

1-1-1996

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Recommended Citation

Brian W. Jacobs, *No-Win Situation: The Plight of the Hmong, America's Former Ally*, 16 B.C. Third World L.J. 139 (1996), <http://lawdigitalcommons.bc.edu/twlj/vol16/iss1/7>

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NO-WIN SITUATION: THE PLIGHT OF THE HMONG—AMERICA'S FORMER ALLY

Brian W. Jacobs*

Last month, Hmong leaders of a refugee camp in Thailand sent a 5,000-signature petition to Congress, pleading for American help to stop their imminent forced repatriation to Laos. Soon after the petition arrived in Washington, the Thai government arrested six of the petitioners, saying they would be jailed until they agreed to "voluntarily" return to Laos.¹

I. INTRODUCTION

The Hmong² are a people who feel that they have been placed in a no-win predicament, so any efforts that they make should be directed towards gaining at least a measure of safety for themselves and their people. The Hmong state that they are being forced from refugee camps in Thailand to Laos, where they fear for their lives because of past hostilities against the ruling government.³ The Hmong were a pre-literate⁴ hill tribe living in the mountainous region of Burma, China, Thailand, Vietnam, and Laos⁵ when they were called upon by the United States to resist the aggression of the Indochinese communists who were threatening the political order in the area.⁶ With the defeat of the United States, many thousands of the Hmong fled to Thailand, where they live in refugee camps.⁷ Presently, at a critical time

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¹ Marc Kaufman, *U.S. Lawmakers Turn Up the Heat for Hmong Fighting Repatriation*, PHILA. INQUIRER, Oct. 3, 1994, at A2.

² The Hmong in the past have been referred to as the "Meo," which is a pejorative term implying slavery and contempt. JANE HAMILTON-MERRITT, *TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942-1992*, at 3 (1993). The Americans who fought in this area used the term "Meo." *Id.* at 206-07.

³ Marc Kaufman, *Hmong Activists Decry What They Say Is Forced Repatriation to Laos*, PHILA. INQUIRER, Apr. 27, 1994, at A7.

⁴ Stephen Magagnini, *Hmong General Carries on Fight for His People in U.S.*, SACRAMENTO BEE, July 2, 1995, at A1, available in WESTLAW, NPMJ File.

⁵ See TIMOTHY N. CASTLE, *AT WAR IN THE SHADOW OF VIETNAM* 5 (1993).

⁶ *Id.* at 38.

⁷ Kaufman, *supra* note 3, at A7.

in their history, they have been forgotten or ignored by the international community, particularly by the people of the United States, whose government relied on their help during the Vietnam War.⁸ The Hmong allege that their people are being forced to repatriate to Laos, which still maintains the same government which they resisted for the United States.⁹ This forced repatriation is being conducted with the consent of the world community¹⁰ and funding from the United States government.¹¹ Some United States officials see the Hmong refugee issue as an obstacle to foreign economic development and political opportunity.¹²

This Note examines the current plight of the Hmong and advocates that the Hmong should focus their energies on achieving the attention of the world community, which may, at the very least, help to insure their future safety. Part II of the Note presents a historical background to their current plight. Part III examines possible legal claims of the Hmong. Finally, Part IV examines other possible solutions to the problems the Hmong face.

II. HISTORICAL BACKGROUND

A. *The Hmong People*

In order to understand the situation that the Hmong now face, it is important to understand the Hmong people and the events that led to the current repatriation of the Hmong to Laos. In the mid-Twentieth Century, the Hmong lived in the mountain regions of Southeast Asia¹³, especially in Laos, and they maintained their existence through the use of slash and burn agriculture.¹⁴ Rice was their key subsistence crop, but their most important crop was opium.¹⁵ The Hmong use opium as a traditional source of medicine¹⁶, and have used opium as

⁸ See generally CASTLE, *supra* note 5, at 79-83.

⁹ See *Hmong Refugees Fear Forced Repatriation*, BANGKOK POST, Dec. 4, 1994, available in WESTLAW, INT-NEWS File.

¹⁰ See Kaufman, *supra* note 1, at A2.

¹¹ See Marc Kaufman, *Those Other Refugees-Why America Owes a Special Debt to the Forgotten Hmong*, WASH. POST, Aug. 28, 1994, at C5.

¹² Marc Kaufman, *Allies Abandoned-The United States Enlisted the Hmong to Help Fight the Cold War. Now it is Shunning Them During the Peace*. PHILA. INQUIRER, Feb. 27, 1994, in FEATURES INQUIRER MAGAZINE, available in WESTLAW, PHILINQ File.

¹³ CASTLE, *supra* note 5, at 5.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

¹⁶ Kaufman, *supra* note 12.

a cash crop, selling it to the Chinese, Vietnamese, and colonial French, who profited from the drug trade.¹⁷

The Hmong were generally able to stay independent of the controlling governments of the Lao region.¹⁸ This government was a monarchy at the time of the Vietnam War.¹⁹ In 1950, a new resistance group called the Pathet Lao formed to oppose the current monarchy of Laos.²⁰ This political faction began to align itself with the Viet Minh, the communists of Vietnam.²¹ The United States gradually entered the Vietnam War in the late 1950s and early 1960s.

B. *The Hmong in the "Secret War"*

The communist forces began to threaten the monarchy, and the United States viewed the Laotian monarchy as a key barrier to the aggressive acts of the communists in the region.²² Even though the United States was unwilling to directly intervene militarily in Laos,²³ the Central Intelligence Agency (CIA) looked for allies to protect the area.²⁴ The Pathet Lao had been encroaching on the Plain of Jars, a traditional land of the Hmong.²⁵ The CIA found General Vang Pao, the military leader of the Hmong.²⁶

The Hmong had been fighting the Pathet Lao under the direction of Vang Pao for some time before the arrival of the CIA, to oppose encroachment on their territorial lands.²⁷ The forces of Vang Pao were not part of the royal army, but rather were a separate, independent fighting force.²⁸ A special contingent of CIA officers, John E. "Jack" Shirley, Lloyd "Pat" Landry, and Anthony "Tony" Poe, were instructed by Gordon L. Jorgenson, the CIA station chief at the United States Embassy, to begin the recruitment and military training of the Hmong population.²⁹ The Hmong said that they would be willing to fight the Pathet Lao if they had the weaponry.³⁰ These CIA officials made prom-

¹⁷ *Id.*

¹⁸ CASTLE, *supra* note 5, at 6.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.* at 26–27.

²³ *See id.* at 30.

²⁴ *Id.* at 38.

²⁵ *Id.* at 9.

²⁶ *See* Magagnini, *supra* note 4, at A1.

²⁷ *See* HAMILTON-MERRITT, *supra* note 2, at 80.

²⁸ *See* CASTLE, *supra* note 5, at 38.

²⁹ *Id.* at 38.

³⁰ HAMILTON-MERRITT, *supra* note 2, at 86. The Hmong may have fought the Communist

ises to the Hmong that they would provide assistance in fighting the communist forces, and they also assured the Hmong of assistance in case the war was lost.³¹

The CIA actively recruited the Hmong, hoping they could be used to support the royalist government of Laos.³² They offered to increase the living standards of the Hmong by developing pig breeding centers and teaching them carpentry, to develop a sense of national identity among the Hmong.³³ These CIA officers also traveled around to the Hmong villages with interpreters, telling the people that "the Vietnamese will soon come to take your land. We [the United States] will give you the means to fight and defend your homes."³⁴ The Hmong accepted the help of the CIA, and soon, several thousand Hmong had new weapons and were being trained by the CIA.³⁵ However, the United States did not undertake any formal treaties or agreements with the Hmong, since the war in Laos was officially clandestine.³⁶ The plan in the United States was to keep the North Vietnamese army and the Pathet Lao at bay until a diplomatic solution could be negotiated.³⁷

The Hmong fought valiantly, often rescuing downed American pilots, watching the movements of the enemy forces, and fighting the ground war.³⁸ Eventually, approximately 60 percent of the 300,000 Hmong in Laos joined in the war against the communist forces.³⁹ At its peak, the Hmong army numbered nearly 40,000.⁴⁰ The Hmong fought bravely, and they sustained staggering losses in the war.⁴¹

In 1973, concurrent with talks involving the United States concerning the end to the conflict in Vietnam, the royal Laotian government and the Pathet Lao began similar talks.⁴² On February 21, 1973,

forces with or without the help of the Americans. It seems that they wanted arms, training, and food from the Americans. *See id.* at 89.

³¹ W. Courtland Robinson, *Laotian Refugees in Thailand*, in *LAOS: BEYOND THE REVOLUTION* 215, 220 (Joseph J. Zasloff, Leonard Unger eds., 1991) (citing Department of Health and Human Services, Office of Refugee Resettlement, *The Hmong Resettlement Study*, Vol. 1, 18 (1985) [hereinafter *Hmong Resettlement Study*]).

³² *See* THEODORE SHACKLEY, *THE THIRD OPTION* 71 (1981).

³³ *See id.* at 71-72.

³⁴ CASTLE, *supra* note 5, at 38 (quoting various United States CIA officers).

³⁵ *Id.* at 39.

³⁶ HAMILTON-MERRITT, *supra* note 2, at 226.

³⁷ *Id.* at 95.

³⁸ *See* CASTLE, *supra* note 5, at 82; *see also* Kaufman, *supra* note 12.

³⁹ Kaufman, *supra* note 12.

⁴⁰ Robinson, *supra* note 31, at 217.

⁴¹ *Id.* (Between 1963 and 1971, 18,000 to 20,000 Hmong were killed in combat).

⁴² CASTLE, *supra* note 5, at 115-16.

the Agreement on the Restoration of Peace and Reconciliation in Laos was signed.⁴³ The Agreement required that foreign armed forces would completely cease all military activity in Laos.⁴⁴ Vang Pao's Hmong army was assimilated into the royal army, and foreign assistance to the royal forces decreased.⁴⁵ The communists took control, and on December 1-2, 1975, the Pathet Lao established the Lao People's Democratic Republic (LPDR).⁴⁶

C. *The Hmong Refugee Crisis*

By the time the LPDR had been established, the Hmong had already begun to flee Laos en masse.⁴⁷ By the end of 1975, more than 44,000 had fled into Thailand.⁴⁸ On May 15, 1975, approximately 3,000 Hmong, including General Vang Pao, were airlifted into Thailand for safety.⁴⁹ The Pathet Lao arrested royalist and anti-communist dissidents and put them into "re-education camps" where they performed forced labor.⁵⁰ Approximately 10 percent of these dissidents died in the camps.⁵¹

In 1975, the Thai government allowed the United Nations High Commissioner for Refugees (UNHCR) to set up temporary camps, providing food, clothing, shelter and medical care for the influx of Indochinese refugees.⁵² The Thai government officially listed these people as displaced persons, since they entered in violation of the Thai Immigration Act.⁵³ As displaced persons, they are *prima facie* illegal immigrants, subject to imprisonment, fines, and expulsion.⁵⁴ The United

⁴³ *Id.* at 117.

⁴⁴ *Id.* at 118.

⁴⁵ *See id.* at 121, 125.

⁴⁶ *Id.* at 127.

⁴⁷ Robinson, *supra* note 31, at 217.

⁴⁸ *Id.* at 217. Other groups also fled the newly-communist Laos at that time, but not nearly in the numbers of the Hmong. *Id.* at 218.

⁴⁹ *Id.* at 217. Robinson suggests that fear of reprisals was not the only reason the Hmong left Laos. *Id.* He also points to the fear of massive starvation in the face of loss of food drops. *Id.* at 217-18.

⁵⁰ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, FORCED BACK AND FORGOTTEN THE HUMAN RIGHTS OF LAOTIAN ASYLUM SEEKERS IN THAILAND 6 (1989) [hereinafter FORCED BACK AND FORGOTTEN]. The Pathet Lao admit to having imprisoned some 10,000 to 15,000 persons, but defectors estimate the numbers to be between 30,000 and 60,000 persons. *Id.*

⁵¹ *Id.*

⁵² Robinson, *supra* note 31, at 218.

⁵³ *Id.*

⁵⁴ *Id.* at 219.

States, after the fall of Laos to the Pathet Lao, began to allow resettlement of Hmong refugees within its borders.⁵⁵

Even before they had taken power, the Pathet Lao called for the total elimination of the Hmong.⁵⁶ The official publication of the Pathet Lao, the *Khao-xane Pathet Lao*, called for the Hmong to "be exterminated down to the root of the tribe."⁵⁷ When the communist government was installed in 1975, many Hmong who remained in Laos continued the resistance against the LPDR.⁵⁸ During this time, the Hmong allege that the LPDR began to drop chemical toxins on the Hmong, including one called "Yellow Rain."⁵⁹ The use of biological and chemical toxins against the Hmong most likely caused injury to thousands.⁶⁰

The possibility of "re-education," the poor state of the economy, food shortages, and especially the possibility of being resettled abroad, particularly in the United States, began to attract other Laotian people to the Thai refugee camps, and in 1978, the number of lowland Lao arrivals in Thailand reached 48,781.⁶¹ In 1979, President Carter announced that the United States would admit 168,000 Indochinese refugees in that year, but Thailand was still burdened with over a quarter of a million refugees.⁶² The conditions of the camps, along with the possibility of resettlement abroad were becoming too much of a lure for refugees for the Thai government, who in 1981, instituted a policy of "humane deterrence," which consisted of opening a camp with more austere conditions and no access to resettlement.⁶³

⁵⁵ *Id.* at 220.

⁵⁶ FORCED BACK AND FORGOTTEN, *supra* note 50, at 8.

⁵⁷ *Id.* at 7-8.

⁵⁸ See HAMILTON-MERRITT, *supra* note 2, at 378-89. In their desperation, some Hmong turned to a mystical group called the "Chao Fa"-Prince of the Sky. *Id.* at 381. This was a resistance group which promised a god-like intervention that would both protect them from being slain by an evil giant and give them the power to destroy the giant. *Id.*

⁵⁹ See *id.* at 454. Hamilton-Merritt discussed biological and chemical toxins that were used against the Hmong. *Id.* One soldier reported that ". . . they [the planes] dropped poisons. There were three kinds used-yellow, black and blue. . . When the yellow poison like rain came, people got dizzy with vomiting. . . The black one. . . if touched or if breathed. . . could kill you." *Id.* at 393. In meetings of the American Association for the Advancement of Science in 1983, Matthew Meselson, a Harvard biochemist, advanced the proposition that the "yellow rain" was in fact only bee excrement, which was quickly picked up by the media and discredited the testimony of the Hmong. See *id.* at 454-60.

⁶⁰ See *id.* at 446-47. In 1982, Secretary of State Alexander Haig submitted a report to the Congress that determined that Laotian and Vietnamese forces had used chemical toxins in Laos since 1975. *Id.* at 446.

⁶¹ Robinson, *supra* note 31, at 221-22. Other factors also contributed to this exodus, including medicine shortages, food rationing, rice tax, arbitrary arrests, labor conscription, and work collectivization. *Id.*

⁶² *Id.* at 222-23.

⁶³ *Id.* at 223-24.

To slow the influx of refugees, the United States passed the Refugee Act of 1980⁶⁴ which restricted resettlement in the United States and provided for approval of resettlements on a case-by-case basis.⁶⁵ The Act caused the resettlement of Hmong in the United States to drop from 27,000 in 1980 to 3800 in 1981.⁶⁶ There were additional reasons for the numbers of Hmong resettling in the United States to fall off. Hmong in the Thai camps began to refuse to resettle in Western countries, including the United States.⁶⁷ Stories reached the camps about the difficult life ahead of them if they were to immigrate to the United States, since the resettled Hmong were the most welfare-dependent group in the United States.⁶⁸ General Vang Pao, who by this time had resettled in the United States himself, instructed refugees to remain in Thailand, since he continued to support a low-level resistance against the Laotian government, which he eventually hoped would lead the Hmong back to Laos.⁶⁹ Other potentially legitimate refugees were screened out of the process as well. Due to stricter United States drug laws, any immigrant or refugee needs to test drug-free for five years, instead of six months as the case had been before.⁷⁰ The new policy screened out many potential refugees because of the Hmong use of opium as a traditional medicine.⁷¹

Despite the resettlement efforts abroad, the populations in Thailand's camps were growing,⁷² while the number resettled in the United States was shrinking.⁷³ In 1985, Thailand, backed by the UNHCR, the United States, and Canada, instituted a screening process intended to

⁶⁴ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 USC §§ 1101 et seq (1988 & Supp. 1992)); See Robinson, *supra* note 31, at 225.

⁶⁵ Robinson, *supra* note 31, at 225.

⁶⁶ *Id.* at 226.

⁶⁷ LYNELLYN D. LONG, BAN VINAI: THE REFUGEE CAMP 50 (1993).

⁶⁸ Marc Kaufman, *As Return to Laos Nears, Hmong Hopes are Dashed: An Agreement Calls for 12,000 to go Back by Mid-1995. Hmong Leaders Say the Communist Nation is Not Safe for Them*, PHILA. INQUIRER, Aug. 5, 1994, at A3.

⁶⁹ LONG, *supra* note 67, at 50.

⁷⁰ Kaufman, *supra* note 12.

⁷¹ *Id.* There are many cases of Hmong in trouble in the United States because of their use of opium. In *U.S. v. Koua Thao*, a hmong man was found guilty of knowingly and intentionally possessing opium with intent to distribute it when the opium came in a package in the mail to his address. 712 F.2d 369, 371 (8th Cir. 1983). His convictions for using the United States mail to import opium and his conviction for intentionally importing opium were overturned since there was no evidence that he caused the opium to be sent. *Id.* However, in *U.S. v. Vu*, the use of testimony at trial from a customs supervisor that opium importation in his area was 95% due to the Hmong community violated the defendant's due process rights. 13 F.3d 1206, 1212-14 (8th Cir. 1994).

⁷² Robinson, *supra* note 31, at 221-22.

⁷³ *Id.* at 226.

distinguish illegal immigrants—those who came across the border for purely economic reasons, from refugees—those who participated either in anti-communist activities or in the old regime.⁷⁴ The Thai government created another category of refugees, those persons with relatives in a third country, suggesting that Thailand now was willing only to allow in immigrants who had a reasonable chance of resettlement in a third country.⁷⁵

To become a legitimate refugee in Thailand, the potential migrant must pass through a screening process.⁷⁶ This screening process begins with an initial interview by a representative of the Ministry of Interior (MOI).⁷⁷ Potential immigrants who receive initial approval, that is, who are “screened-in,” are sent to the provincial committee for confirmation, and, once confirmed, are sent to the appropriate camp.⁷⁸ If rejected, the UNHCR may appeal.⁷⁹ Otherwise the applicant is put into a detention center to await repatriation.⁸⁰ However, many of the potential asylum seekers are “screened-out” even before reaching the process.⁸¹ There are widespread reports of bribery, the interview is cursory, and anyone suspected of having been smuggled in by third parties is forced back into Laos.⁸² Many refugees report paying from 2000 to 36,000 baht (\$80–\$1500) just to enter the process or to obtain a favorable decision.⁸³

⁷⁴ LONG, *supra* note 67, at 52. According to a Thai Ministry of Interior (MOI) memo, refugees included:

1. former officials, military, or police during the pre-LPDR period;
2. persons who used to work in embassies, international organizations, foreign firms during the pre-LPDR period;
3. persons who participated in political and social movements against the communist governments.

Illegal Immigrants included:

1. persons who claim dissatisfaction with the new regime, owing to tax collection, forced labor or the draft;
2. persons who desire to have a place for business because of their dissatisfaction with the LPDR economic system;
3. persons influenced by others, especially Lao hill tribes;
4. persons who claim relatives in Thailand or in a third country.

Robinson, *supra* note 31, at 229.

⁷⁵ Robinson, *supra* note 31, at 229.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Robinson, *supra* note 31, at 229.

⁸¹ FORCED BACK AND FORGOTTEN, *supra* note 50, at 24–26.

⁸² *Id.*

⁸³ Robinson, *supra* note 31, at 231.

In the late 1980s, the process to enter Thailand became even more restrictive since local officials were instructed by the MOI to allow fewer potential immigrants into the screening process.⁸⁴ The Thai government also used a method called the “pushback”—that is, attempting to stop the flow of immigrants at the border to decrease immigration.⁸⁵ In one report of a pushback, an eight-year-old girl was among thirty-three Hmong who attempted to smuggle themselves over the Thai border on a raft.⁸⁶ Thai officials fired on the group, confiscated their money, and, the next day, put them on boats back to Laos.⁸⁷ Reports indicate that upon arrival on the Laotian side of the Mekong river, the Pathet Lao took the group into the forest, where they were gunned down.⁸⁸ The eight-year-old, the only survivor of the group, was shot but not killed;⁸⁹ two days later, sixteen more Hmong were massacred in a similar incident.⁹⁰

Recently, diplomats from the various nations have addressed the refugee problem in Southeast Asia, and in 1991, the governments of Thailand and Laos, along with the UNHCR signed the Luang Prabang Agreement.⁹¹ The Luang Prabang Agreement provided for the repatriation of the refugees from Laos, and the closing of the camps by the end of 1994.⁹² The Laotian government had still refused to accept refugees who had been screened-out by the Thai government.⁹³ Laotian officials admit that some members of the government still fear and dislike the Hmong, but the official government position is one of reconciliation.⁹⁴ The Hmong were not consulted, nor even allowed to participate in the framing of this agreement.⁹⁵ The Agreement has been difficult to implement, both because the Hmong have been and are still openly hostile to the government of Laos, and also because of the continuing low-level resistance fought against the LPDR by the Hmong.⁹⁶

⁸⁴ See FORCED BACK AND FORGOTTEN, *supra* note 50, at 26.

⁸⁵ See *id.* at 13–14.

⁸⁶ *Id.* at 16.

⁸⁷ *Id.*

⁸⁸ *Id.* at 17.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Kaufman, *supra* note 12.

⁹² *Id.*

⁹³ Robinson, *supra* note 31, at 231

⁹⁴ Kaufman, *supra* note 12.

⁹⁵ *Id.*

⁹⁶ See Kaufman, *supra* note 11, at C5. See also Raids 'Staged from Thailand'-Hill Tribe Rebels, SOUTH CHINA MORNING POST, Oct. 30, 1993, at 11.

The voluntary approach to repatriation left unresolved problems for the parties to the 1991 agreement, not the least of which was that many of the refugees were unwilling to return to Laos.⁹⁷ The United States attempted to find a Hmong leader who would be willing to lead back Hmong to Laos, in the hope that others would follow suit.⁹⁸ In early 1991, the United States government thought they had found the leader in Vue Mai, a fifty-seven-year-old Hmong who had been a major in the CIA's secret army in the war in Laos.⁹⁹

Vue Mai had continued to fight the communists for another decade after Laos fell to them in 1975.¹⁰⁰ Vue Mai was assured by United States and UNHCR officials that his return to Laos would be safe, and his clan agreed to follow him.¹⁰¹ He crossed the Mekong river into Laos in November 1992.¹⁰² Upon return, Vue Mai was frustrated by delays in promised United States money and difficulties in finding adequate resettlement areas.¹⁰³ On September 11, 1993, ten months after returning to Laos, Vue Mai was reported missing and has not been heard from since.¹⁰⁴

Subsequently, the Vue clan refused to migrate to Laos.¹⁰⁵ However, the entire clan has been labeled traitors by the other clans left in the camps, ostracized from the rest of the Hmong community for deciding to return to Laos.¹⁰⁶

Various governments and agencies blamed each other for the disappearance of Vue Mai.¹⁰⁷ The United States and the UNHCR faulted the continued Hmong resistance for the disappearance, since these groups would have the most to gain from this.¹⁰⁸ The Laotian government has denied any knowledge of the cause of Vue Mai's disappearance, but relatives of Vue Mai view this skeptically, since an LPDR officer was assigned to follow him wherever he went.¹⁰⁹ The Laotian

⁹⁷ See Kaufman, *supra* note 11, at C5.

⁹⁸ Marc Kaufman, *Hmong Leader's Vanishing in Laos Reverberates in the U.S.*, PHILA. INQUIRER, May 1, 1994, at A1.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Kaufman, *supra* note 12.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Kaufman, *supra* note 98, at A1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Kaufman, *supra* note 12.

¹⁰⁹ Kaufman, *supra* note 98, at A1.

government proffered the hypothesis that Vue Mai may have run off with a girlfriend, but deny any other knowledge.¹¹⁰ If the Laotian government had knowledge that the resistance had taken him, it is probable that they would have made it public, since a kidnapping by one of their own would have given them a chance to discredit the resistance.¹¹¹ In the week of November 18, 1994, Representative Benjamin A. Gilman, a Republican from New York, accused the Laotian and Vietnamese governments of kidnapping Vue Mai, and stated that he had information to this effect.¹¹² However, the U.S. has been unwilling to press the Laotian government on this claim.¹¹³

The disappearance of Vue Mai did not put an end to repatriation; in fact, repatriations to Laos have sped up.¹¹⁴ Thousands of refugees from the various camps were repatriated in the early 1990s, and the schedule for closing the last refugee camp in Thailand available to Laotians is set for the end of 1995.¹¹⁵ By the second half of 1994, all of the refugee camps for Laotian refugees in Thailand had been closed with the exception of the Ban Na Pho camp, which held about 11,000 people, and these refugees are expected to be repatriated by the end of 1995.¹¹⁶

All of the refugees are supposed to have returned "voluntarily." However, the definition of "voluntary" varies greatly between the various parties.¹¹⁷ The United States and the UNHCR believe since all of the refugees that have returned have signed documents stating that they are returning voluntarily, that their repatriation is indeed voluntary.¹¹⁸ However, many of these people are given the choice between repatriation and being sent to a prison-like detention center until they decide that they are willing to go back to Laos.¹¹⁹ Some have even been arrested for protesting the "voluntary" repatriations, and placed in the detention camps.¹²⁰ These officials insist that, even though the Hmong have no choice but to return to Laos, they are not being forced.¹²¹

¹¹⁰ Kaufman, *supra* note 12.

¹¹¹ See Kaufman, *supra* note 98, at A1.

¹¹² Marc Kaufman, *Laos Accused of Seizing a Top Refugee-U.S. Should not Support Repatriation, Lawmaker Says*, PHILA. INQUIRER, Nov. 18, 1994, at A3.

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Kaufman, *supra* note 12.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Kaufman, *supra* note 1, at A2.

¹²¹ Kaufman, *supra* note 68, at A3.

Officials from the United States and the UNHCR say that they will use forcible repatriation if necessary, which may include methods such as handcuffs, chains, and tear gas, which were the methods used by Hong Kong authorities when they faced a similar situation with Vietnamese refugees.¹²² These officials claim that the Hmong are trying to stir up trouble at the urging of Vang Pao, and that the refugees do not want to leave the camps since life for them there is relatively easy.¹²³

The Hmong tell a different version of the story. They accuse the Thai government of forcing refugees to sign agreements at gun point.¹²⁴ They also point to the disappearance of Vue Mai and deny that they are willing to go back to Laos.¹²⁵

Upon return to Laos, the UNHCR has promised that each person would receive financial aid of 3000 baht and that each family would be given fifteen rai (two hectares) of land.¹²⁶ UNHCR officials also deny that any abuse is being inflicted on the refugees upon their return.¹²⁷ The Laotian government is in charge of finding areas for the refugees to repatriate.¹²⁸ They have repatriated the Hmong to various regions in smaller settlements rather than returning them to their former homeland or keeping them together as a group.¹²⁹ The Laotian government cites environmental reasons for not allowing the Hmong to return to their ancestral sites, since their slash-and-burn farming is destructive.¹³⁰ However, a possible political reason for keeping the Hmong separated would be to keep them under greater control, since there is still ongoing resistance.¹³¹

The Hmong say that it is not safe to return to their former homeland.¹³² Pobzeb Vang, the chairman of the Lao Human Rights Council, testified in April, 1994 that those Hmong that have returned to Laos in the 1990s have faced persecution and even death upon their re-

¹²² See Kaufman, *supra* note 1, at A2.

¹²³ Kaufman, *supra* note 12.

¹²⁴ *Id.*

¹²⁵ See Kaufman, *supra* note 11, at C5.

¹²⁶ *Hmong Refugees Begin Journey Home*, BANGKOK POST, June 30, 1994, available in WESTLAW, INT-NEWS File.

¹²⁷ Kaufman, *supra* note 68, at A3.

¹²⁸ See *Laotian Refugees to be Returned in Phases*, BANGKOK POST, July 28, 1994, available in WESTLAW, INT-NEWS File.

¹²⁹ Kaufman, *supra* note 12.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See generally Marc Kaufman, *A Friendly People's Republic-Laos' Dour Communist Regime Is Only Beginning to Seek Western Visitors*, PHILA. INQUIRER, Dec. 11, 1994, at T1.

turn.¹³³ The Hmong fear returning to Laos since it is not an open country which would make it difficult for others to monitor their safety.¹³⁴ Other outside observers are critical of the agreement to return the Hmong to Laos.¹³⁵ Representative Pat Schroeder was concerned because of the "well-documented cases of mandatory repatriation of Hmong to Laos and gross violations of human rights by the Laotian government, which has closed Laos to all monitoring by independent human rights organizations."¹³⁶ The United States is trying to improve relations with its neighbors in Southeast Asia because of the allure of larger markets and raw materials.¹³⁷

The situation of the Hmong was taken up again by the United States government in the summer of 1995.¹³⁸ The United States House of Representatives passed a bill which would make Laotian or Vietnamese Hmong priority groups in immigration quotas.¹³⁹ This bill would appropriate \$30 million for their resettlement.¹⁴⁰ The measure has foreign officials concerned, since it may lead to a new wave of refugees.¹⁴¹ However, the bill is still before the Senate.

III. LEGAL CLAIMS OF THE HMONG

A. *Claims in United States Courts*

Many scholars perceive a responsibility on the part of the United States to assist the Hmong.¹⁴² This is evidenced by the efforts that are still taking place in the United States.¹⁴³ The United States continues to attempt to rectify the refugee situation of the Hmong.¹⁴⁴ These

¹³³ Kaufman, *supra* note 3, at A7.

¹³⁴ Kaufman, *supra* note 12.

¹³⁵ See generally BANGKOK POST, *supra* note 9.

¹³⁶ *Id.*

¹³⁷ See Kaufman, *supra* note 12.

¹³⁸ 7/18/95 Cong. Q. Wkly. Rep. 2074 available in WESTLAW, CONGQTWR File.

¹³⁹ *Hong Kong's Camp of Tears*, ECONOMIST, May 27, 1995, available in WESTLAW, INT-NEWS File.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Refugee Committee Urges Sensitivity in Handling Remaining Indochinese Asylum Seekers in Thailand*, PR. NEWSWIRE, Mar. 29, 1995, available in WESTLAW, INT-NEWS File; Hiram Ruiz, *The Hmong Supported Us, Now They Need Our Support*, PHILA. INQUIRER, Apr. 23, 1994, at A9.

¹⁴³ Patrick Jasperse, *House Backs Bill to Open Up U.S. to More Refugees*, MILWAUKEE JOURNAL SENTINEL, May 25, 1995, at 3A. Rep. Steve Gunderson stated that this was the most important vote in Congress since the authorization of military force in the Persian Gulf, and that this would prevent torture and eventual death of these people. *Id.*

¹⁴⁴ See *id.*

however are moral arguments and do not invoke legal obligations. Another scholar stated, "To the extent that a state or society or institution has contributed to the causes of the creation and flow of refugees, there is an obligation to extend relief and refuge to those refugees."¹⁴⁵

It can be argued that the United States is indebted to the Hmong and that debt goes beyond mere moral responsibility.¹⁴⁶ The CIA sought help in its covert war against the communist forces in Laos, and the Hmong were actively recruited.¹⁴⁷ The United States, however, never entered into a formal treaty or agreement with the Hmong. In secret hearings in 1969 before the Senate Foreign Relations Subcommittee, William Sullivan, the former director of American actions in Laos, responded to a question on the continuous supplying of Vang Pao and his army to fight the communists.¹⁴⁸ He testified that there was no formal obligation on the part of the United States to the Hmong.¹⁴⁹ He further stated that it was important to keep the war secret since Kennedy and Khrushchev had come to an "understanding" in Vienna in 1961.¹⁵⁰ This understanding amounted to the Soviets and the United States both ignoring the other's presence in Laos, and thus, according to top officials at the time of the war, the United States had more of a commitment to the Soviet Union than it did with the Hmong.¹⁵¹

The Hmong could claim that they had a "contract" with the United States government. They state that they have been abandoned by the United States, not only when Laos fell to the Communists in 1975, but also now as they are being forced to repatriate against their will.¹⁵² The Department of Health and Human Services found that "assurances were made by U.S. officials to support the Hmong during the war, and to provide them with assistance in the event that Laos was lost to the Communists."¹⁵³ CIA officials also traveled from village to

¹⁴⁵ Charles S. Milligan, *Ethical Aspects of Refugee Issues and U.S. Policy*, in REFUGEE LAW AND POLICY 172 (1989).

¹⁴⁶ See Kaufman, *supra* note 3, at A7. In 1994 Congressional Testimony, the Chairman of the Lao Human Rights Council discussed the refugee problem with the acting director of the State Department Bureau of Refugee Affairs: "There were, however, two points on which the speakers basically agreed: that the United States had a special obligation to the Hmong dating back to the Vietnam War years, but that the obligation was coming to an end." *Id.*

¹⁴⁷ See HAMILTON-MERRITT, *supra* note 2, at 86.

¹⁴⁸ *Id.* at 226-27.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 227.

¹⁵¹ *Id.* at 228.

¹⁵² See Kaufman, *supra* note 11, at C5.

¹⁵³ Robinson, *supra* note 31, at 220, (citing *Hmong Resettlement Study*, Vol. 1, 18).

village stating that the United States would give the Hmong the means to fight and defend their homes.¹⁵⁴ This would most certainly constitute bargained-for consideration. There was no express limit to the time those fighting materials would be provided. After the United States left, tens of thousands of Hmong, including families and clans in Laos, were left without assistance.¹⁵⁵ Many of these people made the trek out of Laos on foot and by boat across the Mekong River.¹⁵⁶

The Hmong, however, had been fighting the Communist aggressors anyway, and the United States seemed only to be supplying them with arms and training.¹⁵⁷ The Hmong would likely have lost the war against the Communist forces without the assistance of the United States.¹⁵⁸ The United States continued to assist the Hmong after the LPDR takeover.¹⁵⁹ The United States assisted in air-evacuating approximately 3,000 Hmong, including General Vang Pao, to safety.¹⁶⁰ The United States also allowed many thousands of Hmong to emigrate.¹⁶¹

The Hmong, though, could hardly have believed that the American obligation to their people would last indefinitely.¹⁶² The United States government was, in fact, only abiding by the terms of the Vientiane Agreement of 1973, when foreign military activity in Laos was banned.¹⁶³

The Hmong also probably lessened the weight of any possible contractual claim that they might have had by continuing to fight the Communists after the United States pulled out in 1975. The low level resistance has been deemed "cruel" and "unnecessary," and General

¹⁵⁴ CASTLE, *supra* note 5, at 38.

¹⁵⁵ See generally HAMILTON-MERRITT, *supra* note 2, at 355-77.

¹⁵⁶ Robinson, *supra* note 31, at 217.

¹⁵⁷ This is demonstrated by the fact that the Hmong resistance continues to fight the Communist Government of Laos even until today, even without the support of other countries. See, e.g., *Ministry Rejects Call to Stop Repatriation*, BANGKOK POST, May 19, 1995, at 2, available in WESTLAW, INT-NEWS File.

¹⁵⁸ See CASTLE, *supra* note 5, at 110. By 1968, the Hmong had begun to fight conventional actions against North Vietnamese forces, which devastated the Hmong. The casualties forced Vang Pao to recruit thirteen- and fourteen-year olds. *Id.*

¹⁵⁹ See Robinson, *supra* note 31, at 217, 223.

¹⁶⁰ *Id.* at 217.

¹⁶¹ *Id.* at 223.

¹⁶² See Jasperse, *supra* note 143, at 3A. Representative Toby Roth, in May of 1995, stated that the Vietnam War was twenty years old and that more immigrants from that area should not be brought in to the country. He finds that there is a greater obligation to the taxpayers of the U.S. *Id.*

¹⁶³ CASTLE, *supra* note 5, at 118.

Vang Pao's continued financing and support of the war has been discredited by the United States government.¹⁶⁴

The Hmong could also attempt to bring a claim against the United States for a violation of Article 33 of the 1951 Convention relating to the Status of Refugees, a United Nations Treaty to which the United States is a signatory.¹⁶⁵ To press a claim against the United States, the Hmong would have to establish that they were members of a protected class, that they had standing to sue in United States courts, and that by funding the forced repatriation, the United States was forcing the Hmong to return to a country where they had a genuine fear of persecution.¹⁶⁶ As defined by the convention, a refugee is 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. . . , is unable or, owing to such fear, is unwilling to return to it.¹⁶⁷

Thus, in order for the Hmong to be established as refugees under the convention, it must be found that they have a legitimate fear of persecution because of their ethnicity in Laos.¹⁶⁸

The United States has a specific standard for granting refugee status, that of "well-founded fear of persecution."¹⁶⁹ The standard is the same in the Convention as it is in the Immigration and Nationality Act (INA).¹⁷⁰ This standard of well-founded fear involves both a subjective and an objective part.¹⁷¹ One must not only have the subjective fear of persecution, but this fear must also be grounded in objective reality; there must be facts that demonstrate that persecution may occur.¹⁷² These facts need not, however, demonstrate a greater than 50% chance

¹⁶⁴ Kaufman, *supra* note 11, at C5.

¹⁶⁵ *Convention relating to the Status of Refugees*, reprinted in UNITED NATIONS PUBLICATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 294 (1988).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at art. 1, ¶ A(2).

¹⁶⁸ *Id.*

¹⁶⁹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

¹⁷⁰ See *Carcamo-Flores v. INS*, 805 F.2d 60, 62 (2nd Cir. 1986); Immigration and Nationality Act of 1952, 8 U.S.C.S. §§ 1101 et seq.

¹⁷¹ *Id.*

¹⁷² *Cardoza-Fonseca*, 480 U.S. at 430.

of persecution.¹⁷³ Taking for granted that the Hmong, as a group, have a subjective fear of persecution, the Hmong would still have to show facts that support the likelihood that they may be persecuted.¹⁷⁴

In *Garcia-Ramos v. I.N.S.*, a person who, as a member of an anti-governmental organization, participated in public demonstrations, planted fake bombs, acted as an armed guard to hunger strikers, and distributed political propaganda was found to have satisfied the standard of well-founded fear of persecution.¹⁷⁵ However, in *Gutierrez-Rogue v. I.N.S.*, the court found that the moving party had not made out a reasonable fear of persecution.¹⁷⁶ This woman lived in Nicaragua and her husband was a Contra.¹⁷⁷ She had been forced to spend a year in Cuba teaching and studying Marxism, had her food rationing card taken away, had death threats made against her, and was threatened to be forced to dig trenches for the government.¹⁷⁸ However, her claim was defeated since she did not make a sufficient showing of a well-founded fear of persecution because the Sandinistas, the persecuting group, no longer held power.¹⁷⁹ A group or a person, in order to show a well-founded fear of persecution, must have taken active steps against the persecuting group.¹⁸⁰

The Hmong, as a group, seem to have suffered the persecution that would be required for a group to qualify for refugee status.¹⁸¹ They have fought an on-going rebellion against the LPDR since the party took power in 1975. They have been singled out by the LPDR as a group for extermination because of their activities.¹⁸² The disappearance of Vue Mai upon his return to Laos also tends to justify the fear that the Hmong have of persecution upon their return.¹⁸³ Finally, the lack of openness of the Laotian government also fosters real fear in the Hmong of returning to Laos.¹⁸⁴

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ 775 F.2d 1370, 1374 (9th Cir. 1985).

¹⁷⁶ 954 F.2d 769, 771 (D.C. Cir. 1992).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 772.

¹⁸⁰ *See id.*

¹⁸¹ *See generally* HAMILTON-MERRITT, *supra* note 2, at 337-51.

¹⁸² *Id.* at 528. In 1975, the LPDR, on its own official radio, stated that it intended to "wipe out" the Hmong and asked others to join the goal. *Id.*

¹⁸³ *See* Kaufman, *supra* note 112, at A3. Rep. Benjamin A. Gilman claims that he has information that Vue Mai was abducted by "Unit 53, an LPDR undercover police unit trained by the Vietnamese. *Id.*

¹⁸⁴ *See generally* Kaufman, *supra* note 98, at A1.

Despite the fact that they were singled out as a group when the LPDR first gained power, UNHCR and United States officials state that the Hmong have not presented substantial concrete evidence of persecution upon re-entering Laos.¹⁸⁵ Furthermore, the Laotian government has denied any disparate treatment among the people who return to their country.¹⁸⁶ Laos could attempt to justify this treatment as a way for the new government to secure political power. Laos has attempted to improve relations with the rest of the world, and they could argue that the ruling government does not wish to cause harm to the Hmong, as this would jeopardize their standing internationally. The Hmong make allegations that they are treated differently upon their return to Laos, but this could be seen as self-serving, since they do not, as a group, wish to return to Laos until the strict regime no longer controls.¹⁸⁷ The major powers involved, especially the UNHCR, deny the problems that the Hmong allege upon returning to Laos.¹⁸⁸ Further, allegations of responsibility for the disappearance of Vue Mai have been leveled not only against the Laotian government, but also against the Hmong.¹⁸⁹ The Hmong resistance would clearly have the most to gain by the disappearance of this leader.¹⁹⁰ The disappearance increases international attention to their plight which could cause major powers involved to take a second look at the process of repatriation.¹⁹¹

In light of all the facts involved in their plight, it is probable that the Hmong would be considered to be refugees under the Convention, or at least under the United States definition of refugee.¹⁹² They have a reasonable fear of persecution in Laos. The Hmong in Thailand,

¹⁸⁵ See Kaufman, *supra* note 3, at A7. Probzeb Vang, the chairman of the Lao Human Rights Council, claims to have information that Hmong who have been returned to Laos have faced persecution and even death, but the State Department and the United Nations deny that there is any abuse occurring at all. *Id.* But see Hamilton-Merritt, *Sanctuary for the Hmong*, WASH. POST, Apr. 25, 1994, at A17. Tens of thousands of Hmong have fled camps in fear of repatriation. One Hmong, living in the United States, received a phone call from relatives in Thailand, alleging forced repatriation. *Id.*

¹⁸⁶ See BANGKOK POST, *supra* note 9.

¹⁸⁷ See, e.g., *Hmong Repatriation to Laos, 1994: Hearings Before the Subcomm. on Asian Pacific Affairs*, (statement of Pa Kao Her, President of the Democratic Chao Fa Party of Laos), available in WESTLAW, USTESTIMONY File; *Hmong Man Fights to Save Brother from Repatriation*, MILWAUKEE J., Mar. 13, 1995, available in WESTLAW, NPMJ File.

¹⁸⁸ See Kaufman, *supra* note 3, at A7.

¹⁸⁹ Kaufman, *supra* note 98, at A1. Lao and State Department officials claim the Hmong are the likely abductors of Vue Mai. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² See *Cardoza-Fonseca*, 480 U.S. at 430-31.

especially those that fought in the war, are fleeing from a government that has persecuted them, and is still unwilling to allow other outside organizations to watch over the Hmong upon their return.

If the Hmong in Thailand qualify for refugee status, which the Thai government frequently denies, labeling most border-crossers illegal immigrants rather than refugees, they would still likely fit the United States definition of refugee. However, to win a claim against the United States government, the Hmong would still have to establish a violation of Article 33 of the 1951 Refugee Convention.¹⁹³

Article 33 reads: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁹⁴ Assuming Laos to be a place where Hmong life would be threatened, this Article would deny to any signatories the right to send a Hmong refugee back to Laos.¹⁹⁵ This concept of *nonrefoulement* has a specific legal meaning.¹⁹⁶ Some scholars state that this principle is independent of any legal refugee status, and that a state which returns foreign nationals to a country with a poor record of human rights abuses has the burden of justifying its actions in light of the conditions in the country of origin.¹⁹⁷ This principle, however, does not entail any particular solution such as asylum, admission, or residence.¹⁹⁸ The only binding obligation upon a signatory is to refrain from sending a refugee to a country where his life or freedom may be threatened.¹⁹⁹

The United States has accepted Article 33 of this Convention, and therefore, the obligations extend to actions of the United States.²⁰⁰ In order to be held to the standards of the Convention, though, the

¹⁹³ HUMAN RIGHTS COMPILATION, *supra* note 165, at 306, art. 33, ¶ 1.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 21 (1989). Non-refoulement is a prohibition on a state from sending a refugee to a country where he risks persecution. This encompasses rejection at the frontier, expulsion or extradition. *Id.* But see *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549, 2564 (1993) (refouler refers only to an alien already within a territory).

¹⁹⁷ GUY S. GOODWIN-GILL, *Nonrefoulement and the New Asylum Seekers*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 103, 105 (David A. Martin ed., 1988).

¹⁹⁸ *Id.* at 106.

¹⁹⁹ *Id.*

²⁰⁰ Gil Loescher & Ann Dull Loescher, THE GLOBAL REFUGEE CRISIS 90 (1994). The United States is a signatory to the 1967 Protocol Relating to the Status of Refugees, which incorporates Article 33 of the 1951 Convention. HUMAN RIGHTS COMPILATION, *supra* note 165, at 311.

United States itself must be returning the refugees, and the United States could deny the allegations, claiming no responsibility. The UNHCR and Thailand signed the agreement to return the Hmong to Laos with the United States not being a direct participant.²⁰¹ The United States is merely providing financial support to the process.²⁰² However, the Hmong could press their claim by alleging that, by providing financial support, the United States is constructively returning the refugees. This would be a novel approach on an international level.

Even if the aforementioned situation existed, that is, the Hmong were refugees in the legal sense of the term, they had a well-founded fear of persecution, and that the United States was, in effect, returning them through the funding of involuntary repatriation, the Hmong would face the additional hurdle of having standing to sue in the United States, without which they probably could not even obtain a judgment.²⁰³ Since the Hmong are not on United States soil, and they are not citizens or resident aliens, they would not have the protection of the United States Constitution.²⁰⁴ However, in *Haitian Refugee Center, Inc. v. Gracey*, a nonprofit membership corporation, which sole purpose was to promote the well being of Haitian Refugees through various programs and activities, including legal representation, had standing based upon its own interests in providing counseling to bring action in federal court to challenge the interdiction of visa-less aliens on the high seas.²⁰⁵ The Hmong could perhaps set up a similar organization.

A challenge recently came before the Supreme Court which, in many respects, could be similar to a claim that the Hmong could make out against the United States government.²⁰⁶ In a 1993 decision, *Sale v. Haitian Centers Council, Inc.*, various organizations, including Haitian aliens brought suit against the United States government to enjoin it from returning interdicted aliens to Haiti²⁰⁷ under two statutes: Article 33 of the 1951 Refugee Convention, and § 243(h)(1) of the INA.²⁰⁸ The court found that § 243(h)(1) did not apply to actions of

²⁰¹ Kaufman, *supra* note 12.

²⁰² Ruiz, *supra* note 142, at A9.

²⁰³ See *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1422-23 (11 Cir. 1995).

²⁰⁴ *Id.* at 1428, 1429. In this case, Cuban refugees who were on a United States base in Cuba were found not to have due process, equal protection, or First Amendment rights under the United States Constitution. *Id.*

²⁰⁵ 600 F. Supp. 1396, 1402 (D.D.C. 1985).

²⁰⁶ *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 2551.

the United States outside its own borders.²⁰⁹ The court found that the language of this act applied solely to procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States.²¹⁰ In that case, an Executive Order directing the Coast Guard to intercept vessels outside the territorial waters of the United States which were illegally transporting passengers from Haiti to the United States without first determining whether the people qualified as refugees, was challenged.²¹¹ Section 243(h)(1) provides that “[t]he Attorney General shall not deport or return any alien. . .to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country. . . .”²¹² The District Court made an uncontested finding that “hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding.”²¹³

The Court also examined the Haitian claim under Article 33 of the 1951 Refugee Convention.²¹⁴ The Court looked to the plain language of the article and found that the French term “refouler” is not an exact synonym for the word return; rather they found that the term should be translated more along the lines of “repulse” or “expel.”²¹⁵ Thus, the Court found that *refouler* means “. . .a defensive act at the border rather than an act of transporting someone to a particular destination,” and therefore the Article (and the subsequent 1967 Protocol relating to the Status of Refugees) was not intended to govern parties’ conduct outside of their national borders.²¹⁶

In light of this recent decision of the Supreme Court, the Hmong would have a limited chance of winning their claim against the United States government in a United States court for funding the repatriation.²¹⁷ Even if there was clear and convincing evidence that Hmong

²⁰⁹ *Id.* at 2562.

²¹⁰ *Sale*, 113 S.Ct. at 2562.

²¹¹ *Id.* at 2550.

²¹² 8 U.S.C. §1253(h).

²¹³ 113 S.Ct. at 2554.

²¹⁴ *Id.* at 2564.

²¹⁵ *Id.*

²¹⁶ *Id.* at 2564–65. However, in a powerful dissent, Justice Blackmun found fault with various parts of the majority decision. He first determined that the Refugee Act of 1980 was meant to conform with Article 33. He then stated that the language of Article 33 was unambiguous and that vulnerable refugees should not be returned. *Id.* at 2568. He found no geographical limitations to Article 33. *Id.* at 2570. Finally, he found the same to be true for §243(h). *Id.* at 2573.

²¹⁷ *See Sale*, 113 S.Ct. at 2562; Cuban American Bar Ass’n, 43 F.3d at 1428–29.

were being subjected to persecution upon their return, the Supreme Court requires the United States to be acting within its own territory, and the fact that the Hmong are being expelled from Thailand would seem to be a bar to their claim.²¹⁸

Even if the Hmong could convince the United States courts of the legitimacy of its claim, there is a strong possibility that the judiciary would refuse to overrule the Executive Branch.²¹⁹ This type of case brings up Constitutional claims of the legitimacy of the Supreme Court, and the proper role of separation of powers.²²⁰ Often, the judiciary is extremely deferential to the will of the Executive Branch in matters of foreign affairs,²²¹ which is the situation here. Also, the government is willing and perhaps anxious to hide the scars of a long-lasting, costly war.²²² However, in *Committee of United States Citizens Living in Nicaragua v. Reagan*, a group of United States citizens brought suit against their government to stop the funding of the Contras in Nicaragua, and the court refused to apply a blanket use of the political question doctrine.²²³ No violations were found since United States statutory law supersedes any applicable international law.²²⁴

The Hmong could also try to press a claim against the United States for a violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²²⁵ Article 3 reads very much like Article 33 of the 1951 Refugee Convention. It states:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the ex-

²¹⁸ BANGKOK POST, *supra* note 128.

²¹⁹ 13A FED. PRAC. & PROC. JURIS.2d § 3534. Questions which are, by their nature political or submitted to the executive branch, cannot be decided by the judiciary. *Id.*

²²⁰ *See id.*

²²¹ *See, e.g.,* Banco Nacional De Cuba v. Sabbatino, Receiver, 376 U.S. 398 (1964).

²²² *See* Kaufman, *supra* note 12.

²²³ 859 F.2d 929, 934 (D.C. Cir. 1988); *see* 13A FED. PRAC. & PROC. JURIS.2d § 3534 (political question is one which the executive, or its officers, perform duties in which they have a discretion). *Id.*

²²⁴ 859 F.2d at 938-39.

²²⁵ HUMAN RIGHTS COMPILATION, *supra* note 165, 212, art. 3.

istence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.²²⁶

This article explicitly demands that the proper authorities look at the past abuses of the country.²²⁷ However, the Hmong would need to overcome much the same problems they would have with Article 33. The United States government denies continuing abuses by the Laotian government, and has been willing to assist the Thai and the Laotian governments in solving the Hmong refugee problem.²²⁸ However, the Hmong fear returning to Laos, since they have been openly persecuted there for many years.²²⁹ They then run into the same problem of proving a substantial risk of torture upon return.

Even if the Hmong could win a suit against the United States in the United States courts on violations of UN treaties, a durable solution would be difficult for the court to fashion. At best, the government could be enjoined from providing assistance to the repatriation of the Hmong. Discretion to allow refugees into the United States lies in the hands of the Attorney General, who is not required to accept new refugees.²³⁰ The problems of the Hmong, in the words of Judge Edwards, quoted in the *Sale* case, seem to “. . . present[] a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy.”²³¹

B. *Other Claims of the Hmong*

The quote by Judge Edwards, while relevant for the claims of the Hmong in United States courts, is even more valid internationally. The Hmong could attempt to pursue a claim against the United States in the International Court of Justice (ICJ). However, the United States unilaterally withdrew from the ICJ's jurisdiction during the Nicaraguan crisis in the Reagan years.²³² For the Hmong to challenge the United

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Hamilton-Merritt, *supra* note 185, at A17.

²²⁹ See generally HAMILTON-MERRITT, *supra* note 2, at 337-51.

²³⁰ INA, § 208(a).

²³¹ *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549, 2567 (1993) (quoting Judge Edwards' concurring opinion in *Haitian Refugee Center v. Gracey*, 809 F.2d at 841).

²³² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 I.C.J. 392 (Nov. 26).

States in the ICJ, the United States would have to submit to the ICJ's jurisdiction.²³³ The United States would probably refuse to do so rather than cede any authority over their foreign affairs to an international body.

Even if the United States did assent to jurisdiction of the ICJ, the Hmong would still have a further obstacle, since, under international law, the claim of the citizen is the claim of the state.²³⁴ Stated another way, an individual does not have standing in the international court.²³⁵ In this case, all of the relevant governments, the United States, Laos, and Thailand, have all supported the repatriation of the Thai refugees.²³⁶ It would be highly unlikely that a government would press a claim against its interests. The Laotian Government is interested in increasing their stature internationally to attract foreign investment, so they are willing to accept the refugees back.²³⁷ The lack of individual standing prevents claims not only against the United States, but also against Thailand and Laos as well.²³⁸ Perhaps an international organization could take up the claim, but with the UNHCR leading the way in the repatriation of the Hmong, this also seems highly unlikely.

The Hmong could attempt to have their claims entertained in the courts of Thailand. These claims, however, would also be unlikely to succeed. Since the initial influx of aliens, the Thai Government has consistently considered most of the aliens as illegal immigrants and not refugees.²³⁹ The Thai Government does not recognize any abuses taking place on the return of the Hmong.²⁴⁰ Historically, the Thai Government has been placed in a difficult situation. Since the time of the Vietnam War, their land has become the depository of hundreds of thousands of refugees, including the Hmong.²⁴¹ These refugees have fled their lands for a variety of reasons: some have fled because of persecution, others because of economic difficulties, and others because of fear of war.²⁴² The Thai Government has accepted these refugees at great cost to its own country. It is understandable to see that the Thai

²³³ *See id.*

²³⁴ OPPENHEIM'S INTERNATIONAL LAW 846-47 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992) (hereinafter OPPENHEIM); *see, e.g.*, *Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 1970 I.C.J. 3 (Belgium takes on the claim of its citizens).

²³⁵ *Id.*

²³⁶ *See Kaufman, supra* note 68, at A3.

²³⁷ *See generally Kaufman, supra* note 12.

²³⁸ *See OPPENHEIM, supra* note 234, at 846-47.

²³⁹ Robinson, *supra* note 31, at 219.

²⁴⁰ *See NSC Urges UNHCR To Speed Up Repatriation*, BANGKOK POST, May 7, 1994, available in WESTLAW, INT-NEWS File. The NSC deputy secretary of Thailand stated, "Those who have returned (to Laos) have resettled and are well looked after by the Laotian Government." *Id.*

²⁴¹ *See Robinson, supra* note 31, at 236-37.

²⁴² *See id.* at 221-24.

Government wants to find a durable solution, not only to the plight of the Hmong, but also for the thousands of other refugees that have or are inhabiting their land.²⁴³

The Hmong would also have difficulties winning a claim in the international courts against Thailand. If they could overcome the problem of the claim being taken up by some national body, they would face an additional problem: Thailand is also not a signatory to the 1951 Refugee Convention.²⁴⁴ Thus, the standards and obligations of that Convention do not apply to Thailand, unless it could be successfully argued that the 1951 Refugee Convention has become a matter of customary international law, which some of the European courts have accepted.²⁴⁵ However, there is a variety of opinions regarding the rights of refugees and interpretations of the Convention (and subsequent Protocol).²⁴⁶ This would impede any possible claim that the Convention is a matter of customary international law. Also, any claim against the Thai Government would likely result in Thai officials speeding up the process of repatriation.

If the Hmong were to attempt to win a suit against Laos, they would have a nearly impossible time once again, as they would be confronted with the difficulty of having an international organization or a national body pick up their claim. As long as Laos stays clear of violations of international agreements or customary international law, or as long as no foreign power is willing to challenge them, they have the right to control within their own borders. It appears increasingly likely that no foreign power would be willing to challenge the Laotian Government in light of the difficulties that the UN is currently facing in sorting the ethnic difficulties in the former Yugoslavia.²⁴⁷ The continued low-level resistance by Hmong may also become a mitigating factor in any international decision.²⁴⁸

²⁴³ See *id.*

²⁴⁴ THE GLOBAL REFUGEE CRISIS, *supra* note 200, at 91.

²⁴⁵ Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in THE NEW ASYLUM SEEKERS 140-41 (1988) (stating that the Swiss and German courts have used customary international law principles in other areas of nonrefoulement).

²⁴⁶ See *generally id.*, at 123-58.

²⁴⁷ See Christian J. Garris, Note, *Bosnia and the Limitations of International Law*, 34 SANTA CLARA L. REV. 1039 (1994).

²⁴⁸ See Kaufman, *supra* note 98, at A1. See also Keith Richburg, *Insurgency in Laos Seeking to Emerge from Anonymity; Recent Upsurge in Jungle Fighting Reported*, WASH. POST, Feb. 11, 1990 at A27 (reporting one of the escalations in fighting of the Hmong against the Communist Government); SOUTH CHINA MORNING POST, *supra* note 96 (stating that Hmong rebels living in a temple in Thailand are staging raids against the Laotian Government).

The Hmong could also attempt to press claims of genocide against the Laotian Government if they could get an international body to pick up their claim. However, there are complicating factors. First, the "yellow rain" charges have been denied, and scientists have offered other explanations for this experience, which, to some degree, have been accepted.²⁴⁹ The Hmong, though, state that they would have access to credible evidence that the poison bombing occurred.²⁵⁰ When this evidence is combined with the official stance of the Laotian Government in 1975,²⁵¹ a government which made an effort to exterminate the Hmong, the evidence on their side may be found compelling. Hurdles, however, would still remain in their way. By the time an international claim of genocide would be litigated, the Hmong most likely will have been returned to Laos, since the repatriation process has sped up. Any claim against the Laotian Government may, in fact, weaken their position upon their return, since there is no adequate international body to watch for and prevent abuse of the Hmong.²⁵² There have been no prosecutions of genocide in the ICJ, although the ICJ has attempted to set up a tribunal to prosecute war crimes in the former Yugoslavia.²⁵³ The Hmong could, however, attempt to have their claims on genocide heard in the United States.²⁵⁴ In *Kadic v. Karadzic*, a United States Circuit Court decided that aliens can sue under the Alien Tort Act, 28 U.S.C. § 1350 (1988), for crimes in violation of the law of nations, against the parties responsible.²⁵⁵ There is jurisdiction if the party is served on United States soil, and it includes the crime of genocide.²⁵⁶

²⁴⁹ HAMILTON-MERRITT, *supra* note 2, at 454–60.

²⁵⁰ *Id.* at 435.

²⁵¹ See FORCED BACK AND FORGOTTEN, *supra* note 50, at 7–8.

²⁵² *Hmong Repatriation to Laos, 1994: Hearing Before the Asian and Pacific Affairs Subcomm.* (statement of Paul Pao Herr, Treasurer, Hmong National Development, Inc.), Apr. 26, 1994, available in WESTLAW, USTESTIMONY File.

²⁵³ *Bosnia and Herzegovina v. Yugoslavia*, 1993 I.C.J. 3; see *Righting Wrongs*, Comment, SOLICITORS JOURNAL, July 8, 1994 at 679 (praising the set up of the tribunal and advocating the use of bar associations to collect evidence for that tribunal); see also Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994) (proposing alternate military forums for punishing offenses against the law of nations).

²⁵⁴ *S. Kadic v. Radovan Karadzic*, Nos. 94–9035, 94–9069, 1995 U.S. App. LEXIS 28826 at *3 (2d Cir. Oct. 13, 1995).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

IV. OTHER SOLUTIONS FOR THE HMONG AND CONCLUSION

The Hmong, despite the shortcomings of their legal claims, should still attempt to gain for themselves a measure of safety. They have no leverage to exploit. The Hmong have no power now, either in Thailand or in Laos, and no alliance with the United States. The international community has overlooked past abuses of these people in order to attempt to find a durable solution for the Hmong.²⁵⁷ The Hmong are the only group that has not been consulted in any solution process.²⁵⁸

The Hmong need to build a power base in the international community. This may be a challenge at present with the eyes of the world focused on the difficulties in the former Yugoslavia. However, pressing their claims against the various bodies may give them a greater standing internationally. Even though the legal arguments may be weak or precluded by various procedural rules, the process of bringing the claims may, in fact, lead to more attention internationally. The Hmong cause has hitherto been obscure. The Hmong in the United States should continue to try to bring attention to their kinsmen in Thailand. If possible, the Hmong should try to wage a media campaign against the funding of the repatriation process in Thailand.²⁵⁹

The Hmong in the United States could also continue to petition Congress to aid the Hmong refugees. Laos wishes to become a more significant player in the international market.²⁶⁰ The United States could use this as leverage to assure that the Hmong are not persecuted. One writer has suggested several possibilities to increase Congressional pressure on Laos.²⁶¹ He suggests that the Congress could press the UN or the Thai Government to carry out a further review of the cases of those that insist that they have been unfairly denied refugee status.²⁶² Congress can also ensure that those that qualify for resettlement status in the United States be given that option, and Congress can pressure the Laotian Government to open its borders and allow investigations of abuse upon return.²⁶³ Whether or not the claims are substantiated, the United States can bring economic pressure. This solution has

²⁵⁷ See HAMILTON-MERRITT, *supra* note 2, at 521-29.

²⁵⁸ See Kaufman, *supra* note 12.

²⁵⁹ See HAMILTON-MERRITT, *supra* note 2, at 506. The Hmong have kept records of possible past human rights abuses. *Id.*

²⁶⁰ See generally Kaufman, *supra* note 12.

²⁶¹ Ruiz, *supra* note 142, at A9

²⁶² *Id.*

²⁶³ *Id.*

begun to succeed at various times, as at one time or another, a Congressman has taken up their cause.²⁶⁴ However, these efforts on the part of a few Congressmen should not be thwarted, either by apathy or the lobbying of business interests.

The Hmong can also turn to more drastic measures. They have been carrying out a low-level resistance against the LPDR since it took over in 1975. Vang Pao has been receiving contributions to continue a resistance in Laos since he left in 1975.²⁶⁵ Perhaps, if the Hmong stepped up their attacks at this crucial juncture, they would receive more international attention. However, this effort could backfire, since it could seem to the international community that the Hmong are the only hindrance to a working solution to the refugee problem in Southeast Asia, and this would turn sentiment against them. The Hmong most certainly do not want to turn the world opinion against their cause, since this would only have the possible effect of speeding up their repatriation.

The United States must also accept its moral responsibility. Over the last two decades, Thailand has accepted the refugee problem within its borders. The United States has taken a first step in this direction, since the House has passed a bill making Hmong refugees a priority.²⁶⁶ Also, the Hmong must be willing to accept a final solution to their crisis, since they cannot remain in the refugee camps forever.

The Hmong are refugees from a country which has called for the complete destruction of their people. However, many of these abuses occurred quite some time ago, and all countries involved at the time seem to want to resolve old problems. The repatriation of the Hmong has taken on a momentum of its own, and it is difficult to stop the progress. The Hmong, through various legal and non-legal methods, could attempt to provide for themselves a measure of security by attracting the attention of the international community. If more people were aware of their plight, the Hmong would be much less likely to be abused upon any return to Laos. The Hmong, however, face many difficult challenges, and they once again may be called upon to face the hard road.

²⁶⁴ See Kaufman, *supra* note 112, at A3; BANGKOK POST, *supra* note 9; see also Jasperse, *supra* note 143.

²⁶⁵ Richburg, *supra* note 248, at A27.

²⁶⁶ See Jasperse, *supra* note 143, at 3A.