and sacred tradition. The state, especially beneath the banner of national security, has come to exert unconditional claims over the obedience of its citizenry. More than ever before, even in democratic countries, we need the ethical safety valve provided by upholding the prerogative of churches to offer sanctuary to aliens threatened with dangerous and harsh deportation. In a sense, I am arguing for the other side of the separation of church and state, that the state respect a domain of conscience defined by the assertion of judgment by duly constituted religious bodies.

Of course, here too the general principle needs to be qualified by various special circumstances of application. It is not unimaginable that some churches would extend "sanctuary" to fascist and other anti-democratic elements, or to those seeking to avoid legitimate prosecution for crimes in their country of origin. The limits of sanctuary seems like an appropriate question for judicial assessment, but only within a context that acknowledges legitimate scope for grants of sanctuary based on the reasonable belief that the individuals involved face risks of persecution or severe hardship if forced to return to their country of origin.

There is, of course, room for extravagant claims, but all human arrangements are subject to abuse. These alleged concerns at this stage are mainly disguised forms of opposition to any derogation from the concentration to authority in the state. It is fair to inquire why should governments lose some of their authority over immigration policy. The broader constitutional issues here are several: establishing effective mechanisms for protecting human rights; restoring popular sovereignty and the role of the citizenry; de-centering political and legal authority. In the background is a search for greater internal balance between state and civil society, a search that reacts to the steady accretion of power at the governmental center of state power that has occurred over the decades. Sanc-

tuary is a creative embodiment of our earliest constitutional vision of "checks and balances" and it offers our society a way to moderate the exercise of power by government through the privileged inter-position of conscience validated by formal action of religious communities, as well as through taking account of spiritual considerations in the formulation of public policy.

## V. CONCLUSION

The argument of this lecture has been a simple plea: to establish constitutional governance, given the expansion of state power and the uneven pattern of its application in context of entry and exclusion by those of foreign origin, we require considerable legal innovation, especially if, in the spirit of Myres McDougal, we regard the overarching mission of law to be the promotion of values associated with human dignity. Translating this generalized sentiment into practice at the doctrinal level suggests several policy conclusions. We need to strengthen procedures for personal accountability arising from alleged crimes of state by foreign leaders through national and international action. Additionally, we require a flexible doctrine of asylum that is sensitive to humanitarian issues, to the diplomatic conditions for positive international relations, and to the grievances of foreign societies against leaders who have been guilty of gross abuses of power. And finally, we need to give constitutional protection to principled practices associated with the provision of sanctuary to individuals threatened with deportation in circumstances where genuine risks of persecution and hardship exist. These complementary norms are designed to accommodate complex and contradictory issues bearing on whether entry or exclusion is the appropriate stance.

In dealing with the special, somewhat unusual, problems of deposed dictators exceedingly sensitive issues can be involved, especially here in the United States where the dictatorial regime has often been treated as a friend during its period of political tenure. One suggestion made here is to draw a distinction based on circumstances and probable effects between constructive and provocative asylum, and if a controversial former dictator or autocratic ruler is admitted, then his activities should be constrained to avoid provoking a successor government, especially if it frustrated in its efforts to apprehend a former ruler for prosecution. Even provocative asylum may be justified if the practices of the new government represents a deterioration of respect for human rights and democracy. However, such interpretations will be lacking in credibility if manipulated to reflect the geopolitical alignments of the Cold War.

As part of a process of domestic readjustment, it is necessary to reconsider United States policies and practices that encourage the emergence of dictatorial rule in foreign countries. To the extent this encouragement has become known, it has aroused strong anti-American resentment. In this regard, covert operations in particular and interventionary diplomacy in general have damaged the reputation of the United States as a friend of democracy and a promoter of human rights. It is a

matter of reassessing national interests so that the United States will not be regarded as the natural adversary of nationalist movements in the Third World.

Although it is difficult to document, there seems to be a connection between structures of oppression and recourse to desperate strategies of violent resistance, including various forms of terrorist practice. If we seek to break the connection we must as a political actor take human suffering seriously, both at home and abroad. Such a moral perspective underlies what I have had to say on these diverse issues of asylum for deposed dictators and protected entry for endangered aliens.

The law needs, in my judgment, to be guided by this understanding of the moral foundations of political order. It is time to associate the grant of asylum, the option of sanctuary with questions of suffering and the reduction of violence rather than with the abstract, and often misleading, calculations of geopolitics and ideological rivalry. Of course, there are gray areas where judgment is required and errors can occur, as when it becomes necessary to balance the claim of a deposed dictator for asylum and that of an aggrieved people for personal accountability, or to assess whether granting asylum is necessary to induce abdication and the avoidance of civil strife.

In the end, all those with the power of legal decision are encouraged to wrestle with the normative challenge of promoting the values of human dignity in a realistic and effective manner, but with a bias toward decentralist and grassroots solutions (sanctuary) and a skepticism about statist claims to dispose of issues of moral and political choice.