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What are the Conditions for Successful Refugee Return?

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Introduction

What Are the Conditions for Successful Refugee Return?

Alan Simmons

Creating conditions under which refugees may safely and voluntarily return home is among the most pressing issues facing the international community. A large and rapidly growing body of literature is available on the topic. It reveals that a great deal of thought and effort has gone toward establishing the principles and procedures for successful outcomes. Yet the papers in this issue confirm that much remains to be learned and tested. Many refugee-return programs fall far short of hopes, while others succeed in certain respects only. These mixed and often disappointing findings are perhaps not surprising. In virtually all cases, efforts to organize a successful refugee return face enormous challenges.

Peaceful, voluntary refugee return depends first on correcting the persecution or ending the bloody conflict that produced the refugee flows. After general persecution and violence have ended and democracy and peace have been restored, refugee return will be faster, more complete, and more lasting if those going back to their country of citizanship can be provided with safeguards for their personal security as well as access to housing, jobs, and resources for repairing their communities. Many other supports and conditions may be necessary, if one defines *success* to include the eventual full participation of the returnees in national social, economic, and political life, and their active engagement in quest of solutions to national problems.

The six leading papers in this issue of *Refuge* present new information and emerging perspectives on the conditions required for successful refugee return. The findings are based on specific studies of efforts by international organizations, governments, and non-governmental organizations to establish conditions for peaceful, voluntary refugee return and resettlement. These studies focus particularly on the conditions for successful return in situations where human rights and peace have been restored sufficiently that the refugee-return projects are able to address the following specific questions: Can the returnees be guaranteed housing? Can their properties be given back to them? Will returning farmers have access to land? How will they know that any guarantees of land will be implemented? Will they have the resources and conditions to develop their own organizations and/or to participate fully in other organizations involved with solving the problems that they and the wider community face?

The collection of studies begins with a report by Bret Thiele on recent United Nations efforts to establish an international accord on the housing and property rights for returnees. This paper is followed by four in-depth examinations of how such efforts have been pursued in particular cases. Lene Madsen assesses housing and property rights among returnees to Bosnia. Paula Worby and Galit Wolfensohn, in separate papers with different specific concerns, examine access to land among Guatemalan returnees, including those who formed part of the organized return from Mexico and those who were not part of this organized return but pressed to be included in provisions of the accord covering access to land. Alison Crosby evaluates the resources and organizational "space" available to returnee women, also basing her analysis on the Guatemalan case. The leading section concludes with the examination, by K. C. Saha, of the role of the United Nations and the international community in establishing the criteria for the return of Rohingya refugees from Bangladesh to Myanmar.

This study highlights the importance of the international community in establishing standards and supporting the return process, even in cases where the national governments involved (Myanmar and Bangladesh) have never signed the UN Convention on the Status of Refugees.

These studies confirm that the most positive forces for successful refugee return are concentrated initially at the international level (largely through the United Nations) and at the local, non-governmental level. Governments responsible for implementing standards and accords therefore find themselves sandwiched between similar pressures from above and from below. This does not mean that national governments are able or willing to act fully in accord with these pressures. The following three specific problems may seriously limit their responses to progressive proposals.

First, the places to which the refugees are to return are often economically depressed and short of resources following the war, violence, and destruction. There is often a desperate lack of housing, given that much of the stock of previously existing housing has been destroyed. Returnees may find that their former properties, if they are still intact, have been taken over by others (widows, those disabled by the war, etc.) whose needs must also be addressed in any just solution. Land for farmers may have been scarce to begin with, and the lack of non-farm work may make it very difficult to accommodate the needs of local farmers (some now farming lands owned by the refugees) and the returnees. National governments in the countries to which the refugees are returning often lack the resources to address such problems.

Second, the international community generally and the United Nations specifically may be committed to a search for justice in facilitating refugee return, but they may not be prepared to provide the financial resources that would ensure that housing and employment are available for the returnees and for others whose needs must be accommodated in order to ensure justice.

Third, even when foreign governments and the national government have agreed on the provision of resources necessary for reconstruction and purchase of land in the communities to which the returnees are to locate, local and national political realities may lead to highly variable and uncertain outcomes. These outcomes include broken promises and the exclusion of some returnees from benefits that are given to others. They reflect diverse "realities" of post-war and post-repression politics. Many of the attitudes that led to conflict, violence, and repression associated with refugee flight remain imbedded in local and national political structures after peace and democracy have been officially proclaimed. The result is resistance and foot-dragging by state officials when it comes to supporting the returnees.

In sum, these studies provide new data and findings suggesting additional steps that may be taken to increase the success of refugee return programs. Following a peace accord, the international community needs to do more to ensure that resources are available for economic recovery and just solutions to housing, property, and land-access problems for both refugees and for others living in the return communities. Efforts must also be pursued to strengthen civil society organizations that are oriented to local negotiation of conflict and to local solidarity. Only in this way will a new national political agenda arise to overcome biases, injustices, and inequalities that block full success in refugee return. Arguments such as these need to be evaluated in new studies undertaken when such positive steps have been adopted. Despite much effort and some progress in refugee return programs, considerably more remains to be learned through the promotion and evaluation of programs that go beyond those that are found in the cases examined in this publication.

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Recent Developments in United Nations Policy on Housing and Property Restitution for Refugee Return

Bret Thiele

Abstract

This article reviews recent developments at the United Nations on housing and property restitution for the return of refugees and Internally Displaced Persons (IDPs). In August 1998 the UN Sub-Commission on the Promotion and Protection of Human Rights took an innovative step towards facilitating the voluntary return of refugees and IDPs with the adoption of UN Security Council Resolution 1998/26. A descriptive analysis of that resolution and the subsequent developments at the United Nations are presented. Further, the article advocates and solicits support for continued United Nations developments in this regard.

Résumé

Cet article passe en revue les développements récents aux Nations Unies sur la question du logement et de la restitution de propriétés en ce qui concerne les réfugiés et les déplacés internes (DI). Au mois d'août 1998, la Sous-commission des Nations Unies sur la promotion et la protection des droits de l'homme a adopté la résolution 1998/26 — une initiative toute à fait nouvelle pour faciliter le retour volontaire de réfugiés et de déplacés internes. Sont proposés ici une analyse descriptive de cette résolution ainsi que les développements qui ont eu lieu par la suite aux Nations Unies. En plus, l'article préconise — et lance un appel en ce sens — qu'il y ait des progrès continuels aux Nations Unies à cet égard.

According to the UN High Commissioner for Refugees, there are over 21 million persons currently displaced from their homes and living as refugees or internally displaced persons (IDPs).[1] Many have been languishing in refugee camps or other makeshift accommodations for years.[2] Refugees and IDPs often face indifference from the states in which their homes are located or, worse, are subject to outright hostility. Most of the displaced simply desire to return home in safety and dignity. The international community, however, has thus far been unable or unwilling to make this desire a reality.

The right of refugees and IDPs to return voluntarily has long been recognized as one of the best durable solutions—if not *the* best—for cases of mass displacement.[3] Refugees and IDPs, however, have all too often been denied this right.[4] Without adequate, consistent, and coordinated methods to ensure housing and property restitution, return is simply not possible for many refugees and IDPs.

Fortunately, human rights advocates, including the Centre on Housing Rights and Evictions (COHRE)[5] and Habit International Coalition, have begun to address the problem of housing and property restitution. In response to recent lobbying efforts, the United Nations Sub-Commission on the Promotion and Protection of Human Rights[6] (referred to hereafter as the Sub-Commission) has initiated the development of an international norm for housing and property restitution in the context of the return of refugees and IDPs. Further, the Sub-Commission and several non-governmental organizations (NGOs) have requested that the United Nations Commission on Human Rights

(referred to hereafter as the Commission) also address this problem. It is the hope of a growing number of human rights advocates that this norm will not only change the discourse surrounding refugee and IDP concerns, but have a real impact on the lives of millions of persons forced from their homes.

The Sub-Commission is a subsidiary body of the Commission and consists of twenty-six human rights experts from around the world. A key role of the Sub-Commission is to apply its expertise to relevant human rights issues and to advise the Commission.

The Commission is composed of fifty-three member-governments and has a mandate to set international standards and monitor human rights. In recent years the Commission has reduced efforts to set standards and has turned its attention toward implementation. To this end, the Commission has increasingly addressed the needs of states by providing advisory services and technical assistance.

UN Sub-Commission, 1998

At its fiftieth session, the Sub-Commission took an innovative step towards facilitating the voluntary return home of refugees and IDPs with its adoption on August 26, 1998, of Resolution 1998/26.[7] This resolution was strongly supported by this body of human rights experts and in fact was co-sponsored by over half of the Sub-Commission's members.[8] In the resolution, entitled *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons,* the Sub-Commission reaffirmed the right of all refugees and internally displaced persons to return to their homes and places of habitual residence in their country or place of origin.[9] This is a pressing issue, particularly in countries such as the former Republic of Yugoslavia, Rwanda, and Bhutan, where the right to return has been routinely jeopardized or denied outright due to circumstances that include a lack of government will and international coordination. Though addressing this issue generally, the Sub-Commission's resolution went one important step further by urging all states to ensure the free and fair exercise of the right to return to one's home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative, and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms to resolve outstanding housing and property problems.[10]

This resolution tackles one of the most difficult problems currently facing the UN High Commissioner for Refugees and other organizations trying to achieve the return with dignity of refugees and IDPs to their homes and places of habitual residence.

In another novel step, the resolution addresses the lack of coordinated international methods by inviting the United Nations High Commissioner for Refugees, in consultation with the United Nations High Commissioner for Human Rights, to develop policy guidelines to promote and facilitate the right of all refugees and, if appropriate to her mandate, internally displaced persons, to return freely, safely and voluntarily to their homes and places of habitual residence.[11]

UN Commission on Human Rights, 1999

The Sub-Commission's resolution laid the strategic foundation from which a joint state/NGO effort advanced. The effort was directed at getting the Commission to further entrench the right to housing and property restitution as an internationally recognized norm by adopting a resolution of its own.

The Republic of Georgia, with the assistance of COHRE, took the lead in this effort. The Republic of Georgia has an interest in the creation of international norms and guidelines as methods of facilitating the return of refugees and IDPs. Since 1991, Georgia experienced internal strife in the regions of Abkhazia and south Ossetia.[12] This dispute has resulted in the displacement of 230,000 persons from the contested regions.[13]

As representatives of an observer government, and thus unable to formally submit a resolution to the Commission, the Georgian delegation had to seek co-sponsorship from governments with member status.[14] This seemingly simple task proved difficult in the political environment of the Commission. Though expressing general support, some member governments suggested that the language of the draft resolution needed to be altered to more precisely define the rights that form the resolution's foundation. Specifically, several governments required that the rights affirmed in the operative paragraphs be explicitly defined by linking them to existing international instruments. The Georgian delegation also encountered resistance from some governments that have traditionally sought to block any efforts at promoting and protecting economic, social, and cultural rights, such as the right to adequate housing. The delegations from Austria and the United States proved particularly resistant to the draft resolution, though the latter expressed some concern about U.S. business property that may be affected by the dispute in the Republic of Georgia—a subject of no relevance to a draft resolution on hous-

ing and property restitution in the context of refugee and IDP return. In light of this criticism, it was suggested that the Sub-Commission further consider the right to return for refugees and IDPs and take steps to further define the problems and issues involved with the right to return.

Consideration of Georgia's draft resolution was essentially killed when the Commission adopted Resolution 1999/47 on April 27, 1999, which merely noted "Sub-Commission Resolution 1998/26 on housing and property restitution in the context of the return of refugees and internally displaced persons"[15] and encouraged the Sub-Commission "to continue its work on this matter."[16]

The Commission thus had the opportunity to affirm the right of return for refugees and IDPs and strengthen that right by articulating specific standards to facilitate the safe return of refugees and IDPs. Unfortunately, however, the Commission squandered this opportunity. The fact that the Commission failed to act, while at the same time expressing alarm over the ethnic cleansing and resulting refugee flow then occurring in Kosovo, is perhaps short-sighted and certainly inconsistent with its mandate.

It is surprising that the Commission did not seriously consider adopting the draft resolution. The rights affirmed in the operative paragraphs were not novel, nor were they obscure, but rather legal terms defined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[17] In addition, the resolution would help achieve goals enumerated in the Vienna Declaration and Programme of Action, in particular the right of refugees to return to their countries[18] and ensure that IDPs can voluntarily and safely return home.[19]

Furthermore, the resolution would universally establish the standards expressed in a number of highly regarded regional instruments, including annex 7 of the Dayton Peace Accords[20] addressing Bosnia-Herzegovina, the Arusha Peace Agreement of August 1993 addressing Rwanda,[21] and the C.E.A.R.-C.C.P.P. Agreement of October 1992[22] addressing Guatemala.

UN Sub-Commission, 1999

Pursuant to Commission Resolution 1999/47, the Sub-Commission again took up the cause of housing and property restitution for refugees and IDPs. Again, this cause garnered the support of a majority of the Sub-Commission's human rights experts.[23]

In an effort to address the concerns expressed by several governments at the Commission, the Sub-Commission adopted Decision 1999/108 on August 25, 1999, entitled Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons.[24] This decision expressly states the "increasing importance" of housing and property restitution for refugees and IDPs. Furthermore, the decision asks that the Commission solicit input from states, the Representative of the Secretary-General on Internally Displaced Persons, inter-governmental organizations including the UN High Commissioner for Refugees, and non-governmental organizations regarding Sub-Commission Resolution 1998/26. In this way, the Sub-Commission aims to resubmit to the Commission a very important issue for the international community—a draft resolution articulating the definitive statement of the international community on housing and property restitution for returning refugees and IDPs.

UN Commission on Human Rights, 2000

The concept of housing and property restitution for returning refugees and IDPs received the support of Francis Deng, the Secretary-General's Representative on Internally Displaced Persons. In his report to the Commission, Mr. Deng also noted that this topic needed additional research, and he welcomed the fact that the Commission, in its Resolution 1999/47, encouraged the Sub-Commission to continue its work on this matter.[25]

The Commission's resolution on internally displaced persons requests that the UN Secretary-General disseminate Resolution 1998/26 of the Sub-Commission on the Promotion and Protection of Human Rights, entitled *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*.[26] The goal of disseminating the resolution is to solicit comments from governments, NGOs, and other interested parties in order that the United Nations can formulate effective policy guidelines.

The Commission also adopted a resolution on the realization in all countries of the economic, social, and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social, and Cultural Rights, and on the study of special problems faced by the developing countries in their efforts to achieve these human rights.[27] Part of the resolution established the mandate for a special rapporteur on the right to adequate housing. The mandate of the special rapporteur, appointed for three years, is to report to the Commission on the status of the progressive realization of and developments relevant to housing rights; promote assistance to governments in their efforts to progressively se-

cure housing rights; and develop a regular dialogue on possible areas of cooperation between governments, UN bodies, specialized agencies, international organizations such as the UN Centre for Human Settlements, NGOs, and international financial institutions. It is hoped that the special rapporteur can significantly contribute to resolving the difficult issues involved with housing and property restitution in the context of refugee and IDP return.

Conclusion

The Sub-Commission has already taken a significant step. It is now important for the Commission to reaffirm the right to housing and property restitution. This right can then be used as a basis to protect refugees and IDPs from the arbitrary deprivation of housing and property—a deprivation that all too often occurs purely because persons were forced by circumstances beyond their control to flee their homes to save their lives.

It is hoped that the work of the Sub-Commission and the newly appointed special rapporteur will lead to the Commission's reaffirmation of the principles previously expressed in Sub-Commission Resolution 1998/26. A Commission resolution will facilitate that body's often-repeated desire to see refugees and IDPs return to their homes in safety and in dignity. The Commission has expressly articulated that desire in a number of resolutions including 1999/2 of April 13, 1999, on human rights in Kosovo,[28] 1998/69 of April 21, 1998, on human rights in Rwanda,[29] 1998/70 of April 21, 1998, on human rights in Afghanistan,[30] and 1997/57 of April 15, 1997, on human rights in Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia (Serbia and Montenegro).[31]

If carried to completion in the Commission, this resolution will change the discourse on the right to return by creating an internationally recognized norm backed by the international community. More important, this resolution will change not only discourse but real world situations on the ground, by developing guidelines to promote and facilitate the right of all refugees and IDPs to return freely, safely, and voluntarily to their homes and places of habitual residence. Furthermore, the resolution will urge states and other relevant parties to ensure the free and fair exercise of the right to return to one's home and place of habitual residence by all refugees and IDPs and assist in the development of effective and expeditious legal, administrative, and other procedures to ensure the free and fair exercise of this right. By adopting its own resolution on this important subject, the Commission, representing the consensus of the international community, would significantly further the promotion and protection of the rights of refugees and IDPs.

Endnotes

1. The UN High Commissioner for Refugees notes over 18.2 million refugees and IDPs within its mandate. UNHCR, *UNHCR by the Numbers: Persons of Concern to UNHCR at 1 January 1999* (1999). In addition, 3.2 million Palestinian refugees living in Jordan, Lebanon, Syria, the West Bank, and Gaza fall under the mandate of the Gaza-based United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).
2. The UN High Commissioner for Refugees currently assists approximately 4.5 million persons, with approximately 3.5 million residing in refugee camps. See UNHCR, *Refugees and Others of Concern to UNHCR: 1998 Statistical Overview* (1999).
3. For an examination of durable solutions to refugee and IDP crises, see UNHCR, "Issues: Durable Solutions," <http://www.unhcr.ch/issues/durable/durable.htm>.
4. For an examination of the problems of return see UNHCR, "Return and Reintegration," chap. 4 in *The State of the World's Refugees: A Humanitarian Agenda* (1997), <http://www.unhcr.ch/refworld/pub/state/97/ch4.htm>.
5. The Centre on Housing Rights and Evictions is a Geneva-based, international, non-government, human rights organization that addresses economic, social, and cultural rights generally, with a particular focus on the human right to adequate housing and on preventing forced evictions.
6. Formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities.
7. SC Res. 1998/26, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 at 72 (1998).
8. SC Res. 1998/26 was adopted without a vote and was co-sponsored by Mr. Eide (Norway), Mr. Genot (Belgium), Mr. Goonesekere (Sri Lanka), Ms. Hampson (United Kingdom), Mr. Joinet (France), Ms. Koufa (Greece), Mr. Maxim (Romania), Mr. Mehedi (Algeria), Mr. Sang Yong Park (Republic of Korea), Mr. Sorabjee (India), Ms. Warzazi (Morocco), Mr. Weissbrodt (United States), Mr. Yimer (Ethiopia), and Mr. Yokota (Japan). The resolution was ultimately adopted without a vote. *See* UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 at p. 121 (1998).
9. SC Res. 1998/26, note 8 *supra.*
10. Ibid.
11. Ibid.
12. U.S. Department of State, *Background Notes: Georgia,* November 1998.
13. Ibid.
14. Though any government can co-sponsor a draft resolution, only member governments of the Commission may submit a draft resolution for consideration by the Commission as a whole.
15. CHR Res. 1999/47, UN Doc. E/1999/23, E/CN.4/1999/167 (1999).
16. Ibid.
17. The resolution reaffirms the universal applicability of the right to adequate housing (as articulated in article 25 (1) of the Universal Declaration of Human Rights, and article 11 (1) of the International Covenant on Economic, Social and Cultural Rights), the right to freedom of movement (as articulated in article 13 (1) of the Universal Declaration of Human Rights, and article 12 (1) of the International Covenant on Civil and Political Rights), the right to choose one's residence (as articulated

in article 12 (1) of the International Covenant on Civil and Political Rights), the right to privacy and respect for the home (as articulated in article 12 of the Universal Declaration of Human Rights, and article 17(1) of the International Covent on Civil and Political Rights), and the particular importance of these rights to returning refugees and internally displaced persons wishing to return to their homes and places of habitual residence.

18. Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 at sec. I:23 (1993).
19. Ibid.
20. According to article 1 (1) of annex 7, "[a]ll refugees and displaced persons have the right freely to return to their homes of origin." Article 1 (1), annex 7, Dayton Peace Accords. Furthermore, refugees and IDPs "shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them." Ibid. For an analysis of article 1 (1) of annex 7, see Simon Bagshaw, "Benchmarks or Deutschmarks? Determining the Criteria for the Repatriation of Refugees to Bosnia and Herzegovina" (1997) 9 Int'l J. Refugee L. 566.
21. The Arusha Peace Agreement was signed on August 4, 1993, and received the overwhelming support of the United Nations. One of the four pillars of the Arusha Peace Agreement was the repatriation and resettlement of refugees and internally displaced persons. The Arusha Peace Agreement was never implemented although its principal provisions have begun to be implemented by the current Government of National Unity in Rwanda. For a detailed explanation of UN efforts to implement the Arusha Peace Agreement, see the *Second Progress Report of the Secretary-General on the United Nations Assistance Mission for Rwanda*, UN Doc. S/1994/360 (1994). See also GA Res. A/RES/49/23 (1994) (recognizing that the Arusha Peace Agreement provides an appropriate framework for national reconciliation).
22. The C.E.A.R.-C.C.P.P. Agreement was between the Guatemalan National Service Commission for Repatriates, Refugees, and the Displaced (C.E.A.R.) and the Permanent Commission of Guatemalan Refugees in Mexico (C.C.P.P.). For a detailed discussion of this agreement, see R. Andrew Painter, "Property Rights of Returning Displaced Persons: The Guatemalan Experience" (1996) 9 Harvard Hum. Rts. J. 145.
23. SC decision 1999/108 was adopted without a vote.
24. UN Doc. E/CN.4/sub.2/DEC/1999/108 (1999).
25. UN Doc. E/CN.4/2000/83, paras. 74–6 (2000).
26. CHR Res. 2000/53, UN Doc. E/CN.4/RES/2000/53 (2000).
27. CHR Res. 2000/9, UN Doc. E/CN.4/RES/2000/9 (2000).
28. CHR Res. 1999/2, UN Doc. E/1999/23, E/CN.4/1999/167 (1999) (underscoring the right of all refugees and internally displaced persons to return to their homes in safety and honour).
29. CHR Res. 1998/69, UN Doc. E/1998/23, E/CN.4/1998/177 (1998) (encouraging the Government of Rwanda to continue its efforts to improve the welfare . . . especially [of] genocide survivors and returnees . . . with particular attention to matters concerning property).
30. CHR Res. 1998/70, UN Doc. E/1998/23, E/CN.4/1998/177 (1998) (urging all the Afghan parties to seek a comprehensive political solution leading to the voluntary return of displaced persons to their homes in safety and dignity).
31. CHR Res. 1997/57, UN Doc. E/1997/23, E/CN.4/1997/150 (1997) (calling on all authorities in Bosnia and Herzegovina to allow the return of refugees and displaced persons to their places of origin and to immediately cease actions that undermine the right to return, and to take immediate steps to repeal legislation that infringes on the right to return, including laws relating to "abandoned" property, to end illegal evictions of persons from their homes, and to reinstate in their homes persons who have been evicted in violation of their rights).

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Homes of Origin: Return and Property Rights in Post-Dayton Bosnia and Herzegovina

Lene Madsen

Abstract

This paper explores the post-Dayton property regime in Bosnia, as one tool for facilitating return of displaced persons and refugees. Implementation of post-Dayton property laws, intended to facilitate return, is explored, and few successes are found. Reformed property laws—subject of much attention and chief drain on resources of the international community—remain a legal framework on paper only, and have not delivered minority return. In conclusion, the international community must expand its focus beyond minority return, to the broader concept of "durable solutions." Acknowledging that some displaced persons will not wish to return to their home of origin, the international community should engage in parallel efforts to provide solutions to those who genuinely wish to relocate.

Résumé

Cet article explore le régime des droits à la propriété en Bosnie, un des outils développés dans le but de faciliter le retour des personnes déplacées et des réfugiés. L'article examine ce qui s'est réellement passé dans les faits après l'adoption, suite à l'accord de Dayton, de lois sur la propriété ayant pour but de faciliter le retour, et constate qu'il y a eu très peu de succès. Les réformes apportées aux lois sur la propriété, qui ont accaparé tant d'attention et épuisé si considérablement les ressources de la communauté internationale, restent un cadre légal théorique seulement et n'ont pas apporté, comme escompté, le retour des minorités. L'article conclut que la communauté internationale doit élargir sa vision et aller au-delà de l'objectif du simple retour des minorités pour inclure le concept plus étendu de « solutions durables ». La communauté internationale devrait reconnaître la réalité que certains déplacés ne voudront pas retourner à leurs foyers d'origine et devrait entreprendre des démarches parallèles pour proposer des solutions à ceux qui, volontairement et véritablement, choisissent la réinstallation ailleurs.

The General Framework Agreement on Peace (GFAP), also known as the Dayton Peace Accords, which in December 1995 concluded a four-year war in Bosnia and Herzegovina, guarantees refugees and displaced people the right to return to their "homes of origin." This guarantee is an essential element of the agreement that brought to a close a war in which displacement was a central—if not *the* central—goal. Chapter 1, article 1, annex 7 of the GFAP reads,

> All refugees and displaced persons have the right to freely return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The parties confirm that they will accept the return of such persons who have left the territory, including those who have been accorded temporary protection by third countries.[1]

In the context of Bosnia and Herzegovina (hereafter also referred to as Bosnia or as BiH), *homes of origin* has, for the first time in the history of peace agreements, been interpreted to mean "the physical structure in which one lived before the war."[2] Given the sheer magnitude of displacement, this has enormous implications for implementation of the peace agreement, as well as for development of a Bosnian property rights regime. At the end of the war in

December 1995, some 2.2 million people, or approximately half the pre-war population, had been displaced from their pre-war homes.[3] A crucial task of the post-Dayton period has been to support and facilitate their return.

To support the return of displaced persons and refugees now is effectively to support "minority return"—that is, return of those who would be in the ethnic minority in the home of origin. The United Nations High Commissioner for Refugees (UNHCR) estimates that the bulk of the "majority returnees" who wished to return have done so already. Minority returns are immeasurably more difficult, given the likely challenges to the social and material security of the returnees, and the possible threats to their physical security as well. Such returns are much more vigorously opposed by local authorities and others, who perceive the return of minorities as a threat to their political power base.

Implementation of property law has been regarded as the primary tool for the delivery of minority return. Since the Dayton Peace Accords, the property law regime has been substantially overhauled, with changes made to both the pre-war property framework and the wartime legal framework. The thrust since April 1998 has been implementation of those laws, in order to ensure that the displaced are able to return to their homes of origin, thus effectively undoing the ethnic cleansing that was so central to the Bosnian conflict.

This paper will explore the role of property law reforms and ensuing implementation in facilitating minority return in Bosnia and Herzegovina. It will first briefly address the phenomenon of mass displacement and the entanglement of the property system in Bosnia; it will then outline elements of the post-war property regime, and international efforts to establish a property regime in line with the annex 7 guaranteed right to return; and it will briefly explore the record of, and obstacles to, property law implementation. Finally, having reviewed the record of implementation, this paper will query whether there may be additional ways to help the displaced find durable solutions to their displacement, and the potential roles of the international community in such alternate solutions. It will argue that minority return, while still the best of the durable solutions available, is not the only solution, and that implementation of property law is not the only tool.

Property and Mass Displacement

Extensive wartime displacement unravelled elements of the pre-war property framework, leaving the majority of Bosnians in homes in which they had not been living before the war. Wartime authorities established new legal structures, in part to cope with the high level of displacement and the reality of thousands of displaced persons arriving in their communities, and also in many areas as a strategy of ethnic cleansing itself. In all parts of the country, municipalities developed systems to legally allocate abandoned property (under war-time laws), either on a temporary basis, which preserved the underlying ownership or "occupancy right"[4] of the pre-war occupant, or permanently, stripping away the underlying rights.

While some housing was allocated on the basis of need, a substantial number of housing units were allocated through political patronage. Housing became a highly political resource used by the powerful to bestow "gifts" upon friends, political or military colleagues, and others of the "right" ethnicity. Thus professors, doctors, judges, government ministers, police, and many others received the "right," almost always in addition to maintaining their previous accommodation, to occupy a second flat, perhaps larger, or in a better neighbourhood.

This "multiple occupancy" was in some cases the result of families dividing after children married and started new families; in other cases, those "rewarded" with additional living space rented out that space and acquired a tidy profit. Local authorities were reluctant to evict these multiple occupants, particularly when they were political or other public figures. This phenomenon has proven a serious obstacle to the return of displaced persons.

In addition, throughout the country there were large numbers of "illegal occupants"—people in need of accommodation who moved into vacant property independently, without being legally allocated space by the municipality. In both entities of Bosnia—the largely Muslim-Croat "Federation," and the predominantly Serb Republika Srpska—the wartime legal provisions for property did not comply with the GFAP, or with the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).[5]

> During and since the war, all three groups have used property rights to cement the results of ethnic cleansing, erecting legal and administrative barriers in the way of return. The result is a highly complex and unsatisfactory property legal system, with elements of the old laws, war-time regulations, and the Dayton Agreement all vying for precedence . . .[6]

The wartime property regimes in both areas are legitimate responses to the overwhelming humanitarian burden of housing huge flows of displaced persons throughout the country. Clearly, it made sense to reallocate empty housing to those in need.[7] Yet, as shown, housing was not reallocated simply on humanitarian grounds, nor were the

wartime laws applied in accordance with the letter of the law. Rather, application was highly discriminatory and served the political ends of nationalist parties.[8]

Reconstruction of the Property Rights Regime

Much of the energy of the international community since Dayton has been focused on returning displaced persons to their homes of origin, through the establishment of a new property regime, in compliance with annex 7 of the GFAP, and subsequently on implementing those laws. This has been a massive undertaking, involving substantial technical resources as well as a great deal of political will on the part of the international community.

> The reform and implementation of laws giving effect to the right of refugees and displaced persons to abandoned property, as required by Annex 7 to the Dayton Agreement and the State and Entity Constitutions, has been one of the largest projects undertaken by OHR[9] in the last two years. It has consumed the bulk of the field resources of RRTF[10] and the OSCE,[11] it has been the subject of 14 Bonn Power[12] decisions [now 24], and constitutes the bulk of the case load of human rights institutions and domestic courts.[13]

The result is a legislative regime that has been substantially reformed in both the Federation and Republika Srpska. Wartime laws, and contracts signed under those laws, were rendered void, and there is now new legislation and instruction in both entities that creates mechanisms for displaced persons to claim their property. The fundamental function of these laws was to elaborate a legal structure that would help refugees and displaced persons claim property that was theirs before the war, but is now occupied by someone else.

> Political effort has been constructively directed at shaping legislation crucial to the reintegration process. In post-war Bosnia, nothing is as important as property rights . . .[14]

Implementation of Property Rights

Implementation of property laws in both the Federation and Republika Srpska has progressed very slowly and generated precious few returns. Implementation of property law has now been underway for two and one-half years in the Federation and two years in Republika Srpska, with an approximate total of 175,000 claims filed. Results from a recent property-monitoring survey indicate that the percentage of claims resolved (in which prewar occupants were reinstated in their homes), versus the number of claims filed, was about 5 per cent nationwide: 6.5 per cent in the Federation; 1.6 per cent in the Republika Srpska.[15] A second round of monitoring, completed in the spring of 2000, revealed a similarly poor rate of implementation.

There has been reluctance to implement the laws, even where implementation would be relatively easy, or at least free of negative humanitarian consequences. Multiple occupancy remains an issue largely unresolved throughout the country,[16] and even reconstruction-related multiple occupancy has proven difficult to address.[17] Reallocation continues in some areas, despite the legal prohibition against the practice.

Implementation has been least successful in Croat-controlled areas of the Federation, particularly in Canton 7 and Canton 10. In some Croat municipalities, housing boards have still not been established (as in Drvar), and in others the housing board exists but has no staff (as in the Central Zone of Mostar). In Croat-controlled areas, evictions are extremely rare, and forcible evictions unheard of. At the moment, the international community seems stalled, unsure of what leverage, if any, can be utilized to promote implementation.

Implementation has also been abysmal in Republika Srpska. Local authorities refuse to evict anyone who cannot be offered alternative accommodation, and they generally discourage the return of Serb displaced persons to the Federation. Housing boards did not operate for the first three months in which the property laws were in place, and staffing remains a serious issue. The heads of numerous housing boards are themselves displaced persons, who have an interest in preventing return of minorities.

Implementation has been the most successful in Muslim-controlled areas of the Federation, particularly in Sarajevo, where there is, overall, a greater acceptance of minority return. The international community has been able to ally itself with progressive elements within the political leadership, and through establishment of the Sarajevo Housing Commission has successfully pushed for implementation of nearly 2000 decisions. Evicted families with no accommodation are being offered temporary accommodation, and the cantonal government has pledged to reserve a portion of funds generated through privatization of socially owned apartments for the construction of temporary housing.

Obstruction of Property Law Implementation

Municipal functionaries on all sides have developed a number of creative methods to obstruct implementation of the property laws. As some methods have been made more difficult through passage of amendments to the laws or through issuance of letters or instructions, municipal

authorities have simply found new methods, including refusal to accept valid claims, if filed by mail, or by proxy (both of which are permitted by law); requiring documents not required by the laws; requiring current identification documents (even though pre-war documents are sufficient under the law); illegally charging fees, either for filing the claims, or for obtaining supporting documentation; insulting or abusing claimants; claiming lack of authority to decide certain types of claims (such as business premises); or requiring hearings, where it is clear that claimants will not be able to attend (i.e., they are refugees or displaced persons). In some areas, obstruction has been even more overt, and municipalities have simply failed to open the housing offices, opened them for very few hours per week, or understaffed them to the extent that claimants must wait interminably to be able to file their claims.

Obstruction by the housing offices has been supported in many cases by the police. According to recent instructions, police are required to attend all evictions and to provide security as necessary. However, throughout the country the police have been notorious for their lack of support for the property implementation effort, in part because numerous police officers are themselves beneficiaries of temporary accommodation, and some are multiple occupants.

Obstacles to Implementation of the Property Laws

Obstacles to implementation of the property laws are humanitarian and practical, as well as political obstacles, and the last are more difficult to address. These are linked, and those with political motivations are expert at harnessing the humanitarian concerns to suit their purposes.

Humanitarian Obstacles

Perhaps most significant of the humanitarian obstacles is the lack of alternative accommodation in Bosnia and Herzegovina. Approximately 25 per cent of the housing stock in the RS was damaged, with a further 5 per cent completely destroyed; in the Federation, about half the housing stock was damaged, with 6 per cent destroyed.[18] Despite significant efforts of the international community to reconstruct shelter, there is still a very real housing shortage. By necessity, implementation of the property laws and reinstatement of original owners or occupancy-right holders will require eviction of some who have no alternative accommodation. Under the Law on Refugees and Displaced Persons, local authorities are obliged, to provide adequate alternative accommodation to thosewith DP status who have been evicted. Having DP status prevents or stalls the eviction of many, because the authorities simply do not have the alternative housing stock.

Authorities are also reluctant to evict those who suffered particularly egregious losses. During the war, widows and families of killed soldiers were given preference in allocation of vacant housing stock, and their possible eviction, even where there is alternative accommodation, is a highly emotive issue for everyone. Political parties have avoided appearing to reject this constituency. There is also general reluctance to evict anyone who comes from areas where ethnic cleansing was most severe. Presently, in the Federation, virtually no housing boards are willing to evict families from the Eastern Republika Srpska, where ethnic cleansing was made famous in towns such as Zvornik, Bijeljina, and Srebrenica, even if the temporary occupants have property in these locations and theoretically could return. While these issues have been used to serve political ends, they are also genuine humanitarian obstacles in their own right.

From a practical perspective, there is the issue of two-way returns, or "reciprocity." Politicians argue that if "their people" are not able to return, they should not be obliged to let others return to the area, but this is raised here only as a practical consideration. Until returns are evident in all directions, blockages will arise that necessitate evicting people who have no alternative accommodation. While two-way returns clearly cannot be used as a rallying cry to delay action, they are a practical necessity in the absence of large-scale reconstruction projects, which would permit DPS to stay, either through buffer accommodation, or relocation projects.

Finally, a practical obstacle has arisen in some parts of the RS, where some municipalities claim they do not have the resources to hire sufficient numbers of staff, or to train them adequately.

Elaborating upon the discussion of "multiple occupancy" above, it should be noted that when multiple occupants vacate housing units, space will be freed for people to return, but this on its own will not alleviate the housing shortage in Bosnia at present. The sheer level of damage to prewar units implies that the need for reconstruction remains great.

Political Obstacles

The underlying political reality in Bosnia is that return directly contravenes the goals of the leadership of both the Bosnian Croats in the Federation, and the Bosnian Serbs,[19] and is seen as a threat to control over territory either acquired or defended during the war.[20] That return is not supported from the top, and indeed is directly opposed, is the most significant barrier to property law implementation,

manifesting itself in a variety of ways.

> The major reason for the failure of return is opposition from nationalist leaders. Authorities at all levels and in all parts of the country have consistently obstructed return programmes . . . Large scale minority return is opposed on all sides because it raises the possibility of losing control over territory gained or successfully defended during the war.[21]

Croat-controlled areas are led by the Croat Democratic Union (HDZ), which was until January 2000 the party in power in Croatia. Extensive links between the Croatian and Bosnian arms of this party have been identified, according to the International Crisis Group (ICG), is key: identifying the HDZ leadership in Zagreb, Croatia (not Mostar, Bosnia) as the locus of control, the ICG argues that "the backing which the HDZ in Bosnia receives from Zagreb makes it more resistant to international pressure . . . " The ICG continues by saying that to "open" Croat-controlled areas of the Federation to return will require addressing the root of the issue, which is in Croatia.[22]

> The integration of Bosnia and Herzegovina has been consistently obstructed by the main Bosnian Croat Party, the Croat Democratic Union of BiH (HDZBiH). The HDZBiH is dominated by hard-liners who emphasize the consolidation of a pure Croat-inhabited territory centred on Western Herzegovina, with the eventual aim of seceding and joining Croatia.[23]

Leadership in Republika Srpska is divided between the SLOGA ("Harmony") coalition, at the entity level, led by Prime Minister Milorad Dodik, and the SDS (the Serb Democratic Party, the former party of Radovan Karadzic "seen as hard-line opponents of Dayton"),[24] which dominates at the municipal level (and thus controls the housing boards). While the SDS leadership is not as obstructionist as the HDZ leadership in Croat-controlled parts of the country, there is a strong opposition to return of minorities to the RS. The Bosnian-Croat allegiance to a notion of "Greater Croatia" is clearly parallel to Bosnian-Serb sentiment for a "Greater Serbia," although direct institutional links are less evident. Prime Minister Dodik, while sufficiently disassociated from the SDS hard line to have attracted support of the international community, has managed to deliver few returns for fear of radicalizing the electorate. At the local level, the SDS authorities retain a tight grip on the police forces, particularly in the Eastern RS.

Even the Bosnian Muslims, who, unlike the Serbs or Croats, do not look to a "mother nation," are at best ambivalent and also obstruct minority returns to areas they control.[25] Their interest is also in ethnic consolidation, but within the context of Bosnia defined as a multi-ethnic country, and there is a strong desire to regain areas lost during the war, such as the Drina valley in the Eastern RS.[26] They are interested in promoting returns *from* the areas they control, but not *to* the area they control, so they have encouraged returns of Bosniak DPS to areas in which they would be in a minority, in order to legitimate and secure territorial interests. There are recent indications that Bosniak returns to key strategic areas of the RS, such as the Western RS, have been at least tacitly supported by the Bosniak administration.[27]

> . . . the right of return will . . . continue to exacerbate the political contest of wills between the three parties, each obstructing return of displaced persons and refugees of other groups who would dilute their electoral base and are perceived as a threat to territorial sovereignty and national control.[28]

Can Implementation of Property Law Deliver Minority Return?

Based on what has been observed, it seems unlikely that anyone can expect property laws to be implemented soon, to deliver the minority return that is at the heart of the Dayton Peace Accords. Given the record of implementation and the magnitude of the political obstacles to return generally, and to property law implementation more specifically, it would be too optimistic to expect dramatic positive results in the foreseeable future. With an implementation rate of 1.6 per cent in the RS and 6.5 per cent in the Federation, coupled with the utter failure of property law implementation in Croat-controlled areas, it appears that even the intense pressure levelled by the international community will be unable to push this forward soon enough for large numbers of displaced persons to make a commitment to return to their homes of origin. With the reality of at best stable—but more likely reduced—funding for international efforts, the ability to maintain or indeed increase the level of pressure on authorities to comply is unlikely to be indefinitely sustainable.

Finding Durable Solutions for the Displaced

For all of the efforts of the international community, some 836,000 people remain displaced within Bosnia, with a further 330,000 refugees still outside the country, without durable solutions.[29] With five years having now passed since the DPA was signed, there is evidence that many families wish simply to normalize their conditions in their place of displacement, rather than to return to their homes of origin. As the implementation process is drawn out, they remain in limbo, fearful of being evicted from temporary

accommodation, but unable to return.

> International policy has worked on the assumption that the majority of displaced persons would want to return if human rights were respected and democratic values were in place. When people have expressed a wish not to return, this has not been seen as a genuine choice but indicative of systematic intimidation by nationalist politicians.[30]

There are indications that a substantial number of displaced persons do indeed wish to return to their homes of origin. There is also evidence, however, of a substantial minority who may be reticent to return, preferring to integrate with their present host community in Bosnia and Herzegovina, or another community within the country. In 1997, UNHCR and the CRPC carried out an extensive study of the attitude of displaced persons toward return.[31] While they found that the majority did indeed wish to return to their homes of origin, and would like once again to live among their pre-war neighbours, most preferred to do so in a context where their ethnic group controlled the municipal administration. People were much more hesitant to return to a context where they would clearly be in the minority. "[T]hey (also) see the prospect of living under the control of authorities of another ethnic group as the greatest threat to their security and livelihood."[32]

> Many refugees, displaced by war, do not wish to return in the short term. Despite the desires of the international community, Bosnia in 1996, and even more so in 1998, was not the Bosnia of 1991. Many Serbs, Muslims, and Croats expressed the desire to stay elsewhere than return to their homes after the war . . . There are many reasons for this, which reflect the changes to the region since 1991, both political and economic.[33]

Durable Solutions to Displacement

> The impasse between the moral necessity of opposing ethnic cleansing on the one hand, and the practical impossibility of achieving ethnic reintegration on the other, has left the international community in a period of strategic limbo, repeating resource intensive programmes that proved a consistent failure.[34]

UNHCR's concept of "durable solutions" to displacement includes return to home of origin; reintegration in the host country; resettlement in a third country; and relocation (settlement in country of origin in other than their pre-conflict home). These options, as already mentioned, are also guaranteed by annex 7 itself, which guarantees to displaced people the right to return, as well as the right to choose a new place to live. The international community in Bosnia has devoted the vast majority of its resources and energy to securing one option, while devoting insufficient attention to other options that might help "normalize" the lives of displaced persons. While the right to return should clearly be considered the first and best option, it should not be the only option. Indeed, if the international community considered supporting informed, voluntary, lawful relocation, in some cases, this might substantially contribute to implementation of property law, and secure the right of others to return.

> Some returning refugees and displaced persons may decide to settle in their country of origin in a location other than their pre-conflict home: relocation. Not all populations displaced by conflict return to their homes following the end of hostilities. In addition to pre-conflict migration patterns, new migration patterns result from the social and economic upheaval stemming from conflict, the region's transition to a market economy, and other phenomena such as the move of rural populations to urban areas.[35]

UNHCR has identified a number of different forms of relocation: (1) *voluntary relocation,* which is based on informed choice, and respects the property rights of others, (2) *passive relocation,* in which displacement violates the property rights of others and becomes a permanent condition, and (3) *hostile relocation,* in which groups of people are deliberately placed in housing that belongs to other groups, in order to consolidate territorial control and prevent minority returns.[36] It should go without saying that the only form of relocation advocated here is the truly voluntary one, based on informed choice, that does not infringe upon the right of others to return.[37]

> An element of voluntary relocation of population is an inevitable part of post-war recovery. As the international assistance operation shifts in modality from humanitarian to development assistance, the normalization of living conditions must be a priority. Voluntary relocation that occurs through lawful transactions of property may present the best possibility for relieving pressure on the housing situation, and may prove complementary to existing return efforts.[38]

There are several ways in which voluntary relocation could be supported, which vary in their degree of intervention. These include strengthening the role of the CRPC to include facilitating the sale and exchange of property, and providing RRTF funding for urban relocation projects that do not violate property rights and are administered without discrimination.[39] It would be essential to ensure that transactions are voluntary, and that people are provided by the media with maximum information about their options.

Strengthening the Role of the CRPC

The Commission for Real Property Claims (CRPC) was established under annex 7 of the Dayton Accords to render final and binding certificates for title to both private and socially owned property. This legal power is independent of administrative and court processes and is particularly useful where title is contested. Until now, the CRPC has issued only certificates of ownership. However, by the very nature of its work, the commission is also well placed to facilitate property changes among people with proof of ownership. Indeed, in its study on property rights, the CRPC noted that claimants frequently request that it provide this service.[40] Such a service would allow those who are not yet ready to return—but who would like to exchange their property with someone in the other entity—to do so; or if they wish to sell their property, to sell it in a legal and straightforward manner. The CRPC could also help to sell the properties for those who have settled permanently abroad. Such an undertaking would simultaneously provide refugees with resources to help them settle in the host country, and would free up needed housing space in Bosnia. Because of the unique position of the CRPC, it could usefully expand into this area.[41]

Providing RRTF Funding for Urban Relocation Projects

The Return and Reconstruction Task Force does not encourage the funding of relocation projects, whether they are voluntary or not. However, to fund select voluntary relocation projects in each major urban centre in Bosnia would accommodate displaced persons living in claimed accommodation and slated for eviction—people who are genuinely unable to return to their home of origin (because it is severely damaged, or for security reasons), who may be presently employed and successfully integrating into their new community. This would simultaneously free up occupied housing space in those municipalities, and support return. Such accommodation could be provided to evicted displaced persons on a rental basis.

In its study, the CRPC notes that, as in any effort that supports voluntary relocation, it would be essential that displaced persons be provided with the most accurate information available,[42] and that they not be manipulated by their political leaders. It would also be essential that the local press continue to be monitored in order to assess "information" produced by political parties.

Neither of these suggestions is envisaged as a *substitute* for focusing on minority return through implementation of property law, but as *parallel* efforts that would help some people find solutions to their displacement, while contributing to reducing the blockage in property implementation generally.

Conclusions

This paper has explored the post-Dayton property regime in Bosnia, as one tool that facilitates return of displaced persons and refugees. Against a brief review of the legal framework, this paper has discussed the implementation record to date on post-Dayton property laws intended to facilitate return. It has been found that few successes can be recorded. Humanitarian and political obstacles, exemplified in a multitude of mundane obstructive tactics, have resulted in few minority returns. Reformed property laws—the subject of much attention and the primary drain on resources of the international community—have yet to return significant numbers of displaced persons to their homes.

The paper has concluded by arguing that the international community must expand its focus beyond minority return, to the broader concept of "durable solutions," and thus expand strategies beyond property law implementation. Acknowledging that some displaced persons will not wish to return to their home of origin, the international community should engage in parallel efforts to provide solutions to those who genuinely wish to relocate. Such efforts would not only help normalize living conditions for a wider range of people, but would likely also assist in breaking the blockage in property law implementation.

Endnotes

1. Chapter 1, article 1, annex 7 ("Agreement on Refugees and Displaced Persons") of the General Framework Agreement for Peace.
2. The Office of the High Representative interpreted the homes of origin provision of annex 7 of the Dayton Accords to mean the right to return to the *housing unit* in which one lived before the war. UNHCR, "1998 Presentation by UNHCR," *Property and Housing Issues Affecting Repatriates and Displaced Persons in Bosnia and Herzegovina* (compilation of material assembled by OHR for Property Law Training Workshops), 27 (4).
3. Of the approximately 2.2 million displaced people at the end of the war, 1.2 million were refugees, while approximately 1 million were displaced within the borders of Bosnia. International Crisis Group (ICG), *Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia,* International Crisis Group (ICG) Bosnia Project, April 30, 1997, p. 8.
4. Pre-war Yugoslavia had several types of property, including what is referred to as socially owned property, a form of property entitlement that is stronger than a rental arrangement, but weaker than private property rights.

5. Article 1, protocol 1 of the EHCR states, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
6. Marcus Cox, *Strategic Approaches to International Intervention in Bosnia and Herzegovina* (Geneva: CASIN, 1998), 38, 39.
7. OHR, *Refugee Return through Property Laws: Briefing Paper* (Sarajevo: OHR, August 1999), 1.
8. CRPC/UNHCR, *Return, Relocation, and Property Rights: A Discussion Paper,* (Sarajevo: CRPC/UNHCR, December 1997), p. 8.
9. Under annex 10 of the Dayton Peace Accords, the Office of the High Representative (OHR) is the lead agency in Bosnia that deals with civilian aspects of peace implementation. The OHR was given the task at Dayton to mobilize and coordinate the activities of agencies involved in the civilian aspects of the peace settlement. The Peace Implementation Council has the power to expand or develop the powers of the High Representative.
10. The international community has developed an elaborate structure and process to encourage those who are still displaced to return to their home of origin, and has focused with particular intensity on minority returnees. Through the Return and Reconstruction Task Force (RRTF), which is led by the OHR but supported also by the UNHCR and other agencies, the international community has sought to promote return by addressing issues of "space, security and sustainability." In contending with "space," the RRTF has focused on encouraging implementation of the property laws by pressuring and encouraging local officials, to ensure that minorities are once again given access to their property. The RRTF has also played a fundamental role in identifying "axes of return" throughout Bosnia, directing donor funding to areas where minority return is underway or likely to commence.
11. Oganization for Security and Cooperation in Europe.
12. The Bonn Powers are enumerated in chapter 11, paragraph 2 of the Bonn PIC Declaration, which states in part, "The Council welcomes the High Representative's intention to use his final authority . . . to facilitate the resolution of difficulties by making binding decisions as he judges necessary."
13. OHR, *Refugee Return through Property Laws,* 1.
14. David L. Bosco, "Reintegrating Bosnia: A Progress Report," *The Washington Quarterly* (Spring 1998), 76.
15. OHR, *Refugee Return through Property Laws,* 4.
16. ICG, in its report *Rebuilding a Multi-Ethnic Sarajevo: The Need for Minority Returns*, ICG Bosnia Project, February 3, 1998, indicates that about 5000 homes in Sarajevo Canton are occupied by people who have access to alternative housing" p.7.
17. This occurs where temporary occupants are beneficiaries of a reconstruction project, but continue to occupy other housing. This may be because they have a job in the area of the home they occupy, or may simply be because they prefer to have two accommodations.
18. ICG, *Going Nowhere Fast,* 11.
19. Bosco, *Reintegrating Bosnia,* 70; see also Jane M. O. Sharpe, "Dayton Report Card," *International Security* 22 (3): 4.
20. Chaloka Beyani, "A Political and Legal Analysis of the Problem of Return of Forcibly Transferred Populations," *Refugee Survey Quarterly,* 6 (3): 4.
21. Cox, *Strategic Approaches,* 28, 29.
22. ICG, *Minority Return or Mass Relocation?* 43.
23. ICG, *Changing Course? The Implications of the Divide in Bosnian-Croat Politics*, ICG Bosnia Project, August 13, 1998.
24. David Chandler, *Bosnia: Faking Democracy after Dayton* (London: Pluto Press, 1999), 75.
25. An example is documented by ICG in their report, *A Tale of Two Cities: Return of Displaced Persons to Jajce and Travnik*, ICG Bosnia Project, June 3, 1998. The HDZ administration in Jajce has been generally obstructive of Bosniak returns to the town. The SDA administration in Travnik has obstructed returns to Travnik, but relatively supportive of returns by Muslims from Travnik to other parts of the country.
26. European Stability Initiative (ESI), *Reshaping International Priorities in Bosnia and Herzegovina: Bosnian Power Structures* (Brussels: ESI, 14 October 1999), 15.
27. Chandler, *Bosnia: Faking Democracy,* 107.
28. Susan Woodward, "Bosnia after Dayton: Year Two," *Current History* 96 (608): 103.
29. UNHCR, *Refworld*, www.UNHCR.ch/world/euro/bosnia.htm (October 9, 1999).
30. Chandler, *Bosnia: Faking Democracy,* 104.
31. CRPC/UNHCR, *Return, Relocation and Property Rights*, 19. This study involved a survey of 862 displaced persons in BiH, and 683 refugees in Croatia and the Federal Republic of Yugoslavia. The survey was complemented by a series of focus groups held with refugees and displaced persons.
32. Cox, *Strategic Approaches,* 29.
33. Chandler, *Bosnia: Faking Democracy,* 105.
34. Cox, *Strategic Approaches*, 42.
35. UNHCR, *UNHCR Note on Returns from Germany to Internal Displacement in Bosnia and Herzegovina* (UNHCR: Sarajevo, July 1998), paragraph 3.4.
36. UNHCR, *Repatriation and Return Operation 1998* (UNHCR: Sarajevo, 1998), 3, 4.
37. Relocation has been used unscrupulously by some European governments as well as by municipal governments. Numerous *Laender* in Germany (which, according to UNHCR, establish their own criteria for termination of temporary protection and refugee deportation), for example, have supported relocation *in violation of underlying property rights*. For example, relocation projects in Sanski Most and Bosanski Krupa in Canton 1 have involved the reconstruction of houses owned by displaced Serbs, for the continued residence of the Muslim DPS. Municipal governments have in some cases extended themselves to attract this kind of "assistance," preferring to keep the DPS (who are of the same ethnicity and hence more apt to vote for them) than to promote return of minorities (who are less likely to vote for them). Municipalities have also been involved in supporting relocation projects by offering empty municipal land for the purpose—this is not itself a problem, but where that land was used for cultural, social, or religious purposes before the war, such relocation would be in violation of a High Representative Decision of May 26, 1999, intended to ensure that land previ-

ously used by minorities is not reallocated.

38. CRPC/UNHCR, *Return, Relocation, and Property Rights,* 1.
39. Elsewhere I have seen references to establishing a compensation mechanism, as is foreseen in annex 7 of Dayton and in the mandate of the CRPC. I have not listed it here because it seems an unlikely strategy in a context where there are few internal resources to invest in such an enterprise, and where international agencies clearly do not intend to provide resources either. Any scheme based on vouchers or coupons seems unwieldy and impracticable.
40. CRPC/UNHCR, *Return, Relocation, and Property Rights,* 25.
41. Ibid., 26.
42. Ibid., 25.

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Security and Dignity: Land Access and Guatemala's Returned Refugees[1]

Paula Worby

Abstract

This article addresses land recovery and access to new land for returning Guatemalan refugees as a way of exploring the nuances and complexities of a repatriation operation often judged a best-case scenario. It argues that the returnees who fared best in obtaining land did so because of their visible organization and ties to international organizations that intervened on their behalf. The positive examples of land access notwithstanding, a number of unresolved problems regarding land use and titling remain. Furthermore, land in itself is insufficient for social and economic reintegration if the larger context of sustainable and regional development is not addressed.

Résumé

Cet article examine les questions de récupération de terres et d'accessibilité aux terres nouvelles pour les réfugiés guatémaltèques retournant au pays. En fait, cet examen n'est qu'un prétexte pour explorer les nuances et les complexités d'une opération de rapatriement souvent donnée en exemple. L'article soutient que les « retournants » qui ont le mieux réussi à obtenir des terres doivent leur succès à leur organisation très visible et aux liens qu'ils avaient avec des organismes internationaux qui sont intervenus en leur faveur. Nonobstant les exemples positifs d'accessibilité aux terres, un certain nombre de questions restent en suspens, notamment celles touchant à l'exploitation des terres et aux titres de propriété. En outre, la terre en elle-même ne suffit pas pour assurer la réintégration sociale et économique si le contexte plus vaste du développement durable de la région n'est pas abordé.

Between 1981 and 1984, the UNHCR recognized more than 45,000 rural Guatemalans as refugees in southern Mexico.[2] Most arrived in 1982 and 1983, fleeing the worst of the counter-insurgency war that the Guatemalan Army had been waging against a revolutionary guerrilla movement since the 1960s. Successive military governments first used selective and then wide-scale repression, which was aimed at not only guerrilla collaborators, but anyone considered a sympathizer or potential sympathizer. Thus whole villages were victims of indiscriminate massacres. Survivors fled and neighbours picked up and ran when they knew the army was en route. Refugees were indigenous small-scale farmers *(campesinos),* representing about eight language groups, from isolated border regions, and most ended up in Chiapas, in southern Mexico. Families subjected to the same terror further inland normally did not make it to the border but joined the ranks of the internally displaced, whose numbers peaked at an estimated 1.5 million in 1982 (some 20 per cent of Guatemala's population at the time).[3] The Guatemalan Army used mass displacement of the civilian population, immediately followed by controlled resettlement, as a military strategy to gain the upper hand on the guerrillas' real or potential social base (AVANCSO 1990; CEH 1999).

Those displaced persons not "recovered" and resettled by the army in the short term were frequently branded as guerrilla sympathizers. The army included the refugees within this category, and in many cases refugee lands, both private and state-controlled, were given out to new settlers in the early 1980s. From this point on, Guatemalan refugees in Mexico would point to the "land question" as a principal one in determining if and when they would go home.[4]

When successive military regimes gave way to a civilian and elected president in 1986, the new government sent delegations to woo the refugees home, promising, among other things, that they could resettle their land. In part this was to demonstrate to an international audience that Guatemala's

human rights problems were over. But many refugees knew at the time that their lands were occupied or in conflict zones and mistrusted government promises. In 1987 a group of male political activists began to organize as many refugees as possible to demand a "collective and organized return," with land issues at the top of the agenda:

> The struggle for land is one of the most important aspects in the process of the collective and organized return. Our lands in Guatemala were obtained with much sacrifice and legally they are ours but we had to leave them due to army repression . . . We know that the government is giving out our lands to other campesinos. (Comisiones Permanentes 1988)

After many setbacks and several years of negotiations, the Guatemalan government and refugee representatives signed an agreement known as the October 1992 Accords. The October Accords state that the Guatemalan government will guarantee basic security and living conditions, and they allow for international institutions to act as witnesses and guarantors. Since the Guatemalan peace process was far from nearing conclusion at that point, the refugees advocated returning in collective groups in order to maximize their security and attract maximum (mostly international) aid. The international donor community supported the novel situation of refugees participating so directly in establishing the terms of their repatriation. Within Guatemala, these October Accords contributed by example and in content to the broader peace process, which culminated with guerrilla-government agreements in December 1996. From the point of view of the Guatemalan refugees, the October 1992 Accords were especially important because they directly addressed the issues of land access and recovery.

The Lands Left Behind

Previous to their flight, a majority of the refugees came from the large province of Huehuetenango bordered on the west and north by Mexico. They were mostly from highland Indian communities settled for centuries, and from lowland regions on the Mexican border. In general, their land tracts were small, often too small to support a family, and younger couples frequently had no land to claim at all. Labour migration and commerce helped these families supplement their livelihood. Some families had usufruct of municipal lands controlled through the local municipal authorities. Other families had individual private holdings backed by documentation more valid between neighbours than in a court of law, or land titles never inscribed in the property registry. Still others had land in collectively held private tracts with titles in the name of founding community members from a century ago. In these cases, customary law would dictate how land was used by, and divided among, the current generation.

At least a third of refugees came from newly settled areas on the agricultural frontier that had been populated under state and Church colonization schemes from the 1960s on (CEH 1999). Refugee families from these colonization areas left behind large tracts in the subtropical lowlands. Land holdings in these cases were either on national lands under government jurisdiction or on lands bought and privatized by the Catholic Church with a land title in the name of a community cooperative. In the second case, "ownership" was derived from being a cooperative associate, of which there was one per family (always a male head-of-household if one was present). In the case of national lands, plots were allocated to individuals (mostly men) on behalf of their families. Not all families managed to be properly registered with the government land institute, however, and even where the government had distributed "provisional titles," these did not constitute ownership of national land. Incomplete national land registry records and ambiguity in the law about provisional titles became critical issues when refugees sought to recover these lands.

Though refugees could often make only tenuous legal claims to the land they once occupied, their emotional claims were powerful. Stories abound of elderly men and women who stayed behind to die on their land rather than leave it, and of refugee families who would sneak back to check on their lands and even harvest abandoned crops. Most refugees conceived of their flight into Mexico as a desperate and temporary measure. They could not envision a refuge lasting more than a few weeks or months. Only hindsight permitted the refugees to realize that leaving had put their lands in jeopardy.

The Struggle for Land Recovery, Mediation Strategies, and Local Conflict

Though refugees had left their land reluctantly and felt tied to it spiritually, few landholdings remained unoccupied in their absence. Land left by refugees was occupied by a combination of government-induced and spontaneous population movements. The motives of the occupying farmers covered a broad spectrum. There are cases in which family members or neighbours of the refugee family took care of the land in their absence with the full intention of returning it as soon as the rightful owner returned. In other cases, a powerful member of the community, often someone deriving power and protection through links to the army, usurped an individual plot. These two examples were more

common in communities where some families were displaced and others stayed behind. In villages where the entire population was displaced, the government land institute actively campaigned for landless *campesinos* to occupy "vacant" lands or looked the other way when such families arrived on their own. A review of case studies of occupied refugee lands for the Guatemalan Historical Clarification, or "Truth," Commission, mentioned more than a dozen cases of occupation of national lands and specified six cases of fomented occupation of collectively held private lands.[5]

Refugee attempts to recover occupied lands occurred in two distinct periods. Small groups of repatriates that pioneered the land-recovery attempts beginning in 1987 (but prior to the onset of the collective return process in 1993) eventually gained access to their former communities, but alongside the newcomer families who continued to occupy other refugee-claimed lands. In these cases, the government negotiated the return of a small number of families but in a way that undermined the chances of additional refugee families to do the same. In different cases, for example, the occupying group was promised improved tenure security in exchange for ceding vacant lands to repatriates benefiting the latter in the short term but setting the stage for conflicts when other groups of refugees attempted to return later.[6]

The negotiations initiated from 1993 on by the refugees advocating collective and organized returns resulted in some of the most confrontational incidents of the entire repatriation process. By this time, those occupying refugee lands had lived there for ten years or more and were loath to give them up. Examining seventeen cases where refugees were active in trying to recover national lands, basically four different outcomes occurred:[7]

1. The majority of the group received their former lands, and the new occupants were compensated with alternative lands and/or money or divided the lands under dispute (five cases).[8]
2. The new occupants remained on refugee lands, and the refugees received other lands at no cost, although only after years of negotiation (six cases).[9]
3. Refugees received neither their original lands nor alternative lands as a collective group. Some remained in Mexico, and others individually signed up for new lands as landless refugees (four cases).
4. Part of the land was never occupied and therefore easily recovered, but an additional, occupied portion of land claimed by the group was not recovered. The community therefore had to make do with less overall extension than farmed previous to the violence (two cases).

The text of the October Accords was not always helpful in aiding recovery of national land: the accords committed the government to aid refugees with land recovery within a stipulated time period but did not qualify or quantify the type or extent of efforts to be made. Therefore it is important to analyze why some groups obtained a satisfactory solution (land recovery or alternative lands provided at no cost) and others were completely unsuccessful. As a rule, groups that were less dispersed during wartime displacement and more united as a community were able to lobby and mediate on their own behalf. They mostly appealed to the Mediation Group created by the October 1992 Accords. Or they appealed directly to the UNHCR and/or otherwise brought their cause to their international and Guatemalan public. The Mediation Group paired respected Guatemalan institutions (the Catholic Bishops Conference and the Human Rights Ombudsman's office) with the UNHCR and a Mexican-based Guatemalan human rights organization. A complementary international support group (known by the acronym GRICAR) was made up of four embassy representatives (Canada, France, Mexico, and Sweden) and two international private organizations. These organizations acted as witnesses to mediation efforts and therefore brought pressure by the international donor community to bear on the Guatemalan government to respond fairly and promptly to refugee demands. The refugees were not beyond using pressure tactics *(medidas de hecho)* to dramatize their cause and to force government action. These included sit-ins at government offices as well as marches from refugee camps towards the border or merely the threat to do so. While some such activities backfired as the Guatemalan government reacted punitively, others prompted more timely solutions.

The active intervention of the Mediation Group and/or ongoing direct pressure from the UNHCR closely correlates with positive outcomes for refugee groups in relation to land recovery and/or alternative solutions.[10] Satisfactory results were more likely where this kind of intervention occurred, regardless of the kind of land claim held. Conversely, not all cases with stronger legal claims resulted in land recovery or compensation, unless significant pressure was generated. In any case, when the disputes were between two groups of *campesinos* for the same piece of land, just solutions were contingent on the existence of sufficient resources for both groups to receive some kind of compensation.

State Land Purchase Programs for Refugees

As roads penetrated remote regions, unoccupied national lands in Guatemala became few and far between. As the

last remaining tracts of national land were being set aside as ecological reserves in the 1980s and 1990s, demographic pressures and political movements in rural areas prompted the government to create new land programs no longer based on national land grants. Because land reform programs were anathema to Guatemala's land-holding elite, these new programs were based on government acquisition of private lands bought at market prices. The idea was that poor beneficiary families would repay the purchase price to the government over several years.

In 1992, in the agreement signed with refugees, the government promised that all adult refugees without land could become landowners and that the "credit" extended for its purchase would be repaid to a community development fund, not to the government. The refugees were jubilant over this solution, and some viewed it as historical retribution for lands systematically stolen from Indian communities since the Spanish conquest. Outsiders, even those sympathetic to the refugee cause, wondered at the government's apparent demagoguery in promising generous terms that at best would not be replicable to any group in Guatemala other than the refugees and at worst would simply be unworkable because of the resources they would require.

By the time the last organized group of refugees had returned to lands purchased by the Guatemalan government, the latter estimated that $29.7 million had been spent on land for returnees (CTEAR 1999).

Primarily two state programs were used to purchase lands for refugees. One program, known as FORELAP, was exclusively for returning refugees and offered the "revolving credit" scheme already described in which funds were not reimbursed to the government. The other, FONATIERRA, was based on much less favourable terms, and was open to other rural families demonstrating sufficient need. The national land institute, known as INTA, which allocated available national lands at subsidized prices, benefited one group of returnees but thereafter argued that unoccupied national lands no longer existed. The government had phased out all three programs by early 1999 when legislation took effect, creating a new land fund mandated by the 1996 peace agreements.[11]

The land-acquisition programs for Guatemalan refugees were complex and evolved continually. Since in essence these programs were substitutes for other kinds of government-initiated land-reform measures, it is of special interest to examine the problems encountered:

- Much land was purchased at inflated prices. Given the many irregularities of the Guatemalan land market, and the prevalence of informal and therefore undocumented land sales (UNDP 1999), it is difficult to determine how much money was overspent. Nevertheless, the political (and international) pressure on the government generated by the refugees permitted landowners to name their price.[12]
- Because of the high costs involved, the government had a financial incentive to direct refugees towards less productive lands and to crowd more people together in order to achieve a better ratio of cost per family.
- Some refugees were able to obtain expensive, more productive lands, and others settled for less costly (and therefore more isolated and less productive) lands. This resulted in great disparities between communities.
- For lands bought with credit due to the government over the next ten years (through the now-defunct program FONATIERRA), the payment schedules were not feasible, based on projected production. For lands bought through FORELAP, the program provided no mechanisms for the returnees to channel land payments into a community-development fund as mandated. When some communities expressed interest in creating such funds, no technical support was offered.
- Given the high investment made by the government on land purchase itself, the government has been unwilling to give additional funds for production-oriented credits or projects.
- There are few administrative mechanisms in governmental agencies to easily or automatically incorporate married women as joint owners of lands purchased. Government oversight continued, even in the face of women's mobilization to reclaim this right, and was mainly due to the inability of government officials to conceive of a man and a woman as joint heads of the same family.

Despite these limitations, about 30 per cent of the nearly 23,000 refugees arriving as part of the self-defined collective return movement returned to their own lands, and the rest solicited new lands under the purchase programs (or received lands in compensation), sometimes together with non-refugee families.[13]

Given that the land fund (known as FONTIERRAS) created by the 1996 Peace Agreements mimics many aspects of the previous land-purchase programs for refugees, a closer examination of the latter could have yielded many important lessons, both positive and negative, for the new project. As it happened, those administrating the FORELAP project were never consulted, nor were they asked for advice when the new Land Fund was being designed.[14] If the weakest points of the former land programs were an underfunded budget, high land prices, and unrealistic repayment plans, the new Land Fund is maintaining the status quo.

Early in 2000 the fund was anticipating a serious shortfall against funds committed, and even if the funding goal is met, it will address perhaps 5 per cent of rural families demanding land (MINUGUA 2000) if only five hectares per family are given at current prices. As for repayment, even a per family subsidy, flexible grace period, and slightly below-market interest rate will not guarantee payment possibilities if crop prices are less than optimum or any other complication arises. A review of FONTIERRAS land purchases in the last three years reveals a tendency for more inexpensive farms to be purchased, as opposed to farms with good access or quality farmland. One probable reason is the concern of beneficiary groups (and the lending institutions involved) about high indebtedness.

Land Titling Practices, Community Organization, and Women's Land Access

With notable exceptions, the vast majority of returnee communities are not vulnerable to losing those lands from lack of legal ownership.[15] This is to say that their land tenure is stable against threats from outside the community, and most hold legally registered titles showing property either in the name of several individuals or of a community-level organization such as a cooperative or an association.

Even where ownership is assured, however, there are problems. Not all lands were purchased with the precise boundaries demarcated and/or with registered boundaries that coincide with the on-ground perception (by the former owner or by neighbours) of where the property lines are. Thus communities often cannot have access to all of their lands for cultivation or do not even know what areas can be included in their land-use planning. Such boundary problems have sometimes led to violent conflicts between returnees and their neighbours and have led to prolonged and costly court cases. And on some returnee lands, other *campesinos* have undertaken land takeovers or incursions.

Where group land tenure is assured, one growing tendency is to parcel out and privatize family-sized plots. Many returnees express the opinion that holding individual private titles would give them more independence and freedom. Practical obstacles for the returnees to put this into practice are the exorbitant cost of land measurement and legalization. Some negative consequences include the complexity of splitting up collectively managed areas (rubber tree plantations, for example) and the increasing ease with which individuals within the community would be able to sell their land. The latter is considered problematic, despite the flexibility it offers, given that other individuals, perhaps from outside the community, could accumulate disproportionate amounts of land, and also that high turnover or speculation is likely to result in ecological degradation.

But there is another kind of problem pitting collective land security against individuals and the rights of individual families to live and farm in the community. Where lands were allocated collectively through cooperatives or associations (registered entities legally apt to own land), it is relatively easy for a majority of voting members to expel other members from the organization and deny that person and his or her family any rights in the community. Several members have been expelled in this way, sometimes by community consensus, but often through manipulation by a few leaders.[16]

The land rights of women, especially women with partners (married or common-law) are not upheld in the majority of returnee communities where the community enjoys clear title. Whereas there is practice and custom associated with letting a widowed woman or single mother with dependants represent her family on a land title or in a land-owning cooperative, the movement for all adult community women to be joint property owners has met with limited success. As previously mentioned, government institutions continually discriminated against women, even when explicitly petitioned that women represent their families side by side with their spouses. Aside from wanting the status and power derived from being recorded as joint owners, female refugees were concerned that women who separate or are abandoned often lose access to household lands or goods. The UNHCR and several non-governmental organizations supported the refugee women and their organizations in their quest to develop these ideas and lobby the government institutions to uphold their rights. While most refugee groups after 1996 began to include women in the documents transacting land purchases, women encountered many problems back home when they tried to become cooperative members (Morel 1998; Lozano 1997). Where land ownership was subsequently transferred into the name of the cooperative, women were newly excluded because they were not members and also lost their potential role in many community affairs as more and more decision making was passed to the cooperative and its leadership.

Returnee men are more passive about—and sometimes directly opposed to—women's organizing in return communities, as compared to a more supportive stance in Mexico, where women's mobilization helped make the refugee struggle to return home visible and appealing to an international audience. But there are also differences in how the communities define productive work. For example, the institutions that work with cooperatives reinforce the concept that every single member must contribute with co-op

dues and community labour in the same way. Men, therefore, put pressure on women to pull their own weight with equal contributions of cash and physical labour in order to be members. While such expectations are especially onerous for widows and single mothers, this approach also misses the heart of the matter articulated by female leaders: women's work (in the fields and with children and domestic responsibilities in the home) subsidize the labour and cash contributions credited to their husbands. Were this work visible and valued, the community would recognize that women are already paying membership dues and have been doing so for some time. Despite the ongoing work by returnee women's organizations on the topic, the daily struggle for economical survival seems to have derailed or postponed most returnee women's abilities to organize around these rights, and outside advocates have given only limited assistance. As a result, most land titles and/or cooperatives in the returnee communities exclude women with partners, and households headed by women alone are subject to a disproportionate burden of work in order to have land.[17]

Repatriation with Land: A Durable Solution in Itself?

Given the apparent lack of restriction upon where returning refugees could settle, it is surprising to observers that some communities ended up on agricultural lands with good potential and others in extremely remote areas with lands of poor quality. This disparity is the result of two factors. First, many refugees chose to return to their lands and/or areas of origin as a result of cultural and family ties, despite the limitations that these areas represented. Second, from 1993 until 1998, state land-acquisition programs explicitly limited refugees to seek new lands in more isolated areas of the country and gave them strict price limitations, which further limited their options. With few exceptions, therefore, lands were not acquired in the more accessible and land-rich Pacific coast and piedmont regions until 1998–9, when the government changed its purchase policy. Some of the more recently established communities, therefore, have better long-term potential (if capital for productive activities is made available) but received less short-term assistance from the UNHCR and many other funding initiatives that targeted returnees but were disbanded by this late return date.

Returnee villages vary in many ways that affect their development potential (length of time established, degree of external support, internal organization, land quality, production, proximity to markets, access, and infrastructure). The majority, however, are relying on a combination of subsistence agricultural (corn and beans) and cash crops (coffee, cardamom, rubber, sugar cane) and/or beef cattle to launch them into the new millennium and out of poverty. Except for a handful of communities close to major roadways and already producing coffee, the immediate prospects for returnee villages are bleak. Neither credit for agricultural production nor technical support is readily available, and there are no safeguards against market fluctuation, environmental degradation, or natural disasters. The emergency and resettlement programs by international and Guatemalan development organizations, the UNHCR, and the government dwindled once most refugees had crossed the border home, and the initial euphoria over the culmination of the peace process was soon over. The major peace and development initiatives, however, by the likes of AID, the European Union, the World Bank, and the Inter-American Development Bank, are yet to generate visible results for returnee communities and their neighbours.

For repatriation scenarios during and after armed conflict, with similarities to those of Guatemala, some lessons can be concluded. In recovering land or receiving due compensation, it is critical that refugee groups be supported and given the necessary legal assistance and technical advice. Ensuring adequate resources that guarantee compensation and a positive solution for competing parties is important, so that economic development is promoted and tensions are diminished between population groups. In land titling, a model that permits both women and men to jointly represent the beneficiary family is one way of protecting women's interests. Such a model is appropriate, especially when women are not recognized as farmers (as in much of Latin America), even though they fully share farm labour and generate the payments used for land purchase. In any case, the trade-off between community and individual rights is at issue in community-held joint titles, both in gender equality and in the security of political or ethnic minorities. Mechanisms that permit due process protecting individual rights can therefore be important for community prosperity.

In promoting land acquisition programs to enable repatriation, the laudable efforts of the Guatemalan government to purchase private lands for returnees are yet to be tested as the soundest and most cost-efficient way to allocate land to those who would farm it. While it does avoid the politically sensitive problem of land redistribution through other means, the model has resulted in the purchase from large-scale landowners at high prices the lands that they themselves no longer find lucrative. This is not exactly the open land market benefiting buyers that its advocates would like to see.

In summary, the Guatemalan returnees are probably better off than many of their national rural counterparts, but they still share the same overall limitations that the country has as a whole in relation to the international economy. Despite having land, the returnees are still on the losing side of the vast and growing inequality that continues to characterize Guatemalan society. In an eminently agrarian society, land is an important starting point for the Guatemalan refugees, even when their livelihood has long been supplemented with economic strategies that are not land-based. By the same token, however, land itself, in the absence of supporting structures that make farming viable, is only the beginning.

Endnotes

1. Initial ideas for this article were developed by the author in UNHCR (1998), UNDP (1999), and Worby (2000).
2. Many more Guatemalans arrived in Mexico but continued north, returned quickly to Guatemala, or settled outside of areas that would become refugee camps. The figure of 45,000 is taken from a UNHCR internal report for 1984, also cited in CEH (1999). While it includes the first children born in the camps before 1984, it ignores others who stayed only briefly.
3. This frequently cited number for internally displaced has its origins in estimations made by the Catholic Church. The estimate is plausible, after a review of additional data such as a 1984 study of abandoned villages in conflict areas. For further discussion, see CEH, chap. 4, vol. 4, 1999.
4. This paper will not go into a history or description of land problems in Guatemala, a topic amply documented elsewhere. It is enough to say that inequality that results from land distribution is one cause of Guatemala's long conflict. The demand for land by the rural poor and disputes over specific lands remain sources of ongoing tension and violence.
5. Details in CEH (1999), chap. 3, paragraphs 408–15, and annex 5 of the same chapter. Municipal lands and individual cases are not described in detail in this article, although occupation of both occurred. In general, those reclaiming municipal lands were more successful the sooner they returned; most problems occurred for those wishing to return by the mid-1990s, often in large groups. Occupation of individual private holdings was probably underreported to the UNHCR and other relevant authorities. Often families quietly negotiated their re-entry into their village of origin with no outside aid or decided not to pursue potentially difficult claims but rather signed up with other "landless" refugees in the hope of obtaining new and superior lands elsewhere. The last option allowed such families to maintain the sense of community created in exile with other refugees and in that sense was preferable to the isolation they would have experienced as repatriates in their village of origin.
6. See Manz (1988), WOLA (1989), and AVANCSO (1992) for ample description of these cases and government policy towards repatriation at the time.
7. The seventeen cases represent sixteen communities (one with two different outcomes) and are the total number of cases known to the UNHCR of communities with national lands where at least a handful of families (fifteen or more) expressed interest in returning. They are located in four municipalities: Nenton, Huehuetenango; Ixcan, Quiche; La Libertad and Sayaxche, Peten. The list excludes two other communities (in Nenton and Ixcan, respectively) where national lands were recovered because no new occupants were present as a result of the conflictive and isolated nature of the sites.
8. A similar positive solution occurred in five of the six cases previously mentioned where collectively held private lands were occupied. Refugees had more leverage in these cases, given the sanctity accorded to private lands by government politicians.
9. While it resolved the problem from a material standpoint because the same amount of land was granted, the solution ignored emotional and other factors. For some communities, the lost chance to go "home" meant that the fragmentation and dispersion of its former members were indeed permanent.
10. In the seventeen cases of occupied national lands previously cited, for example, there were eleven cases where the Mediation Group, the UNHCR on its own, or entities later set up with the peace accords intervened with significant effort, and refugees either regained their lands or received others in their stead. For the six that were less successful, five received little or no support from the institutions mentioned.
11. Special credit conditions for refugees were maintained until the last group of refugees petitioning for new lands returned in March 1999. By this date, it was assumed that the vast majority of the 22,000 Guatemalans still in Mexican camps (half of which were born there) would choose to integrate into their country of exile. In the future, any new group of refugees petitioning for land will have to use the new fund created by the peace agreements, open to any qualifying low-income Guatemalans, in which beneficiaries are granted a per-family subsidy and below-market interest rates but are obligated to repay lands purchased at market prices. At current land prices, the subsidy is equal to the cost of about half a hectare in the fertile coastal region or up to eight hectares in isolated rainforest ill-suited for agriculture (according to land prices reported by MINUGUA 2000). This compares to thirty to forty-five hectare plots given out to colonizers by the government in the 1960s and 1970s in the then isolated agricultural frontier.
12. This situation led to the ironic situation in which refugees advocated higher prices for the land-owning class they theoretically opposed. The land purchase program was also unable to attract international aid given the (well-founded) perception that the majority of funds benefited landowners who were already wealthy.
13. These figures are derived from UNHCR data and familiarity with the destination of each returnee group. In total, 43,600 refugees repatriated with UNHCR and government assistance between 1984 and June 1999, including a high proportion of children born in refugee camps. Of those who did not arrive with the collective return groups, the vast majority returned to their lands of origin. Thus, calculated as a percentage of *all* repatriates, about 60 per cent went, at least initially, to their former communities.

14. Interview by author of high-level FORELAP official in May 1997. The preliminary fund designed by government staff in 1997 underwent modification when Congress approved the legislation formalizing the fund in May 1999. In the interim, a peace accord "parity" commission with *campesino* and Maya organization representatives alongside the government representatives had significant input into the draft law. No women were a part of this process and neither were groups identified with displaced or returned population.
15. The notable exceptions include three communities of returnees whose lands were purchased under the FONATIERRA program previously cited. The communities allege that their status as returnees under the October 1992 agreements exempt them from the strict repayment terms required by the program, and that the government's choice of FONATIERRA as a funding mechanism was based on a fallacious argument that the program providing credit not repayable to the government, FORELAP, could not legally purchase lands in the land-rich Pacific coast region. As of this writing, the lands in question are now under the jurisdiction of a new government institution, and a solution (partial payment and partial condoning of the debt) is under negotiation.
16. Political and/or personal differences have been at the root of most cases. While one group of returnees averted their disputed expulsion that was related to political differences between themselves and community leaders in one 1997 publicized case, other communities have quietly purged families with unpopular political views or those opposed to the cooperative or association leadership.
17. A preliminary review of fifty communities (mostly collective return sites and representing roughly 25,000 people) shows that if (1) recent non-discriminatory legislation and administrative rules affecting national lands are respected as titling occurs on untitled lands, and (2) if women do not lose access in the several communities where they have already gained co-ownership through purchase agreements or co-op membership, then women would have outright tenure security in perhaps seventeen. Losing ground is possible: in the last two years, female owners were dispossessed through land transfer to cooperatives in at least six cases. The other communities do not include women as owners, with the exception of (some) widows, although some leaders affirm that the plan is to title women and men together as the communities achieve their long-term goal of legally dividing up their lands for each family.

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Refugees and Collective Action: A Case Study of the Association of Dispersed Guatemalan Refugees

Galit Wolfensohn

Abstract

The paper traces the organizational development of the Association of Dispersed Guatemalan Refugees (ARDIGUA), a grassroots, self-settled Guatemalan refugee organization, in an attempt to understand the dynamics of popular mobilization in exile. It examines the challenges faced by the more vulnerable and institutionally marginalized self-settled refugees in their efforts to secure rights as refugees and as returning Guatemalans. It argues that the collective mobilization of self-settled refugees was facilitated by political opportunities external to ARDIGUA, as well as by resources—material and discursive—that the association mobilized. The paper draws attention to the role that self-settled refugees can play as political actors in the wider process of peace and democratization, and argues that the impact of their efforts is significant (beyond their immediate material success) to the extent to which they articulate their traditionally marginalized concerns in politically and institutionally consequential forums. In this way, they contribute to the expansion and democratization of public discourse, and help to widen spaces in which the excluded can actively engage as social and political actors.

Résumé

L'article retrace le développement organisationnel de l'Asociación de Refugiados Dispersas de Guatemala (ARDIGUA), une organisation populaire de réfugiés guatémaltèques auto-établis, dans le but d'essayer de comprendre la dynamique de la mobilisation de masse dans l'exil. Il examine les défis auxquels eurent à faire face les plus vulnérables et les plus marginalisés des réfugiés dans leur tentative d'obtenir des droits en tant que réfugiés et en tant que guatémaltèques de retour au pays. Il propose la thèse que la mobilisation de réfugiés auto-établis fut favorisée par des conjonctures politiques externes à ARDIGUA, aussi bien que par les ressources matérielles et humaines que l'association parvint à réunir. L'article attire l'attention sur le rôle que peuvent jouer des réfugiés auto-établis en tant qu'acteurs politiques dans le processus élargi de paix et de démocratisation, et soutient que l'impact de leurs efforts est important et va bien au-delà de leur succès matériel immédiat. Cela est vrai dans la mesure où ils parviennent à exprimer clairement leurs préoccupations — qui sont traditionnellement marginalisées — dans des forums qui font réellement poids, politiquement et institutionnellement. Ce faisant, ils concourent à l'élargissement et à la démocratisation du discours public et aident à amplifier les espaces où les exclus peuvent prendre une part active en tant qu'acteurs sociaux et politiques.

"It was time to leave," recalled Maria-Jose Cartegena,[1] a self-settled Guatemalan refugee in southeastern Chiapas. In the early 1980s, the violence had spread to the Guatemalan countryside. Villages were under siege, family members lay murdered, and the crops that were not yet burned to the ground were spotted with blood. A harrowing journey led hundreds of thousands of Guatemalans through forests and mountain pathways to the refuge of the Mexican border. In Chiapas, individual families were housed by distant cousins or generous acquaintances, until it was safe to return. Time passed, more families came. Most dispersed through the host population. To avoid deportation, they had to remain inconspicuous and find creative ways to survive. "We spoke, dressed, walked like they did, but raised our children with whispered stories of home. We found refuge from the violence, but were not officially recognized as refugees. We had no security, no documentation, no health care, no education, no land, and no future here. We kept watching and waiting for the right time to return."

Self-settled refugees are de facto political refugees who have settled outside of official refugee camps. Unlike camp-based refugees, the majority are not recognized as official refugees by the host state, or by national and international refugee organizations.[2] This lack of legal status in the host country makes them vulnerable to deportation, and limits their access to social and economic resources, such as health services, education, and labour opportunities.

In 1992, the Association of Dispersed Guatemalan Refugees (ARDIGUA) emerged as the grassroots representative body of self-settled Guatemalan refugees in Mexico. ARDIGUA began to advocate for the rights of self-settled refugees to official recognition and documentation as refugees, and for their right to collective return to Guatemala. ARDIGUA was associated with the broader Guatemalan return movement, but was distinct from the leading camp-based refugee organization, the Permanent Commission of Representatives of Guatemalan Refugees in Mexico (CCPP), because of its self-settled constituency, its related demands, and its independent organizational identity.

The participation of self-settled refugees in the Guatemalan return movement may seem surprising at first. By the very nature of their non-recognized status, they are even more marginalized from the official public sphere than camp refugees, and their legal vulnerability and dispersal make their propensity for collective mobilization extremely low. Yet, it is precisely this counter-intuitiveness that makes the case study of ARDIGUA noteworthy. In drawing attention to the generally under-represented, self-settled refugees, this study sheds light on their plight as well as on their potential to act as a political force. Furthermore, as much more is known about the return efforts of the highly publicized, camp-based CCPP, this case study contributes to a broader understanding of the dynamics of the return effort by drawing attention to this lesser known refugee group.

This paper briefly traces the organizational development of ARDIGUA with the interest of discovering what conditions facilitated the emergence and successful articulation of the association. In other words, rather than take the existence of and support for the popular self-settled refugee organization as a given, the paper explores why such formalized collective mobilization—of refugees generally and of self-settled refugees more specifically—occurred in the Guatemalan case and not in others. Following from this, the paper will assess the impact that refugee efforts had on both material and discursive realms.

To help frame this research, concepts are drawn from the literature on social movements, which attempts to make sense of the *whys* and *hows* of popular collective action (Escobar and Alvarez 1992; Foweraker 1995; Fraser 1993). Using related analytical frameworks, this paper will argue that the viability of self-settled refugees to participate in the return effort was made possible by a combination of: political opportunities on local national, regional, and international realms that helped create political spaces wherein refugees could articulate their concerns in public forums; the ability of self-settled refugees to mobilize resources, both material and discursive, to meet their goals; and the existence of a support network of refugee-related actors, churches, and non-governmental organizations, that helped to grant public legitimacy to the association and its efforts.

This paper argues that the participation of refugees (both camp and self-settled) in the Guatemalan return effort challenged the Guatemalan state specifically and the refugee system more generally. This challenge was embodied in the popular-based refugee organizations that were the formal public expression of refugees as social and political actors, and was effected through the articulation of their demands (for a just and equitable return) in official public forums. This paper will argue, furthermore, that as a popular representative of sub-marginalized actors within this process, ARDIGUA's very existence subverted this marginalization and thus challenged those enforcing the exclusion of its constituency. Furthermore, understanding the return movement to be an example of how collective mobilization in exile can challenge the exclusionary practices of the state (and of the refugee system), this paper proposes that ARDIGUA's efforts (by the very nature of the association's sub-marginalized status), made these challenges more explicit.

While the extent of the material success of ARDIGUA's efforts is debatable, this paper concludes that ARDIGUA contributed to the expansion of discursive space by forcing the inclusion of the traditionally marginalized concerns of self-settled refugees onto national and international agendas. In so doing, it contributed to a broader attempt to democratize institutionalized systems of exclusion.

Context for Collective Action

In 1987, Guatemalan refugees in camps throughout the Mexican states of Chiapas, Campeche, and Quintana Roo began organizing their collective return to Guatemala. Refugee representatives from each camp were elected to form the Permanent Commission of Representatives of the Guatemalan Refugees in Mexico (CCPP)—a body mandated to represent the interests of refugees to the Guatemalan government and international actors. The return effort was a collective, participatory, and secure alternative to the individually based, non-participatory, and insecure state-run

repatriation program (Pritchard 1996; Aguilar 1991; CCPP 1992). It was informed by a wider political vision that saw refugees as social subjects contributing to peace-building and democratization in Guatemala (Arroyo 1995; Costello 1995; Pritchard 1996). In 1992, the CCPP signed the bilateral Basic Accord on Repatriation with the Guatemalan government, which laid the groundwork for implementing the collective return that was to follow. By June 1999, over 43,000 refugees had collectively returned to Guatemala from Mexico (CERIGUA 1999; USCR 2000).

The CCPP, which emerged from and was based within the camps, articulated the self-defined interests of the camp refugees. Yet camp refugees were not the only Guatemalan refugees in Mexico. In fact, over three times the 46,000 refugees who settled in camps throughout Mexico in the early 1980s, settled outside the auspices of official humanitarian assistance. The majority of these self-settled refugees were not recognized as refugees by the Mexican government or by the United Nations High Commissioner for Refugees (UNHCR).[3] They had no legal status in Mexico, had little access to international humanitarian assistance, and were vulnerable to deportation. These conditions led self-settled refugees to have concerns about protection and rights that were distinct from those of their camp brethren. Their legal vulnerability and dispersal made the propensity of self-settled refugees to mobilize collectively extremely low (Salvado 1988; Chavarria et al. 1993; SERCATE 1993; Delli Sante 1996).

In 1992, bolstered by the initial success of the CCPP and fuelled by the division that plagued the CCPP leadership, ARDIGUA emerged as a distinct organizational body claiming to represent the interests of self-settled Guatemalan refugees in Mexico (Kauffer 1997; ARDIGUA 1998). The particular obstacles faced by this population, coupled with the political objectives of the elected leadership, informed ARDIGUA's two central demands. The first was to gain official recognition and related documentation as political refugees in Mexico. The second was to organize a collective return to the resource-rich (and thus expensive, coveted, and contested) south coast of Guatemala (ARDIGUA 1993, 1998; SERCATE 1993; Venet 1998). As ARDIGUA was not a signatory to the Accord on Repatriation, realizing its demand for collective return (which fell under the accord's provision) was not a given.

ARDIGUA used several strategies to overcome its marginalization from the return process and circumvent the obstacles erected by the Guatemalan government, which lay in the way of realizing its objectives. In order to understand these strategies, the conditions that facilitated them, and their material and discursive effects, the following analysis draws on concepts from the literature on social movements.

Political Opportunities,[4] Mobilizing Resources, and Social Networks

ARDIGUA's emergence must be understood within the context of the wider movement for refugee return. The initial mobilization of camp refugees for return (beginning in 1987) was made possible in part through the political opportunities generated by regional and national shifts towards peace and democratization. The mid-1980s saw the initiation of regional efforts to secure peace in Central America through the promotion of coordinated strategies for negotiating peace, which pressured governments to resolve internal conflicts. Related conferences brought attention to refugee issues, presented some rights-based frameworks that could be used to address them, and created political opportunities for refugees to articulate their concerns as social and political subjects. On a national level, 1989 saw the Guatemalan government and civil society engage in a national dialogue (in which refugee representatives participated), and 1990 saw the government begin talks with the insurgent Guatemalan National Revolutionary Unity (URNG) (Arroyo 1995; SERCATE 1993; Aguilar 1991). These events, among others, marked a national shift towards peace and created opportunities for civil society actors, including refugees, to participate in the political transformation.

While these events had an indirect effect on ARDIGUA's emergence, it was the political opportunities generated by the initial success of the more central and publicly recognized CCPP project that encouraged the mobilization of more vulnerable self-settled refugees, and facilitated their articulation in the public sphere.

The establishment of the CCPP and its initial accomplishments widened political opportunities that helped mobilize other refugee groups and were necessary precursors to ARDIGUA's emergence. Through its legitimacy among refugees in the camps, the CCPP fuelled their support for the return project and initiated collective mobilization. This shifted the return from an idea to a concrete political project. Through its linkages with national and international actors, the CCPP established public legitimacy for the return project and gained access to consequential forums in which it formally articulated its demands. Through its linkages with civil society in Guatemala, it gained domestic support for the return and integrated itself as a refugee representative in the wider effort of national peace and reconciliation. And finally, through its negotiation with the government, which culminated in the formal acknowledge-

ment of its demand in the Basic Accord on Repatriation, the CCPP secured tangible legal frameworks through which the return could be effected. Together, these successes established a precedent that other actors, such as ARDIGUA, could build upon to meet their own specific needs and concerns. These linked efforts of different popular refugee organizations illustrate the multiplier effect of popular action, and the interdependence of popular actors in their efforts to bring about change (McAdam 1998; Tarrow 1998).

While shifting political opportunities set the stage for collective action, it was ARDIGUA's success in mobilizing resources that helps to explain its ability to act upon such opportunities (Canel 1997).

In this vein, ARDIGUA's leadership (understood as both a resource and a mobilizer of resources), which was informed by a wider political agenda, played a central role in mobilizing the unlikely population (Alvarez 1997; Kauffer 1997; Briere 1998; Mosquera 1998). The leaders faced distinct challenges in their attempts to mobilize the self-settled population. Unlike camp refugees, who were spatially concentrated, highly visible, and legal, self-settled refugees were dispersed, legally vulnerable, wary of public attention, and distrustful. These variables distinguished ARDIGUA's strategies for mobilization from those of the CCPP. ARDIGUA used informal networks to identify and contact self-settled refugees. The early leadership travelled from house to house to meet with individual refugee families, to introduce the association's mandate and objectives, and to share information about the return effort. In this way ARDIGUA attempted to establish trust with the dispersed community and to promote an active interest in the return project (ARDIGUA 1998).

Balancing this leadership effort was the substantial role of ARDIGUA's constituency, which demanded accountable leadership and helped to define the interests of the association (Ramirez 1999). Facilitating this dynamic was ARDIGUA's relatively participatory organizational structure, which depended upon and actively encouraged the participation of the membership (ARDIGUA 1998, 1993; Horizons 1993). For example, member-based local and regional committees were driving forces behind ARDIGUA's efforts to identify and secure land for return.

ARDIGUA's collective identity paralleled that fostered by the CCPP, by infusing an ethnic and class consciousness with a claim to Guatemalan nationality (Aguilar 1991; Chaviarria et al. 1993; Pritchard 1996). Its distinction, however, lay in the substitution of a shared refugee identity with one that focused on the population's shared experience as self-settled non-documented refugees—an experience that included a constant fear of detection and deportation (Earle 1994; Salvado 1988; Chavarria et al. 1993). This helped to foster a sense of collective solidarity, which was important for organizational unity. Furthermore, by literally bringing together the dispersed and legally vulnerable population (for example, through regional meetings), ARDIGUA helped to foster new links among individuals, which in turn expanded their collective sphere.

The group's shared experience in exile contributed to their collective interest in documentation and return, an interest that ARDIGUA successfully articulated in its demands and subsequent objectives. This shared vision strengthened the internal legitimacy of the association. Within the first two years of its establishment, ARDIGUA could boast an organizational presence in southeastern Chiapas and had extended its efforts to thirty-six communities (SERCATE 1993; Chavarria et al. 1993; Horizons 1993; ARDIGUA 1998).

The effective public articulation of ARDIGUA's objectives became significant in establishing legitimacy with external actors (which included international organizations, governments, non-governmental organizations, church groups, civil society actors, and other refugee organizations). ARDIGUA's exclusion from the institutional sphere, however, required that it adopt strategies distinct from those of the CCPP to make its claims heard. It began by linking its demands to those of the CCPP and the wider return, but modified them slightly to meet its own interests (for example, ARDIGUA was adamant about securing a return to the resource-rich south coast of Guatemala, whereas the CCPP negotiated returns to a variety of regions in the country, many of which were isolated and underdeveloped). As with the CCPP, ARDIGUA expressed it demands in the context of human rights and appropriated institutional labels to articulate its claims in the public sphere (Stepputant 1994). Rather than adapting the "refugee" label, however, the association appropriated the label of "non-recognized refugee," which it then recast as one portion (rather than the central feature) of the self-settled population's identity. In place of this negative identity, ARDIGUA identified spatial dispersal as the primary identifying feature of the *disperso* population.

The response of external actors to ARDIGUA was mixed. ARDIGUA's direct relationship with the Guatemalan government was characterized by government recalcitrance, not unlike that directed against other refugee groups. Such resistance was largely due to extreme pressures put on the government from the Guatemalan landholding elite and the military, both of which saw the returning refugees as a threat to their established power (Costello 1995; Briere 1998; SERCATE 1993). That ARDIGUA demanded a return to the more contentious south coast of Guatemala simply made

these pressures more extreme, and the association's marginality made it easier for the government to forestall its efforts.

ARDIGUA's ability to pursue its objectives in the face of such obstacles was realized in large part through its ability to establish linkages with a support network of refugee-related actors.[5] Its closest and perhaps most dependent link was to the CCPP, because it was the sole signatory to the Accord on Repatriation, and for a long time the only organization working with refugees that the Guatemalan government agreed to recognize (Briere 1998). As such, its cooperation was essential for ARDIGUA to gain access by proxy to the official forums from which it was excluded.

The Church, non-governmental organizations (NGOs), and other civil society actors, in Mexico as well as in Guatemala, also lobbied on behalf of ARDIGUA and pushed for recognition of its concerns in more consequential forums (Aguilar 1991; Horizons 1993; SERCATE 1993; Arroyo 1995; Venet 1998). International and transnational actors also played a prominent role in facilitating ARDIGUA's efforts by providing it with material resources,[6] and by putting diplomatic pressure on the Guatemalan government to meet and conclusively negotiate with the association.

ARDIGUA faced greater challenges than the CCPP in forging organizational relationships and gaining public legitimacy. The CCPP's advantage was partly due to its direct access to and interaction with NGOs and international agencies, such as the UNHCR, that worked with the camp population. This relationship helped to foster mutual familiarity and trust, and provided the CCPP's constituency with access to material resources and training workshops, which helped them hone the skills in leadership and negotiation. While ARDIGUA was admittedly marginalized from the more formal of the institutional actors, such as the UNHCR, it did garner limited recognition from them, which aided in its efforts to negotiate with the state (Venet 1998; ARDIGUA 1998).

Material and Discursive Impacts

ARDIGUA succeeded in realizing one—but not both—of its central demands. By 1999, approximately 750 ARDIGUA members had secured a collective return to the south coast of Guatemala. The self-settled membership remaining in Mexico, however, never received official state recognition or proper documentation as refugees.

Many argue that the substantial success of ARDIGUA's efforts was negligible, because of its failure to secure documentation for the population, and the relatively small number of ARDIGUA returns—as compared to the tens of thousands of refugees who returned under the widely publicized auspices of the CCPP. The latter discrepancy in numbers can be explained by the vulnerable status of ARDIGUA's population base, which discouraged many from mobilizing under the ARDIGUA banner; the protracted delays that ARDIGUA faced in the land negotiations, which led exasperated members to seek alternative means of return; and the 1999 decision of the Mexican government to grant Guatemalan refugees permanent resident status in Mexico, which led many refugees to opt out of the return altogether.[7]

While ARDIGUA's substantive success may have been limited, it should not detract from the non-material effects of popular collective action on the widening of discursive space. And it is precisely in this realm that ARDIGUA's efforts can be understood as radical (Escobar and Alvarez 1992; Fraser 1993; Alvarez 1997; Arato and Cohen 1997). In articulating its demands from its marginalized position, ARDIGUA was presenting a greater challenge (consciously or incidentally) to the status quo than the more publicly recognized camp refugees. More specifically, by demanding that non-recognized refugees be recognized as political refugees, ARDIGUA directly challenged the Mexican and Guatemalan governments, which had an interest in officially ignoring this population. It also posed an indirect challenge to the UNHCR, which, despite its protection mandate, was limited by diplomatic considerations in its ability to address the needs of this population. Finally, by making claims to return to the more developed south coast of Guatemala, ARDIGUA was posing a direct challenge to the landholding oligarchy in the region, and to the systemic racist and classist-informed exclusionary practices that deprive the majority of Guatemalans from exercising their full social, political, economic, ethnic, cultural, development, and citizenship rights.

Discussion and Conclusion

The collective mobilization of self-settled refugees around the issues of documentation and return, as examined in this case study, is unique to the extent to which self-settled refugees—as social and political subjects—were able to enter into consequential forums to make their claims heard and be partially accommodated by the state. It is also unique to the extent that such an expression of agency was formalized in the organizational body of ARDIGUA.

This uniqueness, however, is grounded in the formalization of these efforts, rather than in the efforts themselves. The subject of this case study is significant beyond its immediate context because it draws attention to the ability of refugees—self-settled or otherwise—to articulate agency and resistance in the interest of immediate or longer-term objectives. The focus on collective agency draws attention to the dynamics of popular collective mobilization more

generally, as well as to the conditions of collective action in the displacement context more specifically. That the focus of this study is self-settled refugees—who have a lower propensity to mobilize collectively and tend to be more estranged from the institutional sphere—makes the marginalization of the popular subject explicit, and their struggle more contentious.

ARDIGUA's emergence from within the context of the wider return effort—itself a result of collective action—draws attention to the potential cumulative effect of popular mobilization efforts, and their ability to widen political opportunities through which parallel or more vulnerable popular actors can emerge. Finally, as with the return movement more generally, ARDIGUA's efforts were political, and part of wider efforts to contribute to peace and political transformation in Guatemala. In this sense, this case study also illustrates the significant role that refugees can potentially play as political actors in extended processes of social and political change.

Several issues arose from this study that were not addressed here, but deserve attention and can serve as the basis for future research. One is the longer-term challenges of return, which is not as an end in itself, but a step in an extended process of reception, reintegration, and long-term development. Studies have been conducted on the challenges faced by return communities in Guatemala, which include tensions within the return settlements as well as conflicts between the returnees and the receiving population. The viability of the long-term development and integration of such settlements into the surrounding social, political, and economic landscape remains to be seen.

A related point of interest is the extent to which the organizational experience of ARDIGUA can translate into the Guatemalan context: What role, if any, can ARDIGUA play as an organizational entity in the domestic context? And to what extent will the experience of mobilization affect the continued involvement of ARDIGUA's members as active citizens, now that they have returned?

For those refugees who stayed in Mexico, other issues arise. Those who gained permanent status in the country face the challenges of integration, particularly in the face of diminishing international presence and related assistance for this process. For refugees who remain undocumented, their vulnerability may in fact increase, given that the refugee question is coming to formal resolve, and may make their exclusion from official return or integration efforts permanent.

What can other refugees learn from the Guatemalan return experience? What lessons can NGOs, international organizations, and donors learn about promoting and/or facilitating the participation of refugees in future repatriation efforts? Perhaps future research can draw a comparative analysis of refugee collective action in different countries, to provide general answers to such questions. Such a study could broaden the understanding of refugees as significant social and political actors who can participate in and shape political processes.

ARDIGUA's efforts may spark further interest in the little-studied realm of self-settled refugees, and in the broader social, political, and economic contexts that lead to and shape their experiences in exile. Its efforts may also generate interest in the collective role that they and other displaced persons can play to reappropriate spaces from which they have been marginalized and assert their "right to have rights."

Endnotes

1. Not her real name.
2. While not all self-settled refugees lack official refugee status or documentation, the majority of them do. Reference to self-settled refugees here will refer to those refugees with non-recognized refugee status, and the terms *self-settled, non-recognized, undocumented* and *dispersed refugee* will be used interchangeably.
3. If they were recognized at all by the Mexican government, it was usually as economic migrants, a status that refuted the political nature of their flight and the persecution they suffered.
4. See Tarrow 1998, McAdam 1996, and Schultz 1998.
5. Refugee-related actors include international humanitarian organizations, government refugee agencies, local non-governmental organizations, and churches that work directly with displaced communities by providing social services and advocating. Such actors include other grassroots refugee organizations.
6. For example, the European Commission funded projects, the UNHCR provided ARDIGUA with identity documents as well as limited funds to travel to Guatemala during the negotiations, and Horizons of Friendship helped run organization and human rights workshops.
7. The opportunity to claim permanent residence in Mexico did not have a dramatic impact on the decisions of self-settled refugees to opt out of the return, because many did not consider the government's proposal a viable option. Many presumed that having refugee documents, which they lacked, was a precursor to acquiring permanent resident status, and many more distrusted the government and remained wary of identifying themselves publicly, despite its promises.

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Return to the Nation: The Organizational Challenges Confronted by Guatemalan Refugee Women

Alison Crosby

Abstract

This article focuses on the challenges faced by organized Guatemalan refugee women on return from exile in Mexico. It seems that exile provided a temporary space in which women could organize and assert their rights as women, and this space was closed down upon return to the nation. Part of the explanation can be found in conflicts over power, in particular within the return communities. It is argued that the nature of international community intervention in the camps in Mexico, and throughout the return process, may have contributed to the current community conflicts. The article highlights the new organizational strategies being created by returnee women to effectively participate at the community and national levels, and respond to the needs of their bases within the rapidly changing post–peace accord era. An initiative to create a space for dialogue and negotiation among the women's organizations is examined.

Résumé

Cet article met l'accent sur les défis auxquels les femmes réfugiées guatémaltèques, qui se sont organisées pendant l'exil au Mexique, ont à faire face lors de leur retour au pays. Il semblerait que l'exil ait procuré un espace temporaire permettant aux femmes de s'organiser et d'affirmer leurs droits en tant que femmes et que cet espace de liberté se soit refermé lorsqu'elles sont retournées au pays. Cet état de chose peut s'expliquer, dans une certaine mesure, comme étant une lutte de pouvoir, spécialement à l'intérieur des communautés de retour. Il est suggéré que la nature de l'intervention de la communauté internationale dans les camps au Mexique et tout au long du processus de retour, pourrait avoir contribué à ces conflits communautaires actuels. L'article souligne les nouvelles stratégies organisationnelles que les femmes de retour mettent en place, dans la période de flux qui a suivi l'accord de paix, afin d'avoir une participation effective au niveau de leurs communautés et au niveau national et de pouvoir répondre aux besoins de leurs bases. L'article examine aussi une initiative visant à créer un forum où les

Introduction

This article offers a reflection on the challenges faced by organized Guatemalan refugee women on return from exile in Mexico. It is argued that refugee women's experiences of return throw into sharp relief the gendered boundaries of Guatemala, and can thus shed some light on the nature of women's participation in the post–peace accord era. The data comes from two years of work and doctoral research in Guatemala (1998–2000).[1] In the first section, I examine the effect of the return process on how refugee women organized, exploring their experience in Mexico. I then move on to discuss some of the work that I did with refugee/returnee women's groups around organizational change, in my capacity as peace-building program advisor for the international NGO Project Counselling Service (PCS).[2]

Refuge and Return[3]

The scorched-earth offensives perpetrated by the Guatemalan state during the early 1980s forced hundreds of thou-

sands of people to flee. Most who settled in refugee camps along the Mexican border with Guatemala were indigenous peasants. During more than a decade in exile, indigenous women organized in the camps, in preparation for the return process, and to ensure that their voices were heard in decision making within the camps. They learned Spanish in order to communicate among themselves, and with those outside who were involved with the refugee communities (national and international NGOs, the United Nations High Commission for Refugees). They also went through a process of understanding their rights as women. Several refugee women's organizations were formed, including Mamá Maquín, Madre Tierra, and Ixmucané, each relating organizationally to one of the three branches of the Permanent Commissions—the umbrella group set up to represent the refugees in the negotiation of the return process. Much was made by researchers and activists of refugee women's transformation in exile, and much hope was generated for the role they could play upon return to the nation, and the contribution they could make to Guatemalan women's organizing (Arbour 1994; Crosby 1999; Torres 1999).

In reality the seven-year return process proved to be difficult, both for the returnees in general, and organized returnee women in particular. Given the socio-economic conditions within war-torn Guatemala, the building of return communities was arduous. With little basic infrastructure available, communities often had to be built from scratch. Support from the international community lessened, and interactions with "those who stayed" were difficult, with the returnees often being viewed with suspicion and mistrust, both by local communities and the ever-militarized state.

Women's organizing often took a back seat to the daily pressures of building homes and communities. More emphasis was placed on productive projects than on maintaining spaces for training and reflection. The organizations' membership was often geographically dispersed, weakening the ability to organize effectively. New relationships had to be developed between women in the communities before they could begin to organize together. But what were they organizing for? The goal of organizing in Mexico—return—had been achieved. What was next? "Who do we become, now that we are 'returnees'?" The shift from *refugee* to *returnee* does not signify a change in the status of "other," for the returnee is still an outsider to the nation, "different." The question of who to become was one that refugee/returnee women's organizations all confronted. Such an identity quest was necessarily influenced (and constrained) by the surrounding social context.

One of the biggest problems faced by organized returnee women was conflict with the male leadership within their communities. On return, as part of their integration, returnee men began to reassert the roles within the family and community that they had occupied prior to exile. The co-operative structures set up in the return communities excluded the women's organizations from participation, and the co-operative leadership often sought to curb women's organizing.[4] In 1999 the co-operative of the return community of Nueva Generación Maya, in Barillas, Huehuetenango, closed down Mamá Maquín in the community, saying that the women's organization was too disruptive. Organized refugee women have described how, throughout the years of the return process, they were subject to threats and attacks, and even had their offices burned, by their own husbands, sons, and colleagues.

At the national level, returnee women participated in the Co-ordinator of Uprooted Women, part of the Consultative Assembly of Uprooted Populations (ACPD). The ACPD was formed to represent the uprooted population on the technical commission created to oversee implementation of the Agreement on Resettlement of the Populations Uprooted by the Armed Conflict, which was the peace accord signed between the PAN (National Advancement Party) government and the URNG (Guatemalan National Revolutionary Unity) in June 1994. However, within the ACPD, women were not given leadership positions. According to one woman, "The men never elect us or think of us. We have to put women forward ourselves in order to be taken into account, and when we do achieve this, we are given secondary jobs such as secretaries, which are positions the men do not value" (Project Counselling Service 2000).

Through their membership of the ACPD, returnee women also participated in the National Women's Forum, which was set up to ensure women's participation in the implementation of the peace accords. The forum was an intercultural space, incorporating both rural and urban women. Decisions were made by consensus, which improved women's negotiating skills. According to one forum document, it represented "a network of 25,000 women across the whole country, an unprecedented experience in Guatemala."

Returnee women's participation in regional and national organizations is important, particularly in such boundary-crossing initiatives as the National Women's Forum. However, in order to participate in such institutional spaces, returnee women either had to live away from home, or travel between four and twenty hours, and spend several days away from their homes. This required support from

partners and family members in household and childcare responsibilities, which was often difficult to obtain (Project Counselling Service 2000).

It seems that exile provided a temporary space in which women could organize and assert their rights as women, and this space was closed down upon return to the nation. Part of the explanation can be found in conflicts over power. Women's organizing in Mexico provided the refugee communities with increased access to local and international resources. International NGOs and the UNHCR played a particularly important role in the camps, providing women with support, both financial and moral. However, international support gradually evaporated during the return process. Within the return communities, conflict over increasingly scarce resources was gendered. As the returnee women put it, "In refuge, women's organizing was useful to the men. Here it is no longer useful" (Project Counselling Service 1999). It has been argued that the crisis generated by the exile experience provided a "parenthesis effect," which facilitated changes in women's roles and relationships to the men in the camps (Lozano 1996). These changes were viewed as temporary, and male power was reasserted on return.

The lack of support from external actors for refugee women after return contributed to the closing of spaces in which returnee women could participate and organize. In exile, international NGOs and the UNHCR worked with refugee women in organizational, developmental, educational, and women's-rights projects and processes. External actors also provided women with much-needed moral support in exile, often using their influence to gain the refugee men's acceptance of women's participation, and facilitating women's access to certain public spaces (Project Counselling 2000). This support was interrupted by the return, and no continuity was provided during the (re)settlement or (re)integration.

The nature of international community support for refugee women in exile needs to be analyzed. According to one external actor, there was "a high degree of paternalism and dependency" in the projects carried out with refugee women (Project Counselling Service 2000). It was difficult for refugee women themselves to reproduce the processes on return. One evaluation of the role of the international community in the refugee camps commented that "women hadn't developed sufficient understanding of the process and structures to implement them in the settlements" (Lozano 1996). It is also important to note that the work with the refugee women's organizations in the camps was quite new, beginning only two years before the first set of collective returns. The training was also provided mainly to the leadership within the women's organization, and the capacity to transmit the learning to the bases was not developed (Project Counselling Service 2000). Very recent changes were interrupted by the return. On return, the conditions and social relations were very different within the communities, and thus provided a setback to the transformation begun in exile.

The act of (re)crossing national boundaries does not necessarily signify (re)integration into the nation. The process of becoming a returnee is fraught with dangers and insecurities. The closing down of space in which women could organize highlights the gendered boundaries of Guatemala itself. However, in the face of all the difficulties encountered that have been discussed in this section, returnee women continued to organize and work towards a better future. They felt recognized socially, and understood their rights and responsibilities as women (Project Counselling Service 2000). The following section looks at some examples of the organizational change work that I undertook with the refugee women's organizations.

Creating Spaces for Dialogue

The organizational challenges confronted by refugee and returnee women have been a central focus of both my work and my doctoral research. From mid-1998 to the end of 1999, I coordinated a program within PCS-Guatemala that focused on strengthening the ability of civil society organizations to participate in the peace process.[5] Ten organizations participated in the program, including the three refugee/returnee women's organizations. A particular focus of the program was the strengthening of the organizational elements of social processes. The realities of the post-war era required different strategies for participation and resistance, and consequently modes of organizing that were different from those that had been effective in wartime. Many groups were seeking to change the militarized forms of social relations, which affected the practices of their organizations. Organizational change is not a goal in itself, but a mechanism to enable groups to carry out their work and respond to rapidly changing socio-political circumstances.[6]

As in many other civil society organizations in Guatemala, the structures of the refugee/returnee women's organizations tended to be vertical, with a high degree of centralization of decision making, access to information, control of funding, and forms of consultation, which led to separation between leadership and bases (Project Counselling Service 2000, 29). A focus of the work with the wom-

en's organizations was how to make the organizational structures more accountable and transparent, and thus responsive to the needs of the bases. It was important that all levels of the organizations be involved in these processes.

One of the women's organizations undertook a diagnostic study as part of the project. The objective was to redefine organizational strategies and structures. The study took into consideration the shifting national context, and returnee women's experiences of reintegration. A space for exchange and reflection on the needs and interests of the membership was created. The interviews were conducted by the local co-ordinators themselves, rather than the national leadership, in seventeen communities in three regions of the country. The methodological approach was aimed at reactivating communication between base women and their representatives, to strengthen identification with, and confidence in, the organization. In evaluating the process at the end, the women emphasized the importance of its participatory nature, that they themselves were responsible for conducting the study. The process was supported by the national leadership, and a local NGO that provided the women with the necessary training and accompaniment, facilitating workshops where the interviewers could reflect on the process and the preliminary findings, and putting together the final report using the data gathered by the women. The central challenge faced in completing the study was how to implement the recommended organizational changes.

All three women's organizations undertook similar restructuring, trying to make their organizations responsive to the shifting national and local contexts, as well as to the experience of return. In working with all the organizations, it struck us that it would be important to create a social space in which the organizations could reflect together on the challenges they faced as returnee women in their day-to-day work, discuss strategies for the resolution of problems and conflicts, and compare notes on how to implement organizational change. Until recently, the creation of such a space would not have been possible, given the historical tensions between the organizations, which are rooted in the political tensions and differences between the branches within the permanent commissions. However, political allegiances were split open during the post–peace accord transition, and this allowed for new spaces for dialogue and negotiation to be developed.

The new space for dialogue and negotiation had to be carefully designed. We decided that the first workshop would use the organizational change project as a basis for preliminary discussion and dialogue. Members of each organization would discuss how they went about implementing their respective projects, with ample time reserved for reflection, exchange, and questions. In addition to the three returnee/refugee women's organizations Mamá Maquín, Madre Tierra, and Ixmucané, we decided to invite a rural women's organization, I'x Defensoría de la Mujer Indígena, to participate in the workshop. I'x had participated in the organizational change project, and was confronting many issues similar to those of the returnee/refugee women's organizations. The workshop would also provide an opportunity to begin to break down some of the barriers between "those who stayed" and "those who left."

In the weeks leading up to the workshop, we spent a great deal of time working with each organization on the workshop format, goals, and objectives. Each organization was asked to prepare a brief presentation on the main processes undertaken, with a focus on key difficulties and achievements. Preparation for the workshop was made easier because of the trust built between PCS and the women's organizations, through the work we had done together, not only on the organizational change project, but also historically. One particularly important project was the research study PCS had undertaken with returnee women on their experiences before, during, and after exile (see Project Counselling Service 2000).

I co-facilitated the workshop with the PCS gender consultant. Two national and two regional coordinators from each organization participated, along with an *asesora* (external support person). The presentations structured the event, with time set aside after each one for questions and dialogue. The organizations all came extremely well prepared, bringing photographs, slides, and drawings. Time was reserved at the end to discuss common themes, and possibilities for future workshops. Common difficulties highlighted included conflicts over power; problems with the co-operatives; limited participation in decision making; funding; and women's low civic participation (e.g., in voting). Among their achievements, the women listed the degree of participation within the organizations, and the work that they had done despite adversity.

The workshop was a great success. All the women present engaged in lively and frank discussion and debate. There was the sense that this was a new space for dialogue and joint action, and that possibilities should be generated for continued co-ordination, collaboration, and sharing of information. A key comment made by many women was that the workshop had given them *ánimo* (energy) for the work to be done, despite the difficulties and challenges highlighted during the day. As one woman stated, "We all suffer

the same things, but each one of us here values our work. We must not leave things here. Let's hope that we can continue sharing" (Project Counselling Service 1999).

To conclude on a positive note, the success of the organizational change project, and the workshop initiative in particular, led to the development of a program by the women's organizations and the PCS that would support the daily work of the individual women's organizations, and continue individual and collaborative organizational change and strengthening. Funding was obtained, and the program is about to get underway. A central component will be the creation of an inter-organizational space for leadership development, and the formulation of collective responses to the barriers to organization that returnee women experience, which have been highlighted in this paper. It is hoped that this work will contribute to the strengthening of returnee women's participation within the post–peace accord nation.

Endnotes

1. I would like to thank the refugee/returnee women's organizations Mamá Maquín, Madre Tierra, and Ixmucané, as well as the rural women's organization I'x Defensoría de la Mujer Indígena. The working relationships I developed with these exceptional women were the inspiration for this paper. I would also like to acknowledge my colleagues at PCS Guatemala, in particular Susan Murdock and Carolina Cabarrús, as well as Jean Symes and Sylvie Perras from Inter Pares. Conversations with Frances Arbour were useful in helping me think through some of the key arguments within the paper. Financial support for my doctoral research was received from the Social Sciences and Humanities Research Council of Canada (SSHRCC), through a doctoral fellowship.
2. PCS is an international consortium comprising five NGOs, with four from Europe (Danish Refugee Council, Norwegian Refugee Council, Dutch Inter-Church Aid, and Swiss Inter-Church Aid) and one from Canada (Inter Pares). Since 1979, PCS has been working with local counterparts, NGOs, and popular organizations to find durable solutions to the problems faced by refugees, displaced persons, and others affected by armed conflict throughout Latin America.
3. Part of this section is taken from my contribution to Blacklock and Crosby, forthcoming. Most of the information on refugee women's experience of exile in Mexico comes from previous research (see Crosby 1999). Unless indicated otherwise, the main source of data on refugee women's experiences of return is my work with the women's organizations, through meetings, conversations, interviews, and workshops. A major source of information is the recently completed study undertaken by PCS Guatemala with returnee women on their experiences before, during, and after exile. I quote from the unpublished Spanish version of the manuscript, and all translations are my own.
4. Returnee women in general were not members of the co-operatives, and therefore could not be landowners (the exception being the return community of Nueva Libertad, Alta Verapaz, where women were both co-operative members and co-owners of the land. This, however, seemed to be due to the co-operative's attempts to exclude other families from joining the community) (Project Counselling Service 2000). The explanation for women's non-membership can be found in the high membership fees, and the amount of time required for co-operative activities. Household duties, which consumed fifteen hours of women's work daily, on average, were not recognized by the co-operative as a contribution to the community. Women were also subject to threats by co-operative members when they persisted in demanding co-operative membership and access to land.
5. The peace process should not be viewed merely in terms of the implementation of the peace accords signed between the PAN government and the URNG, but rather as a wider project of dismantling militarized social structures and relations.
6. The program, officially entitled Support for Internal Transition of Civil Society Organizations in the Peace Process in Guatemala, was jointly administered by PCS-Guatemala and Inter Pares (the Canadian NGO, which is a founding member of the PCS consortium). Inter Pares obtained funding for the program from the Canadian government's Peace Building Fund. I had some difficulty in deciding on the shorthand term to refer to the program in this article. While the program was underway, we referred to it as the institutional strengthening project (*fortalecimiento institucional,* or FI in shorthand). However, such a term does not adequately reflect the nature of the program: as an Inter Pares colleague commented to me, PCS supports social processes, not institutions per se, and what was important within the program was strengthening the organizational elements of social processes. In the end, I decided to use the term *organizational change,* although this does not adequately capture the essence of the work undertaken, either.

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Learning from Rohingya Refugee Repatriation to Myanmar

K. C. Saha

Abstract

The author examines the role of the United Nations and the international community in establishing criteria for the return of Rohingya refugees to Myanmar from Bangladesh. This study highlights the importance of the international community in establishing standards and supporting the return, even in cases where the national governments involved (Myanmar and Bangladesh) have never signed the UN Convention on the Status of Refugees. The author concludes that the repatriation of Rohingya refugees from Bangladesh has been relatively successful, and that the pattern seen in this return could be usefully replicated in order to bring about the voluntary repatriation of other refugee groups to Myanmar.

Résumé

L'auteur examine le rôle joué par les Nations Unies et la communauté internationale dans l'élaboration de critères pour le retour de réfugiés Rohingya du Bangladesh vers le Myanmar. L'étude souligne le poids considérable dont pèse la communauté internationale lorsqu'il est question d'établir des critères et de soutenir le processus de retour, et cela, même dans des cas où les gouvernements concernés (le Myanmar et le Bangladesh) n'ont jamais signé la Convention des Nations Unies sur le statut des réfugiés. L'auteur conclut que cette opération de rapatriement de réfugiés Rohingya du Bangladesh s'est relativement bien passée et que la tendance observée dans ce retour pourrait être utilement reproduite afin d'obtenir le rapatriement volontaire d'autres groupes de réfugiés vers le Myanmar.

Causes of the Refuge Displacement

The Arakan region of Myanmar, like the Kachin state, the Karen state, and the special division of the Chins, has witnessed insurgency since Myanmar's independence in 1948. The Rohingyas are Muslim descendants of Arab and Persian traders who settled in the Arakan region, and there has been intermarriage with the indigenous population over several hundred years. The population of the Muslims in this region is about 3 million. The region has a common boundary with Bangladesh, separated by the Naaf River and interspersed with forests and hills. The Arakan province has been traditionally under the influence of Bengali culture because of its proximity to Bangladesh.

Even prior to 1992, there had been several displacements of the Rohingyas, the major one being in 1978, when the Myanmar government announced that there was an alarming increase in the number of illegal migrants from Bangladesh, in the Arakan region. A campaign disguised as a search for illegal immigrants produced a wave of refugees to Bangladesh. "At least 130,000 Rohingyas had deserted their homes and went over to Bangladesh."[1] The Myanmar authorities maintained that those who had fled across the border were Bangladesh nationals who had illegally entered Myanmar. However, under international pressure, the government agreed to accept the refugees from Bangladesh. An agreement for repatriation was signed with Bangladesh, and the Rohingya refugees were repatriated to Myanmar.

In Myanmar, during general elections in 1990, the Rohingyas supported the National League for Democracy (NLD), whose focus was termination of military rule in Myanmar. The military regime, under the State Law and Order Restoration Council (SLORC), negated the results of the general election and intensified its campaign against the ethnic minorities who supported the NLD. The

Myanmar authorities alleged that the Rohingyas in general were aiding, abetting, and hiding the insurgents who were supporting an independent state of Arakan. "The authorities issued arrest warrants against 10,000 Muslim students for an alleged insurgency plot against the State."[2] Subsequently the army terrorized the entire Rohingya population, who started deserting their homes. The UN high commissioner for refugees, Sadako Ogata, in a statement issued on February 14, 1992, said that "she was deeply concerned about the conditions in Myanmar that were forcing people to flee at the rate of 400 to 600 a day."[3] The UNHCR Technical Mission, which inspected a large number of encampments in Bangladesh, reported that "the refugees were streaming into the country at a rate of thousand a day. Unless the conditions improved in Myanmar, their numbers were expected to increase."[4]

"About 210,000 Rohingya refugees reached Bangladesh by 1992."[5] Amnesty International reported that the military regime had seriously violated the human rights of ethnic minorities in Myanmar. An Amnesty fact-finding team sent to interview Rohingya refugees in Bangladesh confirmed reports of widespread human rights abuses, including torture and murder. "The U.S. Committee for Refugees which visited Bangladesh in February, 1992, also reported that the refugees had fled because of human rights abuses committed against them by the Myanmar authorities. Their homes and mosques were destroyed, their lands appropriated, their men were subjected to forced labour and physical abuse. The Myanmar Military's actions were part of a deliberate campaign of terror aimed at driving the Rohingyas out of Myanmar."[6] In the February 1993 Report to the United Nations Commission on Human Rights, the UN special rapporteur on Myanmar concluded that Muslims in the state were at high risk.

Steps Taken for Repatriation of the Refugees

The influx of such a large number of refugees posed serious problems for Bangladesh. It expressed its serious concern to the Myanmar regime. Prime Minister Begum Khaleda Zia pleaded that "the Myanmar authorities must take back the Muslim refugees who fled to Bangladesh to escape military crackdown. Bangladesh cannot look after the refugees for long. They are citizens of Myanmar and they will have to return to their country."[7]

The mediation of UN Undersecretary General Jan Eliasson to resolve the refugee problem between Bangladesh and Myanmar produced results. Myanmar agreed to send its foreign minister, U Ohn Gyaw, to Dacca for talks with his counterpart on the modalities for the return of over 210,000 Rohingya Muslims. Myanmar authorities made the assurance that that it was prepared to accept refugees who had evidence of prior residence in Myanmar. An agreement calling for "safe and voluntary" repatriation of refugees was signed in early 1992 by the foreign ministers of both countries. An agreement on technical modalities to be followed in bringing repatriation, signed by officials of both countries, provided methods for checking the identity of the refugees. Under the agreement, repatriation was to start on May 15, 1992. But repatriation could not start on the decided date because a majority of the refugees were against any return. However, talks at the official level between the two countries continued. A proposal to involve the UNHCR during repatriation was rejected during the talks held on July 30, 1992. However, later the two countries agreed to involve the UNHCR in the repatriation of refugees. Both countries further agreed on a four-point formula to create congenial conditions in Arakan for the repatriation of refugees. The agreement reached on August 23, 1992, provided:

1. *Azan* (call for prayer) over loudspeakers will be allowed in mosques in the Muslim majority Myanmar province.
2. The Rohingyas will be allowed to move freely from village to village in their homeland, ending earlier restrictions.
3. The Rohingyas from their shelters in Bangladesh can travel to Arakan to see for themselves the conditions created for them and then come back to camps.
4. Those Rohingyas who do not possess a citizenship certificate can apply for it after returning home.[8]

Repatriation began in batches, in early September 1992. But soon there were protests from a large number of refugees opposed to repatriation. "The refugee camp at Dhuapalong built with UN assistance was the scene of bloody clashes between refugees and the Bangladesh security forces which left 6 Myanmar Muslim refugees dead, scores injured and over 200 arrested."[9] The protests of refugees continued in other camps also. "The inmates of Naikhangchari camps at Gundum went on a rampage, damaging the camp office. The refugees demonstrated inside the camps opposing repatriation."[10] Chaos and confusion prevailed in the camps. "The armed refugee militants who were opposing the process of repatriation virtually seized control of camps at Dhechuapalong after the rumour was spread that a fresh group of refugees would be sent to Arakan. Tension was also mounting in camps at Nayapara, Balukhali, Dhum, Sailor Dheba, Dhuapalong and Rangikhali areas near Cox's Bazar in the Chittagong Hill Tract. Large contingents of Bangladesh police raided sev-

eral camps on October 10, 11, and 12, 1992, to apprehend the rebels and made number of arrests."[11] The situation became quite tense in a number of camps. "At least 70 people including 15 policemen were injured in a fierce gun battle between security forces and militant Muslim refugees on December 5, 1992. The clash took place when a group of 1300 refugees willing to return to Arakan, were being taken to a transit camp in Cox's Bazar for repatriation. Some of the refugees fired from automatic weapons. The security forces hit back by firing 40 rounds. Tension continued to prevail at the Nayapara refugee camp, after the violent incident."[12]

The Bangladesh government had banned any political activity by the refugees, but their leaders secretly continued their activities. Two organizations of the Rohingya Muslims—Rohingya Solidarity Organization (RSO) and the Arakan Rohingya Islamic Front (ARIF)—were active. Their aim was to set up Rohingya settlements in different parts in Cox's Bazar in Bangladesh and to launch a movement to establish a Muslim Rohingya state, with the help of international assistance. These organizations had a considerable influence over the refugees in the camps.

The UN high commissioner for refugees, Ms Ogata, appealed to the prime minister of Bangladesh to stop the forced return and to allow the UNHCR free access to the refugee camps. The UNHCR had pulled out of the repatriation towards the end of November 1992, after allegations that many refugees were sent home against their will. Bangladesh, on the other hand, accused the UNHCR and some Western relief agencies of discouraging refugees from going back to their homes. A new memorandum of understanding was signed between Bangladesh and the UNHCR, which provided that refugees willing to return home would themselves register their names for repatriation, before being taken to one of the three transit camps on the bank of the Naaf River. The new agreement gave UNHCR officials unlimited free access to the refugee camps. Under the previous system, camp officials had drawn up a list of volunteers from names provided by refugee headmen. But aid agency workers often claimed that the headmen were bribed or forced to provide names.

The refugee repatriation became further complicated when a number of refugees deserted the camps. It was alleged that local communal organizations instigated the refugees to desert the camps, and as a result 20,000 refugees ran away from camps in Cox's Bazar and Bandarban to hilly areas. Several hundred local residents of Maheshkhali area demonstrated before the police station on August 3, 1993. The demonstrators alleged that "about 400 Rohingya refugees had so far entered the Maheshkhali area after fleeing their camps. They urged the authorities concerned to take back the refugees to their assigned shelters."[13]

Repatriation involved several rounds of talks between officials of the two countries. The fifteenth round was held on August 31, 1993. Repatriation, which began in September 1992, continued in batches throughout 1993. During a cyclone on May 5, 1994, in which twelve out of nineteen camps were razed to the ground, eighty-six refugees were killed. The government suspended repatriation in view of the losses suffered by the refugees in the cyclone. Between August 1994 and March 1995, large-scale repatriation was completed. "But the repatriation came to a virtual halt in April 1995 when Myanmar authorities suddenly started talking about re-verification of individual refugees who had earlier been cleared for repatriation. Thus repatriation of 54,000 remaining refugees became uncertain."[14]

In the beginning of the repatriation process, the Myanmar authorities offered clearance to refugees on the basis of a "runaway list," which they themselves had prepared. But they later admitted that the runaway list was far from accurate. "About 42,000 cases were pending as they did not pass the scrutiny carried out by the Myanmar authorities. If one member of the family failed the scrutiny, the whole family was stranded. The files of the failed individuals were sent to the Bangladesh authorities for more particulars. And such a process of re-verification sometimes took as long as one year."[15]

Repatriation continued in small batches in 1996 and 1997. During repatriation there were fresh cases of Rohingya Muslims from Myanmar coming to Bangladesh. "Bangladesh Rifles 39 Battalion had pushed back a group of 81 Rohingyas to Myanmar on April 25, 1996. The Bangladesh Rifles personnel had apprehended them while they were trying to enter into Bangladesh crossing the Teknaf border. They formally handed over the apprehended Rohingyas to the Myanmar Border Security Force (NASACA)."[16] In February 1997, a total of 26,832 refugees were still awaiting repatriation. The director of the UNHCR's Regional Bureau for Asia said, "We are close to winding up the repatriation of the refugees from Bangladesh. We will now only focus on re-integration of the returnees in their homes. The situations in Myanmar have changed a lot. And the authorities there were extending all co-operation to the UNHCR. They have accepted the protection role of UNHCR and granted its international staff unrestricted access to all the returnees. But there is no guarantee that no fresh exodus will happen in future."[17]

In the meantime, the Myanmar authorities had set August 15, 1997, as the deadline for repatriation of all refugees. But repatriation continued to be faced with problems. "The government postponed scheduled repatriation of 200 refu-

gees on July 23, 1997, following a law and order situation in two camps. Some 200 refugees from the Katupalong camp were due to go back home. A militant group from the Nayapara camp marched towards the Katupalong camp and asked the refugees not to return to Myanmar. Hundreds of refugees armed with bamboo sticks, bows and arrows forced out six officials and employees from the camp. They also damaged six huts and looted the goods that were to be distributed amongst refugees. Police arrested four refugees on charge of rioting."[18] The rioting was very serious. "UNHCR officials from Dacca went to Cox's Bazar on July 24, 1997, morning to visit the camps and had talks with government officials on the latest developments. UNHCR officials however said that no force was being applied to make the refugees agree to be repatriated."[19]

An editorial in a Bangladesh newspaper commented "that the Bangladesh preparation fell short of taking the UNHCR officials along, which was why they were purportedly urging the Bangladesh authorities now to ensure voluntary repatriation. Bangladesh might have followed the procedure of sending the local UNHCR office the list of would-be returnees. Seemingly there had been some communication gap. But it was ironical that Bangladesh had to undergo a sensitivity test at the fag end of the send off process involving the last batch of 21,000 refugees"[20]

A week after the riot, further talks were held. "A tripartite meeting among government officials, UNHCR representatives and leaders of Rohingya refugees was held in Cox's Bazar on July 30, 1997 which failed to resolve the problem that arose out of anti-repatriation stand taken by a section of the refugees. The meeting held for the consecutive day ended inconclusively, as leaders of Rohingya refugees were firm on their eight-point demand, which included suspension of repatriation till democracy was restored in Myanmar. Despite repeated assurances by both the government and UNHCR that their demands would be considered, the militant refugee leaders did not agree to give up their anti-repatriation agitation."[21]

There were suggestions from some quarters and international organizations that the remaining refugees who were unwilling to repatriate should be allowed to settle in Bangladesh. Bangladesh Foreign Minister Abdus Samad Azad said "that Bangladesh would not allow the remaining refugees to settle in the country permanently. It should be the responsibility of the international community to settle them elsewhere. Bangladesh with its limited resources should not bear the additional burden of allowing the refugees to stay in Bangladesh permanently."[22] The remaining refugees maintained that the situation in Myanmar was far from normal. "Some refugees in Kutapalong camp claimed that 15,000 refugees who had been earlier repatriated to Myanmar came back to Bangladesh during the last couple of months to escape the wrath of the military junta."[23] "The anti-repatriation group thought that if they could hold off the return of refugees until August 15, 1997, the deadline set by the Myanmar authorities to receive the Rohingya returnees, they would be able to stay back in Bangladesh for good."[24] Officials of the Bangladesh Foreign Ministry observed that it would be difficult to complete repatriation by the August 15, 1997, deadline, because the process of convincing and counselling was still on.

The Bangladesh authorities conveyed their feeling of urgency to Myanmar authorities and requested an opportunity to sit across the table and discuss the issue. It was also made clear that lists of many refugees who had volunteered their names had been sent to Myanmar authorities for clearance, but no clearance could be obtained. Tension continued in the refugee camps. "Over a hundred persons, including 8 policemen, were injured in a clash between policemen and the refugees at Nayapara refugee camp in Cox's Bazar on October 21, 1997. Police said the trouble began when a group of refugees attacked the policemen as they tried to stop a clash between two rival groups of refugees."[25]

The refugee repatriation in 1998 and 1999 was negligible. There are still 20,000 to 22,000 refugees in Bangladesh. Negotiations between Bangladesh and Myanmar continue. It was agreed that after January 2000, fifty refugees would be repatriated every week under UNHCR supervision. But it is still to be seen when repatriation of all the refugees is actually completed.

Lessons from the Rohingya Refugee Repatriation

Addressing causes of displacement

Before undertaking any repatriation of refugees, it is necessary to address the causes of displacement. Rohingya displacement was the result of persecution by the Myanmar regime. The first step in such a situation was to persuade Myanmar to stop such acts of persecution and to take back its own citizens who were staying in Bangladesh as refugees. After the effective and timely intervention by the UN and the international community, the Myanmar authorities adopted a positive attitude to resolving the crisis. They admitted that the Rohingyas in the Arakan region had been subjected to many restrictions and that their freedom of movement and freedom of religion had been curtailed. They also agreed to improve the conditions in Arakan and signed an agreement with Bangladesh to that effect. Further, they agreed to negotiate with Bangladesh on the modalities to be followed for the repatriation of the refugees.

To bring about repatriation of refugees in any refugee

situation, the UN and the international community should attempt to bring about reconciliation between the state and the refugees purely out of humanitarian consideration, without concern for any political issues. Such reconciliation must ensure the safety and security of the refugees and the enjoyment of their rights and privileges, just as any other citizens. In the case of the Rohingyas, if the UN and the international community had insisted that democracy first be restored in Myanmar, as many refugees had demanded, before repatriation was begun, it is unlikely that any repatriation could have occurred.

Bilateral agreements as a basis of repatriation

Neither Bangladesh nor Myanmar signed the 1951 Convention on the Status of Refugees or the 1967 Protocol. However, both countries entered into a bilateral agreement. The Myanmar authorities adopted a flexible approach by accepting refugees with proof of prior residence in Myanmar. Implementation was made more flexible as a result of a series of meetings held at the official level to sort out practical difficulties experienced during actual repatriation. Bilateral agreements are generally criticized on the grounds that such agreements may overlook the interest of the refugees, and that repatriation may be effected even when the situation is not conducive from the point of view of the refugees. But many countries prefer a bilateral framework for finding a solution, since they feel that involvement of a third party can unnecessarily internationalize the issue. The Rohingya refugee repatriation has shown that bilateral negotiations can bring about solutions to the satisfaction of all. Moreover, even within a bilateral framework, the international community can always intervene if the human rights of refugees are violated. What is of utmost importance from the point of view of the refugees is that a solution to the crisis be found, by effecting early repatriation, and if a bilateral mechanism can help bring it about it, that should be pursued. So there is a need to strengthen the bilateral mechanism rather than to view it with skepticism.

Involvement of the UNHCR

In case of repatriation within the framework of a bilateral agreement, the scope of involvement of the UNHCR is limited. The parties to the agreement should enjoy full freedom and support from the UNHCR. The role of the UNHCR should be only to oversee the repatriation, and if violation of the rights of refugees occurs, it should highlight such a violation and take up the issue with the authorities concerned. Refugees in most situations demand repatriation only under supervision of the UNHCR, but involvement of the UNHCR entails UNHCR clearance at every stage of repatriation. Such involvement can be counter-productive in many situations, so it is necessary to clearly spell out the scope of involvement of the UNHCR in each refugee repatriation process. The role of the UNHCR in repatriation under a multilateral agreement when the states have signed the 1951 Convention, and the role under a bilateral agreement, cannot be the same. Presently, the UNHCR follows the same approach in every repatriation.

Voluntary Repatriation

There were allegations that Bangladesh had repatriated many Rohingya refugees against their wishes, from the very beginning. The UNHCR, which was involved in the repatriation, despite initial reluctance of both countries, also protested against forced repatriation and withdrew itself from the repatriation process. The principle of *non-refoulement* has to be strictly followed in any repatriation, but vested groups often manage to stall repatriation, taking umbrage at this principle. These groups sometimes manage to obtain the support of the UNHCR and succeed in their objective of stalling repatriation.

Bangladesh has accused the UNHCR and other NGOs of obstructing the repatriation and supporting groups totally opposed to repatriation under any circumstances. There were instances of armed refugee groups preventing willing refugees from repatriating. The refugee groups continued to oppose repatriation on the grounds that the situation in Myanmar had not yet returned to normal and that those who had been repatriated were being persecuted by the Myanmar regime. They also claimed that some refugees who had repatriated came back to Bangladesh. The UNHCR should have investigated such instances to effectively counter such allegations or to take up the issue with the appropriate authorities in order for them to take corrective action.

The question to be answered is, How can misuse of the issue of principle of *non-refoulement* be prevented, so that vested groups cannot stall repatriations?

Law and order in camps

There had been serious breaches of law and order in refugee camps on several occasions when refugee groups clashed against the security forces and among themselves. Such clashes were violent, and firearms were used, with loss of human life. Security forces had to open fire on several occasions to regain control. Proliferation of sophisticated firearms in refugee camps is a challenge of growing concern. Some refugee groups with arms were able to terrorize other refugees in the camps. Such acts of violence not

only embarrass the host country but also harden its position. The host country tries to expedite repatriation and takes measures to deny asylum to refugee groups in the future, thereby undermining the entire principle of protection. Bangladesh had already prevented the entry of some Rohingyas by arresting them at the border and handing them over to the Border Police of Myanmar.

The question is whether there is a need to evolve a code for refugees, specifying their duties and obligations in the host country. The 1951 convention has specified the rights of refugees in the host country but is silent on this aspect.

Period of Repatriation

In the case of Rohingya refugees, repatriation started in 1992, but repatriation of all refugees has not been completed. In the initial years, repatriation of large numbers of refugees could be completed, but in the later years repatriation was very slow, and during some periods there was no repatriation at all. Any repatriation process is fraught with uncertainty, but still there is need to have a timeframe for repatriation. Refugee groups opposed to repatriation were allowing only small groups to return, as a part of a well-considered strategy to stall repatriation, and they succeeded in stretching out repatriation over eight years. The long period of repatriation creates avoidable complications. The Myanmar authorities applied stricter verification criteria for the later refugees. They also set a deadline for completion of repatriation because they did not want the process to continue indefinitely.

Repatriation or resettlement of remaining refugees

Out of 210,000 refugees, more than 190,000 refugees were repatriated. What was the justification for the remaining refugees to continue living in the camps? Those who have genuine fears of persecution duly established after thorough verification, case by case, may be allowed a longer period of asylum in the host country, or be resettled there or in a third country.

But the question is why other than these categories of refugees, remaining refugees should be allowed to stay on. Should the cessation of refugee status not be assumed as their non-return is deliberate, particularly when meaningful national protection is available?

Conclusion

Repatriation of Rohingya refugees from Bangladesh could be regarded as successful. The military regime in Myanmar adopted a positive approach on the issue of repatriation of the Rohingya refugees. This repatriation process has, however, highlighted many important issues that need to be considered in order to promote more meaningful and effective refugee protection. In Myanmar, as a result of widespread human rights abuses, hundreds of thousands of people have fled the country and are living as refugees in camps or settlements in Thailand. The same approach of reconciliation and effective intervention by the international community, as was seen in the case of Rohingya refugees, can bring about voluntary repatriation to Myanmar of other refugee groups.

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Ethical Reflections on the Institution of Asylum

Peter Penz

Abstract

This article explores the rationale for protecting and assisting refugees, from an ethical perspective. It also examines the relationship between a country's obligation to provide asylum and that country's affluence. The field of tension between statist and cosmopolitan ethics is analyzed. After showing that the former establishes weak and limited asylum obligations and after offering a brief argument for cosmopolitanism, the article explores cosmopolitan forms of utilitarianism, libertarianism, and egalitarianism. A reasonable synthesis of the last three perspectives is proposed: it includes a strong duty to provide asylum, a broad definition of the kinds of displacement that create entitlements to international protection and assistance, and international burden-sharing based on relative affluence.

Résumé

Cet article exploratoire se penche sur la raison d'être fondamentale — du point de vue de l'éthique — de l'aide et de la protection offertes aux réfugiés. Il examine ensuite la relation qui existe entre le devoir d'asile d'un pays et son niveau de richesse. Cette exploration se fait à l'intérieur de l'espace de tension qui existe entre l'éthique étatiste et l'éthique cosmopolite. L'article démontre que l'éthique étatiste ne propose, dans le meilleur des cas, que des devoirs faibles et limités. Il continue avec une brève plaidoirie pour le cosmopolitisme, avant d'examiner les formes cosmopolites de l'utilitarisme et des doctrines libertaires et égalitaires. Une synthèse équitable est proposée, qui inclut le devoir ferme d'offrir l'asile, une définition générale des types de déracinements donnant droit à la protection et à l'assistance internationales, et un système de partage des charges au niveau international basé sur les niveaux relatifs de richesse.

Introduction: Two Ethical Questions

What is the ethical basis for protecting and assisting refugees from other countries? Does a country's affluence affect its moral obligations? These are the questions to be addressed in this article. The focus is on the institution of asylum, not the current debates about asylum policies and procedures. (The approach sketched out here could be applied usefully to the latter, but that would require a much longer treatment.)

The questions are ethical and require an ethical approach to answer them. Such an approach must be distinguished from a socio-scientific or legal approach. A socio-scientific analysis describes and explains, e.g., how asylum is viewed in particular countries or cultures and the reasons for this attitude, such as the fact that a religion's founding prophet sought asylum at a crucial point in his messianic career. Such an analysis is different from an evaluative and prescriptive approach, which is shared by both ethics and the law. The strictly legal approach, represented by legal positivism, is still, in one sense, descriptive: it articulates what the law says and then applies it to a case in an evaluative or prescriptive manner. Certain schools of ethics, such as the school of natural law, do that, too, although what it initially describes is not law made by people, but divine law. However, regardless of whether ethical schools take a "realist" approach (which involves *discovering* ethical principles or the ethical order) or a "constructivist" approach (which recognizes that we human beings and our societies *construct* ideas of the good and the right), the ethical approach requires that laws and social practices be submitted to evaluative scrutiny. This is the approach I will use in this essay when exploring refugee protection and assistance. In other words, I will not ask, Do certain refugee policies and practices accord with legally established rights and obligations? Rather, my question will be, What form must refugee laws, policies, and practices take in order to be ethical?

I will evaluate competing ethical perspectives, especially perspectives that differ on the ethical significance of national borders. And I will evaluate ideal types of ethical perspectives. Most functioning systems are mixtures of ethical principles, and these ethical principles can often be traced to different ideal types of coherent ethical perspectives. So ideal types of ethical perspectives are seldom good representations of functioning ethical systems. Furthermore, they seldom provide the most satisfactory prescriptions. Nevertheless, to understand the rationales, it makes sense to initially analyze such ideal types and then treat particular instances of real-world prescriptions as hybrids of such ideal types.

I have not yet defined the word *refugee.* In fact, I will leave this definition open, because the implications of each ethical perspective lead to different definitions, just as with the term *asylum.* These implications need to be explored, rather than defined away. What we can accept for the moment is that *refugees* are persons who have been forced to leave their home area.

A further question arises about alternatives to asylum and whether they should be pursued. Asylum is necessary when people are forced to move. Are there ways of preventing or minimizing such displacement? Should they be pursued as alternatives to asylum or merely to minimize the need for it? One option is humanitarian intervention and the creation of safe havens for threatened populations. Temporary asylum in neighbouring countries may also be a way of minimizing displacement and the requirements of asylum. Each ethical perspective has a different view on such approaches.

Finally, before proceeding to the actual analysis, it may be important to acknowledge that the following treatment of asylum is Eurocentric. Not Eurocentric in the way that the Geneva Convention of 1951 and the establishment of the office of the UN High Commissioner for Refugees was, when it limited itself to refugees in Europe and ignored mass refugee problems elsewhere. Asylum needs and rights in the whole world are addressed here. Rather, an allegation of Eurocentrism could be made because the range of ideas employed, including those of cosmopolitanism, are drawn from thinking in the North Atlantic sphere and its intellectual culture. That, no doubt, is true. However, there is no single Western value system. Rather, the North Atlantic cultural sphere has been a terrain for struggle among competing value principles and systems. The analysis presented here certainly cannot be taken to represent a mainstream position, especially its cosmopolitan dimension explained below. Similarly, there is no one system of Asian or African values. In fact, even national cultures typically are arenas in which competing values are in contention. It is not unreasonable to suppose that the range of values in contention in the West or the North is not unlike the range of values in the East or the South. What is offered here as an ethical analysis is intended as a contribution to a global dialogue about the ethics of asylum. It is to engage, not to pronounce. It would be very enlightening to place this analysis in a dialectic with, for example, Islamic, neo-Confucian or African perspectives on asylum.

Sovereigntist Ethics and Refugees

The most conventional ethical perspective holds that the relevant community for ethical considerations is the national community within which ethical obligations hold, but that certain limited ethical requirements also apply to relations with outsiders. It involves three levels of obligations: (1) It recognizes strong moral obligations, such as duties of mutual aid, only to co-citizens. (2) It normally requires that as long as aliens enter a country legally and respect the laws and customs of that society in other ways, they should be treated with civility. (3) Obligations towards other countries and citizens in those countries are limited to those of non-intervention, and merely require that their sovereignty be respected. I will therefore refer to this form of international ethics as *sovereigntism.*[1]

Focusing on duties to refugees, what is crucial is that international obligations under sovereigntism are limited to non-intervention. That means first of all that victims of persecution, repression, or general violence cannot be protected or helped on the territory of their home country. They have to flee across their country's border in order for help to be permissible. However, even then, under strict sovereigntism, protection and assistance are not required. Since they are not citizens of the country they flee to, they have, under sovereigntism, no moral claim to help, although as a matter of charity or hospitality such help may be extended.

When international intervention is necessary in order to avert the need for flight, sovereigntism allows it only in a non-coercive form. So it can take the form of diplomacy and perhaps even economic inducements, but it cannot involve invasions of the kind undertaken in the 1970s by India into East Pakistan, Tanzania into Uganda, or Vietnam into Cambodia, all of which were initiated at least partly to prevent further atrocities by states against their own people. All these actions involved violations of sovereignty. (Whether economic sanctions violate sovereignty is a matter of contention; according to international law, apparently they do not.)

Asylum, Internationalism, and Communitarianism

Although there are certain sections in state elites that still adhere to unqualified sovereigntism, international law since World War II has moved beyond it in several ways. International human rights, incorporated in international treaties, are qualifications to sovereigntism. One such right is a right to asylum, in the form of a prohibition of the forced return of those who have reached foreign territory and can claim individual persecution *(non-refoulement)*. It is a limited right, because it does not include a clear right to entry and does not apply to other forms of victimization, such as by general rather than specifically targeted violence. It is true that many states assure such entry and accept broader criteria, but such criteria are not part of formal international law. Another non-sovereigntist aspect of international law finds that foreign intervention is both permissible and required when victimization takes the form of genocide. Unfortunately, international law is only "soft law," in that it is not backed by an agency with clear responsibility and capacity to enforce it, and, given that intervention is costly and hazardous, the prevention of genocide is not assured, as the 1994 genocide in Rwanda made evident. That international law is merely soft law places it between normal law and ethics. Like normal law, it has been formally codified, but, like ethics, it is backed by conscience and moral pressure rather than authoritative enforcement.

The right to asylum represents a deviation from the ideal type of sovereigntist ethics. The sovereign-state system is one solution to the problem of international or inter-state relations or, more broadly, relations between peoples. The problem at issue is the potential for conflict to become war. The sovereign-state system, which Europe adopted in the 1600s, as an alternative to the Habsburgs' defeated imperial approach to maintaining international order, vests supreme authority in states, and foregoes any supervening authority that might restrain the exercise of that supreme authority of states. There are internal arrangements that impose such restraints, such as the institutions of representative democracy, of checks and balances between the different branches of government, and of federalism. However, the sovereign-state system, which emerged in Europe when states were mostly authoritarian, imposed no such restraints on states. For a state elite to be internationally recognized as legitimate, it was necessary only to demonstrate that it exercised its authority effectively. That it exercised its authority responsibly was not a requirement. Repression, exploitation, and even genocide are not violations of sovereignty when interpreted as autonomy among states.

There is, however, one argument that accepts the principle of sovereignty, but that nevertheless provides for a limited extension of international obligations beyond non-intervention. The sovereigntist system does produce certain benefits, such as preventing or limiting war—a highly dubious proposition in light of the system's historical performance—but it also has widely recognized disadvantages. In particular, it fails to protect citizens against rapacious behaviour by their own governors, other than through whatever internal institutions that the citizenry has won or been granted. With the institution of asylum, and more specifically by establishing a *right* to asylum, the system minimizes this disadvantage. It means that, as long as victims of repressive states can reach foreign territory, they can escape victimization. While this argument for an obligation to grant asylum emerges from a particular understanding of the sovereign-state system, it goes beyond strict sovereigntism. It means that there are international obligations other than merely that of non-intervention. To acknowledge this difference, I will refer to the ethics that recognizes the rights and duties of asylum as *internationalism,* to distinguish it from sovereigntism.[2]

Another perspective—one that is closely related to sovereigntism and may also provide a moral basis for asylum—is communitarianism. The point of departure for moral thinking has sometimes been to equate the moral community with the state-nation (a term used here in recognition of the fact that nations are typically created by states, rather than the reverse). But the point of departure is the ethno-cultural community as the moral community. The ethno-cultural community is the generator of values. It defines define the community that naturally recognizes these values. And most important, it is morally fundamental because it is entitled to be protected against destruction, erosion, and intrusion. According to communitarianism, states are entitled to sovereignty to the extent that they represent such communities. (Ideal nation-states involve a coincidence of the state-nation and the ethno-cultural community. In reality, even countries that come close to this situation—Japan or Bangladesh—contain ethno-cultural minorities.) When states victimize certain communities or fundamentally violate their values, they no longer represent such communities. Thus, while communitarianism leads to a presumption of the primacy of sovereignty, such a presumption is conditional and can lead to the right to call on international assistance in a struggle to protect communities against victimization or violation by the state. A minimal form of such assistance is to receive and protect refugees that come from such communities. Furthermore, communities often have the moral

obligation of hospitality as part of their inherited values. However, this value varies with cultures and can be quite closely circumscribed, as when it applies to ethnic kin only. It may not guarantee refuge to all asylum-seekers. Communitarianism can thus provide for asylum either on the basis of the value of hospitality (which is variable and unreliable) or on the basis of the universal value of the primacy of communities.[3]

Nevertheless, under either internationalism or communitarianism, traditional conceptions of asylum do not require states to treat refugees in the same way they treat their own citizens. There are citizen rights and there are refugee rights, and the two are not the same. This is a reflection of a two-level ethic: one applies within the society that refugees are not part of, and the second applies across the boundaries of society to strangers, including refugees. In other words, first, there is national ethics, with extensive specific rights and duties, as well as the more general right to have one's interests included in the public interest, which it is the duty of the state to advance. Then there is international ethics with much more limited entitlements and obligations.

The second question posed in this essay is, Does a country's affluence or poverty make a difference to its international obligations? This question is important in two respects: the amount of assistance that the host country owes to refugees who have taken asylum within its borders, and the amount of assistance that non-host countries owe to host countries. Clearly, given that asylum is granted at least to save lives, assistance to refugees must be sufficient to ensure their survival. The general orientations of internationalism and communitarianism in themselves, however, provide no guidelines for the living conditions to be assured to refugees; there is no requirement that these living conditions be in some way comparable to the living conditions in the host country. Nor do these ethical perspectives imply the need for other countries to share the burden. Of course, on both these issues it is possible to add to the general ethical perspectives certain particular ethical judgments that answer the question, but such judgments would be simply ad hoc supplements rather than integral parts of the ethical perspectives. This suggests the need to look at an ethical perspective, or framework, that does generate answers to these questions from within itself.

Cosmopolitanism and Asylum Obligations

That perspective is cosmopolitanism. It is the major alternative to both sovereigntism and communitarianism. Internationalism is a position between sovereigntism and cosmopolitanism. Cosmopolitanism treats all of humanity as part of one moral community, without distinguishing between compatriots and foreigners. Whatever moral obligations we have to other persons, we have to *all* other persons, regardless of nationality. States have institutional significance, but they do not define moral communities. Borders do not represent the limits to general moral concerns. States are, of course, important in that they are the collective and authoritative agents of their citizens. This means that they assume moral obligations that citizens can meet only collectively or that are best met collectively.[4]

This applies both to granting asylum and to meeting long-distance obligations to refugee protection and assistance. It is true that asylum can be granted individually, to the extent that the law allows individual refugees to enter if they have been invited to do so by individual citizens, as in the case of refugee sponsorship. However, that is unlikely to fulfill the full range of obligations to refugees, given that the *need* for asylum does not derive from prior cross-border personal relations and given further that such need may not be adequately met by the charitable behaviour of host-country citizens. Presently, the burden of asylum typically falls on poor countries, and an equitable sharing of the burden of providing for the migration, settlement, and establishment costs of refugees is best assured through state action, either through the resettlement of refugees from countries with a disproportionate share of refugees or through international assistance.

There are arguments that support a cosmopolitan approach. Without attempting to be comprehensive, two of these arguments briefly are as follows. (1) Global integration of economies, cultures, and polities has proceeded to such an extent that mutual vulnerability is now worldwide. As a result of this integration, the relevant moral community has thus become humanity as a whole. (2) The earth and its resources cannot justifiably be appropriated merely by occupying a piece of land and claiming either ownership or sovereignty over it. Even if the original occupancy of land that is not used by other people warrants occupancy rights that can be bequeathed and traded in perpetuity, regardless of the scarcity that this creates for others, in this or in subsequent generations, there is another objection. It is that the history of the acquisition of land and territory is filled with conquest, violence, fraud, and exploitation—including that through colonialism—so that the moral basis of land titles and territorial boundaries is very much in question. This is not to say that land ownership or territorial state authority cannot be justified, but merely that they cannot be treated as absolute and that other

moral obligations may impinge on them or constrain them. Under cosmopolitanism such moral obligations can arise from considerations that cut across borders.[5]

In international politics the most obvious expression of cosmopolitanism has been the quite remarkable development and codification of international human rights in the last half-century. The right to asylum is part of this set of human rights. The following discussion, however, will not focus on human rights for two reasons. One is that many international human rights are not actually cross-border rights, but merely internationally recognized rights of citizens in relation to their respective states. In that form, they are not cosmopolitan in the full sense. By contrast, the asylum right, which consists of a right of foreigners in relation to host states, is fully cosmopolitan. But there is a second reason. It is that there is a great variety of human rights, and they derive from different ethical perspectives that provide their rationale.[6] It is upon these underlying ethical perspectives that I will focus instead. These are all accommodated within the cosmopolitan approach, which provides only a particular ethical frame by requiring that people outside one's borders be entitled to the same moral consideration as people within those borders. What this moral consideration amounts to depends on the ethical perspective that applies within this cosmopolitan frame. Just as within the nationalist or sovereigntist frame different ethical perspectives compete and vary in their implications for the nature of moral obligations towards compatriots, so different ethical or social-justice perspectives are compatible with the cosmopolitan frame. In fact, the perspectives that compete within the former frame are applicable within the latter.

My approach will be to identify three such different perspectives, to show their implications for refugee protection and assistance in a cosmopolitan frame and to explore whether a synthesis of the three is plausible. The three perspectives are (1) libertarianism, (2) utilitarianism, and (3) egalitarianism. An international human-rights regime can derive from any one of these three, as long as whatever is to be maximized—liberty, utility, or equality—is not pursued simply from one policy to the next but is institutionalized as a set of rights that accomplishes that aim. Alternatively, and more commonly, it is pursued as a policy goal that is constrained by a set of rights in order to prevent abuses or mistakes that negate the long-term maximization of the particular goal. The actual international human-rights regime of today is very much a mixture of the three ethical perspectives.[7] The approach here will be to articulate the three positions, briefly explore their respective strengths and weaknesses, and develop a reasonable synthesis.[8]

First, I will sketch the main ideas of the three ethical perspectives.[9]

Libertarianism holds that it is the individual who is sovereign, that her freedom, interpreted as freedom from interference by others, including in particular the use and enjoyment of her property, is to be maximally advanced by protecting certain rights, and that the greatest threat to such freedom comes from the agent of the collectivity, the state.

Utilitarianism consists of the simple position that human well-being (or the well-being of all sentient beings) should be maximized.

Egalitarianism advocates the minimization of inequalities. There is, however, a fair amount of disagreement within egalitarianism about which good or dimension is to be equalized. For our purposes, I will take it to be first survival chances, then life prospects. Sometimes the principle of equality and the principle of need are taken to be at odds with each other, because different people have different needs, and the needs principle therefore requires the differential treatment of people. But to present this as an opposition or divergence between the two principles is mistaken. Needs can reasonably be taken to be whatever people require in order not to be disadvantaged, relative to others. To provide a paraplegic person with a wheelchair—to which a normally mobile person is not entitled—is simply to reduce the inequality in mobility between the two. So differential need fulfillment serves equality. I will therefore deal with needs under egalitarianism.

One difficulty in any discussion of cosmopolitan ethics is that, unless the prescription is for a revolution to create a cosmopolitan world with appropriate institutions, it has to provide prescriptions for a world with essentially sovereigntist institutions. This is very much reflected in the upcoming discussion of asylum. Presumably cosmopolitanism would prescribe open borders, so the function of borders would be confined to delineating political jurisdictions with their legal, regulatory, and service systems, where these systems cannot be used to exclude individuals. Open borders would, of course, make asylum in its strict sense redundant, although refugees might still need protection in the form of assistance. The discussion that follows will explore the implications of cosmopolitan perspectives on asylum when the cosmopolitan prescription of open borders has not been accepted. In other words, the cosmopolitan prescription of asylum obligations is, from its own perspective, very much a second-best prescription.[10]

Cosmopolitan Libertarianism

Libertarianism is analogous to sovereigntism: the central focus is on non-intervention. In sovereigntism, non-intervention is applied to relations between states, in libertarianism to relations between individuals, and to relations between institutions (such as the state) and individuals. There are obligations not to interfere in the private sphere of others, but no obligations to assist. Providing assistance to the needy may be morally admirable, but it is not required, because such a requirement would interfere with the liberty of the providers. Under strict libertarianism, the need to avoid interfering would appear to apply to asylum as well. Libertarians do not argue, for example, that individuals are morally required to assist those who have been repressed by a national government. However, libertarianism does recognize authoritarianism as an evil. Moreover, it allows that, when freedoms conflict, some freedoms are sacrificed to others, e.g., judicial coercion is accepted and found necessary in order to protect individuals against force and fraud. When cosmopolitan libertarianism recognizes that victimization by foreign authoritarianism requires the same moral attention as domestic authoritarianism, such recognition can lead to an obligation to provide asylum. In this way, an argument for asylum on the basis of the violation of one's civil rights *can* flow from cosmopolitan libertarianism, although it does not inevitably follow. Entitlement can be taken to represent a variant of cosmopolitan libertarianism. Does this mean that, under this variant, rich countries have greater obligations than poor countries? There seems to be nothing in libertarianism, even of the cosmopolitan kind, to indicate that they do, nor that rich countries have obligations to poor countries that carry the bulk of the asylum burden.[11]

Cosmopolitanism Utilitarianism

Cosmopolitan utilitarianism requires that the well-being of humanity be maximized. Is it advanced by the right to asylum? The most plausible position is that it is. The sacrifices (losses of well-being) made by those who must provide asylum will normally be considerably outweighed by the gains in well-being of those who thus find refuge from repression. In fact, under cosmopolitan utilitarianism this conclusion applies to quite a wide definition of refugee. The well-being of humanity will be advanced by establishing the right to asylum for those whose survival is threatened by general violence (without being specific targets of persecution), famine, or other forms of environmental disaster, i.e., those who are forced to leave because of a well-founded fear for their lives as a result of state failures.[12] This means that, from the perspective of cosmopolitan utilitarianism, the restriction of asylum rights by the 1951 Geneva Convention to victims of persecution is much too narrow. It does not mean, however, that the obligation to provide asylum is unlimited. The limit is reached when the effort to provide asylum costs more, in terms of human lives, than the lives saved by the provision of asylum. Such a limit, however, would be reached only in exceptional circumstances, such as when famine refugees flee into a country that is also experiencing food shortages. (Even then, the obligation, rather than ending, shifts to other countries.) In general, cosmopolitan utilitarianism prescribes asylum obligations that are much more generous than those that are currently prevalent.

This raises the question of burden-sharing and the relevance of affluence and poverty. On the one hand, the limit to the obligation to assist refugees is more quickly reached in poor countries than in rich ones. So rich countries should, from this ethical perspective, be the ones to be called upon to respond to the asylum rights of refugees in the first instance. On the other hand, an implication of maximizing well-being is that costs should be minimized at the same time. Costs represent losses in well-being in that they reflect the use of resources that could have been used to pursue other opportunities to enhance well-being, e.g., providing for agricultural irrigation for peasants in the host society. This means that, when several options accomplish the same gains in well-being for refugees, the least-cost option should be chosen. These two considerations open the door to a complex set of issues that is beyond the scope of this paper to fully pursue. I will confine myself to some brief points about the implications of cosmopolitan utilitarianism.

(1) Refugee protection that maximizes well-being, i.e., asylum provision that does the most for refugee protection and assistance at minimum cost, is usually provided in neighbouring countries. Refugees benefit because their transportation costs are limited, and they are more likely to find ecological, cultural, and economic environments with which they are relatively familiar. And the required assistance is seldom expensive. Refugees are also relatively close for their eventual return, which then remains relatively inexpensive. In other words, the proximity of asylum to the home of the refugees is typically an advantage when applying the utilitarian criterion.

(2) If the need for asylum is temporary, the provision of asylum may not need to be permanent. In other words, refugees may be required to return when the reasons for the displacement have been removed.[13] If and when war-

ranted, the return may be accomplished by the withdrawal of assistance rather than direct coercion. In contrast to the libertarian, for whom coercion is to be minimized, the utilitarian is concerned about only the effects of coercion upon well-being. But the utilitarian will generally value a minimally coercive approach to return. It is not that the withdrawal of assistance is not coercive, but it is less coercive than outright expulsion. At the same time, if the refugees have been away from home for a long time, it may no longer be home to them, other than in a nostalgic sense, and a mandated return could involve extensive suffering, while the host society may not benefit from their departure because the activities of the refugees have over time become tightly integrated into the host economy. This, too, would need to be taken into account in a utilitarian perspective.

(3) Preventing displacement will often be a more effective strategy for maximizing well-being than merely accommodating the refugees. Prevention can include a wide range of measures that are open to a cosmopolitan, including those that violate state sovereignty, such as mounting an invasion to prevent atrocities, to end a civil war, or to create safe havens. (An invasion might even be necessary to allow people who are trapped to become refugees.) Utilitarianism is a consequentialist ethic, which is to say that the justification of actions depends on the outcomes, including unintended ones. Side effects are therefore important and have to be considered. Whether preventive intervention is justified will therefore depend on the whole complex range of consequences. This also applies to non-coercive prevention of displacement. If flight is due to famine and the lack of assistance within the home country, and could be averted by the provision of international assistance, then assistance rather than asylum will be cost-effective. In other words, emergency assistance can be an alternative to asylum and will typically be preferable from a utilitarian perspective. It, as well as safe havens, can also assist those who have not been able to cross borders—the internally displaced.

(4) Actually, the element that utilitarianism wishes to maximize is overall well-being, not its distribution. At this very simple level, then, there are no obligations for rich countries to share the burden of poor countries that provide asylum. However, one form of utilitarianism is based on the assumption that a certain amount of money (or, more generally, control of resources for living) in the hands of someone who already has much will produce less well-being than the same amount of money for someone who has little. Thus, transferring $1000 from a rich person to a poor person will increase the well-being of the poor person by more than it will reduce the well-being of the rich person. There is thus a utilitarian (maximization of well-being) argument for redistribution from the rich to the poor, including across borders and to refugees. This version of utilitarianism slides substantially into egalitarianism and I will turn to that ethical perspective now.[14]

Cosmopolitan Egalitarianism

Cosmopolitan egalitarianism is concerned with distribution worldwide. Global inequalities are to be minimized. While different formulations are concerned with different dimensions of people's lives that are to be fully equalized (well-being, purchasing power, opportunities, etc.), in the case of asylum it can be taken to be personal security and the means of survival. Moreover, in the area of distribution between countries, the relevant dimension will be something like gross domestic product (GDP) and the availability of land and other accessible natural resources. The first implication of cosmopolitan egalitarianism is that people who lack the security of survival are one of the most deprived groups. Providing such security, including that achieved through asylum, is then a top priority for cosmopolitan egalitarians, and practically all other concerns take second place to it.

Of course, for cosmopolitan egalitarianism the agenda goes much further and involves the elimination of all significant inequalities. Without pursuing this radical vision here, there is one other implication of this perspective that is relevant to the issue of asylum and that is that of burden-sharing. The most obvious form of burden-sharing is the distribution of refugee admissions equally among countries. However, such a prescription is neither clear nor necessarily best, even from an egalitarian perspective. First, what does it mean to distribute refugee admissions equally? Strict equality, regardless of the size of the country certainly does not make sense. If it means some kind of proportionality, is this in relation to the existing population or to the geographic size of the country? And surely the affluence or poverty of countries is relevant as well. Even if a suitable formula could be worked out, it is not clear that the burden of asylum is best distributed through the distribution of refugee admissions. Given the earlier discussion under utilitarianism, it might well make most sense to ask the neighbouring countries to accommodate the refugees, to the extent that they can, but to have the relatively rich countries pay for the resources, provisions, and services required by the refugees. Egalitarianism requires the minimization of inequalities. Financial burden-sharing is promoted by the venerable public-finance principle of *ability to pay.* The

poor don't pay, and contributions are levied according to the level of affluence. This requires a more progressive criterion than, for example, the development assistance target of 0.7 per cent of GDP, which is analogous to a flat tax rate. Like progressive taxation, it requires progressive levies for assistance to refugees. The ideal cosmopolitan approach would be the taxation of individuals according to their income and wealth. In the absence of appropriate cosmopolitan institutions, the next best approach is a system of progressive levies on countries. The fundamental point here is that, under cosmopolitan egalitarianism, affluence and poverty are highly relevant to the matter of sharing the burden of asylum duties.

It might be objected that sending money rather than accepting refugees is not an acceptable form of burden-sharing. However, unless refugees are accepted in the rich countries in the large numbers in which they appear—an implausible prospect in light of the problems of cultural and economic integration—a policy of selecting a small proportion of refugees for resettlement in the rich countries simply introduces a serious element of inequality into the refugee community, between those who are resettled and those who are left behind, often in conditions of serious deprivation. Resettlement tends to be much more an immigration policy than a refugee protection and assistance policy. This point applies even more to those who have the means to reach the territory of rich countries in order to claim asylum there, supported by the territorial laws that may then apply to them. For a cosmopolitan egalitarian, the refugees entitled to protection and assistance are those confined in miserable refugee camps. They tend to be out of the sight of pressure groups and are easily forgotten. As for the right to claim asylum by entering a rich country, that must be protected, but more on grounds such as that of hospitality, a value held particularly by communitarians, and on grounds that it is a step towards open borders, which is a long-term aim of cosmopolitans.[15] But there should be no illusion that it does much to advance global distributive justice.

Constructing a Cosmopolitan Position on Asylum

Instead of engaging in a careful critique of each of these perspectives, I will treat them all as being ethically illuminating and as offering potential building blocks for a more complex cosmopolitan position. Libertarianism focuses on self-determination, utilitarianism on the public interest, and egalitarianism on distributive justice. How should this cosmopolitan position now be constructed? The need for asylum reflects the lack of cosmopolitan institutions, such as global protection of human rights and open borders. If such institutions were in place, their fallibility might still make asylum necessary. A cosmopolitan case for asylum is thus paradoxical: it is a prescription for a non-cosmopolitan, pre-cosmopolitan, or inadequately cosmopolitan world. As such, the argument and prescription must consider the dangers and the limits of the existing world. The dangers are repression, violence, and the failure of states to protect their citizens. The limits, from a cosmopolitan perspective, are the lack or insufficiency of international constraints on the exercise of state authority, the existence of border controls, and the lack of reliable mechanisms of international redistribution and of other international supports for states to protect and assist their citizens. This lack of institutions and hard law across state borders means that cosmopolitanism is, at least for the time being, confined to the observance of ethical norms in state policy and their progressive incorporation in the soft law of international treaties. As such, it still faces an uphill struggle against the incumbency of the old sovereigntist ethic.

Just as in national politics we treat the public interest as a—in fact *the*—central criterion for public policy, it is equally warranted to do so in a cosmopolitan perspective. That makes utilitarianism the starting point. At the same time, egalitarianism comes in as a distributive criterion, and libertarianism typically provides certain constraints in the form of rights. In this discussion of asylum rights and duties, however, libertarianism turns out to largely reinforce what is already prescribed by the other perspectives.

This then makes the utilitarian argument central. The crucial parts of this argument are the following: (1) Asylum is important to the global public interest and is to be instituted in a strong form, not merely as a right not to be returned to the country of origin, but also as a right of entry to other countries in the first place. (2) Refugees—those entitled to asylum—should be defined in much broader terms than those who have been persecuted and should include those victimized by violence, famine, and disasters. (3) Asylum is to be provided with adequate assistance, but also at least cost. The balance is to be struck globally rather than in relation to local conditions, given the cosmopolitan frame at work. (4) The least-cost approach can mean that asylum is provided largely in neighbouring countries. (5) The least-cost approach may mean no more than temporary asylum in many cases. (6) The least-cost approach also requires that measures to prevent or minimize displacement, including humanitarian or preventive intervention, need to be considered first and that can also minimize the need for asylum.

Furthermore, egalitarianism generates two further propositions: (7) The dangers and deprivations of refugees are so important that their protection comes before practically all other concerns. (8) Progressive levies to distribute the burden of providing asylum on the basis of international ability to pay are essential. They are not only required by international social justice, but are also crucial to prevent the institution of asylum from being eroded by the financial self-defence of poor countries excessively burdened by asylum demands. Overburdened poor countries may be pushed to contain costs by restricting entry, forcing refugees out of the country, and leaving refugee camps poorly provided for.

Finally, on grounds that can be supported by all three perspectives, including cosmopolitan libertarianism in particular, there is one other ethical requirement related to asylum, which, like emergency assistance, can be a conceivable alternative to it. (9) In cases of genocide or other forms of life-threatening state repression, such as deliberate famine, the "community of states"—namely the United Nations, which is all that we now have to institutionally represent humanity as a whole—is required to undertake coercive intervention, including military invasion by a multilaterally authorized force. Of course, this does presuppose that alternative preventive efforts are ineffective or too harmful (e.g., long-term economic sanctions, which weigh most heavily on the innocent or even the victims) and that the negative consequences of such intervention are not likely to be worse than its gains.

Conclusion

Strict sovereigntism does not provide for asylum obligations. Communitarianism and internationalism can provide a basis for asylum obligations, but the basis for the quality of asylum as well as for burden-sharing is uncertain and typically grafted on ad hoc. Cosmopolitanism, at least in the form of the mix of ethical perspectives articulated here—based primarily on cosmopolitan utilitarianism, qualified by egalitarianism, and reinforced by cosmopolitan libertarianism—provides for a strong obligation to provide asylum. Cosmopolitan utilitarianism includes admission in the first place, is quite broad in its interpretation in that the qualification for asylum includes a well-founded fear for one's life due to general violence, famine, and disasters, and requires countries to share the burden of asylum, based on the respective national ability to pay.

Endnotes

1. This perspective is referred to as "morality of states" in Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) and in Rachel McCleary, *Seeking Justice: Ethics and International Affairs* (Boulder: Westview, 1992): 1–20. (McCleary also provides a useful and short introduction to international ethics.) A more conventional term is *realism.* See, for example, two chapters in *Traditions of International Ethics,* eds. Terry Nardin and Donald R. Mapel (Cambridge: Cambridge University Press, 1992): Steven Forde, "Classical Realism," 62–84, and Jack Donnelly, "Twentieth-century Realism," 85–111. However, realism covers everything from the moral skepticism in international relations—which holds that the anarchy of those relations drive out all moral considerations and make them irrelevant—to the protection of the status quo in order to prevent war and, finally, the kind of position described here. *Sovereigntism* is a more illuminating label for the last.
2. I have also referred to this perspective as *statist internationalism.* See Penz, "The Ethics of Development Assistance and Human Security: From Realism and Sovereigntism to Cosmopolitanism.." In *Ethics and Security in Canadian Foreign Policy,* ed. Rosalind Irwin (Vancouver: UBC Press, forthcoming), ch. 3. For a fuller development of this line of argument on asylum, see Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," *The Review of Politics* 49 (1987): 251–73. Hendrickson has presented asylum rights as part of "realism," i.e., sovereigntism as used here, rather than as going beyond it. "This principle is sufficiently valuable and so closely tied to the justification for a system of independent states that it is unlikely that realists would reject it save under exceptional circumstances." See David C. Hendrickson, "Political Realism and Migration in Law and Ethics," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money,* eds. Brian Barry and Robert E. Goodin (University Park, PA: Pennsylvania State University Press, 1992), 221. However, what he has presented goes beyond *strict* sovereigntism and contains elements of internationalism.
3. For an example of a communitarian position see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), especially ch. 2. For a more internationalist form of communitarianism, see Howard Adelman, "Justice, Immigration and Refugees," in *Immigration and Refugee Policy: Australia and Canada Compared,* eds. H. Adelman, A. Borowski, M. Burstein, and L. Foster (Melbourne: Melbourne University Press, 1994), 63–91.
4. For representatives of cosmopolitanism, see Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) and Thomas Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989).
5. For a somewhat more extensive argument see Penz, "Sovereignty, Distributive Justice, and Federalism: A Cosmopolitan Perspective," in *Globalism and the Obsolescence of the State*, ed. Y. Hudson (Lewiston, NY: Edwin Mellen Press, 1999), 121–46.
6. It is true that some theorists use human rights as the starting point for their ethical reasoning, e.g., natural-law theorists, but

the more widely held view is that human rights, as well as other rights, such as those of states, derive from more basic ethical perspectives. (Cf. R. J. Vincent, "The Idea of Rights in International Ethics," in *Traditions of International Ethics,* eds. Terry Nardin and Donald R. Mapel [Cambridge: Cambridge University Press, 1992], 250–2.) International human rights codified in international law are merely those on which treaty-making parties have been able to agree.

7. It should also be noted that Rawlsian social-contract theory, too, can be interpreted as a particular synthesis of the three ethical perspectives. (John Rawls, *A Theory of Justice* [London: Oxford University Press, 1971.]) John Rawls's own version, however, is strictly sovereigntist, i.e., it applies only within particular political jurisdictions. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979) and Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989) represent the cosmopolitan approach to Rawlsian social-contract theory.
8. For a similar approach taken to two other issues, development-induced displacement and development assistance, see Penz, "The Ethics of Development-Induced Displacement," *Refuge* 16 no. 3 (1997): 37–41, and Penz, "The Ethics of Development Assistance and Human Security: From Realism and Sovereigntism to Cosmopolitanism," in *Ethics and Security in Canadian Foreign Policy,* ed. Rosalind Irwin (Vancouver: UBC Press, forthcoming), ch. 3.
9. Fuller explanations than those provided below can be found in David M. Smith, *Geography and Social Justice* (Oxford: Blackwell, 1994), 52–73.
10. In the distinction made by Anthony H. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto: Oxford University Press, 1994), 218–33, between "alternative visions," cosmopolitanism would be "utopian," in the sense that it looks to a new future, communitarianism "nostalgic," in that it tends to be backward-looking, and sovereigntism "pragmatic," in that it works within the current rules of the game.
11. However, for a certain egalitarian version of libertarianism, one that asserts equal entitlement to pure rent from all of the earth's land and natural resources, see Hillel Steiner Steiner, "Libertarianism and the Transnational Migration of People," in *Free Movement: Ethical Issues in theTransnational Migration of People and of Money,* eds. Brian Barry and Robert E. Goodin (University Park, PA: Pennsylvania State University Press, 1992), 89–90.
12. For a useful list of potential categories of refugees, see Howard Adelman, "Justice, Immigration and Refugees," in *Immigration and Refugee Policy: Australia and Canada Compared,* eds. H. Adelman, A. Borowski, M. Burstein, and L. Foster (Melbourne: Melbourne University Press, 1994), 82.
13. This has been proposed, for example, by Castillo and Hathaway, with many safeguards, with the intent not so much to minimize costs as to maximize refugee protection, in terms of numbers, in the face of asylum fatigue by host countries. See Manuel Angel Castillo and James C. Hathaway, "Temporary Protection," in *Reconceiving International Refugee Law,* ed. Hathaway (The Hague: Kluwer Law International, 1997), 1–34.
14. The most notable representative of this form of utilitarianism is Peter Singer. See his *Practical Ethics,* 2nd ed. (Cambridge: Cambridge University Press, 1993), especially ch. 8, and Peter and Renata Singer, "The Ethics of Refugee Policy," in *Open Borders? Closed Societies? The Ethical and Political Issues,* ed. M. Gibney (New York: Greenwood Press, 1988).
15. For further reasons see W. Gunther Plaut, *Asylum: A Moral Dilemma* (Toronto: York Lanes Press, 1995), 55.
16. This by no means denies tensions between the perspectives. To the extent that libertarianism places property and contract rights in moral bedrock, then precludes crucial egalitarian and utilitarian considerations, I set it aside. Instead I treat such rights as derivative from an indirect form of utilitarianism and as being to some extent contingent. Furthermore, egalitarianism and libertarianism come much more into their own as one pursues moral issues to greater depth than the level at which they are explored in this article. Thus, libertarian considerations within a cosmopolitan framework can lead to the principle of subsidiarity, according to which decisions should be made as close to the community level as is consistent with effective solutions to the type of problem to be addressed. For a discussion of how a possibly libertarian bias in the 1950 Geneva Convention on Refugees not only made it geopolitically partisan, but also excluded most Third World refugees from its mandate, see Plaut, ibid., 57–8.

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Manufacturing "Terrorists": Refugees, National Security, and Canadian Law

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Abstract

In the first part of a two-part article, the author critically evaluates the anti-terrorism provisions of Canada's Immigration Act. The impact of these provisions on refugees is the focus of the essay, but her observations are relevant to the situation of other categories of non-citizens as well. The inquiry begins by considering international efforts to address "terrorism," the relevance of international humanitarian law to an assessment of acts of "terror," and the nature of contemporary discourse on "terrorism." Next, the evolution of the current admissibility provisions in Canadian immigration law, with particular reference to refugee policy and national security, is reviewed. A brief discussion of current policy directions concludes part 1.

Résumé

Dans ce premier volet (d'un article à deux volets), l'auteure se livre à une évaluation critique des dispositions anti-terroristes de la loi canadienne sur l'immigration. Elle se concentre sur l'impact de ces dispositions sur les réfugiés, mais ses remarques sont aussi valables pour d'autres catégories de non-citoyens. L'enquête examine, avant tout, les efforts déployés au niveau international pour contrecarrer « le terrorisme », la pertinence de la loi humanitaire internationale dans le cadre de l'évaluation des actes de « terreur », et la nature du discours contemporain sur le « terrorisme ». Seront examinés ensuite, la façon dont ont évolué les dispositions courantes de la loi canadienne sur l'immigration, la notion d'admissibilité, avec une référence particulière à la politique sur les réfugiés et la sécurité nationale. Pour conclure cette première partie, on trouvera une brève discussion sur les tendances dans la politique actuelle.

> What can we make of the fact that terrorism has become such a shifty category that yesterday's terrorists are today's Nobel Peace Prize winners? . . . [W]e question the very possibility of defining and thereby giving a satisfactory account of, the facts categorized as terrorism . . . Far from being a benign or gratuitous labelling exercise, the stark issue of who has the power to define another as a terrorist has obvious moral and political implications . . . The various types of fictionalization—representation by the media, political manipulation, academic definitions, the imaginary archetype . . . find their genesis and nourishment in the play with meaning and confusion of contexts inherent in the word "terrorism."
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> —J. Zulaika and W. Douglas, *Terror and Taboo*[1]

Introduction

Although numerous states and movements have used violence to achieve specific political goals throughout history,[2] the use of the word *terrorism*[3] has relatively recent origins. The term was coined to describe a specific phase of the French Revolution known as the Reign of Terror, when the Jacobins initiated a campaign of repression in which at least 17,000 French citizens were guillotined and many thousands more imprisoned and tortured.[4] In this context, Mitchell indicates that "[t]errorism was perceived as an unspeakable crime—the product of moral depravity or madness."[5] "Terrorism" was initially described an exercise of repression by a state against its own citizens, but during the course of the nineteenth and twentieth centuries both the term itself and the measures adopted by states in response to it became increasingly politicized. One need only consider the U.S. description of its retaliatory bombing attacks in Sudan and Afghanistan as "counter-terrorism," or the speeches of Israeli leaders decrying the "terrorist" acts of Palestinians while justify-

ing gunfire on crowds of Palestinian civilians as "defence," to appreciate how "terrorists" are manufactured for the most cynical and explicitly political purposes.

Canadian officials acknowledge that Canada has never been a major target for "terrorist" attacks.[6] The government's preoccupation with "terrorism" has focused primarily on the perceived "terrorist" threat posed by refugees and immigrants arriving from non-Western countries. Security intelligence reports confirm the existence of individuals and organizations operating in Canada to support, plan, and mount attacks elsewhere, although open information by no means suggests that the participation rate of immigrants in these activities is proportionally higher than of people born in Canada.[7] Such reports have been used to justify a complex web of immigration security measures. While few would dispute the legitimacy of genuine efforts to protect public safety, the problem with many of these measures is that they have cast an unacceptably wide and uneven net. The "terrorist" has become the post-modern substitute for the "vicious class" that nineteenth-century immigration laws constructed as a tool of immigration control. In common with their historical counterpart, anti-terrorism provisions in the Immigration Act serve as a cover to legalize the broadest discretion over who gets in and who is permitted to stay.

In 1991 Gorlick commented that the government used its national security policies to exclude those considered to harbour ideological or political views inimical to the liberal democratic values of the Canadian state.[8] In the post–Cold War context with its attendant international realignments, this observation no longer provides a full account of immigration security policy. An analysis of current deportation practices suggests that immigration measures aimed at protecting the "security of Canada" are not about rooting out foes of democracy and genuine threats to the nation. They are but one tool, in an increasingly sophisticated arsenal, to contain and manage refugee admissions.[9] In this regard, not all refugee communities are subjected to the same level of security scrutiny.

As Whitaker explains in his recent discussion of the security dimension of refugee policy, the "systematic political bias of the Cold War has been replaced by a patchwork of specific biases."[10] He points out that the injustices against individuals are just as frequent today, but the "biases are more diffuse."[11] Indeed, under the new order, the designation of certain refugees as "terrorists" serves multiple geopolitical and economic interests. While I agree with Whitaker that racism should not be seen as a sole explanation for government security policy,[12] current policies do reinforce systemic racism in Canadian law and practice.[12]

A few examples are illustrative. On the one hand, the government introduced expedited screening and emergency evacuation for 5,000 ethnic Albanians fleeing Kosovo in 1999, in spite of the reasonably high level of active support for the Kosovo Liberation Army among the refugee population.[14] On the other, there was an extremely modest response, implemented only last year, to a humanitarian crisis in Sierra Leone, a country that has suffered a devastating war for the past decade and has produced a massive outflow of refugees. We can also consider the inherent contradiction in a government policy that permits certain diaspora communities to raise funds in support of political causes and organizations in their homelands with impunity, while others risk expulsion from Canada for the very same conduct. In preparation for the World Conference on Racism, the Canadian Council for Refugees noted,

> Certain ethnic or national groups are particularly apt to be targeted for extra security checks . . . Those who have been found inadmissible or have been kept waiting without a decision being made on a security related provision include significant numbers of Iranians with some association with the Mojahaddin movement and Kurdish people.[15]

In effect, the immigration/national-security apparatus replicates an imperative of exclusion and restriction that pre-emptively and selectively casts some groups of refugees and other non-citizens as "terrorist," "alien," and "other"—people on the periphery whose claims for justice can be ignored.[16]

As Canadian law changes its conception of refugees from victims and survivors to fearsome "terrorists," political activism that is lawful for citizens becomes a basis for expelling non-citizens. The expression of support for a liberation struggle being waged in one's country of origin can be sufficient grounds to be designated a security risk. The Immigration Act accords the same treatment to the mastermind of a hijacking and the person who has raised money in Canada to support an orphanage in her war-ravaged homeland. Refugee claimants seeking asylum and Convention refugees applying for permanent residence may be subjected to security interviews that all too frequently resemble interrogations and for which the individuals arrive unprepared, having been given no notice of the purpose of the interview or their entitlement to be represented by counsel.[17] Most of the adverse information that the Canadian Security Intelligence Service (CSIS, or "the Service") collects will be classified on national security grounds and therefore not disclosed to the person concerned. Refugee claimants may be deemed ineligible to even initiate their claims and be divested of the right to a "post-claim review." Subsequent administrative proceedings very often leave

individuals in a legal limbo while their files await review by department analysts. Once a "security certificate" has been issued, the decision of a single "designated" judge is considered conclusive proof of the allegations against the individual and cannot be appealed. The result will be mandatory detention, followed ultimately by deportation back to the country where the refugee may be at serious risk of persecution, torture, or death. While the numbers of affected individuals are relatively small, the gravity of the issues at stake signal an urgent need for law reform.[18]

The overarching objective of this paper is to provide a critical lens through which the anti-terrorism provisions of Canada's Immigration Act can be evaluated. The impact of these provisions on refugees is the primary focus of this essay, but my observations are relevant to the situation of other categories of non-citizens as well. My inquiry will begin by considering international efforts to address "terrorism," the relevance of international humanitarian law to an assessment of acts of "terror," and the nature of contemporary discourse on "terrorism." Next, the evolution of the current admissibility provisions in Canadian immigration law, with particular reference to refugee policy and national security, will be reviewed. A brief discussion of current policy directions will conclude part 1. In part 2, an analysis of the Federal Court's key decisions dealing with immigration security and refugee exclusion will be examined, highlighting the Court's role in manufacturing and instrumentalizing "terrorists." Before concluding, some preliminary suggestions for navigating the contested representations of "terrorism" will be offered, with a view to restoring human rights for refugees while safeguarding a genuine public interest in security.

"Terrorism": International Initiatives and Contemporary Discourse

The first international initiative aimed at combating "terrorism" was undertaken in 1937 by the League of Nations. The proposed Convention for the Prevention and Punishment of Terrorism defined "terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." Only one nation, India, ratified the Convention before the outbreak of the Second World War and the demise of the League of Nations.[19] In the post–1945 era, the threat of "terrorism" gained increasing prominence on the agendas of the United Nations, and a number of Western states in particular. Between 1968 and 1972, a series of high-profile hijacking incidents against Israeli and Jordanian aircraft, together with the Munich Olympics attack by the Black September Organization, coalesced international concern.[20] At the same time, however, recognition of the legitimacy of anti-colonial (and sometimes violent) struggles against oppressive regimes (e.g., South Africa, Mozambique, and Palestine) was becoming increasingly important throughout the Third World. Through a series of resolutions adopted during the first decades of the United Nations, the abstract principle of self-determination as initially articulated in the UN Charter had been upgraded to an invocable right of peoples.[21] Schrijver describes how this development culminated in the Decolonisation Declaration of 1960, in the identical Article 1 of the International Covenants of Human Rights of 1966, providing that "All peoples have the right to self-determination," and in the firm recognition accorded to self-determination in the 1970 Declaration of Principles of International Law Governing Friendly Relations among States.[22] In this context, any effort to define "terrorism" was fraught with difficulty. As noted by Higgins, "[i]f the West was nervous that a definition of terrorism could be used to include 'state terrorism', the third world was nervous that any definition which emphasized non-State actors would fail to differentiate between terrorism properly so called, and the struggle for national liberation."[23] When the draft Convention on the Prevention of Terrorism, sponsored by the United States, was introduced at the United Nations in 1972, a bitter debate ensued between First World and Third World nations on the merits of a categorical ban on the use of violence. The draft Convention was rejected.[24] In the intervening years, the United Nations has attempted to achieve a fine balance between these competing concerns, through a series of strongly worded resolutions condemning "all acts, methods and practices of terrorism"[25] on the one hand, and on the other, by promulgating treaties that deliberately avoid umbrella definitions in favour of proscribing specific and defined criminal misconduct. Developments in international humanitarian law, discussed below, represent a parallel response to the question of national liberation wars.

To date, the United Nations has developed eleven separate agreements prohibiting, among other things, aircraft hijacking, aircraft sabotage, attacks against ships and fixed platforms in the ocean, attacks at airports, violence against officials and diplomats, hostage-taking, the use of unmarked plastic explosives, terrorist bombings (excluding, in certain cases, activities committed within a single state) and, most recently, the financing of terrorist offences.[26] Regional bodies have adopted similar agreements.[27] The essential goal of the treaties is to elevate the specified offences to the status of "international crimes," ensuring prosecution of the accused by imposing upon signatory states

the alternative obligation to extradite or submit the accused for prosecution to the appropriate national authority. The new International Criminal Court (ICC), a separate but complementary initiative, will have jurisdiction over international crimes including genocide, crimes against humanity, war crimes, and aggression—whether committed by states or insurgent groups. However, the Rome Statute does not identify "terrorism" among the distinct categories of crimes within the court's jurisdiction.[28] With the exception of the crime of aggression, which remains undefined, pending adoption of an agreed definition, the treaty defines each of the crimes with specific reference to illegal acts.[29] It deserves mention that the Rome Statute includes detailed provisions for individual and "superior" criminal responsibility. In this regard, mere membership in an organization—in the absence of a nexus to the commission of an offence, or in the case of superior officers, in the absence of personal command responsibility for their subordinates who committed an offence—is not a crime under the Rome Statute.[30]

The inability of states to arrive at a common consensus on the meaning of the term *terrorism* has not prevented international bodies from condemning it, nor has it prevented states from criminalizing specific acts. The 1996 G8 Ministerial Conference on Terrorism adopted a series of measures that made no attempt to define terrorism.[31] Instead the agreed text aimed at facilitating extradition arrangements and clamping down on criminal use of the Internet and "camouflage" charities involved in illicit transborder fundraising.[32] Before the meeting, President Clinton identified terrorism as

> [t]he greatest security challenge of the twenty-first century . . . We cannot have economic security in a global economy unless we can stand against those forces of terrorism. The U.S. will lead the way and we expect our allies to walk with us hand in hand.[33]

In more concrete terms, Canada's Criminal Code identifies discrete offences involving aircraft, international maritime navigation, internationally protected persons, nuclear material, and hostage taking, as well as war crimes and crimes against humanity, all of which may be subject to Canadian prosecution, regardless of where the offence was committed.[34] The newly implemented Crimes against Humanity Act ensures that refugees who have committed such crimes may be subject to domestic prosecution.[35] On the other hand, membership in an organization has not been a crime in Canada since the imposition of the War Measures Act against the Front de libération du Québec during the October crisis thirty years ago.[36] A minority of countries, including Italy, Portugal, and Turkey, have enacted legislation making it a crime for citizens and non-citizens alike to belong to a "terrorist" organization, to provide support or recruit for a "terrorist" organization. It is noteworthy that the Italian Court of Appeal sustained convictions for the Palestinians accused of hijacking the Italian cruise ship *Achille Lauro* in 1985 but found that only the small, armed nucleus of the Palestine Liberation Front that conceived and carried out the hijacking was an "armed band" ("international terrorist organization") within the meaning of Italy's penal code. Neither the Palestine Liberation Front nor the Palestine Liberation Organization as a whole could be considered criminal organizations, because their essential objective was the liberation of Palestine.[37] Domestic laws in Germany, the United Kingdom, and the United States identify "terrorism" itself as a crime but include a precise definition of the term for the purpose of applying the law. The majority of countries responding to a Counsel of Europe survey in 1991 indicated that they had no special anti-terrorism legislation.[38]

While the academic literature on "terrorism" includes a proliferation of definitions, the consensus among many authors is that there is no universally or even generally accepted definition.[39] Schmid reports that 109 different definitions of the term *international terrorism* were advanced between 1936 and 1981,[40] and more have appeared since.[41] Although there seems to be agreement that "terrorism" involves the threat or use of violence, Lambert indicates that differences in definition range from the semantic to the conceptual.[42] The term has been used as a synonym for "rebellion, street battles, civil strife, insurrection, rural guerrilla war, coups d'état and a dozen other things," with the result that it has "become almost meaningless, covering almost any, and not necessarily political, act of violence."[43] Levitt suggests that the effort to formulate a widely acceptable definition is akin to the search for the Holy Grail."[44] Commenting on the initiatives undertaken by the United Nations over the years, Higgins emphasizes that "[t]errorism is a term without legal significance . . . it is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned."[45] Commenting on the initial definition contained in the League of Nations Convention, Borricand observes that this initiative "has been much criticized and quite rightly so."[46] He elaborates, "Indeed, defining terrorism by the terror it causes is a tautology; speaking of criminal acts is remarkably vague, since the notion of crime varies from one State to another; and lastly, classing as terrorism only those acts that are directed at a State . . . is a very restrictive idea . . . "[47]

In the face of this definitional quagmire, the use of "terrorist" as a conceptual category in the absence of any qualification of constituent elements, must be seen for what it is: a highly charged political position embedded in the particularity of a given cultural, social, and tactical context.[48] Chomsky identifies the political filters employed to cast the Kurds as "marxist and terrorist," while characterizing the Turkish state as a "secular democracy beleaguered by terrorism,"[49] in support of this thesis. Challenging the definitions of "terrorism" exploited by the "terrorism industry" of Western states, quasi-private institutes, and private security firms, Herman and O'Sullivan assert,

> If . . . the West has been able to label the world's rebels in Indochina, Indonesia, the Philippines, South Africa, Central America, and other places as "terrorists," and the West and its proxies as engaging in "counterterror," this is a propaganda achievement of historic dimensions. It is also the ultimate Orwellian transformation: the victims are made the terrorists, whereas the terrorists are the alleged victims driven to a counterterror response.[50]

In a similar vein, Falk underscores the extent to which the language of "terrorism" has been enlisted in the service of partisan causes that lie at the root of contemporary geopolitics. When Western states criminalize popular movements that have been banned by ruling elites in their countries of origin, very often the main patterns of conflict are actually reinforced.[51] Support for Falk's analysis is found in two recent examples. External support became a critical component of the ANC's ultimate success in overthrowing the apartheid regime in South Africa. On the other hand, when the United States proscribed the Liberation Tamils of Tamil Eelam (LTTE) as a "foreign terrorist organization" in 1997, the prospects for initiating peace talks and bringing an end to the protracted war in Sri Lanka deteriorated. It is interesting to contrast the response of a spokesperson for the Sri Lankan foreign office, hailing the American ban on the LTTE as "a victory for Sri Lanka's foreign policy," with the concern expressed by moderate critics that the U.S. policy would thwart attempts to bring the movement into the democratic mainstream, forcing it to become more intransigent.[52] When Western counter-terrorism policies quell all prospects for external dissent, fundraising, and mobilization, legitimate liberation struggles are further marginalized, leaving even less space for non-violent, political strategies.

Returning to the question of defining "terrorism," the adage often cited that crystallizes the problem is, One person's freedom-fighter is another's terrorist. The context of the international debate has been limited to non-state actors. Even the most recent treaties on the suppression of terrorist bombings and financing are directed narrowly at activities committed against states and their populations, but not by states. In this regard, Chadwick notes that the language used in efforts toward anti-terrorist codification is a manifestation of ideological solidarity on the part of some Western states. She asserts,

> States have yet to target themselves for codified sanction for acts of terrorism, whether such acts are state-sponsored, state-supported, or state-conducted. This omission is particularly egregious when viewed in the light of the many state mechanisms of public control which may work to provoke societal violence. This disregard of at least one-half of the equation required to solve the problem of political violence makes it highly possible that state-centric solutions arrived at are in error in both approach and effect.[53]

For Chadwick the problem isn't the intrinsic nature of the term *terrorism,* but rather the offence-specific and piecemeal nature of the UN treaties. While acknowledging the conceptual and definitional pitfalls, she advocates a more even-handed working definition of "terrorist offence," which stipulates that "the instigators of terrorist violence can be an individual, a group, or a government."[54]

The crucial difference between Chadwick and the primarily Western "experts" and defenders of "terrorism" discourse, whom Chomsky and Falk sharply rebuke,[55] is that Chadwick focuses squarely on the need for an international strategy that accounts for and accommodates the legal rights and entitlements of "peoples" engaged in wars of national liberation.[56] Chadwick, in common with a broad range of other scholars, argues that the guidance of international humanitarian law is critical in any assessment of "terrorism," and ultimately in any effort to deter its occurrence.[57] When acts of "terror" and violence are committed in an armed conflict, international humanitarian law furnishes the rules of conduct for both state and non-state actors and distinguishes between permissible and impermissible uses of force.[58] While critical theorists continue to interrogate the broader project of international law and its colonial antecedents, there is much less controversy about the pragmatic utility of using universal rules to define the categories of permissible participants and strategies involved in armed conflict. As noted by Greenwood, even before 1899, "the requirement that certain humanitarian principles be observed in warfare was well established in all main cultures."[59] According to norms that many scholars assert have achieved the status of customary international law, groups that can be identified as a "people" are entitled to use armed force to assert claims of self-determination against a state that engages in systematic repression and human rights violations. In such conditions

an otherwise internal or civil conflict is "internationalized."[60] Falk indicates that "there is no right to resort to force so long as a government behaves democratically and in fundamental accordance with the basic principles of human rights. But, where a government is oppressive toward a racial or political, ethnic minority or religious minority, or to a constituent people within its sovereignty . . . there is an increasing international recognition of the right to armed resistance."[61] In effect, this is an extension of the principle of self-defence that legitimized the use of force by states against non-state actors, subject to the underlying causes of the conflict.[62]

In Canada, the Geneva Conventions Act directly implements our treaty commitments,[63] and the government has been an advocate of the principles of equal rights and self-determination of peoples at the United Nations.[64] Acts of violence, no matter how deserving the ultimate goal, underscore the philosophical conundrum of means versus ends and whether it can ever be ethical to sanction death and destruction in support of a just cause. It is difficult, if not deeply problematic from a moral perspective, to justify the deliberate killing of an unarmed population, regardless of the cause or purpose. In this regard, international humanitarian law does not seek to justify or rationalize violence, but rather to assert a comprehensive set of rules that apply to all actors in a conflict—and to promote the prosecution of those who violate the rules clearly and consistently. Thus a claim to "combatant status" does not immunize all acts of violence, but it has a significant impact on the characterization of particular actors and offences. In the context of wars of liberation or independence being waged by groups with a recognized right to self-determination, the use of force against military targets or police units empowered to conduct "public order" missions is permitted. When civilians are targeted in attacks by such groups, those acts are subject to sanction as violations of humanitarian law, with recourse to a set of well-established defences. Thus illicit acts of war perpetrated by or on behalf of "peoples" struggling for their rights to self-determination, are a separable phenomenon distinct from individual, sporadic acts of violence in peacetime. As Cassese points out in his study of the *Achille Lauro* hijacking, "the activities of national liberation movements *per se* cannot be equated with terrorism . . . just because these movements are comprised of irregular combatants fighting against governments, this does not mean they should be seen by the international community as criminal organizations."[65] In cases where illicit acts are systematic and widespread, Cassese suggests that a state may legitimately consider the armed nucleus or faction of a movement as a criminal organization. However, " . . . such an . . . assessment does not necessarily involve the whole movement, so long as the latter pursues legitimate political objectives . . . "[66] An in-depth exegesis on international humanitarian law is beyond the scope of this paper, but it should be clear from the foregoing summary that in assessing the means or method of violence employed by states and non-state actors alike, an understanding of the context is essential. Certain acts that are impermissible in peacetime are permitted in war.

Article 21 of the new treaty on the financing of "terrorism" explicitly acknowledges the interplay between its own mandate and international humanitarian law: "Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions."[67] Thus full compliance with the treaty would explicitly require its provisions to be interpreted in light of international humanitarian law. Shortly before the treaty opened for signature in January 2000, Canada indicated its intention to sign and ratify it.[68] The treaty is especially relevant to the Canadian context, because a majority of the refugees and other non-citizens considered security risks under the Immigration Act are not people who have ever engaged in violent activity themselves, but are associated with Canadian organizations that CSIS has identified as "fronts" for fundraising in support of "homeland conflicts."[69] Before ratifying the treaty, the government will need to review whether existing Criminal Code offences address the requirements of the Treaty, for it imposes an obligation on states to establish as criminal offences the specific offences enumerated in the other terrorist conventions,[70] as well as,

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[71]

Arguably domestic law concerning conspiracy, common intention, and aiding or abetting unlawful acts already addresses the situation of people who contribute material support to the commission of illegal acts. While any individual in Canada could be subject to criminal prosecution on these grounds, in practice, prosecutions are never initiated against refugees whom the government finds to be engaged in financing "terrorism." The fact that these refugees have not engaged in any unlawful activities (either in Canada or their country of origin) must be at least a par-

tial explanation for the absence of such prosecutions.[72] It should be noted that the UN treaty itself criminalizes "terrorist" fundraising only to the extent that funds are collected "wilfully . . . with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out . . . " the specified offences or acts.[73] Additional provisions indicate that it is also an offence to participate as an accomplice, organize or direct others to commit an offence, or intentionally "contribute to the commission of an offence by a group of persons acting with a common purpose."[74] The Treaty is a clear affirmation that those who financially contribute to violent acts are to be considered just as culpable as those who detonate the bombs.

However, the Treaty's provisions clearly articulate the legal requirement of *mens rea*. Individuals will be found complicit in the commission of an offence only when they knew or ought to have known that their activities were supporting the crime. The requirement of this mental element is consistent with the standards widely applied in both criminal and refugee law[75] and necessarily implies that mere membership or affiliation with groups responsible for international crimes would not be sufficient to establish an offence under the treaty.

It is also important to note that the treaty incorporates an express limitation on the duty to extradited offenders who will be subjected to discriminatory applications of the criminal law authority:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite . . . if the requested State Party has substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.[76]

As Hathaway emphasizes, an individual does not face genuine criminal prosecution where discrimination results in selective prosecution, denial of procedural or adjucative fairness, or differential punishment.[77]

The Treaty further stipulates that its measures must be implemented through the mechanism of domestic criminal law. In the Canadian context, the necessary result would be that anyone alleged to have been involved in financing "terrorism" will be afforded all the safeguards of the criminal justice system, including constitutionally protected rights to counsel, to know and meet and the state's case, and most importantly, the benefit of the criminal law standard of proof—not to be convicted unless guilt is established beyond a reasonable doubt. From a human rights perspective, it would be a significant advance if the Canadian government proceeded to implement the Convention and prosecute alleged offenders. Such action would be viewed as positive, however, only if the government resorted to the criminal law for citizens and non-citizens alike—repudiating the current practice of invoking security certificate and deportation proceedings (with none of the safeguards already mentioned) for refugees and other non-citizens. In the meantime, deportation continues to be the preferred recourse for addressing alleged refugee "terrorists," and so a more thorough examination of the applicable immigration laws and their historical evolution follows.

Canadian Immigration Law and National Security

Canada's historical record clearly reflects the extent to which each new influx of immigrants engendered reactions that sought to criminalize foreigners and thwart others from gaining admission in the first place. As Stasiulus and Yuval-Davis observe, immigration laws have been used in settler societies to encourage "desirable" immigrants to settle in the country and to exclude "undesirable" ones.[78] In this regard, post-Confederation immigration law and policy in Canada share a trajectory with other colonial states. While seeking to promote immigration as an strategy essential for industrial growth, the newly formed Confederation was equally concerned about controlling entry and safeguarding the developing nation from individuals thought undesirable because of their "race" or nationality, as well as for economic, medical, criminal, or security reasons. Canada's first Act Respecting Immigration and Immigrants, passed in 1869, was designed primarily to ensure the safety and protection of British immigrants travelling to Canada. As early as 1872, there was a prohibition against immigrants who might be a security risk. That year an amendment to the Immigration Act provided that "The Governor in Council may, by proclamation, whenever he deems it necessary, prohibit the landing in Canada of any criminal, or other vicious class of immigrants, to be designated by such proclamation."[79] Section 41 of the Immigration Act of 1910 added to the prohibited classes "any person other than a Canadian citizen [who] advocates in Canada the overthrow by force or violence of the Government of Great Britain or Canada, or other British Dominion, Colony, possession or dependency, or the overthrow by force or violence of constitutional law or authority."[80] A privative clause in the Immigration Act denied the right of appeal to anyone who was refused admission or ordered deported pursuant to the Act.[81]

In the wake of the Russian Revolution in 1917, the "Red Scare" in the West, as well as increasing labour unrest in Canada, the scope of Section 41 was widened to include

anyone who "advocates or teaches the unlawful destruction of property" and anyone who "is a member of or affiliated with any organization entertaining or teaching the disbelief in organized government." The government used this statutory authority to bar entry or deport hundreds of "anarchists and revolutionaries," who were primarily suspected communists and union organizers.[82] This amendment gave the government the right to deport anyone who was deemed a member of one the inadmissible classes, for up to five years after arrival in Canada. By 1923 all immigrants were required to have visas, and procedures for the examination of visa applicants began to develop. During the inter-war period as well as World War II, the Immigration Act continued to provide government officers with broad discretionary powers to exclude individuals, including "enemy aliens," on the grounds of national security.

Following World War II, the Canadian government sought to expand the immigration program in an effort to meet labour market demands as well as to contribute to the relief of displaced persons in Europe. In recognition of the security problem posed by the surge in immigration, the RCMP was dispatched to London to join the immigration vetting team. In the immediate post-war period, fear of Soviet infiltration (not Nazi collaborators) was the primary security concern. This concern became heightened when a clerk from the Soviet Embassy named Gouzenko defected and revealed the existence of a communist spy network. The "Gouzenko affair" generated a widespread preoccupation within government about security—a concern that grew as Cold War tensions increased. Immigration regulations continued the absolute prohibition on admission of communists, while Cabinet directives authorized a selective course of immigration security screening without deciding whom to screen, how to screen, or what screening criteria would be applied. These decisions were left to the discretion of the RCMP. Records indicate that Cabinet regarded security matters as a key priority but did not want the security process made public. As reported in a recent Federal Court decision,"[n]ot only was the actual process secret but the fact that such a process was in place was a closely guarded secret."[83]

In 1952 a new Immigration Act was implemented, governing Canadian immigration procedures for the following twenty-five years. Section 5 of the Act listed the classes of persons who were prohibited from admission to Canada, while Section 19 provided the authority to deport those already in Canada on security grounds.[84] According to the Act, individuals were considered security risks who are, have been, or are likely to become "members of or associated with any organization, group or body of any kind concerning which there are reasonable grounds for believing that it promotes or advocates . . . subversion by force or other means."[85] Other subsections of the Act specifically addressed related security risks, including espionage, sabotage, and treason. The Immigration Appeal Board Act of 1967 implemented a right of appeal for people facing deportation but also set out the conditions for overriding appeal procedures in serious security cases.[86] From its early roots through to the 1960s, the explicit objective of immigration law and policy was to sustain the British character of Canada and exclude those who were thought incapable of contributing to the government's assimilationist project of nation building. The driving force behind measures of national security and immigration control during this period was the Anglo-Saxon fear that the influx of foreigners threatened the nation's "racial purity" and/or political fabric.[87]

Canada became a party to the 1951 United Nations Convention on the Status of Refugees (Refugee Convention) in 1969. The Convention carved out an explicit exception to the notion that states had the absolute prerogative to decide whom to admit to their territories.[88] Qualified refugees would no longer be seeking a privilege, but be asserting a right that statutory states would be obliged to consider. Despite the idealism and neutral language embedded in the Convention, ideological considerations frequently informed Canada's response to international refugee crises, particularly in the early years of the Cold War. The refuge provided to people fleeing communist regimes in Hungary in 1956, Czechoslovakia in 1968, and Vietnam in 1979, while the relatively closed door offered to Chilean refugees fleeing Pinochet's coup in 1973, are striking manifestations of this tendency.[89]

In response to a government green paper recommending that immigration legislation should embody a more positive approach, a new Immigration Act was implemented in 1978.[90] This legislation, amended several times over the past twenty-two years, is still in force. For the first time, the objectives of Canada's immigration policy were explicitly spelled out. These included attainment of Canada's demographic goals, promotion of family reunification, and development of a strong economy. The Act included among its purposes the imposition of standards of admission that do not discriminate on grounds of race, national, or ethnic origin, colour, religion, or sex; the fulfilment of Canada's international legal obligations to refugees and upholding its humanitarian tradition towards the displaced and the persecuted; the maintenance and protection of the health, safety, and good order of Canadian society, and promotion of international order and justice by denying the use of Canadian territory to persons who are likely to en-

gage in criminal activity.[91] The Act incorporated the essential parts of the 1951 Convention definition of a refugee and its "exclusion clauses." Protection would be afforded to persons with a well-founded fear of persecution for reasons of race, religion, nationality, or membership in a particular social group or political opinion. Status would be denied to those not deserving protection, including the perpetrators of war crimes, serious non-political crimes, and acts "contrary to the purposes and principles of the United Nations." The Act also incorporated the principle of *non-refoulement,* the positive commitment not to remove refugees to a country where their life or freedom would be threatened for any of the Convention reasons. Exceptions, consistent with the Refugee Convention, were stipulated for persons who constituted a danger to "the security of Canada" or public safety.[92] In 1977 United Nations High Commissioner for Refugees (UNHCR) had cautioned that as exceptions to an important protection principle, the security and public order provisions should be interpreted and implemented restrictively.[93] Neither the Act nor subsequent regulations referred to the meaning of "security of Canada"[94] or the UNHCR's caution.

Section 19 (1) of the Act established a somewhat refined list of classes of people who were inadmissible to Canada for security reasons: persons who there are "reasonable grounds to believe" have engaged or will engage in espionage, subversion against democratic government, and subversion by force of any government.[95] In addition, persons were inadmissible where "there are reasonable grounds to believe [they] will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence."[96] Finally, there was a provision to exclude persons who had committed war crimes and crimes against humanity.[97] The Act explicitly referred to the Criminal Code for the purposes of defining war crimes and crimes against humanity, and the Code's definitions of "public order offences" would clearly be relevant to the interpretation of espionage. However, nothing in the new Act, regulations, or administrative policy provided any criteria or guidance for what constituted "membership" or "subversion." Over the next decade, Canada opened its doors to thousands of refugees from non-traditional source countries. However, Canada's record of compliance with international human rights standards and the Refugee Convention in particular continued to be uneven.[98]

In the wake of concerns about the conduct of the Security Service of the RCMP in the 1970s, the government established the Commission of Inquiry Concerning Certain Activities of the RCMP commonly referred to by the name of its chair, Mr. Justice D.C. McDonald. In 1981 the McDonald Commission released its second report, *Freedom and Security under the Law.*[99] The Commission found that the RCMP had subjected many groups, including the "new left," Quebec separatists, unions, the Indian movement, and others to surveillance, infiltration, and "dirty tricks," solely on the grounds that they were exercising their freedom of expression through lawful advocacy, protest, and dissent. A full chapter of the Commission's report addressed immigration security screening. The Commission found that the statutory security criteria set out in the Immigration Act were "too broad" and were inconsistent with the definition of "threats to the security of Canada," which the Commission proposed should inform all security-related screening activities.[110] The Commission observed,

> Canada must meet both the requirements of security and the requirements of democracy: we must never forget that the fundamental purpose of the former is to secure the latter . . . In taking the position that the requirements of security in Canada must be reconciled with the requirements of democracy, let us be clear that we regard responsible government, the rule of law and the right to dissent as among the essential requirements of our system of democracy.[101]

Although the Commission recommended including political violence and "terrorism" within the admissibility provisions of the Immigration Act, it underscored the importance of distinguishing between international groups secretly pursuing in Canada their terrorist objectives against foreign governments, from representatives of foreign liberation or dissident groups who come to Canada to promote their cause openly.[102] Based on the Commission's findings, Parliament endorsed the establishment of a new security intelligence agency, outside of the RCMP, with a mandate to investigate and advise but without prosecutorial or enforcement powers. In 1984 the Canadian Security Intelligence Service Act was adopted, and the service was created to, among other things, provide government departments and agencies with security assessments on prospective immigrants. Section 2 of the CSIS Act defines "threats to the security of Canada" as being (1) espionage or sabotage; (2) foreign-influenced activities within or in relation to Canada that are detrimental to its interests and are clandestine or deceptive and involve a threat to any person; (3) activities within or relating to Canada, directed toward or in support of the threat or use of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and (4) activities directed against undermining by covert unlawful acts—or directed toward or intended ultimately to lead to

the destruction or overthrow by violence of—the constitutionally established system of government in Canada. The statutory language in Section 2 is very broad and has been the subject of criticism for this reason. As Gorlick notes, statutory terms such as *clandestine* or *deceptive* and *foreign influenced* are not defined in the Act, and "inevitably the interpretation of such terms will fall to the agency that has the most to gain from statutory power, that is, CSIS itself."[103] An important safeguard, however, is the inclusion at the end of Section 2 of the specific qualification that a threat to the security of Canada "does not include lawful advocacy, protest or dissent unless carried in conjunction with any of the activities referred to above."[104]

Parliament failed to implement the McDonald Commission's proposals on revising the Immigration Act. The result is that the definition used by CSIS officers to investigate and provide advice to ministers on security risks that may be posed by prospective immigrants continues to be inconsistent with the admissibility provisions of the Immigration Act. Whereas the term *threat* in the CSIS Act is specifically defined in terms of enumerated activities rather than associations, the Immigration Act maintained its use of broad admissibility categories. Over the next decade many of the criticisms surfaced that had been levelled against the RCMP, and now were directed at the new security intelligence agency and the practices and conduct of its officers.[105] Complaints have been made to the Security Intelligence Review Committee (SIRC), the agency "watchdog" for CSIS, documenting the extent to which the service has crossed the line and is engaging not just in monitoring threats to the security of Canada, but, like the RCMP before when dealing with "subversives," is intruding into the lives and futures of those involved in legitimate forms of expression and dissent.[106] Reporting on investigations spanning several years, SIRC found instances in which CSIS instructions that sources report on only "authorized subjects of an investigation" had not been fully implemented.[107] Also noted was "an occasional lack of rigour in the Service's application of existing policies, which oblige it to weigh the requirement to protect civil liberties against the need to investigate potential threats."[108] Media reports have exposed how, in some cases, refugees have been overtly or implicitly induced to become informers on fellow community members—with promises of prompt resolution of their own residence applications.[109] All prospective immigrants, including refugees, are under a certain compulsion to cooperate with CSIS officers, as a positive recommendation from the Service is a condition for obtaining permanent residence status and citizenship.

Canada signed the 1984 Convention Against Torture (CAT) in 1985 without any reservation and ratified it in 1987, after extensive consultations with provincial and territorial governments.[110] Article 3 of the CAT imposes an absolute, non-derogable obligation on states not to return anyone to a country where she or he is at risk of torture, effectively superseding the security exception in the Refugee Convention.[111] Although the government was an increasingly vocal proponent of human rights standards and institutions in international and regional fora, no steps were taken to incorporate the obligations assumed under Article 3 of the CAT into domestic immigration law.[112] In the same period, the government was setting up the Immigration and Refugee Board that would provide refugee claimants with an oral hearing. A Supreme Court decision interpreting the new Charter of Rights and Freedoms held that existing administrative procedures for determining refugee status inside Canada failed to meet the procedural guarantees of fundamental justice.[113]

In 1992, as Cold-War security considerations had given way to an increasing preoccupation with deterring "illegal migration" from the South, the Canadian government introduced a series of restrictive amendments to the Immigration Act. Bill C-86 made changes to the overall structure of existing immigration security procedures and enumerated a set of specific objectives for the scheme under the heading "Safety and Security of Canada." Section 38.1 of the amended Act articulated the purposes of the security procedures:

> Recognizing that persons who are not Canadian citizens or permanent residents have no right to come into or remain in Canada and that permanent residents have only a qualified right to do so, and recognizing the necessity of cooperation with foreign governments and agencies in maintaining national security, the purposes of sections 39 to 40.2 are
> (a) to enable the Government of Canada to fulfil its duty to remove persons who constitute a threat to the security or interests of Canada or whose presence endangers the lives or safety of persons in Canada;
> (b) to ensure the protection of sensitive security and criminal intelligence information; and
> (c) to provide a process for the expeditious removal of persons found to be members of an inadmissible class referred to in section 39 or 40.1.[114]

Bill C-86 introduced a new form of criminality into the Act, provisions to render refugees and immigrants "inadmissible" where there are reasonable grounds to believe they will "engage in terrorism"[115] or are "members of an organization that there are reasonable grounds to believe will . . . engage in terrorism."[116] An additional subsection provided that persons are inadmissible if they have engaged in "ter-

rorism," or are "members of an organization that was engaged in terrorism," unless they can satisfy the Minister that their admission would not be detrimental to the national interest.[117] According to former Solicitor General Doug Lewis, these clauses were designed to ensure that Canada does not become a safe haven for retired or active terrorists.[118] The subsections dealing with espionage and subversion were broadened to include within their ambit past or present membership in organizations that have engaged in these acts in the past, are engaging in them now, or will engage in them in the future.[119] The package of amendments also introduced "access criteria" into the Act, requiring all refugee claimants to undergo an eligibility determination pursuant to an enumerated list of disqualifications that were based, among other things, on the new security admissibility criteria. In cases where the Minister found it "contrary to the public interest," claimants would be divested of the right to pursue their refugee claim.[120] Subject to a further ministerial opinion that they constituted a "danger to the security of Canada," Convention refugees as well as those deemed ineligible to claim refugee status were to be deported back to the very countries from which they fled and where their lives or freedom would be threatened.[121] In defence of the legislative amendments, it was suggested that the former Immigration Act "put the safety and security of Canadians at risk . . . [and] we have to face the fact that the world of the 1990's is a world of increasingly sophisticated, internationally organized criminals and terrorists."[122]

Once the amendments contained in Bill C-86 were implemented, immigration officers had an expanded basis to support determinations of inadmissibility. With the new provisions on "terrorism," the Immigration Act delegated the job of identifying possible terrorists to CSIS while retaining for its own department the ultimate authority to decide who will be excluded from Canada on the basis of possible links to "terrorism." Certain refugee communities found themselves increasingly subject to surveillance by CSIS. Long delays associated with security clearance procedures meant that some individuals could expect to wait years before being able to sponsor family members, enrol in post-secondary education, start a business, or travel outside the country. Complaints lodged with SIRC about these delays or the nature of advice provided by the Service failed to resolve the problems. In three recent Kurdish cases, SIRC Chairman Robert Rae concluded that adverse assessments provided by CSIS were based on inaccurate assumptions. Despite the extensive investigations and hearings that supported SIRC's conclusions in these cases, the Service responded by preparing "updated assessments" in defence of its original advice, a move that has been interpreted as an attempt to overrule and effectively discredit the committee.[123] The absence of definition or discriminate content for the terms *terrorism, membership in a terrorist organization* and *security of Canada,* permits the Minister of Citizenship and Immigration unfettered discretion to issue security certificates. Unlike the procedures set up in the United Kingdom, where there are statutory definitions and the designation by the executive of which groups and organizations meet the definition, is subject to approval by both Houses of Parliament and even appeal,[124] there are no public procedures to deal with the designation of terrorist organizations.

By the 1990s there was an emerging consensus among scholars and legal experts that both the principle of *non-refoulement* and the prohibition against torture had become rules of customary international law, and further, peremptory norms of *jus cogens*.[125] In the extradition context, two Supreme Court rulings confirmed that fundamental justice should prevent Canada from surrendering a fugitive to a foreign state in circumstances where they would be subjected to torture.[126] In the same spirit, in 1996 Canadian government representatives in Geneva joined in the consensus for the 1996 Conclusion of the UNHCR's Executive Committee in reaffirming "the fundamental principle of *non-refoulement*, which prohibits the expulsion and return of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture."[127] Yet within the next two years the government executed deportation orders in direct contravention of requests by the United Nations Committee against Torture and the Inter-American Commission on Human Rights.[128] Domestically, the government was maintaining its firm commitment to its "right" to deport criminals[129] and "security risks," regardless of the human rights at issue.[130] Although a United Nations resolution urges states to ensure that refugee status is "not used for the purpose of preparing or organizing terrorist acts,"[131] international institutions firmly support an absolute prohibition against deporting anyone to a county where there is risk of torture.[132] Removal is also proscribed to a country where fair trial guarantees are absent, the death penalty will be imposed (albeit with considerable variation in state practice in this regard)[133] or, with some balancing of interests, in cases that result in statelessness,[134] and family separation, particularly where children are involved.[135]

Meanwhile, over the past several years, there have been repeated calls from some quarters for Canada to restrict access to its refugee program and an increasing public perception that Canada's "porous" borders are endangering

Canadians.[136] In response to such concerns, the federal government commissioned a series of studies and consultations,[137] and most recently proposed a number of wide-ranging reforms to the Immigration Act. Although Bill C-31, the Immigration and Refugee Protection Act, will not be implemented because of the recent federal election, it provides a good indication of future policy directions. As for national security issues, the bill maintained the provisions related to "membership" and "terrorism," with no definition or statutory criteria for either term. There was provision for discretionary relief in circumstances where the minister was "satisfied that the admission would not be detrimental to the national interest."[138] The bill failed to address repeated recommendations that the definition of *security threat* in the Act be harmonized with the definition in the CSIS Act.[139] In addition to proposing broader grounds for security inadmissibility, the bill proposed to treat permanent residents and other non-citizens in the same manner under a new category as "foreign nationals." Currently, permanent residents faced with security proceedings have automatic access to SIRC, which examines the basis of the security opinion and provides an important check on the authority of CSIS. SIRC counsel have an opportunity to question witnesses who have been permitted to testify *ex parte* and in effect represent the interests of the person concerned. A summary of such evidence, subject to security "expurgation," is provided. It is only after the hearing is completed that SIRC issues a recommendation to the Governor in Council on whether a certificate should be issued.[140] In proceedings involving non-permanent residents, on the other hand, the certificate has already been issued and the task of a "designated judge" (one of a small number of Federal Court judges who have received special clearance to review security cases) is to determine whether it should be quashed. The government's case is presented primarily in secret and in the absence of the person concerned. In most cases, the CSIS officers who actually conducted the interviews and tendered the adverse security recommendation are not made available for questioning. The court has no independent counsel to assist, nor are there any special rules governing the unique features of such hearings.[141] Bill C-31 proposed the lower standard of procedural justice for all foreign nationals by stripping SIRC of its current responsibility for permanent residents. Both refugees and permanent residents were to be accorded only an "informal and expeditious" Federal Court review of ministerial security opinions, with no possibility of further review or appeal. It deserves mention that ten years ago, a parliamentary review of the CSIS Act recommended that the Immigration Act be amended to allow *any* person subject to an adverse security report to have the case investigated by SIRC, with direct recourse to an administrative hearing.[142] The latest legislative initiative not only failed to address the existing shortcoming in the Act, but was proposing to further erode an essential safeguard. Although the bill contained new references to the CAT, the explicit exemption authorizing the Minister to deport people regardless of the risks they might face, remained in place for designated security cases.[143]

The overhaul of the Immigration Act in 1978, implementation in 1982 of the Canadian Charter of Rights and Freedoms, as well as the emergence of new international standards, generated considerable optimism about the prospects for a meaningful amelioration of conditions for immigrants and refugees as historically disadvantaged groups in Canadian society. Recourse to "Charter challenges" would offer an important mechanism of accountability, with the courts providing aggrieved individuals direct access to public decisions affecting their lives and an opportunity to challenge laws independent of government law reform agendas.[144]Despite these lofty hopes, the foregoing review of the national security/admissibility provisions in Canadian immigration law discloses little evidence of progress. The individuals and groups subject to security targeting may have changed, but the measures proposed in 2000 bear remarkable similarity to historical forms of exclusion. The enforcement of the seemingly neutral admissibility provisions and their attendant procedures leave wide scope for unprincipled and discriminatory decision with virtually no appeal mechanism and limited procedural rights. Resort to the courts has not addressed the inequities in the system but instead has frequently reinforced them.

The second part of this paper will include a closer look at Federal Court jurisprudence concerning refugees and other non-citizens alleged to be "terrorists" or members of "terrorist" organizations.

Endnotes

1. J. Zulaika and W. Douglas, *Terror and Taboo* (New York: Routledge, 1996) at x, xi, 16.
2. O. Elagab, *International Law Documents Relating to Terrorism*, 2nd ed. (London: Cavendish Publishing Limited, 1997) at xx.
3. The words *terrorism* and *terrorist* are placed within quotation marks throughout this paper in recognition of their meaninglessness as a legal category.
4. T.H. Mitchell, "Defining the Problem" in D.A. Charters, ed., *Democratic Responses to International Terrorism* (New York: Transnational Publishers, 1991) at 10.
5. *Ibid.*, at 11.
6. CSIS, "Trends in Terrorism," Report #2000/01, 18 Dec. 1999 <www.csis.gc.ca/eng/miscdocs/200001e.html> at 2; and *Report*

of the Special Senate Committee on Security and Intelligence (Kelly Committee), January 1999 <www.parl.gc.ca/36/1/parlbus/commb…/com-e/secu-e/rep-e/repsecintjan99-ehtm> c.1 at 2.

7. Kelly Committee, *ibid.*, c.1 at 14.
8. B. Gorlick, "The Exclusion of 'Security Risks' as a Form of Immigration Control: Law and Process in Canada" (1991) 5:3 *Immigration and Nationality Law and Practice* 76.
9. See P. Shah, "Taking the 'Political' out of Asylum: The Legal Containment of Refugees' Political Activism" in F. Nicholson and P. Twomey, eds., *Refugee Rights and Realities* (Cambridge: Cambridge University Press, 1999) 119-135.
10. R. Whitaker, "Refugees: The Security Dimension" (1998) 2:3 *Citizenship Studies* 413 at 427.
11. *Ibid.*
12. *Ibid.* at 430.
13. Institutional racism can manifest in the form of explicitly racist policies in which the state directly reinforces racist biases in society, or it can be found in systemic form ("systemic racism") concealed in systems, practices, policies, and laws that appear neutral and universalistic, but disadvantage racialized persons. The Commission on Systemic Racism in the Ontario Criminal Justice System noted that racism has "a long history in Canada." While the focus of the provincial study was the criminal justice system, the commissioners emphasized that "[r]acism has shaped immigration to this country and settlement within it…" An examination of Canadian immigration law and policy from historical and contemporary perspectives requires an analysis of racism as a defining feature of Canadian society. *Report of the Commission on Systemic Racism in the Criminal Justice System* (Ontario: Queen's Printer, 1995); *Stephen Lewis Report on Race Relations in Ontario* (Ontario: Queen's Printer, 1992).
14. In a meeting between representatives of the Canadian Council for Refugees (CCR) and the Senior Director for Security Review with the Department of Citizenship and Immigration (CIC), CIC acknowledged that some Kosovars had joined the KLA because it was "the only way to protect themselves and their families;" and that in such circumstances the individuals were not declared inadmissible. (Montreal,12 September 2000).
15. Canadian Council for Refugees, *Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies,* in preparation for the UN World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, 1 Nov. 2000 <www.web.net/~ccr/antiracrep.htm>.
16. H. Bannerji, *The Dark Side of the Nation* (Toronto: Canadian Scholars' Press, 2000) at 115. See also, D. Matas, "Racism in Canadian Immigration Policy" in C. James, ed., *Perspectives on Racism and the Human Services Sector* (Toronto: University of Toronto Press, 1996); L. Jakubowski, "Managing Canadian Immigration: Racism, Ethnic Selectivity, and the Law" in E. Comack *et al., Locating Law, Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999); A. Simmons, "Racism and Immigration Policy" in V. Satzewitch, ed., *Racism and Social Equality in Canada* (Toronto: Thompson Educational Publishing, 1998).
27. For an excellent account of one such interview/interrogation experienced by Suleyman Goven, a Kurdish refugee from Turkey, see M.J. Leddy, *At the Border Called Hope* (New York: Harper Collins, 1997) at 76-82; and the recent conclusions of the Security Intelligence Review Committee (SIRC), discussed *infra*, In the Matter of the Complaints under the Canadian Security Intelligence Service Act by S.G. and S.D., SIRC File Nos. 1500-82, 83,7 April, 2000, in which the Committee upheld two complaints, recommending in particular the need for Canadian Security Intelligence Service (CSIS) officials making assessments to develop a more sophisticated analytic framework, the entitlement of the applicant to written notice of the date and time of the interview, its purpose, and the fact that the applicant has the right to attend with counsel (at 31). Mr. Goven's complaint was one of three immigration security screening complaints on which SIRC rendered decisions in 2000. In the wake of SIRC's findings in these three cases, a new policy has been adopted that will provide applicants two to eight weeks' written notice of the interview by a convocation letter specifying that the interview will be with a CSIS employee. See *SIRC Annual Report, 1999-2000* at 82, footnote, 33 <www.sirc-csara.gc.ca/annual/1999-2000/ar9900_e.html>.
18. In the past year CSIS conducted 81,650 immigration security screening assessments, of which 109 contained notification that the individual "is or was" a member of an inadmissible class as defined in s. 19(1) of the Immigration Act. *SIRC Annual Report 1999-2000*, *ibid.*, at 36. The number of individuals subsequently subject to security certificate procedures or left in legal limbo due to inaction on the part of CIC is not published. However, a CIC official recently indicated that there are approximately 250 security cases pending with the department, of which 150, or 60 per cent, are Convention refugees within Canada, a further 20 per cent are overseas applicants, and 20 per cent are non-refugee cases. *Supra* note 10.
19. J.J. Paust *et al.*, "Terrorism" in *International Criminal Law: Cases and Materi*als, 2nd ed. (Durham, N.C.: Carolina Academic Press, 2000) at 999-1000.
20. See P. St. John, "Counterterrorism Policy Making: The Case of Aircraft Hijacking, 1968-1988" in D.A. Charters, ed., *supra* note 4 at 73-77.
21. N.J. Schrijver, "Interpreting the Principles and Purposes of the United Nations" in P.J. van Krieken, ed., *Refugee Law in Context: The Exclusion Clause* (The Hague: T.M.C. Asser Press, 1999) 237 at 244. See also, *Reference Re Secession of Québec* [1998] 2 S.C.R. 217.
22. *Ibid.*
23. R. Higgins, "The General International Law of Terrorism" in R. Higgins and M. Flory, eds., *Terrorism and International Law* (London: Routledge, 1997) at 16.
24. Mitchell, *supra* note 4 at 14. Several years later, members of the *Ad Hoc* Committee on International Terrorism drew attention "to the unacceptability of a broad interpretation of the concept of international terrorism which would include the national liberation struggle, acts of resistance against the aggressor in territories occupied by the latter and demonstrations by workers who were opposed to exploitation." *Report of the Ad Hoc Committee on International Terrorism,* ch. 2, Summary of the General Debate, UN Doc. A/34/37 (1979), para. 16; and see paras.

30-31.

25. U.N.G.A. Res. 53/108, 26 Jan. 1999 at para. 1. See U.N.G.A. Res. 3034, 18 Dec. 1972; UN G.A. Res. 44/29, 6 Dec. 1989; U.N.G.A. Res. 46/51, 9 Dec. 1991, UN Doc. A/46/54; and the *Declaration on Measures to Eliminate International Terrorism,* annex to UN G.A. Res. 49/60, 9 Dec. 1994, which states, *inter alia*, that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." See also *Measures to Eliminate International Terrorism,* UN G.A. Res. A/51/631, 4 Dec.1996; and UN G.A. Res. A/51/210, 16 Jan. 1997.
26. The eleven Conventions include: the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 1963; the Hague Convention for the Suppression of the Illegal Seizure of Unlawful Acts against the Safety of Civil Aviation, 1970; the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports serving Civil Aviation, 1988; the International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the International Convention against the Taking of Hostages, 1979; the Rome Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; the Montreal Convention on the Marketing of Plastic Explosives for the Purpose of Detection, 1991; the International Convention for the Suppression of Terrorist Bombings, 1998; and the International Convention for the Suppression of the Financing of Terrorism, 1999. Two instruments, while not directed expressly at terrorism, are also relevant: the Convention on the Prohibition on the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, 1972; and the Vienna Convention on the Physical Protection of Nuclear Material, 1980.
27. See *OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are Internationally Significant*, 1971, which avoids defining terrorism in favour of an enumerated list of "common crimes of international significance" that includes "kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection . . . as well as extortion in connection with those crimes" (art. 2). Art. 6 indicates that "[n]one of the provisions of this convention shall be interpreted so as to impair the right of asylum." See also, European Convention on the Suppression of Terrorism, 1977; European Communities, Agreement Concerning the Application of the European Convention on the Suppression of Terrorism among Member States, 1979; SAARC Regional Convention on the Suppression of Terrorism, 1987.
28. A draft text proposing that inclusion of "crimes of terrorism" within the parameters of the Court's jurisdiction was not adopted. In addition to listing offences under the major UN terrorism treaties, the text indicated that the Court would have jurisdiction over "Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another *State* [emphasis added] directed at persons or property and of such a nature as to create terror . . . for whatever considerations and purposes . . . " Preparatory Committee on the Establishment of an International Criminal Court 11-21 Feb. 1997, Working Group on Definition of Crimes, UN Doc. A/AC.249/1997/WG.1/CRP.4 at para.1.
29. One hundred and twenty states voted in favour of the establishment of the ICC, and twenty-two of the sixty states required for the Statute to enter into force have ratified it. Canada signed the Rome Statute in December 1998 and ratified it on 7 July 2000. See <www.un.org/law/icc/statute/status/htm>. The Rome Statute is the most current codification of a universal approach to combating serious international crimes. See <www.un.org/law/icc/statute/romefra.htm>. Within the ambit of "war crimes," defined in Article 8, are wilful killing, torture, taking of hostages, intentionally directing attacks at civilian populations or civilian objects, and attacking or bombarding undefended towns or buildings. The Statute sets a higher threshold for crimes committed in internal wars, stating the Court's jurisdiction extends only to acts that take place in a state where there is a "protracted armed conflict between government authorities and organized armed groups or between such groups."
30. See Rome Statute, art. 25(3) "Individual Criminal Responsibility," art. 28, "Responsibility of Commanders and Other Superiors," and art. 30, "Mental Element"; See also *Report of Preparatory Commission for the ICC,* Finalized Draft Text of the Elements of Crimes, PCNICC/2000/INF13/Add.2,<www.un.org/law/icc/statute/elements/english/add2e_w.doc>; and the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadic*, which gave extensive consideration to the question of criminal responsibility, Opinion and Judgment. Case No. IT-94-1-T, 7 May 1997, paras. 688-692.
31. The G8 (Group of 8) countries are Canada, France, Germany, Japan, Italy, Russia, the U.K., and the U.S.A.
32. Measures adopted during the G7/P8 Ministerial Conference on Terrorism, Paris, June 1996, as cited E. Chadwick, "Terrorism and the Law: Historical Contexts, Contemporary Dilemmas, and the End(s) of Democracy" (1997) 26 *Crime, Law and Social Change* 329 at 330, and *SIRC Annual Report 1999-2000*, Section 1 n.6.
33. P. Webster and I. Brodie, "G7 Vow to Pursue Terrorists," *The Times*, 27 June 1996 at 14. Ironically, the United States has refused to sign the 1998 Convention for the Suppression of Terrorist Bombings.
34. Criminal Code, ss. 76, 77, 78, 78.1. Until this year, s. 7 of the Criminal Code stipulated that in cases where the alleged acts were committed outside Canada, prosecutors had to prove an offence under international law as well as an equivalent offence in the Code. This was one of the reasons that prosecution of World War II war criminals has been difficult, particularly after the Supreme Court's ruling in *R.* v. *Finta* [1994] 1 S.C.R. 701.
35. The Crimes against Humanity Act, R.S.C. 2000 c. 24, imple-

ments Canada's obligations under the Rome Statute. It amends, *inter alia*, the Criminal Code by replacing the jurisdictional provisions of s. 7 with the actual offences of genocide, crimes against humanity, and war crimes, enhancing the government's capacity to prosecute and punish persons accused of these crimes. This Act closes the technical loophole left in the wake of the Supreme Court's ruling in *Finta*.

36. In response to what many scholars have described as a "very modest terrorist threat," the Canadian government proclaimed the War Measures Act, which gave the police sweeping powers to arrest and detain anyone suspected of association with the FLQ. The use of these powers was widely criticized at that time and "has come to be regarded as a heavy-handed overreaction." W.M. Vaughn, "Canadian Reason of State: Terrorism, Emergency Powers, and Civil Liberties" in D.A. Charters, ed., *supra* note 4 at 165.
37. As discussed in A. Cassese, *Terrorism, Politics and Law* (Princeton, N.J.: Princeton University Press, 1989) at 121-123.
38. J.J. Paust *et al*., *supra* note 19 at 1020.
39. See R. Slater and M. Stohl, "Introduction" in R. Slater and M. Stohl, eds., *Current Perspectives in International Terrorism* (New York: Macmillan, 1988) at 1-11; A.P. Schmid and R.D. Creliston, *Western Responses to Terrorism* (London: Frank Cass, 1993) at 11; and P.P. Heymann, *Terrorism and America* (Cambridge: MIT Press, 1998) at 3-9.
40. A.P. Schmid and A.J. Jongman, *Political Terrorism: A New Guide to Actors, Concepts, Data Bases, Theories and Literature* (New Brunswick, N.J.: Transaction Books, 1988) at 1-38.
41. J.F. Murphy, "The Need for International Cooperation in Combatting Terrorism" (1990) 13 Terrorism: An Int'l. J. 381, *quoting* W. Lacqueuer (citation omitted).
42. J. Lambert, "The Problem of International Terrorism and the Response of International Organizations" in P.J. van Krieken, *Refugee Law in Context: The Exclusion Clause*" (The Hague: T.M.C. Asser Press, 1999) at 177.
43. W. Lacqueur, ed., *The Terrorism Reader* (1979) at 262, and ———, *The Age of Terrorism* (1987) at 11, as cited in J. Lambert, "The Problem of International Terrorism and the Response of International Organizations" in P.J. van Krieken, *ibid*., at 177.
44. G. Levitt, "Is 'Terrorism' Worth Defining?" (1986) 13 Ohio N.U.L. Rev. 97.
45. R. Higgins, *supra* note 23 at 28.
46. J. Borricand, "France's Responses to Terrorism" in R. Higgins and M. Flory, eds., *supra* note 23 at 145.
47. *Ibid.*
48. Zulaika and Douglas, *supra* note 1 at 96-99.
49. N. Chomsky, *Necessary Illusions: Thought Control in Democratic Societies* (Concord, Ontario: House of Anansi Press Limited, 1991) at 287; and see ———, *The Culture of Terrorism* (London: Pluto Press, 1988); ———, *Pirates and Emperors* (Montreal: Black Rose Books, 1991). In a similar critique, Said notes that the terms *fundamentalism* and *terrorism* " . . . signify moral power and approval for whoever uses them, moral defensiveness and criminalisation for whomever they designate." E. Said, *Culture and Imperialism* (London: Chatto and Windus, 1993) at 375.
50. E. Herman and G. O'Sullivan, *The Terrorism Industry: The Experts and Institutions that Shape Our View of Terror* (New York: Pantheon Books, 1990) at 218-219.
51. R. Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism* (New York: E.P. Dutton, 1988) at 164.
52. "Colombo Hails Ban on the LTTE," *The Hindustan Times*, 10 Oct. 1997. A few months later, in January 1998, the Sri Lankan government formally outlawed the LTTE.
53. E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (The Hague: Martinus Nijhoff Publishers, 1996) at 120.
54. *Ibid*., at 3.
55. Wilkinson suggests that "there should be no special privileges or discrimination in favour of those who plead political motives for their crimes of violence. According terrorists special status only serves to legitimise and perpetuate their own self-perception as 'freedom fighters' . . . " P. Wilkinson, "The Strategic Implications of Terrorism" in M.L. Sondhi, *Terrorism and Political Violence, A Sourcebook* (India: India Council of Social Science Research, Har-Anand Publications, 2000); and see ———, *Terrorism and the Liberal State*, 2nd ed. (London: Macmillan, 1986). For an analysis of the "terrorism industry," its links with Western governments, and the scholarship that sustains it (including the work of Wilkinson), see Herman and O'Sullivan, *supra* note 50.
56. None of the international instruments that identify the rights inhering in "peoples" actually define the term, thereby providing no guidance on which "peoples" are entitled to self-determination. In the early years of the UN states attempted to restrict the interpretation of the term in the interest of preserving territorial units. Scholars now suggest that the term *peoples* has evolved to mean groups that share common political goals, a will to live together, and clear ethnic and/or cultural ties. Chadwick, *supra* note 53 at 4-5.
57. International humanitarian law (IHL) includes two main branches: the law of war, and limited aspects of human rights law. It is principally concerned with *jus in bello*, that is, the rules applicable during armed conflicts, governing the conduct of hostilities and the protection of persons affected by the conflict. The primary treaty instruments that codify these rules are the four 1949 Geneva Conventions for the Protection of War Victims and the 1977 Protocols I and II Additional to the Geneva Conventions of 1949. The Geneva Conventions are considered customary, as are parts of the 1977 Additional Protocols. International law also addresses *jus ad bellum*, that is, the rules governing resort to force. See A. McDonald, "Introduction to International Humanitarian Law and the Qualification of Armed Conflicts" in P.J. van Krieken, ed., *supra* note 42.
58. See *International Educational Development/Humanitarian Law Project,* Written Statement Submitted to the UN Commission on Human Rights, 53rd Session (1997), which addressed the question of the status of the LTTE in Sri Lanka. The brief emphasized: "[a] fundamental principle is that combatants in a war are entitled to combatant status . . . this status is inconsistent with a label of 'terrorist.' A terrorist has neither combatant status nor the right to engage in combat." <www.webcom.com/

hrin/parker.html> at para. 5.

59. C. Greenwood, *International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, May 1999, at para. 3.10.
60. Whether a conflict is characterized as international or internal is relevant for two reasons: In an international conflict there is a right to armed resistance; there is also concomitant responsibility, as all violations of IHL will be subject to prosecution as universal jurisdiction offences. The traditional approach to the classification of conflict focuses on the technical status of the parties, while another approach has developed that focuses on the general process of armed conflict and the presence of various "internationalizing" elements. Subject to some interpretive debate, an internal conflict becomes international when a "people" face conditions of colonialism, alien occupation, or racism, or the non-state party is recognized as a belligerent (either outside the state or by the established government), or a foreign state participates in the armed conflict. Many states will resist characterizing a liberation group as a "people" and their struggle as an "international" conflict, as it represents an incursion on sovereignty. As noted by Chadwick, a series of successful liberation wars has "led to alterations in common understanding regarding which 'Peoples' are entitled to assert claims for self-determination, and to use force to achieve their rights." Chadwick, *supra* note 53 at 4, 64.
61. As an expert witness in a Canadian immigration security case, discussed *infra*, Falk characterized the right of self-determination as "an emerging norm of customary international law that depends for its clarification and assessment upon the specific context within which the claim is being made." *Minister of Citizenship and Immigration and Solicitor General of Canada* v. *Suresh,* DES-3-95 (T.D.), Transcript vol. 48, 3 Feb. 1997, at 33-34, 43-47; See also, E.P. Syquia, "Dr. Jean Pictet and International Humanitarian Law," *Studies and Essays* (The Hague, Boston: Martinus Nijhoff, 1984); T. Meron, "War Crimes in Yugoslavia and the Development of International Law" (1994) 88 AJIL 78; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); P. Malanczuk, "Self-Determination and the Use of Force" in P.J. Van Krieken, ed., *supra* note 42 at 263-278; J.J. Paust *et al*., *supra* note 19 at 803-833; *Declaration on Principles of International Law and Friendly Relations Among States, 1970*; UN General Assembly Resolution 3103 (XXVIII) 12 Dec. 1973.
62. Article 51 of the Charter of the United Nations, 1945, enshrines the "inherent right of individual and collective self-defence" in the face of armed attacks against member states of the United Nations.
63. *Geneva Conventions Act*, R.S.C. c. G-3, as am. S.C. 1990, c.14.
64. In proceedings before the UN Commission on Human Rights, the government expressed the view that the right of self-determination belonged to indigenous peoples as well as other collectivities and that the right is " . . . expanding to include the concept of an internal right for groups living within existing states that respect the territorial integrity of states . . . " Statement of the Canadian Delegation to the UN Commission on Human Rights, 21 Oct. 1996-1 Nov. 1996.
65. A. Cassese, *supra* note 37 at 7.
66. *Ibid*., at 123.
67. Terrorist Financing Convention, *supra* note 26, art. 21.
68. S. Bell, "Canada to Outlaw Fundraising for World Terrorism," *National Post*, 30 Dec. 1999.
69. W. Elcock, Submission to the Special Committee of the Senate on Security and Intelligence, 24 June, 1998, at 11.
70. International Convention for the Suppression of Financing of Terrorism, 1999, art. 2 (a).
71. *Ibid*., art. 2.1(b). Hathaway and Harvey suggest that this section may provide a conceptual basis for a more general definition of "terrorism," a project to which the UN General Assembly remains committed. J.C. Hathaway and C.J. Harvey, "Framing Refugee Protection in the New World Order" (2001) 34(2) Cornell Int'l L.J. n. 46.
72. The government also has never initiated prosecutions of alleged torturers in the refugee population, despite the specific obligation to do so in the Convention against Torture and the Criminal Code. Denying safe haven through deportation continues to be the government's preferred strategy.
73. *Ibid*., art.2.1
74. *Ibid*., art.2.5
75. See G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Oxford University Press, 1996) at 95-114; S.D. Amarasinha and M. Isenbecker, "Terrorism and the Right to Asylum under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: A Contradiction in Terms, or Do Opposites Attract?" (1996) 65 *Nordic Journal of International Law* 223 at 228; and *Ramirez* v. *Minister of Employment and Immigration* [1992] 2 F.C. 306 (C.A.), discussed *infra*, with respect to complicity in the context of refugee exclusion under the Convention (and Canadian law).
76. *Ibid.,* art. 14. This limitation, known in extradtion law as the "political offence exception," is also found in the European Terrorism Convention. For a discussion of the application of the political offence exception in the context of asylum and terrorism, see. J.C. Hathaway and C.J. Harvey, *supra* note 71.
77. J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 176-179.
78. D. Stasiulus and N. Yuval-Davis, eds., *Unsettling Settler Societies, Articulations of Gender, Race, Ethnicity and Class* (London: Sage Publications, 1995) at 23-24.
79. S.C. 1872, 35 Vict. Ch. 28, s.10.
80. S.C. 1910, Edw. VII, ch. 27, s. 41.
81. *Ibid*., s. 23.
82. N. Kelly and M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 181-82, 207-209. See also, D.H. Avery, *"Dangerous Foreigners": European Immigrant Workers and Labour Radicalism in Canada, 1896-1932* (Toronto: McClelland & Stewart, 1979) at 87; and J. W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Canada: The Osgoode Society for Canadian Legal History and Wilfrid Laurier Press, 1997) at 250.
83. *Canada* v. *Dueck* (T.D.) T 938-95 (1998) at n.144. A fascinating record of post-war immigration security procedures is con-

tained in this Federal Court decision rejecting the government's application to revoke Dueck's citizenship.

84. R.S.C. 1952, ch. 325.
85. *Ibid*., ss. 5 (l), 19 (a).
86. S.C. 1966-67, ch. 90.
87. See A. Brannigan and Z. Lin, "'Where East Meets West': Police, Immigration and Public Order Crime in the Settlement of Canada from 1896 to 1940" (1999) 24 *Canadian Journal of Sociology* 87 at 91.
88. National policies on the admission and exclusion of foreigners are typically characterized as central aspects of state sovereignty. In this context, immigration has been characterized as a privilege rather than a right. See. R. Plender, *International Migration Law,* 2nd ed. (Dordrecht, Netherlands: Martinus Nijhoff, 1988). By affording individuals the right to seek and enjoy asylum, the Refugee Convention represents a significant incursion on state sovereignty. However, neither the Convention nor other international instruments impose an unequivocal obligation on states to admit or host refugees. This apparent contradiction is addressed in part through the application of *non-refoulement* provisions, discussed below.
89. R. Whitaker, *supra* note 10 at 419-420.
90. S.C. 1976-77, ch. 52.
91. See Immigration Act, ss. 3(f), (d),(i),and (j).
92. Sections 32 and 33 of the Refugee Convention set out the security and public order exceptions to the obligation of *non-refoulement,* an obligation described as the cornerstone of international refugee protection. See G. Goodwin-Gill, *supra* note 75 at 167-171. The Convention stipulates that these exceptions must be applied in accordance with "due process of law"—language that the new Act did not incorporate and thatexisting procedures arguably lack. The Act also failed to incorporate many other protections afforded in the Convention.
93. See EXCOM Conclusions No. 6 (XXVIII) on Non-Refoulement and No. 7 (XXVIII) on Expulsion (1977). Established in 1951, the functions of the UNHCR include the promotion of international standards for the treatment of refugees. Consensus reached by its Executive Committee in annual sessions are expressed in the form of Conclusions. Strictly speaking, these Conclusions are not binding on states, but they comprise a form of "soft law," which contribute to the development of international refugee law. The UNHCR's interpretation of the exclusion clauses is consistent with the general rule that exceptions to human rights standards should always be interpreted restrictively. Art. 31 of the *Vienna Convention on the Law of Treaties* 1969 also requires that interpretation be made in "good faith" and in light of a treaty's object and purpose. See also G. Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees*, Swedish Institute of International Law, Studies in International Law, vol. 9 (Uppsala: IUSTUS Forlag, 1989) at 165 and 220-221; and *Pushpanathan* v. *Canada* [1998] 1 S.C.R. 982, in which the Supreme Court confirmed that provisions that disentitle a person to human rights protection are to be read narrowly and restrictively. This caution was articulated most recently in UNHCR, *Comments on Bill C-31,* 11 July 2000, available on the website of the Canadian Council for Refugees <www.web.net/~ccr>.
94. As noted by Kiss, national security has a very specific meaning in international law, which is distinct from public safety or order. As it is used in the Covenant on Civil and Political Rights to limit specified rights, national security "means the protection of territorial integrity and political independence against foreign forces or threats of force. It would probably justify limitations on particular rights of individuals or groups where the restrictions were necessary to meet the threat or use of excessive force. It does not require a state of war or national emergency, but permits continuing peacetime limitations, for example, those necessary to prevent espionage or to protect military secrets." A. Kiss, "Permissible Limitations on Rights," in L.K. Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981) at 297.
95. Immigration Act, s. 19(1) (e) and (f).
96. *Ibid*., s. 19(1)(g).
97. *Ibid*., s. 19(1)(j).
98. See S. Aiken, "Racism and Canadian Refugee Policy" (1999) 18:4 *Refuge* 2.
99. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law, Second Report,* vol. 2 (Ottawa: Minister of Supply and Services Canada, 1981).
100. *Ibid*., at 823.
101. *Ibid*., vol. 1, at 43-44.
102. *Ibid*., at 436.
103. Gorlick, *supra* note 8 at 77.
104. CSIS Act, R.S. 1985, c. C-23, as am. by R.S., 1985 c.1 (4th Supp.). s. 2 (a), (b), (c), (d).
105. See, *e.g.*, M.J. Leddy, *supra* note 17. 82. See SIRC, *Annual Report 1997-1998* (Ottawa: Minister of Supply and Services, 1998) at 9-12.
106. SIRC File Nos. 1500–82, 83, *supra* note 17.
107. *SIRC Annual Report 1999-2000*, *supra* note 17, Section 1, at 17.
108. *Ibid.*
109. See, A. Thompson, "Not Our policy to Coerce Refugees," *The Toronto Star*, 1 May 1998; "More Refugees Come Forward with Claims of CSIS Threats," *The Toronto Star*, 23 April 1998; "Spy Agency Tactic under Fire," *The Toronto Star*, 4 April 1998; "How a Spy is Hired: Case of Tamil Refugee Claimant Shines Light on How CSIS Operates," *The Toronto Star*, 20 Jan. 1996.
    This has been difficult to "prove" for the purposes of formal complaints, as screening interviews are not tape recorded. Certain CSIS officers have been unable to recall such remarks when subsequently requested to address concerns on the manner in which an interview was conducted. Although complaints of this nature were raised in the cases of S.G. and S.D., the Chair was unable to substantiate them with regard to the complainants themselves. The SIRC reports recommended that all security interviews should be recorded and retained until a decision on immigration status is determined by the Department of Citizenship and Immigration. See SIRC File No. 1500–83 *supra* note 17 at 32.

110. *Outlawing an Ancient Evil: Torture, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Initial Report of Canada* (Ottawa: Multiculturalism and Citizenship Canada, 1989) at 1. The Committee against Torture is a body of ten experts who are elected by states but serve in their personal capacity to monitor state compliance with the Treaty. Every four years Canada must submit a performance report on measures it has adopted to effect its treaty commitments and defend the report before the Committee. Canada submitted in its third report in September 1999, which the Committee evaluated in November 2000. Note that Canada has recognized the Committee's competence to receive and consider communications alleging violations of the Treaty, from individuals subject to its jurisdiction, as well as other states.
111. Art. 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 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 existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
112. The Criminal Code, s. 269, criminalizes torture, defined in the same terms as art. 1 of the CAT. The government has suggested that the "post claim review" available to refused refugee claimants implements Canada's obligations under art. 3 of the CAT. However, people at risk of torture are not eligible to apply if they never made a refugee claim, if they were found ineligible to make a refugee claim, if their refugee claim was found to have "no credible basis," if they have been designated as a security risk or public danger, or if they fail to apply within fifteen days of a negative refugee decision. For those who are eligible to apply, the complex definition is not consistent with art. 3, requiring, for example, that the risk apply in every part of the country of deportation destination. Decisions are made on paper submissions, without any oral hearing, by a relatively junior immigration official. A positive decision on a discretionary "humanitarian and compassionate" review (which requires a $500 application fee for an adult and $100 for a minor) will not overcome security inadmissibility. In rare cases, a "minister's permit" may be issued to individuals who are inadmissible for security reasons but for whom there are extraordinary circumstances to grant a temporary right to remain in the country. Generally evidence of successful establishment is required, in addition to any personal risk associated with return. In 1999 just four permits were issued in security cases. There is no automatic stay of removal in cases where decisions are pending, so individuals are often removed even though a decision has not been made on their case. See *Annual Report to Parliament on Minister's Permits Issued in 1999* <www.cic.gc.ca/english/pub/permits99e.html>; and Canadian Council for Refugees, Submission to UN Human Rights Committee in preparation for the examination of Canada on its compliance with the Covenant on Civil and Political Rights, March 1999, <www.web.net/~ccr/iccpr.htm#top>.
113. *Re Singh and Minister of Employment and Immigration and 6 other appeals* [1985] 1 S.C.R. 177.
114. Immigration Act, s.38.1. See ss. 39-40.1 for details of the procedures.
115. *Ibid.*, s. 19(1)(e)(iii).
116. *Ibid.,* s. 19(1)(e)(iv)(C).
117. *Ibid.*, s. 19(1)(f)(ii), (iii)(B).
118. Hon. D. Lewis, Solicitor General, *House of Commons Debates,*132:163 at 12533, 22 June, 1992.
119. Immigration Act, s. 19 (1)(e)(iv)(A);(f)(iii)(A).
120. *Ibid.*, s.46.01(1)(e)(ii).
121. Note that s. 52 of the Immigration Act provides that persons subject to deportation may be allowed to leave "voluntarily" and to select the country to which he or she wishes to go, *unless* the Minister directs otherwise (emphasis added). A person who is not permitted to leave voluntarily will be removed to one of four destinations: (1) the country from which the person came to Canada; (2) the country in which the person last permanently resided before coming to Canada; (3) the country of which the person is a national or citizen; or (4) the country of that person's birth. If none of these countries is willing to receive the person, then the Minister may select any country willing to accept him or her. *With the approval of the Minister,* the person may select (within a reasonable period of time) any country willing to grant admission (emphasis added).
122. J. Shields, Parliamentary Secretary to the Minister of Employment and Immigration, *House of Commons Debates,* 132:163 at 12504-5, 22 June 1992.
123. Interview with A. Brouwer, Maytree Foundation, 22 November 2000. See also SIRC Files No 1500-82, 83; and *SIRC Annual Report 1999-2000*, *supra* note 17.
124. In the U.K., a new terrorism law authorizes the Secretary of State to proscribe organizations involved in either international or domestic terrorism, but such designations require the approval of both Houses of Parliament. In addition, the legislation sets out a procedure to be followed by an organization that wishes to challenge the designation or an affected individual. After an initial application to the Secretary of State, there is a right of appeal to the Proscribed Organizations Appeal Commission with provisions for representation, and a further appeal on points of law to the Court of Appeal in London. M. Barber, House of Commons Library (U.K.) Research Paper 99/101 13 Dec. 1999, "The Terrorism Bill: Bill 10 of 1999-2000," <www.parliament.uk>. In the U.S., the Antiterrorism and Effective Death Penalty Act, 1996, empowers the Secretary of State to designate "foreign terrorist organizations." The purpose of the power is to deny material support to the designated organization and to seize its assets. It is not a criminal offence to belong to a designated organization, but membership is grounds for deportation and denial of entry for non-citizens. According to the Immigration and Nationality Act, an "alien terrorist" is an alien who contributes in any of several specified ways to any of several designated unlawful acts. The list of acts includes hijacking, sabotage, hostage taking, assassination, other miscel-

laneous crimes, and a "threat, attempt, or conspiracy" to commit any of the enumerated acts. The U.S. State Department currently includes thirty non-state organizations on its list of terrorists and seven governments.

125. The identification of a general principle of international law as *jus cogens* provides it with the status of "higher law." Art. 53 of the Vienna Convention on the Law of Treaties sets out the *jus cogens* rule, indicating that a treaty is void if it conflicts with a peremptory norm of general international law, namely a norm that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." There is some disagreement on the precise scope and content of *jus cogens.* See Sir I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd. ed. (Manchester: University Press, 1984) at 18. With regard to the prohibition on torture, see, J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrech, Netherlands: Martinus Nijhoff Publishers, 1988) at 12 and 176; *Re Pinochet Ugarte* [1999] H.L.J. No. 12 (24 Mar. 1999); *Prosecutor* v. *Furundzija* (10 Dec. 1998), Case No.: IT-95-17/1-T 10; and on the principle of *non-refoulement*, see G.S. Goodwin-Gill, *supra* note 75; K. Parker and L.B. Neylon, "Jus Cogens: Compelling the Law of Human Rights" (1989) 12 Hastings International & Comp. L. Rev. 411 at 435-436; G. Stenberg, *supra* note 93 at 278-280; Cartagena Declaration on Refugees, 1984-85 *Report of the Inter-American Commission on Human Rights,* Conclusion 5 at 177-182; and 1988 *Report of the United Nations High Commissioner for Refugees,* UN GAOR, 40th Sess., Supp. No. 12 at 6, UN Doc. A/40/12 (1985).
126. *R.* v. *Schmidt* [1987] 1 S.C.R. 500 at 522 and 532; *Kindler* v. *Canada* [1991] 2 S.C.R. 779 at 832 and 851.
127. EXCOM Conclusion No. 79 (XLVII) General Conclusion on International Protection (1996), para. (j).
128. In 1997 and 1998 Canada carried out deportations in contravention of requests from the Committee against Torture *(Tejinder Pal Singh* v. *Canada)* and the Inter-American Commission on Human Rights *(Roberto San Vicente* v. *Canada)*. See Amnesty International, "Refugee Determination in Canada: The Responsibility to Safeguard Human Rights," Response to Government of Canada's White Paper, February, 1999.
129. In 1995, in a climate of rising hysteria about "immigrant criminals," the government implemented Bill C-44, introducing significant changes to the rights of refugees and long-term permanent residents. Pursuant to s. 70(5) of the amended Act, individuals who are classified as a "danger to the public" may be arrested and held indefinitely pending deportation under an opinion issued by the Minister. The threshold for consideration of the issuance of a danger to the public opinion is conviction for a criminal offence carrying a maximum penalty of ten years or more. The potential sentence, rather than the actual sentence imposed by the court in the particular circumstances of the case, is the determinative factor. Under the new scheme there is no right of appeal or an oral hearing, and procedures largely resemble those used in security cases with the exception of more complete disclosure in the absence of a need to protect intelligence information.
130. In 1998 the House of Commons Standing Committee on Citizenship and Immigration issued a report in which the question of deporting people in contravention of formal requests by international human rights bodies was considered. The Committee indicated that "[w]e are unwilling to recommend that deportation should *never* occur in these cases, because there could be extreme situations that would shock Canadians should the government not remove an individual." It was recommended that "great caution" should be exercised in such cases and that deportation proceed "only for the most compelling reasons." Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal*, June 1998, at 19; Recommendation 28. In its formal response the government agreed that "such caution is needed" but made no commitment to comply with the requests of international human rights bodies. Government response to the Report of the Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal.* See also, Canadian Council for Refugees, *Comments on Canada's Compliance with the Convention against Torture,* Prepared for the United Nations Committee against Torture, November 2000.
131. UN G.A. Res. 51/210 (16 Jan. 1997), para. 3; see also, Declaration on Measures to Eliminate International Terrorism, U.N.G.A. Res. 49/60 (9 Dec. 1994) Annex, para. 5 (f).
132. In the case of *Paez* v. *Sweden* the UN Committee against Torture directly addressed the scope and nature of article 3 of the CAT and its relationship with the Refugee Convention. This case involved Sweden's proposal to deport a failed refugee claimant who was a member of the Shining Path and had admitted to handing out home-made bombs that were used against police. The Committee rejected Sweden's contention that the "terrorist character" of the Shining Path could justify the deportation, noting that "the nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention." Committee against Torture, Communication No. 39/1996, UN Doc.A/52/44 (1997) at 94. See also *Khan* v. *Canada*, Committee against Torture, Communication No. 15/1994, UN Doc. A/50/44 (1995) at 46; International Covenant on Civil and Political Rights, art. 7; and UN Human Rights Committee General Comment 20 (article 7) UN Doc. CCPR/C/21/Add.3: "State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement" (at para. 9). The European Court of Human Rights has developed a similar protection against *non-refoulement*. See, *e.g.*, *Chahal* v. *U.K.* (1996), *Reports of Judgments and Decisions*, 1996-V, paras. 72-82; 23 EHRR, 1997, at 413; also, R. Plender and N. Mole, "Beyond the Geneva Convention: Constructing a *de facto* Right of Asylum from International Human Rights Instruments" in F. Nicholson and P. Twomey, eds., *supra* note 9, 81-105.
133. *Second Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 44/128, annex, 44 UN GAOR Supp.

(No. 49) at 207, UN Doc. A/44/49 (1989). Despite the fact that the death penalty is not imposed in Canada, the Supreme Court of Canada has confirmed the constitutionality of extradition orders against non-citizens in cases where the fugitives could be subject to the death penalty in their country of origin. The constitutionality of surrendering Canadian citizens to face the death penalty in the United States is pending decision in the Supreme Court. See *Kindler* v. *Minister of Justice*, [1991] 2 S.C.R. 779; *Reference Re Ng Extradition (Canada)*, [1991] 2 S.C.R. 858; and *Minister of Justice* v. *Burns and Rafay*, S.C.C. No. 26129.

134. Art. 8 of 1961 Convention on the Reduction of Statelessness; and EXCOM Conclusion No. 78 (XLVI) Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons (1995). Although the Convention does not directly address deportation, it imposes on states an obligation to ensure that the right to nationality is protected and that state action does not lead to statelessness. See also art. 12. 4 of the International Covenant on Civil and Political Rights.
135. The right to family life is inscribed in arts. 17 and 23 of the International Covenant on Civil and Political Rights as well as in arts. V and VI of the American Declaration on the Rights and Duties of Man; the Convention on the Rights of the Child imposes a direct obligation on states to ensure that the "best interests" of children are a primary consideration in all actions concerning children. See *Baker* v. *Canada* [1999] 2 S.C.R. 817; and R. Plender and N. Mole, *supra* note 132 at 97-101.
136. See, *e.g.*, the evidence provided by former ambassadors M. Collacott and W. Bauer before the Standing Committee on Citizenship and Immigration on 1 Dec. 1999, on the Committee's Study "Refugee Protection and Border Security," <www.parl.gc.ca/InfoComDoc/36/2/CIMM/Meetings/Evidence/cimmev07-e.htm>.
137. R. Tassé, *Removals: Processes and People in Transition*, Report prepared for Citizenship and Immigration Canada, February 1996; Legislative Review Advisory Group, "Not Just Numbers, A Canadian Framework for Future Immigration" (Minister of Public Works and Government Services Canada, 1997). In January 1999 the government released its long awaited white paper *Building on a Strong Foundation for the Twenty First Century: New Directions for Immigration and Refugee Policy and Legislation* <www.cic.gc.ca>. The document proposed reforms in broad terms without indicating concrete measures to be pursued. For relevant commentary see the special issue "Not Just Numbers and New Directions: Implications for Canadian Refugee Policy" (1999) 18:1 *Refuge*.
138. Bill C-31, The Immigration and Refugee Protection Act, ss. 30(1)(c) and (f).
139. See, *e.g.*, *The Report of the Special Senate Committee on Security and Intelligence,* Jan. 1999, ch. 2 at 11 <www.parl.gc.ca/36/1/parlbus/commb…/com-e/secu-e/repsecintjan99-ehtm>; Legislative Review Advisory Group, *supra* note 127, Recommendation 138; and the Security Intelligence Review Committee, *Annual Report 1997-1998,* Section 1 at 10 <www.sirc-csars.gc.ca/ar9798_e.html>.
140. See Immigration Act, ss. 39.1,39.2 and 40.
141. *Ibid*., s. 40.1.
142. "In Flux but not in Crisis," *Report of the Special Committee on the Review of the CSIS Act and the Security Offences Act* (Ottawa: Queen's Printer, 1990); and see Gorlick, *supra* note 8 at 79. In response to Bill C-31, SIRC expressed concern, noting its "unique expertise in acting as a competent tribunal to handle appeals related to intelligence and security matters—a capacity that Parliament intended it to have . . . this proposal would remove important existing safeguards in the activities of CSIS that could have a serious negative impact on national security, on individual rights, or on both." *SIRC Annual Report 1999-2000, supra* note 17 at 2.
143. Bill C-31, *supra* note 119, ss. 71, 72, 75, and 108. For critical commentary see briefs submitted by UNHCR, *Comments, supra* note 94; Canadian Council for Refugees; Maytree Foundation <www.web.net/~ccr>.
144. R. Romonow, J. Whyte and L. Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 218; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishers, 1994) at 68-74; and P. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30 at 49.

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Book Review

Journeys of Fear:
Refugee Return and National Transformation in Guatemala

Edited by Liisa North and Alan Simmons
Montreal and Kingston: McGill-Queen's University Press, 1999
337 pages, integrated bibliography
Cloth, ISBN 0-7735-1861-4, $60.00; Paper, ISBN 0-7735-1862.2, $25.00

This book is a very important contribution to knowledge about refugee repatriation because it challenges assumptions widely held in the international research and policy literature. The findings are particularly compelling because they arise from a team research project that, over several years, examined details of the return process and its national and international context. The study started in the early 1990s as Guatemalan refugees began their collective, largely self-organized return from Mexico, well before the 1996 Guatemalan Peace Accord. The research project followed events through to 1998, when the return flow had dwindled to a trickle, even though only half of those who were expected to return had done so. By the end of the study, much was known about how returning refugees had fared in the post–Peace Accord era. The findings—reported in fifteen carefully researched chapters, including substantive integrating chapters (introduction and conclusions) by research team leaders North and Simmons—brilliantly illuminate the Guatemalan case. Perhaps more important, in challenging common views about refugee repatriation, the volume suggests the need for new perspectives.

There has not been enough research on refugee repatriation, particularly in relationship to peace agreements. It has been a mantra that there cannot be peace unless the peace agreement settles the refugee issue. I have repeated that mantra often enough myself. The documented material in this volume tells a different story.

For example, in the Guatemalan civil war, one unique development was an agreement made directly between the refugees and the Guatemalan government. "The internationally mediated accord established between organized refugees and the Guatemalan government provided formal guarantees for the security of the returnees" (Castillo 133), but, as the author continues, "the implementation of the accord was uneven and the return process was fraught with uncertainty." More baldly put, there was a wide gap between what the peace agreement provided and what actually happened. Yet the peace agreement held, despite inadequate implementation of the refugee provisions.

Critical to the peace agreement were the witnesses, including the NGOs, who legitimate the process and act as moral sources of authority for dispensation of reconstruction funds. Further, to access the funds, conditions are placed on their use, which allow needed changes to take place. As Levitt (chapter 13) tells the story, the accompanying NGOs were mobilizing agents because they facilitated institutional and policy reform, providing legitimacy and access to resources, and witnessing implementation of the peace agreement.

If successful implementation of refugee repatriation is not essential to maintenance of a peace agreement, and the work of NGOs is, ironically, more critical, even though they are present to assist in that repatriation, do repatriated refugees help to keep the peace by acting as agents of change? Again, the research belies this notion. "Overall, it appears that the refugees, despite their transformative goals and new perspectives and skills, had a limited impact on home communities during the years immediately following their return. Their modest contribution to change may be largely explained by the fact that resistance to deeper transformation has been overwhelming in Guatemala" (North and Simmons concluding chapter, 288)

In other words, successful settlement of the refugee issue is not a necessary condition for ending a conflict. Further, repatriated refugees are not the catalyst for change that ensures that the peace is kept. Ironically, perhaps the refugees have an indirect responsibility for ensuring that resurgence of the conflict is avoided and for building the

new grounds for maintaining the peace, because of the NGOs who come to witness and assist in the return.

In fact, returnees often contribute, unintentionally, to continuation of the conflict or instigation of new conflicts. North and Simmons point to the impediments that came from the returnees themselves to the transformative project, including the conflict between the back-to-the-land movement and the propensity of those living in rural areas to migrate to cities (chapter by Gellert), landlords' increasing dependence on seasonal jobs for survival (chapter by Castillo), and the inherent conservatism of the attempt to reestablish communities (concluding chapter by the editors). The evidence arising from several chapters and documented in the conclusion to the volume goes further. Chapters by Poitevin, de Villa and Lovell, and Fonseca detail the problems inherent in land distribution, political power, and political structures that gave rise to military intimidation and government laxity in fulfilling the terms of land distribution as provided in the peace agreement. These were not the only impediments to transformation. Differences between the returnees and those who never left generated conflict and made the return difficult. These tensions were exacerbated by desires to control development funding and resources (chapter by Egan), conflicts over positions and administrative structures, as well as resistance to the new role of women that arose from their experiences in the camps. The volume provides excellent detail on the gender, ethnic, and identity dimensions of these processes (chapters by Torres, Crosby, Blacklock, and Nolin-Hanlon). It also examines the roles of non-government organizations, foreign governments, and the United Nations in the return and peace processes (chapters by Levitt, Baranyi, and Patroni and Gronau).

In other words, the facts belie our beliefs. Refugee repatriation may not be a necessary condition for avoiding conflict or keeping the peace and may even be a source for new conflicts.

Good research sometimes confounds our most cherished beliefs.

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