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RECONCILING INDIVIDUAL RIGHTS AND STATE INTERESTS

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Introduction

New Approaches to Asylum: Reconciling Individual Rights and State Interests

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The international refugee protection system, which was set up in the wake of the Second World War, has been showing signs of strain for some time now. Some say that it is ill-suited to meet today's challenges, especially those posed by globalization. In a world in which information, capital, goods, and services flow ever more freely across borders, the uncontrolled movement of people is increasingly seen as a threat to the sovereignty of states. Sadly, in an age of global terrorism, it is also seen as a security risk.

When the contemporary refugee regime was established, it was predicated on the willingness of states to relinquish a certain amount of sovereignty, in order to ensure that the basic human rights of a specific category of threatened individuals – refugees – would always be protected. On December 14, 1950, the UN General Assembly adopted Resolution 428 (V) establishing the Office of the UN High Commissioner for Refugees (UNHCR), and giving it a mandate to operate on the territory of sovereign states on behalf of an especially vulnerable group of non-citizens – refugees. Just six months later, the 1951 *Convention relating to the Status of Refugees* was adopted. It established an obligation for states to protect refugees from being returned to situations of danger and to grant them a certain basket of rights normally reserved for citizens.

The willingness of states to agree to this visionary system was in part a recognition that their performance in 1938 at the Evian Conference, and subsequently in turning back Jews trying to escape Nazi Germany, should never be repeated. But it was no doubt also a sign of how little they could imagine the complexity which refugee problems would acquire.

In 1951, refugee problems indeed seemed limited in nature and in scope. As a result, the UNHCR was initially given just a three-year mandate. The agency was tasked with finding new homes for around 1.3 million refugees remaining from the Second World War, and would then be dissolved. After that first three-year period, the General Assembly renewed UNHCR's mandate every five years until just a few months ago, in December 2003, it finally lifted altogether the time limitation on UNHCR's mandate, a sobering recognition of the apparent permanence of the world's refugee problems.

Today, countries in both the developing and the developed world are expressing growing dissatisfaction with the international refugee system and are looking for new approaches to refugee problems. The reasons for this dissatisfaction are different in the North and in the South, but the implications are strikingly similar: the rights of refugees and asylum seekers will increasingly be jeopardized, unless ways of addressing states' concerns can be found.

In the developing countries, which host the overwhelming majority of the world's refugees, the threat to asylum arises from the large number of protracted refugee situations (70 per cent of the world's refugees have been in exile for more than five years, according to the UNHCR), the absence of durable solutions, the limited capacity of host states to meet refugees' needs, and inadequate burden sharing on the part of the wealthy countries. This is coupled with real or perceived linkages between the presence of refugees and threats to national or regional security, and the rising xenophobia which accompanies all of the above.

In the industrialized world, the strains on the system are caused by irregular migration, the risk it is seen to pose to the security of states and communities, and the abuse or misuse of asylum channels. States lament the high cost of maintaining individual refugee status determination mechanisms, the failure of the many restrictive measures they have crafted to produce the desired results, and the related growth of people smuggling and trafficking. Indus-

trialized countries also face serious difficulties, both practical and legal, in removing persons they find not to be in need of protection. As in the developing world, these problems combine to generate social tensions, fuel xenophobia, and ultimately undermine public support for the institution of asylum. And these issues are also easily manipulated by politicians for partisan purposes.

In the face of so much dissatisfaction, it seems odd that states would unanimously and unequivocally reaffirm their commitment to the cornerstone of the post-war refugee protection system, the *1951 Convention relating to the Status of Refugees.* Yet they did so in December 2001, on the Convention's fiftieth anniversary. If nothing else, this reaffirmation would suggest that states are willing to resolve their dissatisfaction through co-operation rather than confrontation, and through multilateral action rather than through unilateralism.

In reality, however, concern about irregular migration seems to have the upper hand and results in the unilateral implementation of measures which do not incorporate any safeguards for refugees caught up in the immigration control net. Nor does it appear that the wealthy countries' focus on halting irregular migration is matched by a significant shift of resources to the benefit of refugees and their host countries in the South. On February 26, 2004, the UN High Commissioner for Refugees, Ruud Lubbers, announced that asylum applications in the industrialized world had dropped by 20 per cent in 2003 when compared with 2002. Yet the very same day, UNHCR and the World Food Program were forced to launch an urgent appeal for donations, because donor countries had failed to provide the agencies with sufficient resources to supply even the minimum daily caloric ration to refugees in camps in Africa.

This paradox illustrates a risk, namely that the international refugee protection regime may degenerate into a two-tier system. This system would have one standard of behaviour for countries in the developing world, expected to host most of the world's refugees and to keep their doors open, albeit without any guarantee that other countries will share this responsibility. Another standard would apply to the industrialized countries, most of which have the good fortune to be far-removed from refugee-producing areas.

It was in part to tackle this challenge that the UNHCR developed its ambitious two-year Global Consultations on International Protection (2001-2003), and put forward its Agenda for Protection, intended as a kind of road map to strengthen refugee protection in the years ahead. UNHCR's approach to the current challenges is explained in the first article in this issue, authored by two UNHCR officials, Ninette Kelley and Jean-François Durieux. They present UNHCR's "Convention Plus" process, reviewed somewhat skeptically by other authors in this issue, as an effort to bring states and other partners to the negotiating table, to reach concrete agreements to solve specific refugee problems. Although the process is still in its early stages, it remains to be seen whether it will in fact succeed in moving from the theoretical to the particular and, if so, whether it will be able to do so without sacrificing fundamental human rights and refugee protection principles.

A Canadian view of these challenges is provided by Elissa Golberg and Bruce Scoffield, government officials with extensive experience in refugee affairs who are writing in their personal capacity. They urge recognition of the importance of multilateral co-operation to solve refugee problems, and describe some facets of Canada's not inconsiderable contribution to this effort. Still, they warn that states may nonetheless opt for a "lowest common denominator" approach to refugee protection.

An even more sobering perspective is offered by the Hon. Omar Mapuri, Minister of Home Affairs of the United Republic of Tanzania. In remarks made at a panel discussion held during the fifty-fourth session of UNHCR's Executive Committee in late 2003, he appeals for more attention to the situation of refugee-hosting states in the developing world. In addition to advocating for the creation of 'safe havens' within refugee-producing countries, an extremely controversial and widely repudiated idea, he discourages the notion that local settlement of refugees in their host countries in the developing world is a panacea. He also chastises resettlement countries for what he sees as their "cherry-picking" of the best candidates for immigration.

Finding durable solutions for refugees is clearly key to defusing the current crisis, but solutions are scarce. Resettlement – meaning the organized transfer of refugees from a country of first asylum to a third country where permanent settlement is offered – is at present available each year to fewer than 1 per cent of the world's refugees. Repatriation is only possible if conditions in refugees' countries of origin have changed fundamentally. The settlement of refugees in their initial countries of asylum, mostly in the developing world, looks tantalizingly like the most feasible option – notwithstanding Minister Mapuri's warning. Indeed, the UN High Commissioner for Refugees has been actively encouraging governments to integrate the settlement of refugees into their development planning, and has appealed to donor countries to decompartmentalize their development assistance and humanitarian aid, so that refugee-hosting communities can benefit more easily from development monies. But even this eminently sensible approach has not borne much fruit.

The prospect of integrating refugees into their host communities in Uganda is the focus of the article by Sarah

Dryden-Peterson and Lucy Hovil. They agree that refugee settlement should be placed within the framework of national development plans, but the two case studies they present illustrate that even where there is good will on the part of host communities, there are frustrating barriers to success.

At the other end of the solutions spectrum, Joanne van Selm looks at the potential strategic uses of resettlement. Although resettlement is currently being rehabilitated as a durable solution, she points out that this may be for the wrong reasons. European countries, she says, are all-too-tempted to see resettlement as an alternative, rather than a complement, to domestic asylum systems.

Controlling who gets in remains, of course, a central preoccupation of all states, and explains the fundamental tension between globalization and state sovereignty. The next four articles look at this issue from different angles, with security concerns as a constant underlying theme. Benjamin Muller explores the changing nature of "refugee politics," characterized by a number of paradoxes, but most particularly by the paradox between globalization and domestic security concerns. Alexander Betts exposes the content, motivation, and possible consequences of the UK's so-called "New Vision" proposal, and its peculiarly symbiotic relationship with UNHCR's "Convention Plus" initiative. Kinga Janik, writing from a North American perspective, looks at the changing place accorded to refugees in Canadian policy and society, and at the risks posed by the growing negative perception of persons arriving at Canada's borders and asking for protection. And Richard Wazana, in an article initially destined for the previous issue of *Refuge* devoted to interdiction practices, criticizes Australia's refugee policy and refugee discourse, in the harsh light of the 2001 *Tampa* incident. Despite UNHCR's consistent appeal for multilateral co-operation to resolve refugee problems, all of these articles show the extent to which states are tempted by (or resort to) unilateralism.

It is chiefly within the European Union that states have made a serious effort to harmonize their approaches to asylum, albeit with rather disappointing results so far. Harold Shepherd reviews efforts to build a common European asylum policy, as called for by the Treaty of Amsterdam. His article was written before the accession of ten new member states on 1 May 2004, and before the last-minute adoption by the European Council of two key asylum instruments, the so-called "Qualification Directive" and the Directive governing asylum procedures, about which the UNHCR has expressed serious concern. In his article, Shepherd appeals for consideration of whether the 1951 Refugee Convention framework is too narrow a basis for the European discussion, urging consideration of the broader protections accorded by human rights law.

Canada, in its new Immigration and Refugee Protection Act, introduced a broadened "Protected Person" status of the type which Shepherd advocates, encompassing protection under the 1951 Refugee Convention, the 1984 Convention against Torture, and under Canada's Charter of Rights and Freedoms (risk to life or risk of cruel and unusual treatment or punishment). This prompts Michael Bossin and Laila Demirdache to ask whether it is "time to re-evaluate the subjective component of the test for persecution in claims for refugee protection"? They urge decision makers to adopt a test which places the emphasis on the objective nature of the risk faced by persons in search of protection.

A turn from the theoretical to the practical is taken by the last two articles in this issue, which serve to remind us that all of this debate about refugee policy ultimately is about people and the lives of individuals. Grant Mitchell and Sara Kirsner paint a compelling picture of the value of a compassionate model of reception support for asylum seekers, one that uses alternatives to detention whenever possible. They explain the enormous utility of community-based counselling in preparing asylum seekers for all immigration outcomes, including compulsory return to their home countries.

Last but by no means least, Claudia Vargas explores new approaches to the treatment of victims of torture, and makes clear how vital it is to address the needs of refugees individually. Our obligations to protect refugees do not end with protecting them from *refoulement*, but extend to enabling them to start productive new lives. The extent to which the scars of past experiences can, if not healed, impede settlement and integration is often underestimated and should be of concern to government officials and the wider community.

Despite their diversity, each of the articles in this issue highlights the need for a better understanding of migration in a globalized world, and for an open and transparent discussion of practical actions which can be taken when the interests of states clash with the protection needs of individuals. If there is a single theme which emerges from this issue, it is the need for a clear vision of how to preserve refugee protection in the face of such compelling, but often competing, challenges. The absence of direction is deeply troubling to human rights advocates the world over.

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UNHCR and Current Challenges in International Refugee Protection

Ninette Kelley and Jean-Francois Durieux

Abstract

The international refugee protection regime has had both a successful and a troubled history. It has succeeded in providing international protection to millions of refugees when their own States have been unable or unwilling to do so. Despite this considerable achievement, the regime has at times failed to solve serious refugee protection problems and has not been able to effect durable solutions for many of the world's refugees. This essay examines the current challenges to the regime from the perspectives of those most affected by them, recognizing that many of these challenges are not new. It examines how UNHCR's mandate and activities have expanded to meet the larger number and diverse needs of those under its care. As well, it reviews the recent initiatives launched by UNHCR to strengthen international protection for refugees and expand the availability of durable solutions through enhanced multilateral cooperation.

Résumé

Le régime international de protection des réfugiés a connu des hauts et des bas. D'une part, il a réussi à fournir la protection de la communauté internationale à de millions de réfugiés lorsque leurs propres pays étaient incapables ou pas disposés à le faire. En revanche – et en dépit de cet accomplissement majeur – le régime n'a parfois pas réussi à résoudre de sérieux problèmes de protection de réfugiés et n'est pas parvenu à mettre en place des solutions durables pour un grand nombre de réfugiés de par le monde. Cet essai se penche sur les défis confrontant le régime en ce moment-ci, examinant les choses du point de vue de ceux qui en sont les plus affectés, et tout en reconnaissant qu'en réalité beaucoup de ces défis ne datent pas d'hier. Il examine la façon dont le mandat et les champs d'activités de l'UNHCR se sont élargis pour satisfaire les besoins hétérogènes et les nombres grandissants de ceux dont il s'occupe. En même temps, il passe en revue les récentes initiatives lancées par l'UNHCR dans le but de renforcer la protection internationale des réfugiés et d'élargir, à travers une meilleure coopération multilatérale, la gamme de solutions durables disponibles.

Introduction

It is now almost commonplace to question the effectiveness of the international regime for protecting refugees. Some claim that the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol are not able to adequately address the magnitude and the complexity of refugee protection needs. Regional and national institutions, laws, practices, and policies concerned with refugees, which also make up the refugee regime, are as well the focus of disapproval. Yet the critical spotlight on the refugee regime is neither new nor a reflection of recent realities.

The fact is that challenges to the international refugee protection regime are a persistent feature of the history of refugee movements and generally involve serious concerns about the limits of State responsibility for those who are neither citizens nor invited guests. One can look to almost any major refugee movement over the past century and find that debates over the need and the means to provide protection were animated by many of the same anxieties that are echoed most frequently today. These include legitimate, although at times conflated, concerns over preserving sovereignty, maintaining social and economic stability, and preventing threats to national security.

People fleeing persecution disregard international boundaries. Large numbers can overwhelm neighbouring States, many of which do not have adequate resources to fully care for the basic needs of their own nationals, let alone for foreigners. Refugees can strain the patience of more distant States, who question why their responsibilities should extend to those who have transited other countries, whose identities are not known, and who are suspected of using the asylum process to simply seek better economic opportunities.

The international refugee protection regime therefore can be characterized as one that is frequently in a state of crisis. While the regime is rooted in 1951 Convention and 1967 Protocol, these instruments do not, nor were they intended to, meet the full panoply of refugee protection needs. What they established, and continue to provide are important baseline principles for individual international protection and collective responsibility sharing. But they do not directly address, or offer a framework for meeting, other protection imperatives. These include the need for comprehensive approaches to large-scale and protracted refugee situations, more equitable and principled co-operation concerning secondary refugee flows, and expanded opportunities and support for durable solutions. The absence of clear and principled multilateral commitments to address these problems is very much at the heart of the current challenges to international refugee protection.

Given these gaps, other approaches are needed, not to replace the international refugee treaty legislation, but to supplement it, notably drawing from the basic human rights principles underlying it. Without them, State willingness to provide protection and solutions to refugees, and in particular to accept the basic principles set out in the international refugee instruments, may be seriously undermined.

This essay examines the responsibilities of the United Nations High Commissioner for Refugees (UNHCR) and how they have increased to meet the changing patterns and complex needs of global population displacements. It looks at the current challenges to refugee protection, seen from the perspectives of those most affected by them. The final section reviews how UNHCR has responded to those challenges, with particular focus on the Office's efforts to strengthen international protection for refugees and expand the availability of durable solutions through enhanced multilateral co-operation.

UNHCR and the International Protection Regime

The 1950 Statute setting out the mandate of the newly established Office of the UNHCR, and the 1951 Convention, reflect the dominant concern in Europe at the time of their creation. This was to provide protection and solutions for post-World War II refugees.[1] Both documents adopt a relatively narrow definition of "refugee" as a person who, as a result of events occurring before 1951, is outside his or her country because of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group.[2] In addition to the time limitation, the Convention definition, and that found in the UNHCR Statute, had an optional geographic limitation (to those fleeing events in Europe). The time limitation was lifted in the 1967 Protocol. Only a few States have retained a geographic limitation.

The 1951 Convention was, and remains, focused on refugee status based on an individual fear of persecution for reasons of the enumerated grounds. It sets out fundamental principles of international protection, which, notwithstanding its initial limited intent, has provided the framework for ensuring the recognition of refugee status and attendant rights contained therein to millions of refugees over the last half century. These rights include the right to seek asylum in signatory countries, to have asylum claims determined without discrimination, not to be penalized for having entered an asylum country without prior authorization, not to be returned to persecution, and not to be expelled unless in exceptional circumstances necessary for reasons of national security or public order. The Convention also enumerates a broad array of civil, political, social, and economic rights to be accorded to refugees in the territory of a signatory State.[3]

Given the context of its creation, and its initial geographic and time-limited intent, it is not surprising that the Convention does not address all refugee protection needs. In fact, more surprising is that it has responded as well as it has to a broader set of circumstances than initially intended. The persecution of women, of indigenous populations, and of individuals on account of their sexual orientation, and persecution by non-State authorities have been recognized under the Convention definition, thereby extending international protection to them in a manner consistent with today's broader human rights awareness but beyond what would have been envisaged in 1951.

In this regard the development of human rights law more generally over the past fifty years has complemented and augmented the protections afforded under the 1951 Convention, refugees being entitled to the broad range of general human rights protections provided to all individuals in international and domestic human rights instruments as well as the specific protections accorded under the Convention. Together these rights have enriched the international refugee protection regime, underscoring the need for and informing the content of principled responses to refugee needs.

UNHCR's mandate has also been transformed. Originally the Office was intended to be a temporary institution with responsibilities extending only until durable solutions for World War II refugees had been secured. However, as conflicts between and within nations persisted, producing more refugees, the General Assembly continued to extend the duration of UNHCR's mandate. It also expanded the content of it. Successive General Assembly and Economic and Social Council (ECOSOC) resolutions broadened UNHCR's mandate, calling on the Office to assist refugees fearing individual persecution as well as those fleeing generalized violence and also "others of concern" because of their need of international protection.[4] These include former refugees who have returned to their countries (returnees), specified groups who have been displaced within their own countries due to armed conflict or generalized violence (internally displaced persons or "IDPs") and people who are stateless or whose nationality is disputed.[5]

The widening of categories of persons of concern to UNHCR and for which it has protection responsibilities has been accompanied by an expansion of the protection activities the Office is engaged in. Mandated to provide international protection to refugees and to seek permanent solutions to their plight, UNHCR initially focused on identifying refugees within Europe, primarily World War II refugees and refugees fleeing communism, and securing for them resettlement opportunities in the West. Subsequently, massive population displacements arising from conflicts throughout Africa, Asia, and Latin America called for more varied responses in circumstances where the causes of flight and the international protection needs attending them were more complex.

The scope of UNHCR's international protection operations accordingly expanded, embracing a myriad of activities over a number of areas. These include the provision of emergency humanitarian relief assistance and long-term care and maintenance; material and logistical support to returnees; programs to promote refugee protection principles and human rights; more targeted interventions on behalf of refugee women and children; efforts to build and/or enhance democratic governance and conflict prevention; and efforts to promote the channelling of development assistance to benefit refugees, returnees, and local communities.

Once it was a Eurocentric institution, with an initial budget of US$300,000, focused primarily on the local integration and voluntary repatriation of 400,000 European refugees. Today it has 153 offices operating in sixty-nine countries throughout the world, with approximately 5,000 staff and a budget of just under US$1 billion, assisting over 20 million refugees and others of concern

The broadening of UNHCR's international protection activities therefore has been a result of the rise in the number of refugees and others of concern under its care globally, and a response to the varied environments in which it works and the diverse protection needs of those under its mandate. It also reflects the development of human rights law and standards. The protection of refugees has a legal as well as physical dimension. The rights to fair treatment upon reception, not to be returned to prospective persecution, and other recognized rights to adequate health, housing, food, shelter, education, and durable solutions are safeguarded through UNHCR's wide-ranging legal and material assistance activities.

Current Challenges

The expansion of UNHCR's responsibilities and activities and the adaptability of the 1951 Convention suggest that the international refugee protection regime has responded well to the growing demands placed upon it. But these developments do not tell the whole story. The effectiveness of the international protection regime must also be measured by the pattern of refugee movements, the number of refugees who remain at risk and/or without durable solutions, and the willingness of States to admit asylum seekers, recognize and accord rights to refugees within their communities, and share responsibility for refugee protection with neighbouring or more distant States that shoulder a disproportionate burden. Using these indicators, the picture is far from a perfect one.

The total refugee population rose from a few million refugees in the 1970s to over 10 million by the mid-1980s, skyrocketing to more than 18 million over the next decade. Recent figures indicate that in 2003 the number of refugees and others of concern to UNHCR was 20.6 million, "roughly one out of every 300 persons on earth."[6]

The burgeoning numbers of individuals in need of international protection around the world is a consequence of the grave human rights abuses that have characterized the wars and communal violence that have marked the past quarter century. They also bear witness to a global community incapable, and at times unwilling, to interfere to prevent the violations that have sparked so many of the world's major refugee tragedies.

The rise in the number in the world's refugees is one part of the troubled picture of international refugee protection. The other side of the picture is how such refugee populations have been received. Like art, this evaluation is largely a matter of perspective.

Industrialized Countries

Industrialized countries frequently claim that their historic generosity towards refugees, and confidence in the relevance

of the 1951 Convention and 1967 Protocol, have been shaken by the enormous increase in the demands made upon their asylum system by migrants of mixed motivations. They point to the rapid rise in asylum applications beginning in the 1980s, from approximately 140,000 in 1982 to over six times that number by 1992 when close to 860,000 asylum applications were made.[7] Although these figures have decreased significantly since then,[8] some government officials and sections of the media continue to paint a picture of overwhelming numbers swamping national systems and straining social structures.

Commentators point out that it is not just the number of asylum seekers that has led to this loss of confidence in the international protection regime. It is also a reflection of a shift in strategic interests, a radical change in the ethnic background of asylum–seekers, and a rise in clandestine means of arrival. Many refugees in the West during the first forty years of the 1951 Convention were escaping communist regimes and so received a ready welcome. The end of the Cold War removed this strategic aspect of refugee protection. It was also accompanied by a rapid increase in the numbers of asylum seekers coming from further afield than ever before.

The increase in the number of asylum seekers from more distant States reflects not only the violence and conflict which have led to massive population displacements but also the greater ease of travel. Improved transportation and communication linkages, the expansion of transnational social connections, and the growth of illegal trafficking and smuggling networks have made international travel more accessible both to economic migrants and to refugees. They also cause increasing unease among States distressed at the growing numbers of unauthorized arrivals and the expansion in the criminal networks that make such arrivals possible.

Those who arrive unlawfully can be motivated by a number of concerns, including: a need for international protection (to seek safety from persecution and/or generalized violence); economic interests (to improve their quality of life); social reasons (family reunification); and/or a mixture of these concerns. Fair and effective refugee status determination procedures are able to identify refugees within broader mixed migration flows. Where these are lacking, delays and backlogs develop, as in many western States. Combined with large numbers of asylum seekers without proper documents, they lead to growing frustration, intolerance, and allegations that most asylum seekers are simply using the asylum system to "jump the queue," bypassing regular admission procedures and gaining an unfair advantage over more law-abiding and qualified immigration applicants.

Adding to these complaints are the high costs associated with supporting inefficient refugee status determination and appeals procedures, funding the social services afforded to asylum seekers and meeting the expenses of enforcement mechanisms used for detention and removal purposes. The argument is frequently made that money would be far better spent providing assistance to refugees in their own regions – regions that are, however, disproportionately affected by mass refugee flows and which have limited resources to meet the protection challenges involved

Increasingly, the response of many industrialized States has been to implement measures to prevent entry into their territories and to restrict access to their asylum procedures (for example, by visa requirements, sanctions against carriers that undocumented asylum seekers have used, interdiction of asylum seekers en route, application of the safe-third-country concept) rather than to concentrate on improving their refugee determination procedures. Other initiatives to reduce incentives to request asylum include detention, reduction in welfare benefits, prohibitions on wage-earning employment, and restrictions on the ability of families to reunite.

In their efforts to bring asylum claims to more manageable numbers, States have negotiated agreements with transit countries and other countries in which asylum seekers have resided, for the readmission of asylum seekers without ensuring that basic protection guarantees will be met. In addition, restrictive interpretations of the Convention definition and a narrow application of rights within the Convention are becoming a disturbing trend.

There is a tendency to exaggerate the change in attitudes towards refugees in recent years. Many studies have shown that the admission of refugees has always raised fairly contentious issues, and that limiting the application of the 1951 Convention has long been debated within asylum countries in the industrialized world. Having said that, it is true that today there are more vigorous attempts to restrict access and to more narrowly define the application of the Convention than ever before.

Some claim that declining numbers of annual asylum applications bear witness to the success of these endeavours. Others point out that this phenomenon is directly related to the resolution of significant refugee situations, most notably in Afghanistan, Kosovo, and Bosnia, and the consequent reduction of the number of asylum seekers from these countries. What is undisputed is that annual asylum applications in industrialized countries have been in decline, and exaggerated claims to the contrary are not born out by the evidence. From a historically high number of annual asylum applications made in industrialized countries in 1992, they rapidly fell, reduced to over half that amount by mid-decade. While the numbers have since

fluctuated, they have consistently been 30 per cent lower than the peak in 1992. Recent figures indicate that the annual levels have significantly dropped again. Last year some 460,000 asylum claims were made in industrialized countries, approximately 20 per cent fewer than in 2002 and 25 per cent below the 2001 level.[9]

Although the numbers have declined, negative attitudes toward asylum seekers continue to hold considerable currency, often inflamed in the context of elections where promises to reform the asylum system are a popular means to solicit public support. Opinions are frequently fuelled by misconceptions about the reasons why refugees flee and assumptions that refugees and asylum seekers are nothing but a burden on host societies. Arguments in favour of restricting the application of the 1951 Convention, and periodic calls for forgoing it altogether, continue to rattle the international protection regime.

Among the misconceptions about asylum seekers is that they are not credible, as evidenced by their use of false documents and resort to illegal entry to make their asylum claims. The absence of authentic identity documents poses problems for States that seek to be assured, with a reasonable degree of certainty of the identity of asylum applicants. Yet as recognized within the 1951 Convention itself, those fleeing persecution often are unable to get the required documents to travel openly to another State and therefore should not necessarily be prejudiced for failing to do so. Credible evidence short of documentation can confirm the applicant's identity and in some cases the absence of identity documents may in fact corroborate the claim.

The hard necessity of travelling illegally, and resorting to smugglers to do so, has only increased with the greater barriers placed in the way of accessing asylum countries. It involves considerable risks to the refugee. Exposed to exploitation and physical hardship en route, they are often indebted for many years to those who have brought them across borders and face the constant risk of violence for failure to pay. Many do not reach their intended destination and are left stranded in other countries, forcing them to resort to other criminals to protect them from detection and to assist them in moving onward.

Another misconception concerns the impact of the increased ease of transnational travel, which is often perceived as having a greater effect on the global distribution of refugees than is born out by the evidence. While improvements in communication and transportation have in part accounted for increases in the number of asylum claims made in industrialized countries, they have not had a noticeable impact on the distribution of refugees worldwide. The fact remains that most of the increase in the global refugee population continues to be borne by developing countries, where over 65 per cent of the world's refugees are found.

Developing Countries

And here is where perspectives most noticeably collide. While industrialized countries complain about the number of refugees crossing their borders annually, host countries in the developing world are increasingly disillusioned with the absence of effective burden sharing.[10] Here the complaint is not so much that international protection has stopped functioning properly, but that in this regard it never functioned adequately at all. They argue that meeting the burden of meeting the protection needs of refugees has always primarily rested on developing countries whose fragile economies, environments, and social and political stability have been threatened in the process of providing refuge to millions of refugees.

Serious concerns about national security have also accompanied many refugee flows in the developing world, when the conflict that precipitated their flight crosses borders as well. This has significantly threatened the lives and safety of both refugees and local populations. The militarization of the large refugee camps in eastern Zaire following the genocide in Rwanda in 1994 is a particularly dramatic example,[11] although not an isolated one. Moreover, confronted with the challenges of meeting the needs of their own populations, including high rates of unemployment, environmental degradation, and HIV/AIDs – often in the face of declining development assistance – a number of these countries question the logic of having to be primarily responsible for refugees on the basis of proximity alone.

Humanitarian assistance, developing countries say, is often dominated by foreign policy concerns of donor States and influenced by media attention, rather than driven impartially and provided in proportion to the severity of the need.

They point to long-standing crises that have been relatively ignored, such as the Tindouf refugee camps in southwestern Algeria, where refugees from Western Sahara have been living for over twenty-five years and where over 165,000 refugees frequently face acute shortages of food. Constant underfunding of UNHCR care and maintenance programs in other parts of Africa underscore similar concerns.

The response to the Kosovo crisis in 1998–99 is another often-cited example. The international response to the plight of the nearly 1 million Kosovo Albanian refugees who had fled Serbian military repression and later NATO bombardment contrasted starkly with the assistance provided to African refugee emergencies at that time. Veteran aid

workers were among the first to draw the comparisons. In African refugee camps, where water was scarce and sanitation facilities basic, and in areas where one doctor was available for every 100,000 people, thousands of refugees died daily from cholera and other public health diseases. Per capita expenditure for Kosovar refugees in the Balkans, it was alleged, was over ten times that spent on African refugees. Shelter for refugees in Macedonian camps was considerably better than in Africa, water plentiful, food rations varied, medical assistance available (one doctor for every 700 refugees), and death from public health emergencies virtually non-existent.[12]

The point is made that the tremendous outpouring of Western support for Kosovar refugees was in part due to the fact that westerners could identify with the Kosovars, who looked similar and had comparable lifestyles, unlike most refugees from the developing world. But it is also argued that geopolitical considerations, including the desire to arrest an outpouring of refugees into Europe and to prevent destabilization of the region, were paramount concerns. Nor, it is said, was Kosovo a unique case of strategic imperatives dictating the size of humanitarian interventions.

The generous humanitarian support for the repatriation effort to East Timor in 1999 and 2000 has also been attributed to foreign policy concerns driving the humanitarian agenda rather then the needs of refugees and those countries which host them. Concern for stability in the region, and in particular the strong desire of Asian and Western countries to ensure a peaceful transition to independence in East Timor without destabilizing Indonesia and/or disrupting the flow of oil and the security of shipping lanes in the Timor Gap, were key motivations. The point is made that had humanitarianism been the primary concern, "there would have been considerably more donor action during the previous 25 years, during which an estimated 200,000 Timorese died" while under Indonesian occupation.[13]

A similar point is now made in regard to Afghanistan and Iraq, which have been the focus of considerable aid post 9/11. African governments have pointed out that, while the countries within their continent host two-thirds of the world's refugee camps, UNHCR care and maintenance programs there are inadequately funded, so that they are unable to meet minimum standards, let alone provide refugees with a means for decent self-reliance.[14] They claim that money moving to high-profile emergencies like Afghanistan and Iraq draws attention and funding away from just as pressing problems in Africa and elsewhere.

Developing countries further allege that not only is humanitarian aid often disproportionately distributed but the durable solutions promoted by donor counties are likewise imbalanced. They question why they should they be required to keep their borders open to refugees while donor countries are closing theirs, as well as being expected to provide refugees with local durable solutions.[15] Where, they ask, is the symmetry in the frequent demand that resettlement of a relatively small percentage of refugees be accompanied by enhanced opportunities for the local integration of a considerably larger proportion of the refugee population?[16] The capacities of poor countries to integrate their refugee populations, when faced with enormous problems resulting from their own underdevelopment and related social tensions, cannot, they argue, be equated with the capacities of developed countries to significantly enhance the number of refugees they resettle.[17] To suggest otherwise is, they claim, to engage in burden shifting and not burden sharing.

Many countries that host significant numbers of refugees have been doing so for prolonged periods of time. The lack of support in sharing this responsibility has led to a hardening of attitudes towards refugees and weariness with playing host when the costs are so significant. Over the years, developing countries with large refugee populations have cited their need to preserve national security as a reason for their declining commitment to protecting refugees at all costs and for the imposition of tighter border controls, forced repatriation, the roundup of refugees and their confinement in camps, and a refusal to consider the integration of refugees in local communities, which many host governments believe will root refugees there permanently and encourage others to come and reap similar benefits.

Refugees and Asylum Seekers

In the midst of State wrangling over the extent of their responsibilities towards refugees, refugees face a multitude of serious protection concerns. In many ways these constitute the real crisis in today's protection regime. UNHCR annually provides a Note on International Protection to the Executive Committee of the High Commissioner's Programme. There is a disturbing constancy reflected in these Notes in the severe protection problems that have persisted in recent years.

These include high levels of deportation and expulsion from asylum States to territories where the refugees' lives or freedom are threatened. Unacceptably high levels of violence and intimidation of refugees are also consistently reported and are particularly prevalent where large numbers of refugees are confined to camps. These include violence at the hands of armed combatants within and outside the camps as well as harassment, exploitation, and attacks by national authorities and local populations. Other forms of serious harm such as domestic violence, sexual assault, and rape are often endemic to large and protracted situ-

ations, as are a host of other social ills born of the frustration, dependency, and despondency of prolonged confinement.

Refugees and asylum seekers in both large-scale influxes and individual asylum processes face discrimination on account of their race, religion, and national or ethnic origin. This can range from the denial of civil rights concerning employment, education, and access to social services to exclusion from asylum procedures and removal from the asylum country without their applications having been considered.

In addition to these immediate protection concerns, far too many refugees are in a state of limbo with no durable solutions in sight. Two-thirds of the 5 million refugees in Africa, for example, have been in exile for over five years and are confined to camps or organized settlements, many of which are located along insecure borders, vulnerable to attack. They are commonly in remote, environmentally inhospitable areas, which do not receive development assistance. These protracted refugee situations, where prospects for durable solutions are not yet in sight, are another major challenge to the international refugee protection regime.

Even positive trends face significant trials in terms of sustainable protection. In 2003, UNHCR assisted approximately 3.5 million people to return home, the majority of whom were Afghan refugees from neighbouring Pakistan and Iran. Other sizable returnee populations included refugees returning to Angola, Sierra Leone, Burundi, Bosnia and Herzegovina, Sri Lanka, and the Russian Federation.

The challenges involved in these repatriation exercises are enormous, as the spotlight on Afghanistan makes abundantly clear. But Afghanistan is not an exceptional case. In Angola for example, a country devastated by civil war that displaced 4 million people, malnutrition is widespread and mortality and morbidity rates are very high. Close to 3 million refugees and IDPs have returned to their places of origin, and over 150,000 more are anticipated in 2004. They are returning in extraordinarily difficult circumstances. There is little infrastructure for the provision of basic health, education, and water delivery services. Poor roads and destroyed bridges hinder travel throughout much of the country, as does the presence of landmines and unexploded ordnance which prevents the resumption of farming in many areas, threatening food security.

Return, therefore, is not itself a guaranteed durable solution. The stability of the process requires a host of interrelated activities that not only provide immediate material assistance necessary for initial reintegration but link these to other sustainable development activities over the longer term to the benefit of returnees and local residents. This requires sustained and co-operative commitment by a host of actors, no small challenge in complex environments with limited funds allocated for development worldwide. Yet it is a challenge that must be met to ensure the prospects for durable peace and limit the risks of further displacements.

UNHCR and New Approaches to International Refugee Protection

Global Consultations on International Protection

In 2001, on the occasion of the fiftieth anniversary of the 1951 Convention, UNHCR launched the Global Consultations on International Protection. This was a two-year process of ministerial and expert meetings designed to take stock of the developments in international refugee protection over the past half century, to address the gaps in the international protection framework, and to map out a plan of future action.

The Global Consultations were organized along three parallel "tracks." The first culminated in a meeting of State parties to the 1951 Convention and 1967 Protocol in December 2001. The result was a Declaration of States Parties, the first in the history of the 1951 Convention. In the Declaration, States reaffirmed their commitment to implement their obligations under the 1951 Convention and 1967 Protocol, recognized the importance of other human rights instruments in the protection of refugees, and stressed the need to strengthen the implementation of these instruments as well as to work co-operatively to achieve durable solutions for refugees. The Declaration was significant in that it was a formal expression of State support for the existing framework of refugee protection and the political will to do better.

The "second track" of the Consultations was a series of expert roundtable discussions attended by government officials, academics, judges, NGOs, and other interested parties. These focused on issues pertaining to aspects of the 1951 Convention which were subject to varying interpretations and for which greater clarity and consistency were required. Among the topics canvassed were the cessation and exclusion clauses of the Convention, the principle of *non-refoulement* and the internal flight alternative, the meaning of "particular social group" and gender-based persecution, the consequences of illegal entry, and the right of family unity.[18] Each roundtable issued conclusions that identified areas of common ground and provided interpretative guidance.

The "third track" meetings were held amongst members and observers of UNHCR's Executive Committee. These focused on issues not adequately covered by the 1951 Convention such as registration, reception, interdiction, and return of asylum seekers, the protection of refugees in mass-influx situations, the protection of women and child refugees, and how to enhance the prospects of durable

solutions through voluntary repatriation, local integration, and resettlement. Parallel regional meetings were held along similar themes as a way to ensure inclusive and broad input to the process from around the world.

The Global Consultations were an impressive and successful attempt to foster open and informed dialogue among those who did not necessarily view the content of international protection, or State responsibility to provide it, through the same lens. The conclusions arising from the roundtable discussions did not resolve all the points of interpretative divergence, but they do map out points of agreement arrived at and recognized within the process of open discourse that the Consultations provided. They go a considerable distance to encourage and support more consistent application of international refugee protection principles and have formed the basis for a new series of UNHCR Guidelines on International Protection.[19]

The Global Consultations also highlighted areas that require further action to bridge the gaps in the international refugee protection regime, to more equitably share the burdens and responsibilities of protecting large numbers of refugees, and to provide enhanced opportunities for durable solutions. These became the blueprint for setting priorities, priorities which are now reflected in the Agenda for Protection.

Agenda for Protection

The Agenda for Protection, jointly adopted by States and UNHCR in 2002, and welcomed by the United Nations General Assembly that same year, is a comprehensive plan of action for UNHCR, governments, NGOs, and other partners. It focuses on international protection activities that can be enhanced by multilateral commitments and co-operation. Specifically, the Agenda focuses on six interrelated goals: (1) strengthening implementation of the 1951 Convention and its 1967 Protocol; (2) protecting refugees within broader migration movements; (3) sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees; (4) addressing security-related concerns more effectively; (5) redoubling the search for durable solutions; and (6) meeting the protection needs of refugee women and refugee children. Each goal has a detailed set of associated objectives and activities necessary for its attainment.

From an operational perspective, it is up to UNHCR, governments, and others who have endorsed the Agenda to set priorities among its multi-layered and multi-year commitments. For its part, UNHCR offices worldwide set priorities based on the protection needs of their particular operations, and annually report back on the activities undertaken to further their objectives. States have been encouraged to do the same and a number have shown their willingness to do so.

In addition to serving as a plan of action, the Agenda for Protection is also an important gauge against which progress, or lack thereof, in international refugee protection can be measured. To that end, UNHCR's annual Note on International Protection, submitted to the Executive Committee, provides an account of the major protection challenges of the past year and the steps taken to address them. It is one way of holding both the Office and governments accountable for meeting the objectives identified in the Agenda as vital to safeguarding and expanding the international protection regime.

UNHCR 2004 Process

Near the end of the Global Consultations the High Commissioner launched the "UNHCR 2004" process. This was an internal review of how UNHCR is positioned within the United Nations system and its relationship with States and other partners. The objectives of the process were to strengthen the multilateral support for the Office and to ensure that it is able to meet the challenges affecting the protection of refugees and the provision of durable solutions.

One of the ambitions of the UNHCR 2004 process was to secure a more solid funding base to augment the traditional system of having to rely solely on voluntary contributions, which frequently do not meet annual budgetary needs. The process developed a voluntary funding model for 30 per cent of UNHCR's budget, to be piloted this year. Under this model, the contribution of participating States would be determined according to the UN scale of assessments.

The process was also valuable in other key respects. In particular, it led to a UN General Assembly resolution to strengthen the capacity of the Office to carry out its mandate.[20] It also led to institutional priority setting, to guide the Office in the coming years. Among the significant aspects of the General Assembly resolution to strengthen the capacity of the Office was the lifting of the time limitation on UNHCR's mandate. Previously the UNHCR's mandate had to be renewed every five years; it now extends until the refugee problem is solved. This will support more strategic and long-term planning of UNHCR activities.

There is a growing need to forge firmer linkages between the many actors that work side by side in areas that have a direct bearing on UNHCR's activities. These include organizations involved in the fields of humanitarian relief, peace and security, human rights, and development. To ensure that refugee concerns are factored into the operations of such agencies, the General Assembly resolution called on relevant UN entities, including the Emergency

Relief Coordinator, the UN Development Group, and the Departments of Peacekeeping and Political Affairs to include in their planning and programs refugees and other persons of concern to UNHCR.

The UNHCR 2004 process also examined institutional responses to challenges in refugee protection that had been discussed within the Global Consultations. The final report on the process set out a number of priorities for the Office, including implementing the Agenda for Protection, promoting new accessions to the international conventions on statelessness,[21] ensuring full engagement with other agencies in assisting IDPs and returnees, and greater engagement with NGO partners in operational assessment and planning.[22]

In addition, the report highlighted the importance of multilateral co-operation to ensure that refugees and asylum seekers were protected within broader migration control measures and to realize durable solutions for more refugees. These latter priorities have been taken forward by the Convention Plus initiative launched by the High Commissioner in 2003, just as the UNHCR 2004 process was drawing to a close.

Convention Plus

Convention Plus is a process that brings States and intergovernmental and non-governmental partners together to reach special agreements to enhance protection of refugees in areas that are not fully addressed by the 1951 Convention and 1967 Protocol. Specifically, it aims to achieve agreements in the following areas: the more strategic use of resettlement for the benefit of a greater number of refugees; the more effective targeting of development assistance to support durable solutions for refugees; and clarification of the responsibilities of States in regard to irregular secondary movements of refugees. Each was highlighted in the Agenda for Protection as in need of further multilateral attention.

Resettlement has long been recognized as an important response to the protection needs of individuals who are at risk. It is also a durable solution for those who can neither return to their own countries nor integrate locally in the country which hosts them. As well, it is a manifestation of burden sharing, particularly when large numbers of refugees are resettled, thereby alleviating the strain their prolonged presence causes the hosting State.

The need to improve resettlement to enhance its benefits was discussed during the Global Consultations and specific actions to do so were set out in the Agenda for Protection. These include expanding resettlement opportunities; enhancing resettlement capacities through increased partnerships with NGOs and other relevant partners; introducing more flexibility into resettlement criteria; and ensuring resettled refugees enjoy equality of rights and opportunities in the social, economic, and cultural life of the resettlement country.

Convention Plus provides an opportunity for moving ahead on these commitments. It does so in an inclusive manner so that the interests of refugees, hosting States, resettlement countries, UNHCR, and other partners are appropriately accounted for. But it is more than a process of negotiation, for the goal is to reach an agreed-upon set of undertakings, a generic agreement, that can be relied upon to resolve specific refugee situations. Presently a core group of States has been constituted and a draft agreement circulated for further consideration and negotiation.

Resettlement alone will not provide the promise of a durable solution for the millions of the world's refugees in need of one. For many refugees, returning home in conditions of peace and security is the most desirable alternative. In the interim, achieving self-reliance in a hosting State and local integration there are the next best alternatives. But these solutions require significant State co-operation, assistance, and financial support that focus on the sustainable development goals necessary to make such solutions durable in the long term. And here the refugee protection regime runs into obstacles. In the context of return, returnees have seldom been part of national development planning, and their needs as well as their productive capacities have been overlooked. Beyond initial humanitarian assistance for their return home, returnees too frequently are left without the longer-term assistance necessary for their integration and contribution to their communities. In the absence of opportunities for a sustainable future, they can become a source of instability and/or feel compelled to leave again.

Linking aid and development for refugees hosted by poor States for prolonged periods of time has also been difficult. For most hosting States, sheltering refugees has imposed tremendous economic and environmental costs. While they welcome development assistance, their priorities are to use scarce development aid to assist their own populations. Development assistance for refugees, they argue, should be over and above that they would have received had they no refugees, and should have a clear positive impact on their local communities.

UNHCR has developed the *Framework for Durable Solutions for Refugees and Persons of Concern*,[23] which explains the necessity of using development assistance to secure the sustainability of return and, where that is not possible, to increase self-sufficiency of refugees and reduce the costs States shoulder in hosting them. The Framework provides an institutional blueprint for working in partnership with international financial and development partners and UN agencies in the pursuit of durable solutions for refugees.

Convention Plus aims to take the process further by bringing States and relevant development actors together to discuss and ultimately agree upon a framework of undertakings for using development assistance to support durable solutions for refugees. This would entail reaching common understandings on what have proved to be difficult areas for agreement, such as: in what circumstances will donor States and receiving countries target development aid for the benefit of refugees and/or returnees; how, and to whom, will such funds will be directed; and what principles will guide the application of such assistance?

Like the work on resettlement, this segment of Convention Plus also has a core group, led by facilitating States that are beginning to tackle these difficult issues. The generic agreement which is intended to result from these labours will be a tangible contribution to the work on durable solutions. In fact, States have insisted on linking the work on developing framework principles to pursuing solutions in particular refugee situations, drawing on the latter experience to feed into the work on generic understandings.

The third focus area of Convention Plus deals with the complex problems associated with addressing irregular secondary movements: the movement of refugees and asylum seekers from an initial country of refuge to another country without authorization. States resent the unorderly and unauthorized movements of people, be they refugees or not, for they undermine the sovereign right of each State to control who enters its territory. Decisions regarding those they are willing to admit are in principle based on coherent economic, demographic, and security objectives. People who circumvent admission procedures undermine these objectives and are regarded as flouting the authority of the State.

It is for these reasons that States feel particularly justified in erecting tighter restrictions on entry. But for refugees these restrictions are particularly severe, barring access to protection and/or compelling them, in their search of protection, to turn to the services of smugglers and traffickers, often putting their lives at risk in the process. Moreover, barriers to entry do not solve the problem; rather, they shift it, leaving it to other States to meet the protection needs of refugees refused admission to, or access to the determination procedures of, other States. Experience suggests that not only do these deterrent policies fail to stem the flow of irregular migration but they may in fact fuel it. In the absence of regular migration options, migrants and refugees alike will continue to turn to smugglers and traffickers. This underscores the difficulty of the problem as well as the need to find a way of dealing with it that addresses the legitimate concerns of States and the real protection needs of refugees.

Convention Plus attempts to meet these dual concerns, again by pulling together interested States and other parties to examine the causes of irregular secondary movements and the roles and responsibilities of States in these situations, and to seek solutions to address them. The aim is to arrive at a generic agreement that will more clearly delineate State responsibilities in regard to irregular secondary movements: one that respects the rights and obligations found within the 1951 Convention and 1967 Protocol, and that observes the imperatives for greater multilateral co-operation and responsibility/burden sharing. This will entail reaching agreement on, for example, the criteria for determining State responsibility for examining an asylum request, the conditions under which such responsibility can be transferred to another State, and the principles that govern State responsibility for providing durable solutions.

As with the other strands of the Convention Plus process, the irregular secondary movement strand is being considered by a core group of States and other interested parties. They are pursuing two lines of inquiry. The first involves determining the causes of irregular secondary movements as revealed in case studies. The second is exploring the principles and interests that should govern the assignment of State responsibility. The results of both will inform the drafting of a special agreement later in the process.

One might well wonder how these different processes are linked, beyond being areas highlighted for action in the Agenda for Protection. First, they are all attempts to address serious and persistent gaps in international protection and ineffective responses which are harmful to refugees and an irritant to States in the North and South. Moreover, they are all focused on furthering durable solutions for refugees and, when pursued in tandem, have complementary effects. For example, where refugees move from one State to another in an irregular manner because of a lack of protection or durable solutions in the first asylum country, then strengthening international protection capacities in the first country of asylum and/or offering more opportunities for durable solutions such as through local integration, voluntary repatriation, and enhanced resettlement can reduce the need for onward movements while providing sustainable benefits to refugees and host communities alike.

Similarly, a committed effort to resettle a sizable number of refugees hosted in already overburdened States may lead to greater receptivity to continue to protect and provide secure asylum to those who remain. Even where voluntary repatriation is possible, because peace and stability have been restored, there will always be those refugees who for good reason are unwilling or unable to return. When repatriation operations are pursued in parallel with the provision of other durable solutions for refugees, such as

resettlement and local integration, States give meaning to their often-professed commitment to international solidarity and burden sharing for the benefit of refugees.

The joining of these approaches is, in fact, the key to effectively resolving long-term refugee situations as recognized in the 2001 Ministerial Declaration, where States committed themselves to "better refugee protection through comprehensive strategies." In the Agenda for Protection, UNHCR is called upon to follow up on this commitment by reviewing all protracted refugee situations, with a view to exploring with States and other partners the feasibility of comprehensive plans of action to bring into play "each of the available durable solutions, to be implemented in close consultation with countries of origin, host countries, resettlement countries, and refugees themselves."

UNHCR has started this process and intends to use the work and State commitment already shown within the context of Convention Plus to design and implement comprehensive plans of action to solve some of the large refugee situations that have been in need of resolution for too long. A few situations have already been identified. For example, UNHCR is in the process of determining how to bring a mix of solutions to the over 100,000 Somali refugees who for more than a decade have been in Kenya and other neighbouring countries. The Office is also working towards comprehensive solutions for displaced Afghans, including the over 1 million who have returned home and are assisted by Office, and the 3 million others in Pakistan and Iran.

Conclusion

In the fifty-three years of UNHCR's existence, the world has experienced an exponential growth in displaced populations and UNHCR's responsibilities accordingly have expanded to cover a wider range of people in need of protection. UNHCR has had to meet these challenges without a solid funding base and often without firm commitment by States to uphold their international protection responsibilities and to share burdens among each other more equitably.

Recent years have been marked by additional challenges to the international protection regime, but, as well, by deep and broad reflection by UNHCR, States, and other interested actors on how to meet these difficulties. This has resulted in a reaffirmed commitment by States to uphold the principles embedded in the 1951 Convention and 1967 Protocol and to build upon them by joining together to pursue durable solutions for more refugees in a genuine spirit of multilateral co-operation and responsibility/burden sharing.

As significant as these developments are, actions speak louder than words. For its part, UNHCR has taken concrete steps to follow up on the avowed interest of States and others to resolve inconsistencies in the legal application of the 1951 Convention and 1967 Protocol, to foster more inter-state and inter-agency co-operation in its ongoing activities, and to work co-operatively on comprehensive plans of action to provide durable solutions to more refugees.

Whether these efforts will bear fruit depends upon a number of factors, not the least of which are UNHCR remaining focused on these priorities and States being willing to give meaning to their commitment to implement them in a manner that does not exclusively advance their own interests. The success of these initiatives requires sacrificing some self-interest in the knowledge that only by doing so can the refugee situation improve and the number needing international protection be reduced.

Notes

1. The first formal international effort to provide protection for refugees was thirty years earlier when the League of Nations elected Fridtjof Nansen as High Commissioner for Refugees. Nansen was mandated to provide protection for specified groups of refugees, initially Russian refugees and later also Armenian, Greek, Bulgarian, and other groups of refugees.
2. The UNHCR Statute did not include the ground of membership in a particular social group. Guy Goodwin-Gill suggests that this additional ground was part of the 1951 Convention definition to include groups such as landowners, capitalists, and others who may have been at risk of persecution in socialist States. Guy Goodwin-Gill, *The Refugee in International Law*, 2nd edition, (Oxford: Clarendon Press, 1996), 46.
3. For example, the same rights as nationals in regard to primary education, access to the courts and national social assistance and welfare, and the most favourable treatment accorded to foreign nationals in regard to wage-earning employment and freedom of association. For a review of these provisions and State practice, see UNHCR, Note on International Protection, Executive Committee of the High Commissioner's Programme, A/AC.96/951, 13 September 2001.
4. An expanded definition of "refugee" was also adopted regionally within the Organization of African Unity (OAU). In 1969, in recognition that the causes of massive refugee displacements were not limited to individual persecution, the OAU adopted a convention that expanded the definition of "refugee" to include not only those fleeing persecution according to the 1951 Convention definition, but also those fleeing violence and conflict and at risk of indiscriminate harm. Subsequently, in 1984, a colloquium of Central American government representatives and jurists also approved a broader definition of "refugee," similar to that contained in the OAU Convention. Known as the Cartagena Declaration, although not legally binding, the definition recommended in it has been incorporated into domestic legislation by some States and used as a matter of practice by others in the region.
5. The legal basis for this is found in paragraphs 3 and 9 of the UNHCR's *Statute*. Paragraph 3 provides that: "the High Com-

missioner shall follow policy directives given to him by the General Assembly or the Economic and Social Council." Paragraph 9 states that the "High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal." For a complete compendium of GA and ECOSOC resolutions relating to issues of concern to the UNHCR, see UNHCR, *Thematic Compilation of General Assembly and Economic and Social Council Resolutions* (Department of International Protection, 2003).

6. UNHCR, *Refugees by Number: 2003*. Of this total number, 10.4 million are refugees and 10.2 million are others of concern to the Office.
7. UNHCR, *Statistical Yearbook, 2001*, 112–13. These figures are taken from thirty-eight industrialized countries in Europe, North America, Asia, and Oceania.
8. For example, they fell to 377,839 in 1997 and have not exceeded 625,000 in any subsequent year. *Ibid.* and UNHCR, *Asylum Applications Lodged in Industrialized Countries: Levels and Trends, 2000–2002*, March 2003, 7.
9. UNHCR, *Asylum Levels and Trends in Industrialized Countries 2003*, 3, 9.
10. Over 65 per cent of the global refugee population is hosted by developing countries, and more than 30 per cent by the Least Developed Countries (LDC) in the world. UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern,* May 2003.
11. For more on this see UNHCR, *The State of the World's Refugees 2000*, 248–49.
12. For one of the many press reports on the differences, see "Refugee Camps in Africa and Europe Are a World Apart," Los Angeles *Times*, 22 May, 1999.
13. Ian Smilie and Larry Minear, *The Quality of Money: Donor Behavior in Humanitarian Financing* (Boston, MA: Tufts University Humanitarianism and War Project, 2003); online: <http://hwproject.tufts.edu/new/pdf/donor_behav. pdf>.
14. A point made forcefully by the South African delegation at the first meeting of the High Commissioner's Forum, 21 June 2003.
15. A question passionately posed by Tanzania in the third Committee of the 57th Session of the General Assembly on Agenda Item 104, 13 November, 2002.
16. *Ibid.*
17. This was stressed by the African Group at the First Meeting of the High Commissioner's Forum, 27 June 2003.
18. The expert papers presented at each roundtable and the Summary Conclusions of those meetings have been published in E. Feller, V. Turk and F. Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).
19. Five such guidelines have been introduced as of January 2004 on membership in a particular social group, gender-related persecution, cessation, internal flight alternative, and exclusion.
20. United Nations General Assembly Resolution A/RES/58/153, "Implementing Actions by the United Nations High Commissioner for Refugees to strengthen the capacity of his office to carry out its mandate," 22 Dec. 2003.
21. Specifically, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.
22. UNHCR, "Report by the High Commissioner to the General Assembly on Strengthening the Capacity of the Office of the High Commissioner for Refugees to Carry out its Mandate," 20 August 2003, A/AC.96/980.
23. See above, note 10.

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Promoting Protection:
Multilateral Efforts to Enhance Refugee Protection and the Search for Durable Solutions

Elissa Golberg and Bruce Scoffield

Abstract

Many commentators have expressed concern about the state of the international refugee regime, including perceived deficiencies in how States have addressed issues related to access to asylum and the differentiated quality of protection offered among countries. Importantly, however, the last three years have seen a concerted effort by the international community to reinvigorate debate over practical approaches to refugee protection and the need to identify solutions for refugees in protracted refugee situations. This process has resulted in a frank exchange of views among a broad range of States, NGOs, and academics about the challenges and opportunities presented by refugee and other population flows. It has led to a reaffirmation of the centrality of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and a recognition that the development of new tools, strategies, and mechanisms is warranted if the international community is going to respond effectively to contemporary population movements. Canada has been at the forefront in these international discussions, promoting an agenda aimed at securing more holistic responses to refugee protection and using creative approaches to resolve outstanding refugee caseloads. A key challenge will be to sustain the momentum and focus on practical efforts geared towards securing the ultimate goal of refugee protection – finding durable solutions.

Résumé

Bon nombre d'observateurs ont exprimé des préoccupations sur l'état actuel du régime internationale de protection des réfugiés, y compris les manquements perçues dans la manière dont des états ont abordé les questions relatives à l'accès au droit d'asile et les différences qui existent de pays en pays dans la protection offerte. Ce qui importe, cependant, c'est qu'au cours des trois dernières années, la communauté internationale a fait un effort concerté pour relancer des débats dans le but de trouver des approches concrètes visant à assurer la protection des réfugiés et des solutions pour des situations de réfugiés de longue durée. Cette procédure a permis des échanges de vue très francs entre un grand nombre de gouvernements, d'ONG et d'universitaires sur les défis et les occasions que présentent les mouvements de réfugiés et d'autres personnes. Cela a amené une réaffirmation du rôle central que doivent jouer la Convention de 1951 sur le statut des réfugiés ainsi que son protocole de 1967, et la reconnaissance du fait qu'il est impératif de développer des outils, des stratégies et des mécanismes nouveaux si la communauté internationale veut répondre efficacement aux flots de populations contemporains. Le Canada a joué un rôle de premier plan dans ces discussions internationales, promouvant un agenda visant l'adoption de stratégies plus holistiques pour la protection de réfugiés et faisant usage d'approches imaginatives pour résoudre les problèmes de réfugiés. Le grand défi reste de pouvoir conserver cette grande impulsion et de se concentrer sur des efforts pratiques pour atteindre le but ultime de la protection des réfugiés, c.-à-d. trouver des solutions durables.

Introduction

Of the some 20.6 million or so "persons of concern" identified in 2003 by the United Nations High Commissioner for Refugees (UNHCR), just over 11 million were considered to be refugees while just under one million were "asylum seekers."[1] The vast majority of the world's refugees are found in Asia and Africa, while most asylum seekers are in western Europe and North America. What makes these figures important is the often striking inequity in the distribution of resources made available among asylum seekers and refugees. To take only one example, in 2002, Canada contributed some $29 million, in Canadian dollars, to UNHCR while in fiscal year 2001–02 it spent $104 million for the work of the Immigration and Refugee Board (itself only a part of the complex refugee status determination system in Canada).[2]

Countries like Canada spend a significant amount of resources allocated to refugee protection on legal proceedings to determine whether or not a person requires international protection. Indeed, while most persons found to be refugees in developed countries are provided a secure legal status, and thus a "durable solution," it is too often the case that despite many host countries' efforts to provide needed sanctuary, refugees in developing countries can languish for years in camps or on the margins of cities, without a secure status or any prospect of a permanent solution. In addition, the quality of protection and assistance available to most refugees in the world differs dramatically among countries.

In this context, it seems fair to ask how States can best balance the needs of the relatively few individuals able to reach Europe or North America with their response to the needs of the vast majority of refugees who remain in Asia or Africa. In one form or another, this is a question that both States and UNHCR have been grappling with for the past several years. Over the past three years in particular, we have seen important efforts at the multilateral level by Governments and other actors to identify new approaches to many pressing refugee protection issues. Begun as part of the UN High Commissioner for Refugees' Global Consultations on International Protection, this process has led to the development of new tools and an important space for candid multilateral discussion on how to provide effective protection, assistance, and solutions for refugees.

This paper will outline several recent developments at the multilateral level, highlighting the work States are collectively pursuing with UNHCR and others, including a description of Canada's particular objectives and contributions to these discussions. Our aim is to provide some insight and direction to a debate in the field of international protection that is perhaps not often well publicized or understood, but which will undeniably have important ramifications for refugee protection in the years ahead.

Overview of recent developments

An important revitalization of debate in the field of international refugee protection has emerged at the multilateral level. Not only has this enhanced dialogue included a large number of States, it has also included international organizations, NGOs, experts, and refugees themselves. This discourse has stemmed from a growing concern and awareness of the challenges being faced by the international refugee regime.

As articulated most explicitly by the UNHCR, the challenges most often noted are: the application, in some quarters, of a stricter interpretation of the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol; the development of complementary forms of protection; the impact on asylum systems of so-called "mixed flows" of refugees and asylum seekers with economic migrants; the challenge presented by human trafficking and smuggling; and the failure to resolve protracted refugee situations and the impact on host governments.[3] Of course, many of these challenges are not new, and the antecedents for what has become the basis for international co-operation to address these concerns goes back a decade or more.[4] Nevertheless, in 2000–01, a process was initiated by the UNHCR that provided a useful framework for concerted action. This process, encompassing the Global Consultations on Refugee Protection (and its main outcome, the Agenda for Protection), Convention Plus, and the International Forum for International Refugee Protection, has been particularly important in enabling States to engage in a systematic review of contemporary refugee protection issues. Ultimately, the full process seeks to promote a better understanding of the strengths and limitations of the 1951 Convention; the role of other international instruments and mechanisms; and the identification of gaps which may then lead to the development of new and innovative approaches to address them.

The Global Consultations and the Agenda for Protection

The Global Consultations on International Protection (carried out over a period of eighteen months) were composed of three tracks: Ministerial Meeting of States Parties; Expert Roundtables; and policy formulation in the context of the Executive Committee Framework. Although complex and challenging,[5] this initiative by the UNHCR was both timely and comprehensive.

Track one, the first-ever meeting of States Parties, was held in Geneva, in December 2001. The meeting offered an

important opportunity for States to reaffirm their commitment to the fundamental tenets of international protection and the refugee regime. Governments adopted a Declaration that, *inter alia*, confirmed that the principle of *non-refoulement* was embedded in customary international law. The Ministerial meeting further confirmed that while the 1951 Convention and its 1967 Protocol had a central place in the international refugee protection regime, the regime was not static and should be developed further in ways which would complement and strengthen the Convention – including pursuing comprehensive strategies so that refugees would have "access to safer and better conditions of stay and timely solutions to their problems."[6]

Track three involved all member states of the UN with an interest in refugee issues, although not necessarily party to the 1951 Convention. Four meetings were held, focusing on the protection of refugees in mass influx situations; the interface between asylum and migration; asylum processes in the context of individual systems; the search for durable solutions; and protection of refugee women and children. Many of these discussions were buttressed or informed by regional seminars and meetings on maintaining the civilian and humanitarian character or asylum (South Africa), incorporating protection safeguards into interception measures (Canada), strengthening the capacity of countries of first asylum (Eygpt); and resettlement (Norway).

The Global Consultations Process culminated in the negotiation and agreement of an "Agenda for Protection." The development of the Agenda was an important accomplishment, balancing the interests of a variety of actors, including northern and southern governments, while seeking to ensure the central objective was to improve approaches to refugee protection. Jointly adopted by UNHCR and Governments in October 2002, elements of the Agenda were seen as equally applicable to NGOs and other partners. Although not a legally binding document, the Agenda for Protection provided an ambitious framework of action to be pursued over the next five years (including agreed areas for follow-up to address the specific concerns identified during the Global Consultations process). In essence, the Agenda will be pursued through several parallel activities, with some elements strictly intended for the UNHCR to address, while others will require negotiated agreements among Governments. With respect to the latter, the Executive Committee has agreed and started on a multi-year work program to implement aspects of the Agenda. Indeed, within the past eighteen months, several Executive Committee conclusions identified within the Agenda have been adopted, including those related to the civilian and humanitarian character of asylum, registration, the return of persons not in need of international protection, sexual exploitation of refugees, and protection safeguards in interception measures.

Convention Plus and the Forum for International Protection

In the fall of 2002, building upon the ideas which emerged in the Global Consultations, the UN High Commissioner for Refugees, Ruud Lubbers, articulated more clearly a proposal to create a Forum to discuss specific refugee protection issues related to the Convention Plus initiative. In outlining his vision (which has been modified on several occasions), the High Commissioner has stressed that the Convention Plus initiative is intended to complement and buttress the implementation of the 1951 Convention, *inter alia* through the development of "special" multilateral arrangements on thematic issues and specific protracted refugee situations where appropriate and consistent with Article 8 of the UNHCR Statute.

In March 2003, the first meeting of the Forum was held, focusing on the potential strategic use of resettlement as one element in the broader context of the Convention Plus initiative. This discussion, guided by Canada (and with the input of NGOs), led to work on the development of draft elements of what constitutes the strategic use of resettlement. A next Forum meeting is scheduled for March 2004, at which work on how to target development assistance to support durable solutions and clarifying the responsibilities of States with respect to secondary movements will be discussed. As yet, no country situations have been identified as a potential case to which a multilateral "comprehensive approach" can be applied. It is important to note that the Convention Plus initiative has been controversial. Many States question the nature of any "comprehensive approach" and are concerned about the potential impact on the 1951 Convention. At the same time, UNHCR has stressed the need to continue the process in order to develop creative responses to address ongoing and emerging protection problems.

Canada's Contribution

Recognizing its potential for norm setting and the valuable forum for examining complex, new, and emerging refugee protection issues, Canada was extremely active throughout the Global Consultations process and has been engaged in discussions related to Convention Plus. Canada supported the UNHCR and other partners in the call for creative approaches to the challenges presented by contemporary refugee flows and other movements, including via efforts behind the scenes that contributed constructively to public discussions. Canada had likewise supported round tables and initiatives on specific issues such as the civilian and

humanitarian character of asylum; incorporating refugee protection safeguards into interception measures; the strategic use of resettlement; strengthening the protection of refugee women and children; and addressing sexual and gender-based violence. In all of these discussions, Canada has repeatedly emphasized the need to ensure a shared agenda – one which has implications and responsibilities for both northern and southern States. As such, the Government of Canada helped to shape the Agenda for Protection by ensuring issues of interest to both developed and developing countries were identified for follow-up action and consideration.

Canada has also sought to maximize the opportunities presented in recent multilateral contexts in order to promote a more holistic approach to refugee protection and to propose the development of more creative approaches to resolve outstanding refugee caseloads. To be truly effective, Canada has argued, protection must be more than a legal concept, encompassing also concerns for physical and material well-being. In this vein, efforts have been focused, *inter alia*, on reinforcing the civilian and humanitarian character of asylum and on encouraging the UNHCR to focus institutional reforms on rebuilding its protection capacity and ensuring that protection resources are deployed where needs are greatest.

The Civilian and Humanitarian Character of Asylum

From the outset of the Global Consultations Process, Canada strongly supported the idea of developing proposals to enhance protection in the context of mass flows, an issue it has been concerned about for many years.[7] Certainly, while concerns about protection of refugees in mass influx situation is not new, it received renewed and more urgent international attention in the mid-1990s with events in the Great Lakes Region of Africa and the Balkans. Such circumstances bring to the fore a number of important issues for host states and the international community, not least with respect to the presence of combatants or criminal elements among large movements of refugees. The situation showed that any failure to ensure the civilian and humanitarian character of camps can have serious implications for individual refugee protection and well-being. Furthermore, it can increase tensions within host states and among regional actors and, in some instances, can internationalize an initially internal conflict.

While the primary responsibility for ensuring the physical security and legal protection of refugees lies with host governments, they often do not have the capacity or capability to do so. As such, Canada has been at the forefront of the debate around insecurity in refugee camps, and has directed its efforts at both norm building and the elaboration of operational requirements. For instance, the Canadian-led Security Council resolution on the Protection of Civilians in Armed Conflict (S/1296/2000) included a specific provision aimed at addressing the presence of armed elements in refugee camps. Canada has also hosted two international workshops on this issue, focusing on the potential role which can be played by international police and military forces in support of host Governments.[8]

The decision by the UNHCR to have one element of track three of the Global Consultations focus on the civilian character of asylum provided Canada with an important opportunity to move this agenda forward and engage a broad number of States on the development of practical responses in addition to standard setting. Along with several African States, Canada argued that this issue should be given prominence in the Agenda for Protection, and helped to craft what ultimately became Goal Four of the Agenda, "Addressing Security-Related Concerns More Effectively." Able to seize upon the language of Goal Four, Canada collaborated with UNHCR in the development of what became Executive Committee Conclusion number 94 on the civilian character of asylum in the summer of 2002.[9] The Conclusion was an important advancement in that States agreed to identify general principles on the sensitive issue of camp security. It was followed in 2003 with a conclusion focused on Sexual and Gender-Based Violence – another critical aspect of Goal Four.

In parallel with these normative efforts, Canada sought to operationalize policy initiatives. In January 2002, Canada deployed two Royal Canadian Mounted Police to Guinea (on a pilot project basis) to work with UNHCR and Guinea officials in their efforts to improve security within the refugee camps. Currently, one officer is acting as a liaison between UNHCR and Guinean authorities, while a second is developing a training package for a mixed brigade of specially selected police officers and gendarmes responsible for maintaining the safety and security of the refugee camps. As a concrete demonstration of international solidarity, it is hoped the pilot project will help to determine whether such deployments are a viable approach and response to calls for greater international "burden sharing," particularly in the context of mass influxes.

Strategic Use of Resettlement

Although the search for durable solutions is central to UNHCR's mandate, it has often been overshadowed by the immediate needs of assistance and protection. As such, the renewed attention given to the ultimate goal of refugee protection – a permanent solution – either in the refugee's country of origin or in another country is seen as a positive

development within the Global Consultations Process. The 2001 Declaration of States Parties reaffirmed the importance of the search for solutions, recognizing that while voluntary repatriation remains the first choice for most refugees, local integration in a country of first asylum or resettlement to a third country should remain viable responses. Third-country resettlement was addressed in the Global Consultations as a durable solution in its own right, and referenced as a potential tool for international burden sharing, always based on a firm foundation of protection need. This multi-dimensional understanding of resettlement was also reflected in the Agenda for Protection.[10] In launching the Convention Plus initiative in 2003, UN High Commissioner Lubbers also specifically called for new multilateral resettlement arrangements to potentially respond to contemporary refugee protection challenges.

The challenge of using resettlement more strategically was taken up initially by a working group of a number of traditional resettlement countries. With Canada as its chair, the working group developed a discussion paper that was presented to UNHCR's Standing Committee on June 3, 2003. Of particular note, the working group sought to set out a clear conceptual basis for "strategic resettlement," defining it as "the planned use of resettlement that maximizes the benefits other than those received by the refugee being resettled."[11] The working group's paper posited that benefits could accrue to other refugees, hosting states or the international protection regime in general. Building on the discussion generated by this paper at Standing Committee, Canada led discussions on strategic resettlement at the first meeting of the High Commissioner's Forum on International Protection, which was convened in Geneva in June 2003. At that meeting Canada sought to prompt a discussion of modalities for applying the concepts developed in the working group paper through the mechanism of a Convention Plus special agreement. As a result of the debate at the Forum, Canada and the UNHCR jointly convened a small "core group" of countries from both North and South, with the aim of developing a "tool kit" of elements related to resettlement that could be drawn on by States and the UNHCR in the creation of a Convention Plus special agreement. It is expected that once the core group completes its work, the elements will be presented to a future meeting of the Forum. Canada's ultimate goal in this exercise is to contribute through the Convention Plus initiative to new and hopefully comprehensive approaches to providing durable solutions to entire refugee populations.

Future Directions

Given recent developments at the multilateral level and the reinvigorated debates in the field of international protection, the question can rightly be asked, "what has this process ultimately contributed to?" Are refugees better protected now than they were in 2001? Is there a shared commitment to refugee protection and the search for durable solutions among States? What can be said with confidence is that, while the entire multilateral process of debate over the last three years has not been a panacea, it has been remarkable for its candour and pragmatic tone. It has also been significant in that it has drawn in not only those States that would normally be expected to engage in policy discussions related to refugee protection, but also a broad variety of others, in particular from the developing world. The outcomes to date have included the negotiation of new Conclusions of the UNHCR Executive Committee, elements of General Assembly resolutions, new guidelines and field manuals, and expert meetings and recommendations for future action. Certainly if one were to prepare a report card at this stage, however, the results would be mixed, as much of what has been initiated will take some time to be integrated into policies and programming and will require monitoring. Nonetheless, an important set of benchmarks has been set and a fundamentally important dialogue begun.

It is clear that Governments, UNHCR, and others will need to continue to focus on making protection effective and practical, and solutions more accessible, so that refugees are not left to languish for protracted periods of time unable to contribute to their countries of asylum or to sustainable peace in their countries of origin. Multilateral processes offer an invaluable forum for States and other partners to engage collaboratively instead of adopting *ad hoc* and unilateral approaches which are not ultimately aimed at meeting broader needs of refugees. All those who participated in discussions over the last several years have acknowledged that the foundations of the refugee regime are sound but need to be revitalized. In essence, the status quo is not sufficient enough to help us address the current international context and the panoply of challenges presented by contemporary population movements.

In pursuing these ideas, it is essential that the international community not accept a lowest-common-denominator approach to protection but, rather, seek to promote a high but practical standard which is available to a larger proportion of the world's refugees. To accomplish this, it will be important over the next several years for States, UNHCR, NGOs, and other experts to further develop, amongst other things, the concept of "effective protection," including agreement on standards and indicators in refugee contexts. As the High Commissioner continues to promote Convention Plus and the idea of identifying lasting solutions for specific protracted refugee situations, emphasis should be placed on pragmatic approaches rather than

necessarily going down the road of rigid or formalistic agreements on generic themes. In addition, in a climate where new resources may not be easily accessible, Governments will likewise need to be creative in examining not only how they can create greater synergies amongst the policy levers and program tools that exist in various Ministries, but also to re-examine the efficiency of existing tools and whether resources can be reallocated to better achieve the ultimate goal of refugee protection.

Certainly, the questions posed above are clearly complex. To avoid responses which will not ultimately meet the individual needs of refugees or States' interests, nor truly help to ensure a more equitable international response, caution will be needed to avoid the pull towards overly simplistic approaches in an increasingly complex international environment.

Notes

1. <Http://www.unhcr.ch/cgi-bin/texis/vtx/basics>.
2. Stephen Gallagher, "Canada's Dysfunctional Refugee Determination System, " Fraser Institute Public Policy Sources No. 78, (Vancouver: Fraser Institute, December 2003).
3. Erica Feller, "The 1951 Convention: Five Decades of Refugee Protection," *Refugee Survey Quarterly* 20 (2001): 2.
4. See, for instance, the Report of the Working Group on Solutions and Protection to the 42nd Session of the Executive Committee of the High Commissioner's Programme, EC/SCP/64, 12 August 1991.
5. This is particularly true of the emphasis of track three, which focused attention not only on issues either inadequately or not at all covered by the 1951 Convention, but also sought to develop possible approaches or standards for addressing them.
6. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva 13, December 2001, paragraph 13; Report of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/10, 18 January 2002, page 11. Track two of the Consultations process consisted of a series of expert roundtables held during 2001 on specific issues in the interpretation of the 1951 Convention, on which greater clarity was considered necessary.
7. Among other things, Canada has developed and led resolutions on refugees and mass exoduses at the UN General Assembly and Commission on Human Rights since the 1980s.
8. See <http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/ha6-forced-en.asp>.
9. <Http://www.unhcr.ch/cgib-in/texis/vtx/home/opendoc.htm?tbl=EXCOM&id=3dafdd7c4&page=ex ec>.
10. For example, under Goal Three, "Sharing of Burdens and Responsibilities," the Agenda includes objectives related to the use of resettlement as a response to situations of mass displacement. Under Goal Five, "Redoubling the Search for Durable Solutions," several objectives relate to new approaches to resettlement, including "a more strategic" use of resettlement to maximize it's benefits.
11. "The Strategic Use of Resettlement" (A discussion paper prepared by the Working Group on Resettlement), EC/53/SC/CRP.10/ADD.1 03 June 2003.

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The opinions expressed in this paper are entirely those of the authors and do not necessarily represent the policies or opinions of the Government of Canada.

Statement at UNHCR's 2003 Executive Committee

Hon. Omar Ramadhan Mapuri

Abstract

On September 29, 2003, at the 54th session of UNHCR's Executive Committee, High Commissioner Ruud Lubbers convened a panel discussion entitled "Implemention of UNHCR 2004." The process dubbed "UNHCR 2004" followed closely on the heels of UNHCR's Global Consultations on International Protection and was intended to focus more closely on UNHCR's position within the United Nations system and its relationship with states and non-governmental partners.

One of the participants in this panel discussion was the Honourable Omar Ramadhan Mapuri, Minister for Home Affairs of the United Republic of Tanzania. Tanzania hosts more refugees than any other African country. More than half a million refugees, mostly from Burundi and the Democratic Republic of Congo, live in UNHCR camps in the west of the country. Minister Mapuri's statement, reproduced below with his permission, reflects many of the frustrations of refugee-hosting countries in the developing world.

Résumé

Le 29 septembre 2003, à la 54e session du Comité Exécutif du UNHCR, le Haut Commissaire Ruud Lubbers convoqua une table ronde du nom de « Implementation of UNHCR 2004 » ('Mise en œuvre de UNHCR 2004'). L'initiative appelée « UNHCR 2004 » suivit de près une autre initiative du UNHCR « Global Consultations on International Protection » ('Consultations globales sur la protection internationale'), et avait pour objectif d'examiner de plus près la place qu'occupe le UNHCR dans le système des Nations Unies et sa relation avec les états et ses partenaires non gouvernementaux.

Un des participants à cette table ronde fut l'honorable Omar Ramadhan Mapuri, le Ministre des Affaires intérieures de la République Unie de Tanzanie. Il faut savoir que la Tanzanie abrite plus de réfugiés que n'importe quel autre pays africain. Plus d'un demi million de réfugiés – principalement du Burundi et de la République Démocratique du Congo – habitent dans les camps du UNHCR situés dans l'ouest du pays. Les propos du ministre Mapuri, que nous reproduisons ici avec sa permission, reflètent beaucoup de frustrations que connaissent les pays du tiers monde abritant des réfugiés.

I would like to thank the High Commissioner for extending the invitation to me to participate in this panel discussion on the theme of "Implementation of UNHCR 2004." I consider this initative as timely, particularly at this stage when there are many global challenges in almost every aspect of the refugee protection and assistance agenda.

Let me start my presentation with the following assumptions:

1. that this forum is aware of the huge price being paid by countries like Tanzania hosting large numbers of refugees in terms of retarded socio-economic development, environmental degradation, and even internal political backlash;
2. that this forum is aware of the general underfunding of refugee protection and assistance programs by the international community, thus leaving most of the burden to care for the refugees on the lean shoulders of poor refugee-hosting countries;
3. and that this forum is open to new ideas towards addressing pertinent refugee protection issues emanating from experiences of different stakeholders, particularly countries hosting large numbers of refugees.

With those assumptions in mind, I now wish to comment on a few issues raised and some not raised in the High Commissioner's report to the Executive Committee.

First is the issue of resettlement. Resettlement should be seen not only as a protection-focused mechanism, but also as a durable solution based on the contribution that refugees can make to the economies of resettlement countries and as a burden-sharing mechanism. Unfortunately, what seems to be taking place is for the resettlement countries to pick those refugees that they see as assets, leaving behind those they consider liabilities. The ones left behind are usually the uneducated, the aged, the vulnerable, and the ailing, including HIV/AIDS victims. Since countries like mine that host large numbers of refugees are some of the world's poorest, it becomes a burden that those countries have to continue shouldering without much substantial assistance. A proper and justifiable mechanism needs to be worked out in the resettlement process that will ensure equitable burden sharing between UNHCR, the country of first asylum, and the resettlement country.

The second issue I would like to comment on is that of facilitating local integration and taking it as a yardstick for additional development assistance to refugees in a particular country. I would like to reiterate my country's position that local integration of large numbers of refugees may not always be a viable option. In Tanzania, for example, we have both settings where we consider it viable (in respect of the 3,000 Somali refugees) and where we do not consider it viable (in respect of the nearly 1,000,000 refugees from countries of the Great Lakes region). I have noted with relief the High Commissioner's recognition in his report that local integration may not be viable in some settings. In my view, we should refrain from making the local integration of refugees mandatory and a condition for the international community to discharge its burden-sharing responsibility in supporting countries of asylum.

Regarding returnees, I fully concur with the High Commissioner's stance, and there was a convergence of minds at the recent meeting in Dar es Salaam of East African and Great Lakes countries, regarding the need for the protection of and assistance to returnees, to ensure their successful reintegration and to kick-start economic activities that focus on their potential.

Allow me also to shed further light on Tanzania's current advocacy for the creation of "save havens" within the boundaries of a refugee-producing country, as a refugee protection option which could be considered where circumstances allow. Tanzania will always remain open for *bona fide* asylum seekers. But it is our considered opinion that within the period of one year, the international community should be able, subject to the realities on the ground, to set up "safe havens" to which the influx of refugees would be taken and where they would be looked after pending reintegration into their respective home areas when the conflict is brought to an end.

Although there were problems encountered when the arrangement was tried for the first time in Bosnia, the international community is capable of improving on it, if it has the political will. We in Tanzania feel that internal "safe havens" will prevent the spillover to other countries of the effects of the causes of the conflicts that produced the refugees in the first place. Second, "safe havens" will reduce existing contradictions between the treatment of internally displaced persons and refugees. Both groups of affected human beings should be entitled to the same range of human rights and protection regimes. A third case for "safe havens" is that they will generate more effective pressure on the international community and the parties to the conflict to work towards reconciliation and eventual restoration of peace. Fourthly, alleged "benefits"said to accrue to refugee-hosting countries will benefit the refugees' own countries of origin.

Finally, but not least, "safe havens" will reduce undue tensions that have tended to crop up at times between refugee-generating and refugee-hosting countries.

I wish to conclude by fully supporting the High Commissioner's proposal to lift the time limitation on UNHCR's mandate. Experience has shown in no uncertain terms that the UNHCR is not only there to stay, but its role is actually increasing.

The Honourable Omar Ramadhan Mapuri is Minister for Home Affairs of the United Republic of Tanzania.

A Remaining Hope for Durable Solutions: Local Integration of Refugees and Their Hosts in the Case of Uganda

Sarah Dryden-Peterson and Lucy Hovil

Abstract

The protracted nature of conflicts in countries of the global South means that return to home countries for many refugees is increasingly delayed. At the same time, global terrorism and concerns about security have slowed processes of resettlement in countries of the North. Local integration to host communities in countries of first asylum may be a remaining option. This paper explores possibilities for revival of local integration as a durable solution. The authors situate the study within the framework of protracted refugee situations globally and, specifically, within the existing local settlement structure and the Self Reliance Strategy (SRS) in Uganda. Benefits to refugee-hosting communities are analyzed through two case studies: local integration through commerce and through primary education. The paper concludes by exploring ways in which stakeholders, including refugees, UNHCR, and donor governments can work together to promote shared and simultaneous development in refugee and national communities, specifically in conceptualizing the durable solution of local integration within the context of a national framework for development.

Résumé

Le fait que les conflits dans l'hémisphère Sud se prolongent interminablement signifie que pour beaucoup de réfugiés le retour dans leur pays d'origine est de plus en plus retardé. En même temps, le terrorisme global et les craintes sécuritaires ont considérablement ralenti les procédures de réinstallation dans les pays de l'hémisphère Nord. Dans ces conditions, il semblerait que l'intégration des réfugiés dans les communautés hôtes dans les premiers pays d'asile pourrait être la seule solution possible. Cet article examine donc les possibilités de raviver l'intégration locale comme solution durable. Les auteurs placent leur étude dans le cadre des situations de réfugiés qui se prolongent, et, plus particulièrement en référence à la structure locale de réinstallation qui existe déjà en Ouganda, ainsi que leur 'Self Reliance Strategy' (SRS) (« stratégie autocentré »). Les avantages dont bénéficient les communautés accueillant les réfugiés sont analysés à travers deux études de cas : l'intégration locale à travers le commerce et l'intégration à travers l'éducation primaire. L'article conclut en examinant les manières par lesquelles les parties prenantes, y compris les réfugiés, l'UNHCR et les gouvernements donateurs, peuvent travailler de concert pour promouvoir le développement parallèle et simultané à la fois dans les communautés de réfugiés et dans les communautés nationales – plus spécifiquement, en conceptualisant la solution durable de l'intégration locale dans le contexte d'un plan national de développement.

1. Introduction

Political conflicts in various parts of the world are, more and more often, of an extended duration. This means that return to home countries for refugees is increasingly delayed. At the same time, global terrorism and concerns about security have slowed processes of resettlement in traditional resettlement countries and, in some cases, the number of refugees who can be resettled has fallen and their countries of origin have been restricted. The increasing size of refugee population influxes to countries of first asylum has meant that host governments have been

reluctant to facilitate local integration; indeed, local integration carries with it a connotation of permanence as well as security problems and resource burdens.[1] Failure to find acceptable durable solutions among these three options has resulted in increasing numbers of refugee situations worldwide that can be described as "protracted."

"Refugees can be regarded as being in a protracted situation when they have lived in exile for more than five years, and when they still have no immediate prospect of finding a durable solution to their plight by means of voluntary repatriation, local integration, or resettlement,"[2] writes Jeff Crisp. Due to the proliferation of situations that can be described as such, the many stakeholders – including host governments, the United Nations High Commissioner for Refugees (UNHCR), local communities, and refugees – need to come together to further explore the three possibilities for durable solutions and their applicability in given situations.

By the end of 2001, it was estimated that some three million refugees in Africa were in a protracted situation,[3] the vast majority of them in Central and East Africa. The long-term prospect for these refugees is becoming increasingly bleak. In Africa and other parts of the global South, in particular, governments have relied on material assistance from the outside in responding to refugee situations.[4] As a result, the focus of refugee assistance has been about aid, which is by nature a short-sighted endeavour.[5] Over recent years, donors and other international actors have focused their attention increasingly either on high profile crises in which there are large flows of people or on large-scale repatriation cases. As a result, "[p]rotracted situations, which drag on for years and where there is no immediate prospect of a durable solution for the refugees concerned, have consequently been neglected."[6]

The impact of this neglect has been felt directly by those refugees who fall into this category. Tania Kaiser describes the situation in Guinea, where reductions in food rations are taking place not because there has been a corresponding reduction in need, but because there is simply not enough assistance to go around.[7] Durable solutions for refugees – particularly those in protracted situations – that do not depend on continued emergency assistance are urgently needed. Crisp writes:

> …the presence of so many protracted refugee situations in Africa can be linked to the fact that countries of asylum, donor states, UNHCR, and other actors have given so little attention to the solution of local integration during the past 15 years. Indeed, from the mid-1980s onwards, a consensus was forged around the notion that repatriation – normally but not necessarily on a voluntary basis – was the only viable solution to refugee problems in Africa and other low-income regions.[8]

Given the resulting continuation of protracted refugee situations, a reluctance in countries of the North to accept greater numbers of refugees for resettlement, and the dwindling assistance, it is imperative that local integration of refugees be explored as a durable solution. Indeed, while repatriation remains the final goal, local integration gives refugees some certainty about what to do with their lives in the meantime. Furthermore, local integration provides the possibilities of harnessing development aid for the mutual benefit of refugees and their hosts. In striving for sustainable interventions, UNHCR and donor countries are left with little option but to consider initiatives aimed at local integration.

This research explores local integration as a durable approach to the protracted refugee situation in Uganda. In Section 2, a framework for analysis of local integration is presented. Section 3 situates the study within the existing local settlement structure for refugees in Uganda and within the Self Reliance Strategy (SRS), critiquing these policies in the context of local integration. The perceived resource burden that accompanies refugees is one of the central factors that inhibits the adoption of policies that promote local integration; Section 4 therefore addresses the benefits to local communities of hosting refugees, through the specific lenses of integration in primary education and in commerce. In conclusion, Section 5 explores ways in which stakeholders can work together to promote shared and simultaneous development in refugee and national communities, specifically in conceptualizing the durable solution of local integration within the context of a national framework for development, in this case the Poverty Eradication Action Plan (PEAP).

2. *Local Integration as a Durable Solution*

2.1. Local Integration: A Framework for Analysis

Rhetorically, integration has always been a guiding principle of refugee programs in countries of the global South. According to the 1951 UN Refugee Convention, restoring refugees to dignity and ensuring the provision of human rights includes an approach that would lead to their integration in the host society.[9] Indeed the Convention uses the word "assimilation," which implies the disappearance of differences between refugees and their hosts as well as permanence within the host society.[10] Recent thinking, however, emphasizes both the importance of maintaining individual identity[11] and the possibility of "promoting self-reliance pending voluntary return,"[12] whereby local integration could be temporary.[13]

The possibility of integration of refugees and their hosts is a question of concern for the international community and host governments, especially in the context of protracted refugee situations. While the impact of refugees on

host populations has been explored at a theoretical level,[14] there has been little academic research on the costs and benefits of refugee presence to host populations in a country-specific context.[15] In addition, methods to quantify levels of integration between refugee and host communities are lacking in the literature. Indeed, disagreement over the mere definition of the word "integration" in immigration contexts worldwide, and specifically in refugee situations in countries of first asylum, makes analysis of this topic difficult and has prevented adequate research.[16]

Barbara Harrell-Bond outlines a simple definition of integration in a refugee context that is useful to employ as a guide for the purposes of this discussion: "a situation in which host and refugee communities are able to co-exist, sharing the same resources – both economic and social – with no greater mutual conflict than that which exists within the host community."[17] Tom Kuhlman makes this definition more explicit in outlining indices that can be used to gauge refugee integration to a host community. Among others, he identifies the following characteristics of successful integration:

- the socio-cultural change they undergo permits them to maintain an identity of their own and to adjust psychologically to their new situation
- friction between host populations and refugees is not worse than within the host population itself
- refugees do not encounter more discrimination than exists between groups previously settled within the host society.[18]

The economic and social factors of integration embodied in these definitions of integration are crucial to the examination of policies that foster or prevent local integration. Indeed, as will be demonstrated in the case of Uganda, often the mere structural integration of services is seen as a substitute for the more complex process of local integration.

2.2. Local Integration in Countries of the Global South

In countries of the global South, areas that host refugees are themselves plagued with poverty, characterized by a lack of resources and infrastructure for social services and by corresponding difficulties in accessing economic markets. In this context, analysis of the costs and benefits of local integration to host communities are critical in policy formation. As Kibreab asks,

> Given the severity of the economic crises and the environmental degradation facing many of the major African refugee hosting countries, the basic issue that emerges is, can these countries be able or be expected to establish policies, legal frameworks and institutions which could allow the absorption of hundreds of thousands of refugees living within their territories into their societies permanently?[19]

Kibreab then argues that in fact host governments in Africa could not be expected to carry this burden, and he proposes local settlement structures – spatially segregated sites that could be supported by international donors – as the optimal solution. Many countries, of which Uganda is one, have adopted this strategy.

More recent literature, however, suggests that the benefits to host communities of hosting refugees can outweigh the costs, if structures are set up in such a way as to promote joint development.[20] This paper aims to contribute to this body of literature through an examination of the benefits of local integration to refugee-hosting communities, using education and commerce as case studies.

3. Local Integration as a Durable Solution in Uganda

While Uganda has historically dealt with numerous prolonged refugee situations, the previous decade has seen a greater influx of refugees than at any time in the past. As of December 2002, the UNHCR reported a national total of 197,082 refugees living in Uganda, primarily from Sudan, Democratic Republic of Congo (DRC), and Rwanda.[21] It is important to note, however, that this number represents the refugees who are registered with UNHCR and who, almost exclusively, live in settlement areas. In addition to this number, conservative estimates place the number of self-settled refugees in the country at approximately 50,000. In reality, the number is probably far higher. Furthermore, there are 10,000 refugees registered with the Office of the Prime Minister as self-sufficient urban refugees[22] and it is estimated that 5,000 to 10,000 others live in Kampala without assistance or protection.[23]

Uganda provides a unique context for the investigation of local integration as a durable solution.[24] It has a long history as both a generator of refugees and a host country for refugees,[25] and the integration of refugees into Ugandan society has been a common occurrence. As Abraham Kiapi writes, "[u]nless in the case of influx, refugees are, in practice, integrated into Ugandan society. They have been offered employment, including joining the police force and even the army."[26] While social, economic, and cultural integration of refugees to Uganda has successfully occurred in the past, the difficulty of political integration has been a common factor in all cases.[27] Indeed, the legal structures of Uganda have shaped, and continue to shape, the possibilities for local integration in this country.

3.1 The Impact of Legal Structures on Local Integration

The current legislation relating to refugees in Uganda is the outdated Control of Alien Refugees Act (CARA). Enacted in 1960, eighteen years before Uganda ratified the 1951 Refugee

Convention, the CARA is inconsistent with international standards relating to the treatment of refugees. As its title implies, the act focuses on the control of refugees. Although the Act has never been strictly applied in Uganda,[28] this emphasis has had an impact on how refugees are treated. It regulates, for instance, the way in which assistance is delivered to refugees: aid is contingent upon a refugee living in a designated settlement, all of which are located in rural and isolated areas of Uganda. The only exception to this regulation is the 180 refugees[29] who are recognized on UNHCR's urban caseload.[30]

In addition to those refugees who have been officially recognized by the Government of Uganda (GoU) and the UNHCR and are living in settlements, there are tens of thousands[31] more who do not live in settlements. They have opted out of the assistance structures and, instead, have self-settled among the Ugandan population. While "official" refugees fall under the control of the national government structures (through the Directorate of Refugees, Office of the Prime Minister), self-settled refugees tend to operate within the local government structures, both rural and urban. They are integrated into their host community, pay graduated tax, contribute to the local economy, and even run in local council elections.[32] However, their legal status remains insecure and ambiguous: they fall within the category of *prima facie* refugees, but are in danger of being seen as illegal immigrants.

3.2 Local Settlement Structure for Refugees in Uganda

As stated above, Uganda historically has hosted refugees in local settlements. In northern Uganda, the local settlement program for Sudanese refugees started in 1992, when land was made available for agricultural production.[33] Settlements are large, isolated areas of land located in rural areas of Uganda, the greatest concentration being in the northwestern region. These settlements are, in theory, supposed to offer a more permanent departure from the temporary "transit camp."[34] Policy makers state that the original objective of the local settlement policy was to promote a degree of self-sufficiency for refugees.[35] In real terms, this has meant little more than making small plots of land available for the refugees to use, within the geographical confines of the settlement.[36] However, the location of the settlements, the lack of sufficient arable land, and the general insecurity that has characterized northern Uganda for decades have compromised attempts at self-sufficiency in most cases.[37]

Self-sufficiency has been further hindered by lack of freedom of movement, imposing restrictions that conspire against refugees becoming economically and socially independent. In order to leave the settlement in which they reside, refugees must obtain a permit issued by the Settlement Commandant, which is a time-consuming and unpredictable process. A recent study in Kyangwali settlement, western Uganda, showed the extent to which self-sufficiency is compromised by restrictions on movement – as well as corresponding limitations on employment – which exclude refugees from basic interaction with external goods and labour markets.[38] Likewise in Moyo settlement, refugees are isolated not only as a result of the bureaucratic restrictions placed on them, but by the fact that they often do not have the resources to travel the large distances between the settlements and surrounding markets.[39]

As well as creating economic isolation, the settlement structure also generates social seclusion. The physical separation between refugees and nationals creates an environment conducive to tensions between the two groups. For instance Ugandan nationals often perceive refugees as being better off than they are, as they witness World Food Programme (WFP) trucks moving into the settlements. They are also seen as a source of potential competition over scarce resources such as firewood and boreholes.[40] This is due, in part, to the fact that districts within which settlements are located are themselves underserved and marginalized. In addition, although services such as primary schools that have been created for refugees are, in theory, shared with the surrounding national population, there has been a lack of coordination between refugee assistance structures and the wider district development structures, creating inefficiency and exacerbating tensions.

3.3 Self-Reliance Strategy

By the late 1990s, policy makers were increasingly looking for a more sustainable solution to the protracted refugee situation in Uganda. At the same time, the need to operate in coordination with the wider service-delivery structure of Uganda "to optimize [sic] the use of resources for the good of both refugees and the host community"[41] was being recognized. The result was the creation of the Self Reliance Strategy (SRS).

The SRS was jointly designed by the Office of the Prime Minister (OPM) and UNHCR Uganda in May 1999, the culmination of a process that officially began in 1998. It was conceptualized specifically for Sudanese refugees living in the West Nile districts of Arua, Adjumani, and Moyo, recognizing the long-term nature of their situation.[42] Its overarching goal, as stated, is "to integrate the services provided to the refugees into regular government structures and policies"[43] and, in so doing, to move "from relief to development."[44] As Dorothy Jobolingo, Education Advisor to UNHCR Uganda states, "[w]e cannot treat it as a relief situation where we give them something to eat every

day. That is not a durable solution…..... The SRS is not theory. It is a practical solution."[45]

In order to bring about a change from relief to development, the SRS emphasizes the dual objectives of empowerment and integration, in order "to improve the standard of living of the people in Moyo, Arua and Adjumani districts, including the refugees."[46] It seeks to give refugees the ability "to stand on their own and build their self-esteem" through gaining skills and knowledge to both take back to their home countries when they return, and to leave behind sustainable structures.[47] At the time it was written, it was envisaged that, by 2003, refugees would be able to grow or buy their own food, access and pay for basic services, and maintain self-sustaining community structures. The SRS was designed to be implemented at a district level, with OPM and UNHCR playing coordinating roles, and "[ensuring] harmonisation of policy."[48]

In order to "empower refugees and nationals…to the extent that they will be able to support themselves,"[49] the SRS outlines the integration of service delivery in the sectors of agricultural production, income generation, community services, health and nutrition, education, water and sanitation, the environment, and infrastructure development. In this way, it addresses one flaw of the local settlement policy, that of parallel service delivery. It does not, however, address many of the other shortcomings. Indeed, it embraces one of the fundamental problems with traditional development: it attempts to substitute the provision of services for sustainable development based on economic growth.[50]

3.4. Self-Reliance in the Context of the Local Settlement Structure

While the SRS provides a framework for addressing the protracted refugee situation in Uganda, it contains fundamental flaws. The policy itself acknowledges that the success of the SRS is contingent upon two factors: first, that the SRS should be implemented under a new Refugee Bill that addresses such issues as freedom of movement, taxation, trade and employment opportunities, and temporary access to land; second, that it should operate in an environment that is secure from armed conflict.[51] To date, neither of these factors has been resolved: Uganda has, thus far, failed to pass new refugee legislation, and refugees and surrounding populations continue to be attacked by rebel groups, most notably the Lords Resistance Army (LRA).[52] In addition to these two factors, the SRS also acknowledges the marginalization of the West Nile region as being a further limiting factor.

While the SRS acknowledges these factors, there are other flaws within it that have not been taken into consideration. In particular, the SRS advocates self-reliance without local integration. Integration, as defined by the SRS, is based primarily on the coordination of services; it does not present social and economic integration as a necessity in such a process. By divorcing the two areas – integration of services and social integration – rather than acknowledging that they are mutually dependent, the SRS ensures that it cannot bring about self-reliance. Furthermore, while the word "communities" in the SRS document is used to refer to refugees and hosts collectively – reflecting an emphasis on a "community-based" approach – the term, in reality, refers to two geographically isolated groups. The notion of "community" in this context is anathema.

While the SRS expresses similarities between refugees and hosts in terms of cultural background and refers to their common experience of refugeehood, it keeps them physically segregated through the local settlement structure. The concept of full integration – in other words the abolishment of the settlement structure – is left hanging: "Finally, the freedom of movement for refugees within Uganda should be as broad as possible, although a reasonable system of control should not be rejected out of hand."[53] Thus, as with the local settlement structure, the sticking point continues to be the issue of freedom of movement;[54] the SRS attempts to propagate a free-market economy, whereby self-reliance could be achieved, but within a command economy framework. As illustrated below, the impact of these restrictions on commercial activity is just one example of the limitations imposed by such a contradictory approach.

In addition, the SRS refers only to refugees who are in the official assistance structures, and makes no more than a passing statistical reference to the many self-settled refugees living in Uganda. This is a serious omission for two reasons. First, it fails to reflect the refugee population in its entirety. Second, and most importantly, it misses the opportunity to learn from refugees who have, themselves, gone some way towards reaching the dual goals of empowerment and integration laid out in the SRS, not least through commercial enterprise and participating in local labour markets.

3.5. Implementation of the Self-Reliance Strategy

The time frame for implementing the SRS, as outlined in the original Strategy Paper published in May 1999, was ambitious. It envisioned a four-year implementation process, with "[t]he last two years of the strategy…used to consolidate the structures and systems established in the first two years."[55] The one specific benchmark stated was that "[f]ree food distribution will be ended by July 2001,"[56] as the first real step in self-sufficiency. Despite these plans, the implementation of the SRS has been slow and disorganized.

Problems associated with the implementation of the SRS have a number of origins. First, the Refugee Bill that was expected to be passed into law by 2001 at the latest[57] still remains in Parliament where is has just received its first reading. Second, the reluctance of donors to include refugees in district development plans has constrained plans for implementing the SRS effectively.[58] Indeed, development aid to Ugandan nationals and international assistance to refugees continue to be separate and parallel processes. Third, and most importantly, administrative failure and lack of communication have consistently led to delays and misunderstandings in the implementation process. There is disagreement, in fact, over when the implementation of the SRS actually began. A UNHCR representative cites a 2001 start date, when money started to change over to district levels.[59] An official from the Office of the Prime Minister is explicit that it was not until January 2002 that the SRS took effect.[60] District Education Officers and Camp Commandants outside of the West Nile region do not know if the SRS has yet taken effect in their areas and if they are responsible for implementing it.[61] What is clear, however, is that implementation of the SRS has not gone according to plan.

In the sphere of education, it was not until February of 2001 that a workshop was convened to "start looking at the possibilities for integration from a technical point of view and to aim at the hand over of education service delivery from Implementing Partners (IP's) to local governments in the most efficient way."[62] Education was not the first sector to be integrated. Indeed, a similar delay was experienced in other sectors and, more importantly, processes of "sensitis[ing] communities (Nationals/Refugees) in districts on integration,"[63] a process that the designers of the SRS indicated would be crucial to the SRS implementation from the outset,[64] had not yet begun by February 2001.[65] This sensitizing and coordination of stakeholders is a problem that persists to the present. The only person at the Ministry of Education and Sports with even partial responsibility for refugee education says, "[t]here is very little written communication. We go to these [refugee-hosting] schools, we see libraries and classrooms, organisations have given physical cash. But there is no written communication about what they are doing to their schools. So that limits knowledge."[66] It also limits the possibilities for a true integration of services, let alone of communities.

3.6. Review and Evaluation of the Self-Reliance Strategy

The UNHCR and the Government of Uganda had planned a review and evaluation of the SRS during the year 2002. Due to ongoing violence in the West Nile region, however, the lives of refugees have been severely disrupted. Linnie Kesselly of UNHCR Uganda explains that while refugees in Adjumani, for example, had become self-sufficient in terms of food production, the upheavals of recent attacks and violence have caused refugees to flee their fields and become once again dependent on direct assistance. An evaluation in this context would not be productive, she said.[67]

An exhaustive critique of the Self Reliance Strategy is outside the scope of this paper. As outlined above, however, critical aspects of the process of integration have been overlooked both in the formation of the SRS policy and in its implementation. As a result, the possibilities for local integration as a durable solution are not being fully explored at a policy level, within the Ugandan context. Indeed, the Self Reliance Strategy has been conceived and operationalized in isolation from direct experiences with the process of integration of refugee and national communities.

4. Benefits to Host Communities in the Case of Local Integration

In this section, the paper seeks to illuminate some of the factors that are essential to successful local integration of refugees in Uganda through two case studies. The first case study examines refugee engagement in commerce from both within the settlement structure and in a self-settled context. This engagement does not take place according to a planned policy but is rather a strategy spontaneously employed by both refugees and nationals as a means of sustaining livelihoods. The second case study analyzes the service-delivery aspect of primary education as well as the day-to-day realities of social integration through teaching and learning. This social integration takes place both as part of a planned policy and through self-directed local efforts to provide quality education, often seen as "the key to the future."[68]

The two case studies have been chosen to demonstrate the limitations of local integration within the current Ugandan context and to explore and outline the possibilities for success. They examine situations in which the social integration of refugees and hosts takes place at different levels to provide important models both of the processes of social integration under differing conditions and the benefits to refugees and their hosts of such integration. It is work that the authors believe should have been undertaken in the process of development of the SRS and that we believe to be a necessary framework for an urgently needed review and evaluation of the SRS in particular and of local integration as a general principle.

4.1. Economic Integration through Commerce in Moyo District

Commerce is a sector that is fundamentally linked to issues of self-reliance and integration, and illustrates many of the

issues outlined above. Field research in Moyo district in the West Nile region of Uganda[69] provides a telling example of the interaction between commerce and integration. Moyo district lies in Uganda's West Nile region, with the White Nile along the southern border flowing to the northeast, and the border with Sudan to the north. Moyo town is the administrative headquarters for the district and lies fifteen kilometres south of the border with Sudan. The district is in a semi-arid area and has experienced increasingly sporadic rainfall since 1998, creating a harsh agricultural environment and low standards of living. It is also host to approximately 23,000 registered refugees living in the Palorinya Refugee Settlement cluster, and an unknown number of self-settled refugees living throughout the district, but with greater concentration in Moyo town and along the Sudan border. Within the settlements, the SRS has been partially implemented, and some refugees are no longer receiving any assistance.

Through interviews with a cross-section of settlement and self-settled refugees, as well as nationals and officials living in the district, there was an observable difference between the economic activities of settlement refugees and those of self-settled refugees. At one level this is inevitable: self-settled refugees, having opted out of the assistance structures, are forced to find alternative means of survival. However, the difference appeared to go deeper than necessity, and related to the wider socio-political context. Indeed, the function of commerce within this context is tied inextricably to issues surrounding policies on refugee protection, specifically the emphasis on the settlement policy.

Settlements, which are, by their very nature, closed spaces, place serious limitations on commercial activity. For any commercial venture to succeed, goods need to move, and people need to trade and move to places where commercial returns are optimal. In other words, for settlement refugees to engage in commercial activity with any degree of success, they need to be able to leave the settlement with their produce and find a suitable market. Furthermore, they need to be able to do this without jeopardizing their status as refugees. However, our findings indicate that the restrictions placed on settlement refugees are preventing this from happening at any commercially viable level. Eric Werker, in a study carried out in Kyangwali settlement in western Uganda, highlights three restrictions placed on the economic freedoms of refugees: bureaucratic and insecurity-related limitations on movement that prevent refugees from moving in and out of the settlement freely, limitations on working that effectively exclude refugees from external labour markets, and the lack of transport and information flows to and from the settlement.[70] The same restrictions apply directly to Palorinya settlement: with the presupposition for effective commerce being linked to movement, the fact that settlement refugees have their movement so seriously restricted means that they are unable to move freely to markets. Furthermore, should they wish to, they are unable to move to another location where there might be better markets and a wider job market and where their skills are in greater demand.

This lack of ability to carry out commercial activity is accentuated by the fact that many settlement refugees – both those under the SRS and those who are receiving full assistance – showed both a desire and a need to generate additional income. For instance, the most common complaint made by the settlement refugees was that they were unable to generate the funds to send their children to secondary school. While primary education is free, refugees and nationals alike have to pay for secondary education, a demand that is all but impossible for settlement refugees who are unable to generate additional income. Furthermore, the lack of economic opportunity has created an environment of helplessness and dependency – well-documented throughout the literature – that further conspires against what little available commercial activity there is in such a closed, harsh environment.

Self-settled refugees, on the other hand, presented an alternative, even diametrically opposed, picture of commercial activity. These refugees had deliberately opted out of the settlement structure, often because they saw the commercial advantages of doing so, even though it meant they did not receive basic allocations of food, non-food items, and land. Instead of receiving handouts or trying to farm small parcels of inadequate land, they were engaging in a wide variety of commercial activities throughout the district. One young boy talked of how he went into Sudan during the mango season to pick mangoes that he would then sell in local markets within Moyo. By doing this, he generated enough income to pay his school fees.[71]

While this example clearly contravenes tidy, international standards, it is pertinent to note that his activities were taking place with the endorsement of local government officials. Interviews with such officials showed the extent to which they recognized the advantages of allowing refugees to interact freely within the economic activities of the district, not least because it has widened their tax base and increased local revenue. While there was a clear proviso that refugees had to follow the rules that applied throughout the district, local government officials showed the extent to which they had recognised the potential benefits of allowing refugees to engage freely in commercial activity.

However, while the outlook for many self-settled refugees was positive, particularly in contrast to the dependence and helplessness of settlement refugees, it is important not to over-romanticize their situation. Indeed, for many, life

was a daily challenge of survival in a difficult environment, exacerbated by a national policy that prevents self-settled refugees from receiving any additional help outside of the settlement. Furthermore, interviews revealed three potential pitfalls that need to be kept in mind. First, when refugees have become successful in business, politicians have been known to draw attention to disparities between refugees and nationals, thus generating xenophobia. Second, a number of refugees were perceived by nationals to have abused their commercial success with similar results. Finally, when rains fail or the local economy takes a downturn, it is often the refugees who are first to suffer though loss of jobs and increased vulnerability.

Even acknowledging such considerations, it is clear that commercial activity offers a gateway for local integration to take place – not only in allowing refugees to carry out activities with which they are familiar and to improve their standard of living, but also in benefiting the host communities through increased economic activity and local revenue. However, the basic requirement of commercial activity is freedom of movement and choice. Even with the implementation of the SRS, which is supposed to encourage refugees to take more responsibility for their own lives, the limitations on their freedom of movement continually conspire against commercial enterprise. There is thus stagnation within the settlements. Despite the many difficulties they also face, the self-settled refugees show a clear alternative that allows for creativity and self-respect. Furthermore, the fact that self-settled refugees are operating within the local government structures gives their commercial activities security and sustainability.

4.2. Social Integration through Primary Education in Kyenjojo District

While the issues of freedom of movement and integration of refugees and nationals through commerce are skirted by the SRS, education is a sector that is explicitly addressed in the design and implementation of the SRS policy. In particular, the SRS advocates "integrating refugee primary and secondary schools into the district education system."[72] In so doing, the SRS aims to develop "mechanisms for the inclusion of the refugees into the Universal Primary Education (UPE) being implemented in Uganda"[73] and to ensure that "the conditional grants provided to the districts for UPE…be increased to include refugees."[74] Under this system, schools would receive an allocation of UPE funds from the Ugandan government for all pupils, regardless of whether they are refugees or nationals, in addition to funds provided by the UNHCR designed to specifically target refugee education. In this way, both service-delivery and funding for education of nationals and refugees is to be coordinated. Not all refugee-hosting schools in Uganda, however, are included in these initiatives of the SRS.

In the sphere of education, the case is considered of a refugee-hosting area, Kyenjojo District, in which both the integration of services and social integration are taking place. The site is not one of those included in the SRS; the integration occurs simply through coordination between district officials and UNHCR and its implementing partners. While this site is located within the local settlement structure, it is a settlement that is secure, where there is greater freedom of movement than in other places, and where there is open economic interaction between refugees and nationals. This case seems to have been overlooked in the development of the SRS and yet it holds important lessons in the search for models of local integration for refugees in Uganda.

Kyaka II Refugee Settlement is located in Kyenjojo District in Western Uganda on eighty-one square kilometres of land,[75] approximately seventy kilometres by road from the town of Mubende. At the end of December 2002, 3,159 refugees were living in Kyaka II, including 1,905 Rwandese, 1,242 Congolese, and 12 Kenyans. Fifty per cent of the refugees are male, 50 are female.[76] The Kyaka area first hosted refugees in the 1950s following the political turmoil in Rwanda that led to the flight of thousands of Batutsi into Uganda.[77] Kyaka II was created as a settlement to host these refugees in 1959, and many of them stayed until 1994 when it became safe to return to Rwanda.[78] Since 1994, Kyaka II has hosted primarily Congolese refugees and Rwandese of Bahutu origin.

Although Kyaka II refugee settlement was not included in the conceptualization of the SRS, the abundance of land and the stability of surrounding national communities have been conducive to the integration of services in this settlement. Indeed, it meets the conditions for successfully establishing self-reliant communities, as outlined in the SRS. While schools in Kyaka II have received and continue to receive assistance from UNHCR, "they are like any other schools because to us those schools are also government schools."[79] Indeed, refugee pupils are counted in the overall population of a school, and UPE funds are granted on the basis of those numbers;[80] UNHCR supplements the amount the school receives with school fees paid for each refugee child.[81] As the District Education Officer (DEO) for Kyenjojo says, "I grew up and found that these people are studying together…. [T]here is no way you can say that refugees go there [points one direction] and those who are not refugees go there [points in the other direction]…. [T]he goal is to have the child educated. So we don't separate them."[82]

Bujubuli Primary School opened in 1984 and has, since that time, served both the refugees and the nationals who

have made their home in the area. In April 2003, there were 160 refugee and 177 national pupils at this school. A sense of co-operation among pupils and teachers pervades the school. The school feels peaceful; it does not feel like a conflict or displacement situation. It is located far from insecure borders and there is enough land for people to grow their own food. It is a stable place for refugee children.[83]

The social integration of pupils at Bujubuli Primary School is obvious. On a symbolic level, this integration is demonstrated by the two flags that fly in front of the school: the Ugandan national flag and the flag of the Batooro people.[84] At afternoon parades, the children sing the Ugandan anthem, the Ugandan school anthem, and the anthem of the Toro Kingdom. There is a sense that all of the children of the school are "young women and men of Uganda… uniting for a better Uganda."[85] Further, there is not a sense of children being asked to give up their identities as Rwandese or Congolese; but there is a sense of equal belonging. On an individual level, refugee and national pupils model social integration as they do not all sit together in groups but mix in class, by their own choice.[86]

The majority of pupils at Bujubuli are nationals. Although the school was originally built by UNHCR with the aim of providing education for refugees, the nationals who make their home in the area have also benefited. First, children state in interviews that if Bujubuli Primary School were not there, they would have to walk many kilometres to go to the nearest school and may, in fact, not attend school.[87] In this way, access to primary education for nationals is augmented by the presence of refugees. Second, Bujubuli feels more stable than other schools due to the continued presence, aid, and supervision of both UNHCR – and its implementing partner, Office of the Prime Minister (OPM) – and district education officials, which is a benefit to refugees and nationals alike.[88] Third, the infrastructure that has developed with the financial support of both of these stakeholders is more substantial than in neighbouring schools and thus promotes the standard of education for both refugees and nationals. Fourth, the teaching force of the school is almost entirely national, with only one refugee teacher. These nationals are paid both by the Ministry of Education and Sport (Government of Uganda) and the UNHCR, through OPM. The presence of refugees in this area thus increases opportunities for employment of local teachers. Lastly, due to the population of refugee pupils, teachers are hired both by the MOES and OPM, resulting in a greater number of teachers than would otherwise be posted at the school. The lower pupil-to-teacher ratios allow for greater interaction between pupils and teachers, more frequent marking of books, and increased class participation by individual pupils,[89] thus serving to increase the quality of education available in this area of Uganda.

5. *Conclusions: Local Integration within a Model of Development*

The case studies of commerce and education in Uganda demonstrate the need for policies, and their implementation, that strive for joint development among refugees and their hosts. In this context, the simple integration of services cannot be substituted for careful planning, coordination, and monitoring of the social and economic integration of these communities. In order to achieve benefits for both refugees and hosts, conceptualizing local integration through a model of development is essential.

5.1 A Framework for Development: The Poverty Elimination Action Plan (PEAP)

The Poverty Eradication Action Plan (PEAP) is the framework that guides development for Ugandan nationals in Uganda. It articulates a national vision to eradicate mass poverty in Uganda by 2017. Specifically, the goal is to reduce the number of people living below the poverty line to 10 per cent by that time – from 56 per cent in 1992–93, and 35 per cent in 2000.[90] Since its inception in 1997, it has guided the formulation of government policy as well as the direction of international aid. Indeed, the PEAP is the overarching national planning document of the Government of Uganda and clearly places poverty eradication as the fundamental goal of the Government.[91]

As put forth through this document, development is measured by the eradication of poverty that, it argues, will only be possible with economic growth. From these basic assumptions stem the four major, and interrelated, goals of the PEAP: first, rapid and sustainable economic growth and structural transformation; second, good governance and security; third, increased ability of the poor to raise their incomes; and last, increased quality of life of the poor.[92]

Goal 1 expresses the need for large-scale economic growth as a means to eradicate poverty; this growth, while it aims to be rapid, also needs to be sustainable. The PEAP simultaneously advocates for structural transformation within the Ugandan economy, specifically in the context of agriculture. Indeed, the basis of poverty in Uganda is the "poor economy where most people are locked into traditional subsistence agriculture."[93] Importantly, however, the PEAP asserts that the transformation of the economy from agriculture to non-agricultural sectors must happen through the modernization of agriculture and not by its abandonment.

Goal 2 underlines the essential conditions that must be present for development to occur: good governance and

security. When consulted, ordinary citizens "see a definite and direct link between insecurity and poverty levels. For example they say whole regions (North East and Karamoja) have lagged behind in terms of development largely due to prolonged insecurity.[94] Development simply cannot happen without security of person and property.

Goal 3 is the projected outcome of the economic growth described above: an increase in the ability of the poor to raise their incomes. In order for people to raise their incomes, development strategies need to find ways that the poor can participate in economic growth. It is only through this participation that they can benefit. The idea of the PEAP, and the thrust of Goal 3, is not that the rural poor serve as beneficiaries of the country's economic growth but that they are engaged in that growth.

Goal 4 is the anticipated result of the previous three goals. The aim is that with economic growth and the ability of the poor to raise their incomes, the poor will experience enhanced quality of life. Although increased quality of life is dependent on greater access to services such as education and health care, the PEAP is clear that, alone, provision of services is not development. It presents the role of provision of these public services only as a subsidiary to the economic growth that comes with individual freedoms and development of human agency. Creating the environment in which individuals can ensure their own access to services, it argues, is more important than the direct provision of those services.

At its most fundamental level, the PEAP represents a blueprint for long-term national development within the context of a stable environment. It recognizes the need for security, and underscores the extent to which the provision of services is not, in itself, development.[95] The creation of local integration of refugees as a durable solution – a move from relief to development – as outlined in the SRS, needs to take place within the framework created by the PEAP for development in Uganda.

5.2 Towards Local Integration of Refugees in Uganda

Assistance to refugees in Uganda needs to be considered in the light of the PEAP. The question that needs to be asked is, how does development – as set out in the PEAP – occur in the context of the local settlement structure? The local settlement structure and the PEAP present two parallel and uncoordinated assistance/development structures – one for refugees and the other for Ugandan nationals. Perhaps the question is then better phrased as, *can* development occur in the context of a local settlement structure? Self-sufficiency and local integration operate in a symbiotic relationship. Economically, politically, and socially, it is not possible to have one without the other. The SRS system proposes harmony through the integration of services, yet it lays the foundation for antagonism by maintaining notions of "otherness" inherent in the settlement structure.

As evident in the case studies of commerce and education, Ugandan policy needs to shift in order to realize the full mutual benefits of local integration for refugees and their hosts. While this responsibility rests with the host government, the international community, especially an active donor community, has a fundamental role to play. Indeed, the great reluctance of host governments such as Uganda to adopt policies that could promote the self-reliance of refugees rests in the perceived lack of economic viability of this possibility. Specifically, within the confines of a settlement structure, international assistance targeted to refugees can be easily channelled to that purpose; conversely, and importantly, development aid targeted to national populations reaches national populations and does not become diluted by an additional refugee population. In a country of extreme poverty and lack of infrastructure and in which development aid accounts for 52 per cent of the operating budget, the possibility of losing international aid to refugees through an integrated approach is perhaps a risk not worth taking. Until the point at which donors include refugees in development plans and fund district plans accordingly, there will be a continued disincentive for a change in Ugandan refugee policy.

Joint development of refugees and their hosts through a model of local integration is a remaining hope for durable solutions. Indeed, it may be the only remaining option for most of the world's refugees, as possibilities for repatriation and resettlement become slim in areas of protracted conflict and tightening of borders in countries of the North. As demonstrated in this paper, however, local integration need not be conceived of as a fallback option, but instead as a positive step in securing long-term stability for both refugees and host communities.

Notes

1. Karen Jacobsen, "The Forgotten Solution: Local Integration for Refugees in Developing Countries," New Issues in Refugee Research, Working Paper No. 45 (Geneva: UNHCR, July 2001).
2. Jeff Crisp, "No Solution in Sight: The Problem of Protracted Refugee Situations in Africa," New Issues in Refugee Research, Working Paper No. 75 (Geneva: UNHCR, January 2003) at 1.
3. *Ibid.* at 2; among the three million, Crisp identifies 450,000 Sudanese in Central African Republic (CAR), Chad, Democratic Republic of Congo (DRC), Ethiopia, Kenya, and Uganda.
4. Jozef Merkx, "Refugee Identities and Relief in an African Borderland: A Study of Northern Uganda and Southern Sudan," New Issues in Refugee Research, Working Paper No. 19 (Geneva: UNHCR, 2000).

5. G. Kibreab, "African Refugees," in *Reflections on the Africa Refugees Problem* (Trenton, NJ: African World Press, 1985).
6. Jeff Crisp, "No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa" (Paper prepared for a symposium on the multidimensionality of displacement in Africa; Kyoto, Japan, November 2002).
7. Tania Kaiser, "A Beneficiary-Based Evaluation of the UNHCR Programme in Guinea" (Geneva: UNHCR Evaluation and Policy Analysis Unit, 2001) at 21.
8. *Supra* note 2 at 3.
9. Article 34, *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954).
10. B. Harrell-Bond, "Are Refugee Camps Good for Children?" New Issues in Refugee Research, Working Paper No. 29 (Geneva: UNHCR, 2000); Milton Gordon, *Assimilation in American Life* (Oxford: Oxford University Press, 1964).
11. Tom Kuhlman, "The Economic Integration of Refugees in Developing Countries: A Research Model," in *Economic Integration of Refugees* (London: Oxford University Press, 1991); Merkx, *supra* note 4; Marcelo M. Suárez-Orozco, "Everything You Ever Wanted to Know about Assimilation but Were Afraid to Ask" (Fall 2000) 129 Daedalus at 11.
12. *Supra* note 2 at 26.
13. For a discussion of issues of immigrant incorporation in transnational communities, see Stephen Castles, "Transnational Communities: A New Form of Social Relations under Conditions of Globalization?" in Jeffrey G. Reitz, ed., *Host Societies and the Reception of Immigrants* (San Diego: Center for Comparative Immigration Studies, University of California San Diego, 2003) 429–45.
14. *Supra* note 11; also, John Sorenson, "An Overview: Refugees and Development" in Adelman and Sorenson, eds., *African Refugees: Development Aid and Repatriation* (Boulder, CO: Westview Press, 1994).
15. Notable exceptions are Beth Elise Whitaker, "Changing Opportunities: Refugees and Host Communities in Western Tanzania," New Issues in Refugee Research, Working Paper No.11 (Geneva: UNHCR, June 1999); Tom Kuhlman, *Burden or Boon? A Study of Eritrean Refugees in the Sudan* (Amsterdam: Free University Press, 1990).
16. B.E. Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford: Oxford University Press, 1986) at 7.
17. *Ibid.* at 7.
18. *Supra* note 11.
19. Gaim Kibreab, "Local Settlements in Africa: A Misconceived Option?" (1989) 2 Journal of Refugee Studies at 473.
20. See, among others, Karen Jacobsen, *supra* note 1; Tania Kaiser, *supra* note 7; Jeff Crisp, *supra* note 2; Barbara Harrell-Bond, "Toward the Economic and Social 'Integration' of Refugee Populations in Host Countries in Africa" (Paper presented at a conference organized by the Stanley Foundation, "Refugee Protection in Africa: How to Ensure Security and Development for Refugees and Hosts," Entebbe, Uganda, November 2002).
21. "Refugee Statistics as of End of December 2002" (UNHCR BO-Kampala, December 2002).
22. "Urban Refugees," Refugee Law Project, Working Paper No. 6 (Kampala: Refugee Law Project, July 2002).
23. Personal communication with Douglas Asiimwe, Office of the Prime Minister, Directorate for Refugees (5 November 2002); Personal communication with Ebende S. Lomingo, Chairman, Congolese Refugees Development Association (COREDA) (19 November 2002); Alison Parker, "Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala" (New York: Human Rights Watch, 21 November 2002).
24. Louise Pirout, "Refugees in and from Uganda in the Post Colonial Period" in *Uganda Now* (Nairobi: Heinemann, 1988.)
25. A.G.G. Gingyera-Pincywa, "Uganda's Entanglement with the Problem of Refugees in Its Global and African Contexts" in *Uganda and the Problem of Refugees* (Kampala: Makerere University Press, 1988).
26. Abraham Kiapi, "The Legal Status of Refugees in Uganda: A Critical Study of Legislative Instruments," in A.G.G. Gingyera-Pincywa, ed., *Uganda and the Problem of Refugees* (Kampala: Makerere University Press, 1998) at 49.
27. Yolamu Rufunda Barongo, "Problems of Integrating Banyarwanda Refugees among Local Communities in Uganda: A Study of Refugee Settlements in Hoima and Kabarole Districts," in A.G.G. Gingyera-Pincywa, ed., *Uganda and the Problem of Refugees* (Kampala: Makerere University Press, 1998) 117–40; Dixon Kamukama, *Rwanda Conflict: Its Roots and Regional Implications* (Kampala: Fountain Publishers, 1997) 33–43; V. Bond, "Identity Crisis: Banyarwanda Refugees in Uganda" (M.A. Dissertation, University of Edinburgh and Makerere University, 1998) [unpublished].
28. As Abraham Kiapi states in his article "The Legal Status of Refugees in Uganda: A Critical Study of Legislative Instruments": "The study shows that officials do not follow the Act to the letter. It is mainly applied to spontaneous refugees who enter the country in large numbers. Otherwise refugees enjoy the rights enumerated in the international instruments;" *supra* note 26.
29. One hundred and eighty refugees were registered on the urban caseload of UNHCR as of December 2002. Refugees become part of this caseload due to medical emergencies that require treatment in Kampala or severe security issues that make life in a settlement impossible. Although this number fluctuates, it is estimated by Inter-Aid, the implementing partner of UNHCR for the urban caseload, to be consistently around 200 refugees. Personal communication with Scholastica Nasinyama, Inter-Aid (18 November 2002).
30. Refugee Statistics as of end of December 2002, UNHCR Public Information Office.
31. It is impossible to estimate accurately how many self-settled refugees there are in Uganda. As Barbara Harrell-Bond writes, "Everyone who can gets out of them [camps and settlements] as quickly as possible. This is why there are almost always more refugees living among their hosts outside of camps;" *supra* note 10.

32. For a more detailed account of self-settled refugees, see Lucy Hovil, "Free to Go, Free to Stay? Movement, Seclusion and Integration of Refugees in Moyo District," Refugee Law Project, Working Paper No. 4 (Kampala: Refugee Law Project, 2002).
33. *Supra* note 4.
34. The authors would claim that the difference between camps and settlements in this context is nothing but an "operational myth." See Liisa H. Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (London: University of Chicago Press, 1995); Anna Schmidt, "How Camps Became 'Mainstream' Policy for Assisting Refugees" (Paper reporting on research undertaken as part of the EU-funded INCO-DC project on refugee health and welfare in Sub-Saharan Africa, London School of Economics, 1998).
35. "Strategy Paper: Self Reliance for Refugee Hosting Areas in Moyo, Arua, and Adjumani Districts, 1999–2005" (Uganda: Office of the Prime Minister/UNHCR, 1999) at 12.
36. *Supra* note 32. Also, for further discussion of the lack of land in Nakivale settlement, see Emmanuel Bagenda, Angela Naggaga, and Elliott Smith, "Land Problems in Nakivale Settlement and the Implications for Refugee Protection in Uganda" Refugee Law Project, Working Paper No. 8 (Kampala: Refugee Law Project, May 2003).
37. See Tania Kaiser, "UNHCR's Withdrawal from Kiryandongo: Anatomy of a Handover" (2002) 21 Refugee Survey Quarterly 201–27.
38. E. Werker, "Refugees in Kyangwali Settlement: Constraints on Economic Freedoms," Refugee Law Project, Working Paper No. 7 (Kampala: Refugee Law Project, 2002).
39. *Supra* note 32.
40. *Supra* note 32.
41. *Supra* note 16 at 370.
42. *Supra* note 35.
43. *Ibid.* at 2.
44. *Ibid.* at 2.
45. Dorothy Jobolingo, UNHCR Education Advisor, at UNHCR Community Services/Education Coordination Meeting, Entebbe (1 April 2003).
46. *Supra* note 35 at 8.
47. *Supra* note 35 at 2.
48. *Supra* note 35 at 9. In addition, the SRS emphasizes that UNHCR will maintain its primary international mandate to protect refugees, and will keep a presence in districts where there is a "sufficiently large presence of refugees."
49. *Supra* note 35 at 8.
50. This issue is discussed further in Section 5.
51. *Supra* note 35 at 11–12.
52. A most extreme case is the Achol-Pii Refugee Settlement in Pader District, Uganda. In July 1996, the Lords Resistance Army (LRA) attacked the settlement, killing over 100 unarmed refugees and wounding several others. After a passionate appeal to government to relocate them to the southern parts of the country, refugees received a response from the Government of Uganda (GoU), stating that they had no right to decide where to be housed and that if they were tired of government's hospitality, they should go back to their country of origin. Unable to return to Sudan, the majority remained in Achol-Pii. Despite numerous reports warning of an imminent attack on the settlement in 2002, the government did not act. On 5 August 2002, the LRA again attacked Achol Pii Refugee Settlement, killing more than twenty refugees, injuring several others, and displacing 23,000. See L. Hovil and A. Moorehead, "War as Normal: The Impact of Violence on the Lives of Displaced Communities Living in Pader District, Northern Uganda," Refugee Law Project, Working Paper No. 5 (Kampala: Refugee Law Project, 2002).
53. *Supra* note 35 at 15.
54. See also description of the SRS in Jozef Merkx, *supra* note 4.
55. *Supra* note 35 at 38.
56. *Supra* note 35 at 38.
57. *Supra* note 35 at 39.
58. This reluctance by donors is highlighted as one of the constraints within the educational sector in the UNHCR Uganda Country Plan; obtained from Linnie Kesselly, Senior Community Service/Education Coordinator.
59. Personal communication with Linnie Kesselly, Senior Community Services/Education Coordinator, UNHCR Uganda (6 November 2002).
60. Ronald Mayanga, Refugee Desk Officer, Mbarara, UNHCR Community Services/Education Coordination Meeting, Entebbe (1 April 2003).
61. Personal communication with George Bomera, Assistant Commandant, Kyaka II Refugee Settlement (25 March 2003). Personal communication with Charles Mugisa, Assistant Education Officer, Kyenjojo District (8 April 2003). Michael Tindikira, Inspector of Schools, Bukanga Country (5 May 2003).
62. Technical Committee for Education Integration (OPM, Directorate of Refugees; Ministry of Finance, Planning and Economic Development; Ministry of Education and Sports; and UNHCR), "Consultative Workshop for Integration of Education Service Delivery, 13–14 February 2001: Draft Report, April 2001," at 3.
63. *Ibid.* at 27.
64. *Supra* note 35 at 39.
65. Technical Committee for Education Integration (OPM, Directorate of Refugees; Ministry of Finance, Planning and Economic Development; Ministry of Education and Sports; and UNHCR). "Consultative Workshop for Integration of Education Service Delivery, 13–14 February 2001: Draft Report, April 2001," at 27.
66. Personal communication with Francis Agula, Responsible for Francophone education, Uganda Ministry of Education and Sport (16 April 2003).
67. *Supra* note 59.
68. Interview, Jacques Bwira, Headmaster at KURCEC, Kampala (25 November 2002).
69. Field research was carried out in Moyo district from 3 to 13 February 2002. Also see Hovil, *supra* note 32.
70. Eric Werker, "Refugees in Kyangwali Settlement: Constraints on Economic Freedom," Refugee Law Project, Working Paper

No. 7 (Kampala: Refugee Law Project, November 2002); online: http://www.refugeelawproject.org.

71. Interview with self-settled refugee, Moyo town (5 February 2002).
72. *Supra* note 35 at 32.
73. A brief background of Universal Primary Education in Uganda: Major educational reforms began in Uganda in the late 1970s when an Education Review Committee under Idi Amin Dada proposed the introduction of Universal Primary Education (UPE) over a period of fifteen years. Another commission on education was created by Milton Obote in 1980. In 1988 the government instituted another education review commission led by then Vice Chancellor of Makerere University, Kampala, Professor Kajubi. But it was not until 1996, during the heat of the presidential election campaign, that a program of Universal Primary Education was given serious thought by the Government. In January 1997, UPE was finally introduced, this time under the National Resistance Movement (NRM) government. This program exempts four children per family from paying primary school fees. The number of children enrolled in primary school increased that year from 2.6 million to 5.5 million. By 1999, 6.5 million children were enrolled in primary school in Uganda, equivalent to a net enrolment rate of 85 per cent. The existence of UPE does not mean that primary school education in Uganda is completely free. Parents or guardians must often support the cost of school buildings, books, writing materials, school meals, and uniforms. The result has been the development of schools that – while licensed by the government and receiving government aid for teachers' salaries – do charge school fees, which are prohibitive for many families, especially in urban areas. At these schools, the school fees pay for construction of new school buildings, the hiring of teachers to decrease the pupil-teacher ratio, and the expansion of recreational and technology programs. In addition, the quality of education at UPE primary schools that do not charge school fees – and are therefore accessible to most families – is low. There are insufficient schools, classrooms, and trained teachers for the influx of pupils who have joined primary school since the introduction of UPE in 1997. Indeed, for every permanent classroom in Uganda, there are on average 228 pupils. As concluded in a study of the ActionAid-Uganda/Centre for Basic Research, "UPE has improved children's access to classroom buildings but not to quality primary education."
74. *Supra* note 35 at 32.
75. Interview, George Bomera, assistant camp commandant, Kyaka II refugee settlement (25 March 2003). Kyaka II refugee settlement was regazetted in 1994 after the repatriation of Rwandese refugees. At this time the area of the settlement decreased from 220 square kilometres to 81 square kilometres.
76. "Refugee Statistics as of End of December 2002" (UNHCR Kampala, December 2002.).
77. See: Yolamu Rufunda Barongo, *supra* note 27 at 118–22.
78. "Refugee Life," a broadcast of Common Ground (11 March 1997).
79. Interview, Charles Mugisa, Inspector of Schools Kyaka County, Kampala (4 April 2003).
80. Charles Mugisa, Inspector of Schools Kyaka County, at UNHCR Community Services/Education Coordination Meeting, Entebbe (1 April 2003).
81. Personal communication with Imedla Atwooki, Coordinator of Community Services/Education for OPM, Kyaka II refugee settlement (25 March 2003).
82. Interview, Douglas Asiimwe, DEO Kyenjojo District, Kampala (25 April 2003).
83. One of the primary purposes of education in a refugee situation is the creation of stability for children coming from situations of conflict and displacement. As stated in the UNHCR "Education Sector Policy and Guidelines," "[e]ducation helps meet psychosocial needs…. Crisis situations involving conflict and displacement cause disruption of children's lives, the break up of families and social ties, and uncertainty regarding their futures." From UNHCR, *Education Sector Policy and Guidelines (Draft)* (Geneva: UNHCR, 2002).
84. The Batooro people traditionally live in the Toro Kingdom area of Kabarole and Kasese districts.
85. From the Ugandan school anthem.
86. Personal observation in P.5 class, Bujubuli Primary School, Kyaka II refugee settlement (24 March 2003).
87. Interviews with Bujubuli nationals, Bujubuli Primary School, Kyaka II refugee settlement (27 March 2003).
88. Personal observation, Bujubuli Primary School, Kyaka II refugee settlement, and Kabweeza Primary School, Kyaka County (7 March to 10 April 2003).
89. Classroom observations, Bujubuli Primary School, Kyaka II refugee settlement (24, 25, and 26 March 2003).
90. "Poverty Eradication Action Plan (2001–2003)," Volume 1 (Kampala: Government of Uganda, Ministry of Finance, Planning and Economic Development, February 2001) at 1.
91. *Ibid.* at 10.
92. *Ibid*. at 4–5.
93. *Ibid*. at 1.
94. Warren Nyamugasira, "Monitoring of the Poverty Eradication Action Plan (PEAP)" (A presentation at the Consultative Workshop on the Revision of the PEAP and Public Expenditure Review, Kampala International Conference Centre, May 15–16, 2000.)
95. It falls beyond the scope of this paper to analyze the successes and failures of the PEAP.

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The Strategic Use of Resettlement: Changing the Face of Protection?

Joanne van Selm

Abstract

Discussion about resettlement is increasing worldwide. Traditional resettlement countries look to the EU to establish new programs to expand the use of this durable solution. Some EU Member States appear most interested in resettlement for the potential it might offer in resolving the problems of smuggling, high asylum-seeker arrivals, and widespread anti-immigrant tendencies. This article sets out four key arguments on: the reasons for conducting resettlement; the "see-saw" numbers hypothesis; perceptions of refugees according to their means of arrival; and the links between asylum and resettlement, while discussing the European developments and global discussion of the strategic use of resettlement.

Résumé

La réinstallation devient de plus en plus un sujet de préoccupation au niveau international. Les pays de réinstallation traditionnels se tournent vers l'Union Européenne et s'attendent à ce qu'elle développe de nouveaux programmes pour étendre l'usage de cette solution durable. Certains pays de l'UE semblent extrêmement intéressés dans la réinstallation en vue du potentiel qu'elle offre pour résoudre les problèmes de passages clandestins de personnes, de hauts niveaux d'arrivée de demandeurs d'asile et des tendances généralisées anti-immigrants. Cet article met de l'avant quatre arguments principaux : les raisons d'avoir une politique de réinstallation; l'hypothèse des nombres en balançoire à bascule; la perception variable qu'on a des réfugiés selon leur mode d'arrivée; et, les liens entre le droit d'asile et la réinstallation – tout en discutant des développements européens et des pourparlers globaux sur l'utilisation stratégique de la réinstallation.

1. Introduction

"Resettlement" has become one of the most frequently heard words in refugee protection policy discussions in the developed world. After decades as a barely-spoken-of means by which some refugees reached western states, the approach is centre stage. To countries that have long-standing resettlement programs there are aspects of this re-emergence that must be bemusing, aspects that pose challenges to their own programs, and aspects which are encouraging for the future of a protection tool and durable solution which has served them and refugees well. The existing resettlement countries inspired the discussion: their initiative coincided with new European interest in resettlement as an approach to refugee protection.

While wanting to see other states get involved and take on part of the resettlement caseload, traditional resettlement countries are also concerned that resettlement should be well managed by all actors involved for the benefit of all. Within the framework of the Convention Plus and Forum, launched in 2002 and 2003 respectively by UN High Commissioner for Refugees, Ruud Lubbers, the "Strategic Use of Resettlement" has become the foremost subject of discussion. Further, both the U.S. and the EU have sought independent studies in the past year, assisting policy makers and political leaders in thinking about changes in, or the development of, resettlement programs.[1]

The European Union is starting to think about resettlement and how it could be used strategically. The developments which have led to this discussion included the challenges posed by human smuggling, over-burdened asylum systems in which some 50 per cent of the applicants were being rejected by the end of all appeals process, and an increasingly pervasive tide of anti-immigrant sentiment. By the time a significant number of the EU Member States had engaged the discussion in 2003, the United States was

facing significant challenges to its long cherished and well-established resettlement program. Those challenges were highlighted by heightened security concerns in the aftermath of 9/11, but in fact started earlier. The program had become somewhat anachronistic. It was well suited to the Cold War, but ten years after the collapse of the Berlin Wall it had not significantly changed in terms of groups targeted. In changing priorities on groups eligible for selection, the program also needed to adapt its methods.

In the final paragraphs of this Introduction the four key points or arguments to be made in the article will be set out. The following section will explain "resettlement" as a concept and a protection tool in more detail. After posing questions about who could benefit – and how – from the strategic use of resettlement, the focus will be on Europe and on the "global" level discussions about resettlement of the past few years. The challenges to resettlement, as well as the opportunities which resettlement appears to some policy makers to offer, will permeate the rest of this article.

Key Points

1. There is a risk in discussing the "strategic use" of resettlement that motives, goals, and functions of the policy approach become confused and conflated in such a way that the essence of resettlement as a humanitarian program could be lost. This is a serious challenge not only to resettlement itself, but to refugee protection policies in developed countries generally – and a challenge which needs to be addressed.

2. While attention is on resettlement there may be room to deal with the difficulties presented by asylum and irregular entries, in a climate which is more beneficial to good policy making and supportive of refugees than that which prevails today. This is already evident in both Canada and the U.S. This is an opportunity. There lies potential danger, however, in the use states could make of resettlement as a "humanitarian alibi" for restrictive asylum policies. This is demonstrated to an extent in Australia, where asylum seekers are sometimes characterized as "queue jumpers," *i.e.*, people who should have waited for the resettlement program to find them, if indeed they are refugees. The notion underlying the use of the alibi is that people who wait in camps are deserving of compassion and protection, whereas those who take the initiative, even if they are from the same population group as those later resettled, might be vilified. Ironically, we could hypothesize that asylum seekers are in fact showing the type of resourcefulness that would qualify them as those who will succeed in western societies and economies. Nonetheless, in Europe, some focus on positive aspects to refugee admissions could be used effectively to change the debate which currently casts all irregular arrivals as asylum seekers, and describes them all – whether determined to be refugees or not – as scroungers on the welfare states of European countries.

3. Any discussion on the strategic use of resettlement that is based on a see-saw hypothesis in regard to arrival numbers is not only refutable, but also dangerous to the desirable establishment of broad resettlement programs on a global level. The see-saw hypothesis suggests that, whereas in Europe today there are significant asylum-seeker arrivals and is very little resettlement, if in the future there were to be significant resettlement, there would be a decrease in asylum-seeker arrivals. This hypothesis is mostly being employed in the EU discussions; but it is being broadly employed by officials (from Europe and beyond), NGOs, and others in an attempt to "sell" resettlement as an effective protection tool. That resettlement is an effective protection tool is not at issue here; but "selling" the policy to politicians and the general public, as a tool for effectively reducing asylum-seeker arrival numbers, is a great risk. The risk is that a very good resettlement program, which is very effective in broadening access to refugee protection, might be undermined if it were to be evaluated on the basis of its impact on asylum-seeker arrival numbers.

4. Resettlement is *not* asylum, or part of an asylum system. Rather, both asylum and resettlement are elements in a broad, well-functioning and robust international protection system.

2. What Is Resettlement?

Although the word "resettlement" is much used, not everyone knows what it is – or means the same thing when they use the term.[2] In this article, and in the broadest policy sense, resettlement involves the selection and transfer of refugees from a state in which they have initially sought protection to a third state which has agreed to admit them with permanent residence status. Resettlement can be used when refugees can neither return to their country of origin, nor be protected effectively and integrate in their country of first asylum. There are three traditional and equal goals of resettlement: protection, provision of durable solutions, and burden sharing with host countries.

Asylum is a much better known tool of refugee protection in the developed world, especially in Europe, so it is useful to describe resettlement in comparison to asylum. Both resettlement and asylum can offer humanitarian protection and may form complementary elements in an overall refugee protection framework. However, the starting points of the processes are different. Resettlement is a program through which states decide *in advance* who they can help and select individuals whose protection they can guarantee after arrival. Resettlement can offer a durable solution in protracted refugee situations and can be a tool for the

managed arrival of refugees whose status is determined in advance of their travel. Domestic asylum systems, in contrast, should be maintained for people who have sought and requested, by their own means, the protection of a safe and rights-respecting state. Furthermore, asylum is anchored firmly in international and domestic law, and carries legal obligations, particularly in the area of *non-refoulement*. Resettlement may be governed by some domestic legal statutes, but is a discretionary act, and is often based more in policy than in law, even if admission through a resettlement program conveys legal rights to residence to the individuals selected.

Resettlement is a much more complex process than initially seems to be the case. It is resource intensive. It is worth doing well, because resettlement is both about giving refugees the opportunity to get their lives back and about reflecting the humanitarian values of receiving societies. The "right reasons" for doing resettlement include the traditional goals of offering protection, a durable solution, and burden sharing; but these goals can be put into effect by using resettlement to achieve both its humanitarian motives and some more utilitarian ends. Hence, UNHCR and the resettlement countries are engaged in discussion about the strategic use of resettlement in the context of the Convention Plus Forum.

2.1 Which Countries Resettle?

Eighteen countries have resettlement programs.[3] Four of them do not have operating programs as such; they are either under review by UNHCR or have been suspended from the list of "emerging resettlement countries." However, others are thinking of joining them. If one includes all eighteen countries listed below, in spite of the caveats about their operation, there has been a doubling of resettlement countries over a period of some seven years. The eighteen programs, in order of magnitude of permitted annual admissions, are run by: United States, Canada, Australia, Sweden, Norway, Finland, New Zealand, Denmark, Netherlands, UK,[4] Ireland, Brazil, Chile, Iceland, Argentina,[5] Benin,[6] Burkina Faso, and Spain.[7]

The U.S. has had an annual ceiling[8] of between 70,000 and 132,000 refugees each year over the past decade, and a total admission of 807,008 refugees through resettlement between 1993 and 2002. Canada has a target of some 12,000 refugees for resettlement across three types of resettlement program. Australia aims to receive 12,000 refugees per year, with precise resettlement numbers dependent on the number of asylum applications receiving a positive determination and thereby qualifying them as among the 12,000. Over the three fiscal years 2001–2003, Australia resettled 28,106 people and granted asylum to 10,437.[9] In the EU, Sweden has a quota for 1,000 resettlement places, Finland for 750, Denmark, the Netherlands and the UK have 500-person programs, and Ireland has a 10-case program, which could receive up to 60 people in total (in family groups which each form one case).

In preparation for the discussion below, it is worth noting that the U.S. has also has received 822,224 asylum applications between 1993 and 2002. Canada currently receives between 30,000 and 40,000 asylum applications annually. Australia's asylum-seeker arrival numbers fluctuate. The country received just over 12,366 applications in 2001 and just over 6,000 in 2002. All EU member states which resettle receive many more asylum applications than they have resettlement places[10] – and all experience the fluctuations in asylum statistics over the years that are common in the EU. No country that carries out resettlement in significant numbers has seen spontaneous arrivals of asylum-seekers disappear or dwindle as a result of resettlement. None of these countries has engaged in resettlement with the goal of offering an alternative route to the smuggling and asylum-seeking path.

2.2 How Does Resettlement Work?

Selection for resettlement is not as easy as saying, "Well, there are 20 million refugees, so let's resettle 100,000 of them." The process requires criteria to establish which of those refugees need resettlement (who cannot return, and are unable to integrate locally) and who among them might "fit" well with the domestic and foreign policy agendas of the receiving government. These agendas may have little impact on resettlement policies – it might be a matter of giving the destination state a humanitarian profile through the resettlement of the very vulnerable, for example. But the larger the resettlement program, the more various interests and needs must be addressed.

The U.S. has the most sophisticated resettlement system, with three active priority categories for selection. These are: (1) those referred by UNHCR; (2) those falling within designated groups of ethnic origin and/or country of first asylum; and (3) family members of people already in the U.S. from specified countries and who are refugees.

For all three categories, the refugee definition of the Protocol applies, modified to say that they should be outside the United States, rather than outside their country of origin. The second category is the most-used route. Its groups are designated annually, through consultation by the State Department with other government departments, UNHCR, and NGOs. The individuals to be resettled within these groups have assistance in preparing their cases from NGOs. UNHCR's role is limited to consultation during the group designation process. UNHCR has no central role in

the third category either. However, its role is key to the first priority. Until 2003 these referrals were only of individuals; in 2003, in an effort to fill a significant shortfall in U.S. arrivals, an agreement was reached for UNHCR to refer a group – some 7,000 refugees in Cote d'Ivoire. As is usually the case, the paperwork for all of these refugees was to be completed by a contracted NGO acting as an Overseas Processing Entity, prior to U.S. Immigration Service interviews with the candidates. Nonetheless, as always, the U.S. would not necessarily accept all UNHCR referrals: it is possible that the Immigration Service staff do not find a given individual to be a refugee according to their definition, especially as UNHCR employs its Mandate definition, which covers those fleeing conflict, for example. Indeed, the U.S. is striving to accept 50 per cent of UNHCR referrals, a clear indication that more than half have been rejected in recent years.

Since 2002, Canada has moved to limit applications for resettlement made directly by refugees to Canadian embassies, and has placed a much greater emphasis on referrals, chiefly from UNHCR. The Immigration and Refugee Protection Regulations of June 11, 2002, (section 150), require that applications for refugee resettlement be accompanied by a referral from a "referral organization" or from a private sponsor. Section 143 of the Regulations clarifies that "referral organization" means UNHCR or another organization with which the Department of Citizenship and Immigration has concluded a Memorandum of Understanding. Canada relies currently on UNHCR referrals and private sponsors to identify refugees for resettlement, and has not yet concluded agreements with any NGOs or other agencies.

The EU Member States with resettlement programs, and Norway, rely exclusively on UNHCR referrals for selection. The process is cumbersome, and some, most especially the Netherlands, also refuse some 50 per cent of the referred cases on the grounds that their Immigration Service finds the candidates not to be refugees according to the Dutch Aliens Act.

UNHCR is currently charged with referring some 50,000 refugees per year worldwide to all programs, including the U.S. and Canada. With relatively high rejection rates in some states, based not only on definitional differences but also, for the Europeans, on what they view as incomplete information on the referral forms, UNHCR is putting a lot of resources into resettlement. For the Europeans this includes a whole system of clarifying claims and funnelling referrals from the field through Geneva headquarters to the capitals (the U.S. and Canada receive referrals directly in the field, including through a new "hub" system in west and east Africa). All in all, it is resource intensive, and not clear that UNHCR either can or should be performing some of the functions, beyond identifying people as refugees. In spite of the apparent faith placed in the agency in the current European and Canadian systems, and the rhetoric about UNHCR's role in new resettlement programs, the high rejection rate shows there is not much trust among resettlement countries that UNHCR really knows who is a refugee.

3. What Might Be Strategic about Doing Resettlement: For Whom, and Why?

One of the goals of resettlement is solidarity with countries of first asylum. The experiences of Southeast Asian countries in the 1970s and 1980s demonstrate this. Thailand and Malaysia were persuaded to offer initial protection to hundreds of thousands of refugees from Vietnam only because they were assured that countries in North America and Australia as well as several European states would resettle the refugees. Austria was likewise in a position to receive and temporarily offer refuge to many thousands of refugees from Hungary in 1956, because other states were willing to organize their onward movement and protection. While solidarity is a traditional goal of resettlement, the implementation of the policy in search of this goal can also prove to be strategic. It can provide a way in which resettlement can serve a foreign policy function, while achieving a principled aim. Resettlement can be strategically used to support countries of first asylum, encouraging them to continue to offer at least short-term effective protection when major crises occur in neighbouring states.

Another goal of resettlement is to offer a durable solution to refugees who are in a protracted situation in which their short-term protection in a country close to home may have been effective, but they can neither return, nor reasonably stay in that country of first asylum for a long time. By offering a durable solution where resettlement is the only solution possible for an individual or group of refugees, resettlement countries can meet the protection needs of the refugees concerned, and can offer those refugees an opportunity for durable, effective protection, without the need to take personal risks to achieve that.

These applications of resettlement show how it can be effectively used as one of three durable solutions in a comprehensive approach, to the benefit of refugees and several states. Resettlement can also serve foreign and domestic policy agendas through resettlement criteria which respond to interest groups, as outlined above.

One myth about resettlement is the idea that states use resettlement for economic immigration purposes. Across Europe there are policy makers, practitioners, and academics who imagine the U.S., Canada, and Australia sending their officials into the world to find the most intelligent refugees in order to resettle them. Only one of these coun-

tries, Canada, uses "an expectation of self-sufficiency within three years" as a criterion in resettlement selection. Canada does not apply this criterion to vulnerable cases. In other cases it is applied chiefly through the instinct of the selecting officer; such an expectation is not measurable, and, anyway, it simply means having employment and not depending on welfare benefits. Any job will do: it is not a question of looking for the brightest or fittest. One only has to look at the groups that have been resettled in recent years to see that the notion of choosing the brightest and most likely to succeed is a total myth. That is not to say that the refugees resettled to the U.S., Canada, and Australia do not succeed – very many of them do. However, that success can be put down to policies that impact the refugees after selection for resettlement and *not* to criteria for selecting them in the first place.

The emerging thought in Europe is that if a country resettles refugees, as opposed to seeing them arrive spontaneously, the authorities know who they are, the people enter legally, and the process can be managed. To the extent that this can be true for those who are resettled, this thinking is correct: where it fails is in the implicit notion that because resettlement is conducted, there would not be spontaneous arrivals. It is ironic that as the EU sees opportunities to manage arrivals and have more information about the individuals arriving in advance, the U.S. is precisely seeing challenges to its resettlement program in the context of security concerns. On the one hand the State Department has concerns about US government personnel travelling to certain locations for resettlement selection interviews. On the other hand, Immigration officials certainly do not want to admit someone who turns out to be a terrorist in waiting. While the program has never previously been abused in this way, and is unlikely to see such abuse given the protracted camp life from which most resettlement candidates are drawn, it is a concern which since 9/11 seems to be bringing the program down. However, the U.S. has always used its resettlement program for foreign policy purposes, with the State Department as a driving force, while in the EU the push to consider resettlement is coming from Justice ministries and not Foreign Affairs.

4. The European Context

The discussion about appropriate ways to permit refugees to arrive lawfully in EU Member States is taking place outside the context of the work program set out in the Treaty of Amsterdam. A link to the work program is being made by the suggestion that resettlement has something to do with relations between the EU and countries in the regions of origin of refugees; however, such an international relations perspective to resettlement is not part of the experience of the traditional resettlement countries. Refugee resettlement is being considered more widely both in individual governments[11] and in the European Commission, as a way of managing the arrival of pre-selected refugees.

In the debate about resettlement in Europe, the role it can play in managing refugees' arrival in an orderly fashion has become prominent, and is seen as one facet of the potential strategic use of this protection tool. In the Conclusions to the Thessaloniki Summit in June 2003, the European Council took note of:

> ...the Communication from the Commission, which is focusing on more accessible, equitable and managed asylum systems, and invite[d] the Commission to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection, and to examine ways and means to enhance the protection capacity of regions of origin with a view to presenting to the Council, before June 2004 a comprehensive report suggesting measures to be taken, including legal implications.

The Communication from the Commission referred to above was in part a response to proposals tabled by the UK in February 2003.[12] The British government had proposed that transit processing zones be established in places distant from the EU, in which asylum applicants would be processed and, if determined to be in need of protection, moved on at some point to the EU. This proposal was later dropped, as there was little or no interest in it from other Member States. A further proposal, to look at protection in regions of origin, including capacity building for states in those regions, is still under investigation and the subject of pilot projects run by a small group of states including Denmark and the Netherlands. However, several Member States, including the Greek Presidency, and the two major traditional resettlement countries in the EU, Sweden and Finland, raised objections to the pursuit of the UK proposals. In the earliest iterations by the UK, these proposals included the notion that some people might be removed from the regions of origin if their long-term situation proved unstable. This was termed "resettlement" but little resembled traditional understandings of the concept. Concepts change over time, of course, but attaching resettlement to a duty for refugees to remain in their region of origin in the first instance would be a fundamental shift in thinking. Resettlement has long been attached to support for first asylum in regions of origin – but that is rather as an inducement to states in the regions to remain open to refugees, and not a constraint on those refugees' onward movement should they choose to seek asylum spontaneously further afield.

There seems to be a split between EU Member States on what the motives for resettlement are and what functions it

might allow the states to fulfill. Some governments appear to see assistance in resolving the asylum crisis as a motive for resettlement, whereas others see that as a potential function for this policy approach, which they maintain should be pursued for only humanitarian motives. This analysis of the divergence of opinion speaks to the first key point set out in the Introduction. It also raises questions about how strategically the discussion on whether or not to conduct resettlement is being managed within the context of a common goal of European integration on refugee protection, asylum, and immigration issues.

The relationship, or relative absence thereof, between asylum and resettlement is perhaps one of the most confusing points for European policy making. There would naturally be knock-on effects for the European Union's emerging Common Asylum System if the Member States decide to pursue resettlement to a greater extent than is currently the case. These effects would be on the level of the definitions used to determine protection need in the two systems: procedures employed for status determination and integration measures. Indeed, the area of proactive integration policies may be one of the most fertile for a positive impact of resettlement on asylum and immigration generally in Europe. Through advance knowledge of who will be arriving, tailor-made integration programs can be established, starting with pre-departure orientation for the refugees and orientation information for the receiving communities. Such orientation can make expectations on all sides more realistic than might often be the case and provide a basis of motivation for the refugees to learn the language and become independent actors in their new communities.

Expanding resettlement in Europe could be useful in the EU asylum debates for the potential it offers to transform public, political, and expert debate on refugee protection. Information about who refugees are, where they are coming from, and media (among others) following their active integration as part of the new society are all facets of resettlement which could usefully be used by governments to promote positive, humanitarian approaches to protection – and should be used to apply to refugees arriving through asylum as well as those who are resettled. This is not to say that resettlement offers answers to the perceived problems with, or even crises in, the asylum systems in European states today. Nor should resettlement provide any government with a humanitarian alibi for reneging on its human rights obligations to grant asylum to those who have fled persecution in their state of origin. Rather, resettlement should coexist with asylum as two elements in a comprehensive international protection policy. While attention is on resettlement there may be room to deal with the difficulties presented by asylum and irregular entries, in a climate which is more beneficial to good policy making and supportive of refugees than that which prevails today.

As noted above, the European Commission and some Member States see a potential for resettlement to be strategically used to manage a greater number of legal arrivals to the EU Member States than at present. As the number of such arrivals, in 2003, is less than 3,500, it can be said with certainty that the development of resettlement capacity across the EU would facilitate the managed arrival of *more* refugees. If this was the sole supplementary strategic end, beyond the humanitarian motives and traditional goals of protection, durable solution, and solidarity, it could certainly be achieved. Success in this straightforward achievement would not affect or be affected by fluctuations in asylum-seeker numbers. However, the strategic goal implied by some is that the managed arrival of more refugees would reduce the number of people arriving to seek asylum.

There is no objective evidence that this see-saw hypothesis in terms of numbers (shifting from high asylum arrival and low numbers of resettlement places to high numbers of resettlement places and low asylum arrivals) could in fact be valid. Even in the days of more than 150,000 resettlement places per year, the U.S. never saw a drop in asylum-seeker numbers. It did, however, see a significant drop when it introduced asylum reform legislation in 1995. Perhaps one reason for which such reform legislation could be introduced was the fact of there being a large resettlement program (at that time with a ceiling of 112,000 places – and in fact a drop in the resettlement ceiling in 1996 to 90,000 places).[13]

One reason for which resettlement does not impact asylum-seeker numbers is that the pools of people drawn on for resettlement and those groups which are likely to seek asylum are quite different. Many people seeking asylum in western states come from complex situations of conflict and human rights abuses in major states (*e.g.*, Russia) or places in which western governments hesitate to make clear-cut foreign policy choices backed by action. To resettle refugees, and more especially IDPs, from some of these situations would be to make a very decisive foreign policy statement. For example, the EU Member States are, in 2003–2004, seeing high levels of Russian asylum seekers. To enter Russian territory to select refugees for resettlement, and especially to select Chechens and others who claim to be suffering persecution now (as opposed to the U.S. resettlement activities in Russia which focus on past persecution), is quite unimaginable. What is more, in many of these cases, UNHCR is not present to protect and assist the populations, and so is not present to refer them for resettlement. In the cases of both Canada and the U.S., the lists of top ten countries of origin of asylum seekers see only

one or two cases of overlap with the lists of countries of origin from which most resettlement is conducted.

Furthermore, those people who are in need of resettlement are most often those with no durable solution to their protection need, as opposed to people with an immediate and urgent protection need. Asylum systems in western states have generally developed in such a way that they seek very clear indications of immediate danger to the individual seeking refuge. The refugee in need of resettlement might not be able to present such indications to the satisfaction of an asylum adjudicator, but will have no long-term protection and security. As such, it may be necessary, for example, to resettle from states that might otherwise be considered "safe" for the purposes of asylum, but not for long-term protection of particular groups. This was the case, for example, when the U.S. decided to resettle some 10,000 Bosnians from Germany in order to avoid their (forced) return to a Bosnia that the US considered not yet safe following the Dayton Accords of 1995.

The see-saw hypothesis forms a major distraction in the construction of strategic and sensible resettlement policies. It is not impossible to imagine the EU Member States setting up resettlement programs with selection criteria so tainted by a desire to address smuggling and high asylum seeker arrivals from particular countries that they would actually be ineffective in addressing genuine resettlement needs. Nor is it impossible to envisage a resettlement program developed according to principles and criteria appropriate to an effective use of resettlement as a tool of international protection, which after a couple of years would be deemed a failure because of (unrelated) rises, or lack of changes, in asylum seeker arrivals. The linkage does not appear to be strategic for global refugee protection.

As far as the European context is concerned there is a need, indicated in the discussion above, to reinforce the fourth key point set out in the Introduction: resettlement is *not* part of an asylum system. Both resettlement and asylum are elements in an international refugee protection system. Since Tampere, the EU Member States and European Commission have discussed the development of a Common European Asylum System. Asylum is something all Member States have long offered to refugees arriving in their territory and asking for protection. It was a natural place to start. The European Commission set out by discussing resettlement as part of the emerging common asylum system. However, it is not clear that this is appropriate, semantically, politically, or as a matter of fact. For example, those EU Member States with resettlement programs generally conduct them separately from their asylum systems, as do all other resettlement countries.

Asylum and resettlement are not interchangeable either as a means of arrival for any particular individuals or as approaches to refugee protection. Rather, both asylum and resettlement are part of any full tool kit for dealing with international protection needs. I would suggest that Europe should both broaden its approach and clarify its terminology. Conducting resettlement as part of a Common European International Protection System, of which an asylum system would also be a part, would be a useful and strategic approach.[14] In this case, once agreements on resettlement as a policy approach and not a legal obligation were in place, the Member States and Commission would have room, within a Common European International Protection System, to recast the other elements, including asylum, which have a legal basis. European populations would thus get the distinct, and accurate, impression of a new management approach to refugee issues.

The crucial question is whether there is political will among a larger number of Member States to engage in resettlement. Before beginning any type of resettlement program the EU must be fully aware of the necessary level of resource commitment and the need to cultivate partners that would allow the program to function optimally. In getting to the point of perhaps starting a broader resettlement program, the EU Member States must also think strategically about more than just the impact of resettlement on refugee protection: they need to ask if developing this approach is good for European integration, or whether the discussion itself is potentially divisive. They need to ask if conducting resettlement would be positive for Europe's role as a humanitarian player in the refugee protection regime. Clearly, the EU's motives for and goals in doing resettlement would be important in defining its role in the global refugee protection regime, and therefore the European standing in global discussions on the strategic use of resettlement is important to consider.

The Global Level: From Annual Tripartite Consultations to Convention Plus and Forum

The progress towards discussion of the strategic use of resettlement at a global level has been going on for some six years. One point of interest about this progress is that it has in general involved only UNHCR and resettlement countries: countries in the regions of origin of refugees from or through which refugees are resettled have not been involved at all, NGOs have been involved on some occasions, and resettled refugees themselves have been involved only on one occasion (the conference on the integration of resettled refugees in Norrköping, Sweden, in 2001).

A 1994 UNHCR evaluation of resettlement highlighted several areas in which improvements could be made for better UNHCR operation of resettlement opportunities.[15] Among the recommendations of the report (many of which, including this one, were acted upon) was the following:

> A multilateral forum for discussion and planning between UNHCR and major resettlement country governments and non-governmental organizations must be established, to ensure a fine-tuning of complementary interests and strategic planning to address the evolving needs for resettlement. Governments should be encouraged to reflect on the current realities in terms of needs for resettlement and to seek to modify policies and procedures accordingly. Providing a forum for discussion of the wide range of innovative steps taken by individual governments in recent years could provide fertile ground for such crucial developments.[16]

This multilateral forum was created in the form of a Working Group on Resettlement. That group is made up of states and UNHCR.[17] Coinciding with its meetings, Annual Tripartite Consultations, which involve states, UNHCR, and NGOs, are held.

One way in which existing resettlement countries felt they could usefully expand the role of resettlement was by expanding their own number through the addition of new resettlement countries. One development towards this end was the creation in 1997 of a Trust Fund. This fund applied the money which otherwise would have been spent on fifty resettlement places each in Norway, Denmark, and Sweden, with additional funds (not in lieu of resettlement places) from Finland and the U.S. The Fund financed initiatives to encourage emerging countries of resettlement and projects to enhance opportunities for individual and small groups being resettled and to improve the implementation of resettlement activities.

Part of the initial, Nordic thinking was that it would be more efficient to have some resettlement places in small, poorer countries which would be paid for by richer countries. However, in December 1998, UNHCR pointed out that this thinking was flawed, not least because the assumption that poorer countries would welcome the opportunity to develop refugee protection potential with funding from elsewhere proved inaccurate.[18] It became apparent to UNHCR that the capacity for the development of new resettlement programs outside Europe was limited. While eight emerging countries of resettlement had joined the ranks by 2000, only three of them were still active in 2003 (Brazil, Chile, and Ireland). The UK joined this list in 2003 also, but it, like Ireland, was not stimulated by activities supported by the Trust Fund.

The U.S. contributions to the Trust Fund supported other initiatives, including the Norrköping conference on integration of resettled refugees, and the two Handbooks, one on resettlement programs and admission to those programs and one on integration.[19]

Meanwhile, the Global Consultations process led to an Agenda for Protection, which addresses both the burden-sharing aspects of resettlement and the need for a stronger focus on durable solutions.[20] In order to build on this Agenda for Protection, the High Commissioner called for the development of special agreements to complement the Convention, which he called "Convention Plus." An arena called the Forum was established for the discussion of particular subjects of interest. The Forum's first meeting, on 27 June 2003, focused on resettlement. At this meeting, the Canadian delegation tabled a discussion paper, "Resettlement and Convention Plus Initiatives," suggesting that resettlement, in the context of an approach to all durable solutions, could be an ideal area for partnership agreements between states, UNHCR, and NGOs. This paper had been in development in the Working Group on Resettlement, under Canadian chairmanship, after the initiative to discuss the strategic use of resettlement was put forward by Australia. Drawing largely on its own resettlement program for context, the Canadian delegation suggested that it could, together with UNHCR, lead further discussions beyond this initial meeting. The Canadian document also drew attention to important points which are key to contemporary discussion of resettlement, including:

- Solutions are only durable when they result in a refugee having secure legal status in the country providing the durable solution.
- As an administrative decision, resettlement can be a timely and cost-efficient durable solution.
- The inclusion of protection-based criteria that go beyond the 1951 Convention would help to make resettlement a more flexible tool.

The three goals of resettlement as a durable solution, a protection tool, and a burden-sharing instrument remain paramount. As noted above, resettlement programs are nonetheless often shaped by other functions.

It should be noted that motives, goals, and functions are quite different facets of any policy. In the case of resettlement, the motive is humanitarian; the goals are protection, a durable solution, and burden sharing; and the function can be any of the strategic uses to which states put resettlement, *e.g.*, to support their foreign policy aims, to show solidarity with domestic ethnic communities, or, potentially, to counterbalance their asylum systems by offering a means for managed and organized arrival for refugees as well as the irregular entry which the seeking of asylum often necessitates.

The UNHCR Working Group on Resettlement, in its paper *The Strategic Use of Resettlement*,[21] noted that the managed and orderly arrival of persons in need of international protection could result from resettlement. The Commission's Communication of 3 June 2003[22] indicates that EU Member States might indeed find the political will to pursue resettlement as a way to provide for "managed and

orderly arrivals of persons in need of international protection." This could potentially be an intended additional function of resettlement for EU states. However, the *motive* of resettlement should remain humanitarian. It is a normative contention: but converting a function (a desired or intended consequence) of a policy into a motive for operating that policy is quite dangerous, as it leads to the potential undermining of a path which originated in genuinely altruistic and noble motives.

The concern to manage the arrival of refugees can be, and is being, interpreted as a desire to limit asylum seeker admissions. The Canadian Council for Refugees (CCR), in response to the Working Group paper *The Strategic Use of Resettlement*, stated that "Resettlement… is not an 'orderly' alternative to asylum."[23] However, managing the arrivals of more refugees successfully, and using resettlement strategically to achieve that goal, should not have to mean that states seek to reduce or prevent asylum seeker arrivals.

Reactions such as CCR's are in large part inspired by the European debate on resettlement as a response to high asylum seeker numbers, as described above, as well as by Australian practice. In order to avoid such reactions, it would be useful if EU Member State governments, the European Commission, and other resettlement countries which seek to stimulate greater participation in resettlement by the EU states could make clear that their intention in promoting this potential function of resettlement is not to suggest that the EU could or would close down, or further limit, access to asylum procedures. Although the European Commission has frequently written that asylum must remain open, both its, and Member States', representatives send mixed signals as the UK "vision" paper and the discussion it provoked demonstrate.

Although resettlement could not accomplish the function of significantly reducing asylum seeker numbers, it could certainly be used as a response to the indicator, which high arrival numbers give, that there is a refugee crisis going on somewhere. Then EU Member States could engage actively in selecting, resettling, and protecting refugees, thereby allowing or persuading states in the region of origin to provide protection to more people, knowing onward, managed movement is available. Such a use of resettlement would be strategic in offering protection, showing solidarity, and bolstering the EU's reputation as a humanitarian actor.

Conclusions

The strategic use of resettlement is a multi-faceted idea. European states would have several strategic reasons for engaging in resettlement other than any potential or desired impact on asylum seeker arrival statistics. They are also the most likely new resettlement countries, the ones that have the potential to create the most effective new, large-scale resettlement programs. Collective strategic engagement in resettlement could significantly strengthen the EU harmonization process. It would also be strategic for the EU to engage in resettlement because the image of resettled refugees is generally more positive than that of asylum seekers, but also often has a "knock-on" effect, meaning that the public gets more information and understands more about the situations from which both resettled refugees and asylum seekers have fled.

As a matter of strategy, EU Member States should view resettlement as part of a comprehensive approach to protection, which includes other durable solutions and is linked to the EU's external relations as well as its overall immigration and asylum policy development.

These benefits of the development of broader resettlement programs can be much more important in demonstrating that governments are managing the refugee protection issue well than any impact those programs may or may not have on actual numbers of arrivals.

For Europe, and therefore for the global refugee regime, to engage strategically in resettlement, the distinction between motive, goals, and supplementary functions needs to be established. Resettlement needs to be clearly distinguished from asylum. The debate on resettlement places replacing asylum arrivals numerically should be closed. Any potential impact on asylum seeker numbers could better be handled as an unintended consequence, rather than as a direct desire without which resettlement will be viewed as ineffective. The perception of resettled refugees, through appropriate explanations of policy and the people affected in the media, for example, should be managed in such a way that one of the knock-on effects between resettlement and asylum seeking is an improved image for all refugees as people in need of protection. In this way, the strategic use of resettlement could change the face of protection, and benefit all refugees and all states engaging in the full range of protection tools.

Notes

1. The European Commission contracted the Migration Policy Institute to conduct the *Study on the feasibility of setting up resettlement schemes in EU Member States or at the EU level, against the background of the Common European Asylum System and the goal of a Common Asylum Procedure*. This study was completed in September 2003 and is available at <http://www.europa.eu.int/comm/justice_home/doc_centre/asylum/studies/docs/resettlement-study-full_2003_en.pdf>. The U.S. Department of State contracted Professor David Martin to conduct a study of its refugee admissions program. The report of the study, tentatively entitled *The U.S. Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement*, is likely to be released in early 2004.

2. For discussion of this point, see Gregor Noll and Joanne van Selm, *Rediscovering Resettlement* (MPI Insight No.3, December 2003), http://www.migrationpolicy.org/insight/Insight_3_12-2003.pdf.
3. The programs are all described at length in the feasibility study cited above at note 1.
4. The UK's program started in April 2003. While the first selection missions have taken place, no refugees have arrived at the time of writing.
5. Argentina has been removed from the list of emerging resettlement countries.
6. The programs in Benin and Burkina Faso have been suspended and are under review.
7. Spain has been removed from the emerging resettlement countries list, as there had been no arrivals for three years, and there was no fixed quota, just an *ad hoc* policy.
8. Resettlement countries attribute numbers to their resettlement programs. The U.S. operates a *ceiling*, *i.e.,* an upper limit. The logic to this is that there is a maximum number for planning, but a conscious desire to say that there might not be that many refugees in need of resettlement in any given year. In fact, the arrivals have always fallen short of the ceiling, and often by several thousand (by 30,000–45,000 in 2002 and 2003), and this has caused public and political dismay. The European states that conduct resettlement use quotas and the aim then is to meet that number but not exceed it. Sweden and Finland generally fill their quotas; the Netherlands has fallen short for several years now. Canada uses *targets,* allowing them to fall short or exceed the set number by a reasonable margin and still be on target. The feasibility study on resettlement for the European Commission suggests a target band approach for the European Union, with a bidding process for individual Member State targets within the band that is set for the whole.
9. In that three-year period, 167,814 applications for resettlement were received, and 26,758 for asylum.
10. The proportions are smallest for Finland at about three asylum seekers for every resettled refugee. Finland purposefully resettles refugees in order to increase its role in refugee protection in the EU context, since its asylum-seeker arrivals are proportionally small.
11. Besides the UK and Ireland as mentioned above, the German ruling coalition parties (SDP and Greens) included the development of a 500-person resettlement program in their coalition agreement in 2002.
12. Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, Brussels, 3.6.2003 COM(2003) 315 final. The UK proposals were widely known as "A New Vision for Refugee Policy" and were first leaked in the *Guardian* newspaper on 5 February 2003.
13. Resettlement ceiling, arrivals, and asylum arrivals in the U.S. at the time of the 1995 Asylum Reform Act and its impact were:

	Resettlement Ceiling	Resettlement Arrivals	Asylum Arrivals
1995	112,000	99,490	148,695
1996	90,000	75,693	107,130
1997	78,000	70,085	52,217

14. The suggestion of a Common European International Protection System, incorporating a Common Asylum Policy, a Common Resettlement Program, an EU Temporary Protection approach, and EU humanitarian assistance and capacity building programs, is set out at length in the feasibility study on Resettlement (see note 1, above) and in "The EU as a Global Player in the Refugee Protection Regime," Working Paper No. 35, Academy for Migration Studies in Denmark (AMID), forthcoming at http://www.amid.dk/pub/index.html.
15. John Fredriksson and Christine Mougne, *Resettlement in the 1990s: a review of policy and practice*, UNHCR EVAL/RES/14, 1994.
16. *Ibid.*, 9 (emphasis added).
17. The European Commission and IOM are also involved in the Working Group. It reports to the UNHCR Executive Committee.
18. Danish Immigration Service, "Evaluation of UNHCR's Trust Fund for Enhancing Resettlement Activities" (undated mimeo with the author of this article).
19. UNHCR, Division of International Protection, *Resettlement Handbook* (Geneva, July 1997; revised July 2002) and UNHCR, *Refugee Resettlement: An International Handbook to Guide Reception and Integration* (September 2002).
20. Goals 3 and 5 in the Agenda for Protection, http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=EXCOM&id=3d3e61b84. See also EC/GC/02/7 *Strengthening and expanding resettlement today: dilemmas, challenges and opportunities*, for Global Consultations on International Protection 4th Meeting, Third Track.
21. *The Strategic Use of Resettlement: A Discussion Paper Prepared by the Working Group on Resettlement* WGR/03/04.Rev3 (3 June 2003).
22. Commission of the European Communities, *Towards more accessible, equitable and managed asylum systems*.
23. Canadian Council for Refugees, A Working Paper on the Strategic Use of Resettlement (June 2003).

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Globalization, Security, Paradox: Towards a Refugee Biopolitics

Benjamin Muller

Abstract

How can we think, imagine, and make authoritative claims about contemporary refugee politics? I believe this question must precede investigations into struggles/movements advocating rights and political voice for refugees. It is important to come to terms with the changing terrain of refugee politics, in order to (re)conceptualize it and provide some idea of how/where such struggles might be fought. Focusing on the colliding commitments to globalization and security, particularly since September 11, 2001, I argue that "paradox" is a core element of refugee politics. To some extent, this has been rehearsed elsewhere, and I point to the highlights in the existing literature. I suggest that an approach sensitive to Foucault's account of governmentality and biopolitics is particularly helpful, stressing the diffuse networks of power in refugee politics among private and public actors, the increasing role of "biotechnology," and some (re)solution to the globalization – domestic security paradox, leading to what I call the "biopoliticization of refugee politics." Examined here are the politics of asylum and refugee movements in the UK. In particular, the 2002 government White Paper on immigration and asylum – Secure Borders, Safe Haven – provides an example of the changing terrain of contemporary (post-September 11) refugee (bio)politics.

Résumé

Comment pouvons-nous arriver à penser, à formuler et à adopter des positions qui fassent autorité sur les politiques du droit d'asile aujourd'hui? Je suis d'opinion que cette question doit précéder tout examen des luttes et des mouvements qui militent pour des droits et une voix au chapitre (politique) pour les réfugiés. Il est important d'être bien au fait du paysage changeant des enjeux politiques entourant le droit d'asile, afin de pouvoir le re-conceptualiser et fournir une idée de comment et où de telles luttes doivent être menées. Me concentrant sur les objectifs opposés de la globalisation et de la sécurité, tout spécialement après le 11 septembre, je propose que le « paradoxe » est un élément clé de la politique sur le droit d'asile. Dans une certaine mesure, cela a déjà été décrit ailleurs, et je souligne donc les passages importants dans la littérature existante. Je suggère qu'une approche qui serait ouverte à la thèse de Foucault sur la « gouvernementalité » et la bio-politique est particulièrement utile, soulignant le réseau de pouvoir diffuse qui existe dans les enjeux politiques autour du droit d'asile parmi les protagonistes dans les secteurs privés et publics, le rôle grandissant de la bio technologie et quelques solutions du paradoxe globalisation et sécurité intérieure, et menant à ce que j'appelle la « bio-politisation des enjeux politiques du droit d'asile ». Nous examinons ici la politique du droit d'asile et les mouvements de défense des réfugiés en Grande Bretagne. Le livre blanc de 2002 sur l'immigration et le droit d'asile, intitulé « Secure Borders, Safe Haven » ('Frontières sécurisées, havre de paix'), illustre bien les changements qui s'opèrent dans le paysage de la (bio) politique contemporaine (post 11 septembre) sur le droit d'asile.

> *If the nomad can be called Deterritorialized par excellence, it is precisely because there is no reterritorialization afterward as with the migrant, or upon something else as with the sedentary (the sedentary's relation with the earth is mediatized by something else, a property regime, a State apparatus).*
>
> Gilles Deleuze and Felix Guattari[1]

1. *Post-September 11 Refugee Politics: Resolving Paradox?*

The events of September 11, 2001, and the aftermath with which we continue to live have touched almost all corners of political life. Almost immediately, conventional geopolitics were pulled from the dustbin of history, arguments about civilizational conflict gained unprecedented respect, and *realpolitik* had yet another renaissance.[2] However, the fact that this was caused by what many consider to be one of the clearest examples of globalization and/or transnationalism is often lost. Accounts of globalization sensitive to networks, simultaneities, multiple identities, fluid capital, and dramatically altered spatio-temporal relations proliferated, as these became increasingly accepted elements of daily life in late/post modernity. Yet in a puzzling reversal of fortune, the aftermath of September 11 saw states respond with conventional geopolitics, preoccupied with conventional international relations themes, such as sovereignty, borders, and bounded identities. Unfortunately for asylum seekers and forced migrants around the world, there was one exception.

Following the events of September 11, culminating most notably in the United States's creation of the Department of Homeland Security, states across the globe heightened border controls, increased passport restrictions, and embarked on an overall clampdown of movement.[3] As the U.S. government's policies at the U.S.-Mexico border and the Schengen Information System (SIS) in the European Union (EU) prior to September 11 indicate, the proliferation of technologies of control and surveillance used by states to monitor and discipline movement is not unprecedented. The situation facing refugees nonetheless appears to be worsening. In the United Kingdom Tony Blair's support for George W. Bush's campaign against Iraq coupled with the government's decision to introduce restrictive quotas on the number of asylum seekers to the UK is troubling. While the asylum story in the UK can be explained partially by domestic pressure from the Conservative opposition, the events of September 11 have allowed such arguments to be couched in discourses of threats and security.[4] We might ask how social movements, NGOs, and refugees themselves are coping with such an alteration in the global politics of movement. However, this paper focuses on the prior question about how we can (re)think and make authoritative claims about refugee politics. It highlights a core paradox between the "need" to increase domestic state security in light of the terrorist threats, and the continuing commitment to neoliberal globalization, and the extent to which a further "biopoliticization" of refugee politics provides a way of coping with this paradox.

Refugees find themselves at the centre of the core paradox between globalization and domestic security for a number of reasons. States committed to neoliberal globalization must sign onto its principles, one of which is the (relatively) free movement of capital, goods, services, and labour. One of the most advanced instances of this "free movement" is in the EU, where the member states signed onto Schengen have committed themselves to a kind of "borderless" union. However, states simultaneously wish to retain control over the "identity" of their nations and who is included (and excluded) *vis-à-vis* citizenship; and, particularly after September 11, domestic security is high on the agenda. Therefore, while it is important to allow labour mobility to serve the (perceived limitless) growth of the post-Fordist global economy, undesirables might still sneak in the back door. What is particularly puzzling since September 11 is the extent to which the terrorist attacks were in many ways exemplars of transnationalism, globalization, and postmodernity. Rather than follow the familiar model of state hierarchy, it seems terrorists have exploited the conditions of possibility in contemporary globalization organizing as transnational networks with various so-called "cells," using complex telecommunications, and, as the attacks of September 11 demonstrated, very astute about the power of the mediated image. Similarly, international human traffickers, and indeed refugees themselves, are to some extent more astute about the "new realities" of globalization, while states continue to suffer from the theme of Gulliver.[5] In this sense, refugees are at the intersection of this paradox between globalization and security.

In this paper I explore this paradox between globalization and domestic security, and the impact it has on the politics of asylum. How does it alter the terrain upon which refugees are able to act? And, perhaps more importantly, to what extent does this change our ability to speak, think, and make authoritative claims about refugee politics? I begin the discussion by engaging with Nevzat Soguk's argument about the paradoxical status of refugees *vis-à-vis* state sovereignty, and explore this argument in light of the events of September 11 and their aftermath. This is followed by a brief discussion of Foucault's governmentality approach, focusing on the idea of biopolitics and bio-power. I then examine contemporary refugee politics in the UK in light of these theoretical offerings, highlighting how the UK has attempted to cope with the paradoxical commitments to globalization and security in the area of refugee politics. I argue that the UK White Paper entitled *Secure Borders, Safe Haven* exemplifies both the paradox of globalization and domestic security in contemporary refugee politics, as well as the extent to which we are witnessing a "biopoliticization" of refugee politics. Foucault's notion of biopolitics is

helpful in uncovering the complex nature of refugee politics and how states are coping with the paradoxical commitments to globalization and domestic security. I conclude by raising a series of questions about how refugee politics have changed in the aftermath of September 11, returning to the central preoccupation with how we can (re)think and make authoritative claims – and thus act *politically*, whether challenging the speechlessness of refugees, or acting as rights advocates – about contemporary refugee politics. Biopolitics allows a way in, that helps to (re)conceptualize the terrain of refugee politics, highlighting states' management of the globalization-domestic security paradox, as well as providing a richer account of the diffuse networks of power among private and public actors, and the role of (mis)representations of refugee politics. For movements occupied with the rights, protection, and challenge against the political speechlessness of refugees are aided by such a topography of refugee politics that helps to uncover possible spaces and sites of struggle.

2. Sovereignty and Refugee (Bio)politics

> *As suggested, the very refugee or migrant bodies, which, while at first undermining, for instance, a state's ability to produce the claim that it is in control of its proper territories/borders, at times also become a source of re/presentation for the state(ism) whereby the state(ism) poses itself as an ontological necessity (being). I shall call this situation the 'paradox of the representable refugee'.*
>
> Nevzat Soguk[6]

This passage from Nevzat Soguk's account of refugees/migrants at the U.S.-Mexican border highlights the core of his argument, focusing on the paradoxical implications for practices of state sovereignty that the "refugee presences" afford.[7] Soguk's "paradox of the representable refugee" is an empowering tool. It provides an account of the often complex and seemingly contradictory role refugees and migrants have in world politics, particularly in relation to practices of state sovereignty. As Giorgio Agamben astutely puts it, refugees "put the originary fiction of modern sovereignty in crisis."[8] In a rather similar manner, Michael Dillon argues that:

> … the advent of the refugee always brings to presence this: the scandal of the human as such… as a form of making that results in a technologising of politics, seeks to save us; and in the process subject us to novel, possibly terminal, globalised terrors and dangers.[9]

The "scandalous" nature of the refugee fits closely with both Soguk's and Agamben's characterization of refugees. Refugees highlight the fragility of modern sovereignty and the "imagined communities" in which we live. This is, of course, nothing new. But what of the refugees themselves? In the next section of this paper I engage directly with the post-September 11 refugee politics, with specific reference to the situation in the UK. At issue here is the struggle to obtain rights and political voice, and how this terrain upon which this struggle is pursued, and even the conditions under which it is possible to think, imagine, and make authoritative claims about refugee politics in the post-September 11 context, characterized by a paradoxical preoccupation with globalization and domestic security. In this section, I suggest that an approach sensitive to Foucault's account of governmentality and biopolitics, in conjunction with other accounts such as Soguk's, provides a clearer picture of the changing nature of contemporary refugee (bio)politics, the focus being to open up the possibility to further (re)think and make authoritative claims about the politics of contemporary refugee movements. However, a closer examination of Soguk's argument is worthwhile before progressing.

While the kinds of arguments evoked here from the likes of Agamben, Dillon, Soguk and others are increasingly accepted among observers, the conventional story of world politics *vis-à-vis* the discipline of international relations fails to recognize the "scandalous" nature of the refugee, whether in terms of practices of state sovereignty, the construction/definition of "human," and articulating the "body politic." Here, the concern is with how the events of September 11 and their aftermath have altered the terrain of refugee politics, and how the conditions under which we can ask questions, think, and make claims about refugee politics have changed. The struggle for rights and political voice is critical. For Soguk, the voicelessness of the refugee is unquestionable. However, rather than linking this to the disadvantaged predicament of the refugee, or the failure to have the proper political subjectivity of state citizenship, Soguk argues that "refugee discourse" is responsible for this "speechless" condition.[10] Questions of representation are critical, and the post-September 11 context is no different. The discourse has shifted, from one of humanitarianism, where questions of hospitality or cruelty may have entered in, or more identity based distinctions between the unknown alien and the familiar citizen; refugee politics has been drawn into a discourse of security and threat. As Soguk argues, "the privileging of the citizen/nation/state ensemble as the hierarchical imperative of life activities is not unsurprising."[11] These are linked to a core practice of sovereign power: territorializing practices. Soguk has argued elsewhere that:

> … sovereignty claims, connected inescapably to some understandings of space/territory/identity [citizen/nation/state], are

> territorializing practices in the quest for constructing 'representable' essences, meanings, identities and cultures.[12]

By invoking the notion of "territorializing practices," Soguk reminds us of something raised in Deleuze and Guattari's *A Thousand Plateaus*: that is, the extent to which the migrant or refugee is not truly "deterritorialized"; only the nomad is in such a condition, *par excellence*.[13] This is relevant to the extent that it reminds us that while the refugee certainly highlights the "originary fiction of modern sovereignty" stressing the fragility of borders, bounded identities, and the doctrine of modern sovereignty itself, the very core of what can be referred to as "refugee politics" is the very act of "reterritorialization" that makes the refugee, the forced migrant, the trafficked person, a temporal/temporary condition. Herein lies the paradox, where the refugee is at once both the representation of sovereignty's limits and a target of sovereign power. Or, as Peter Nyers has argued in a similar context: "The refugee is thus at once the purest expression of humanity, and also its constitutive limit."[14]

Considering Soguk's "paradox of the representable refugee," and its ability to highlight the dual character of the refugee, as both subject of resistance and product of statecraft, takes us some distance in considering to what extent refugee politics are recast in a post-September 11 context. However, while it is important to highlight this dual character of the refugee in world politics, there is still more to say. In pursuing how we might begin to (re)think and make authoritative claims about contemporary refugee politics, I argue it is necessary to introduce an account of modern politics sensitive to the diffusion of power and the centrality of "the politics of the body," so fundamental to contemporary refugee politics. To this end, I examine briefly what Michel Foucault's discussions of governmentality and biopolitics can offer.

2.1 Biopolitics

> *For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.*
>
> Michel Foucault[15]

According to Michel Foucault, "biopolitics" is about the intervention and regulatory controls of populations.[16] Foucault argues that "diverse techniques for achieving the subjugation of bodies and the control of populations" marks the beginning of an era of "bio-power."[17] Bio-power introduces a critical element of Foucault's "governmentality": the relation between security, territory, and population.[18] Bio-power serves to politicize what Giorgio Agamben refers to as "bare life," making biological existence political.[19] As the passage above poignantly states, biopolitics is a specifically modern form of politics where the biological existence of humanity is politicized, and the veil between the public and private is pushed aside. The administration or "governmentality" of the management of life through (bio)technologies of health care, education, housing, passports, etc., places various "spaces of existence" into the realm of the sovereign's power. As Foucault clearly demonstrates in his genealogy of the prison, the modern technique of punishment employs "disciplinary power" or techniques of coercion in order to train or correct "the body," which is in dramatic contrast to previous approaches that involved the ritualistic marking of the body through terror and torture.[20] In summary, biopolitics marks the modern move from the sovereign power over death, to the sovereign power over life, which is bio-power. This has very important administrative and "governmental" implications.

The move from sovereign power over death to sovereign power over life involves the increased regulatory and corrective mechanisms of the state that exert forms of "disciplinary power" in order to maintain power over life – bio-power. This rearticulation of sovereign power, or what Agamben refers to as the transformation of sovereign power from "territorial state to state of population,"[21] is not, by and large, acknowledged by international relations theory. For the most part, international relations continues to read/represent sovereign power as the power over death; the capability of killing in order to go on living.[22] Hence capital punishment could not be maintained except by invoking less enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One had the right to kill those who represented a kind of biological danger to others.[23]

Foucault suggests that state-sponsored killing must be articulated on biological grounds lest it contradict the sovereign power over the maintenance of life. Here, the merits of drawing on biopolitical knowledges to conceptualize "refugee politics" is clearer. Rather than reading the subjectivity/activity of the refugee through international relations, where one is primarily drawn into debates about the maintenance of (or threats to) territorial understandings of sovereign power, biopolitical knowledge politicizes both the actions of the refugees themselves, and the (seemingly mundane) administrative procedures of the state directed at them. The (re)presentation (demonization) of the refugee as a sick body, terrorist, threat to identity, etc., plays out in the governmentality of the state *vis-à-vis* complex border controls that differentiate on the basis of race, class, economic need, "well-founded fears,"[24] health, and a host of

other (arguably arbitrary) categories between the legitimate and the illegitimate, the banal asylum seeker, and the terrorist, the disease carrier, the job thief.

3. "Camps with En-suites": UK Refugee Biopolitics

> *… we need to send out a signal to the world that we are neither open to abuse, nor a 'Fortress Britain'… It is possible to square the circle. It is a 'two-way street' requiring commitment and action from the host community, asylum seekers, and long term migrants alike.*
> David Blunkett MP, Foreword, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain,* February 2002

> *With its en-suite facilities and comfortable dining room, the 62-bedroom Coniston Hotel has been a favourite Sittingbourne venue for receptions and functions. Now angry residents claim that it will become a 'doss house'.*
> *The Times,* January 20, 2003

> *The immigrants to be dumped in Sittingbourne would have had no health checks for diseases such as tuberculosis or Aids or other contagious diseases. They could be war criminals or paedophiles and Tony Blair wouldn't care as long as they live in your street and not his.*
> British National Party (BNP) Leaflet distributed in Sittingbourne, January 2003

The passages above provide certain "representations" of contemporary refugee politics in the UK. The title of the 2002 White Paper produced by the government hints at the "paradoxical" nature of contemporary refugee politics: *Secure Borders, Safe Haven*. In the foreword, the Home Secretary, David Blunkett, stresses the importance of processing/accepting asylum seekers with a "well-founded fear," providing clear channels/chunnels[25] for those economic migrants who "wish to work and contribute to the UK," while maintaining a robust system for rapidly processing bogus claimants and tackling international human trafficking. Certainly these are admirable goals, most of which were later put down in the Nationality, Immigration and Asylum Bill. The increased preoccupation with domestic security after September 11 is absent from the White Paper and the bill itself. However, as recent media accounts of Conservative calls to overhaul the asylum system and even pull out of the European Convention on Human Rights suggest, discourses of threat and security are not absent.[26] In this section I focus on three issues/occurrences in contemporary UK refugee politics: the government's White Paper, *Secure Borders, Safe Haven*, February 2002; the murder of Detective Constable Stephen Oake on January 15, 2003; and the scandal surrounding the conversion of the Coniston Hotel in Sittingbourne, Kent, into a refugee reception centre. These three issues expose the UK's attempts at "squaring the circle," to use the Home Secretary's language, when it comes to a continued commitment to globalization and the post-September 11 preoccupation with domestic security, as well as the increasing biopoliticization of refugee politics.

The White Paper, *Secure Borders, Safe Haven*, which came out in February 2002, led to the Nationality, Immigration and Asylum Bill 2002, intended to make necessary adjustments to the existing act from 1999, reflecting the contemporary realities in the politics of asylum. What were those realities? Most notably, the events of September 11 prompted nations to clamp down on migrants and refugees, as borders were (re)securitized. The Red Cross refugee camp at Sangatte continued to be a thorn in the side of UK officials, leading to a sizable amount of resources dedicated to issues of human trafficking and the problem of so-called "asylum shopping" in Europe.[27] The seeming complacency of French officials when it came to the "porous" nature of Sangatte raised questions about the efficacy of the Dublin Convention[28] and was one of the contemporary issues preoccupying UK refugee politics. What is also clear from *Secure Borders, Safe Haven* is the centrality of the paradox between a commitment to globalization and domestic security. Under the subheading "The Challenge of Globalization," the White Paper mentions the increased interconnectedness and interdependence in the world, and the need to further liberalize movement, which was under negotiation in the WTO.[29] The material ability to move and the economic necessity for service delivery is acknowledged, as, interestingly, is the idea that the line between the international and the domestic is increasingly problematic: "Globalization also means that issues previously considered 'domestic' are now increasingly international."[30] Taking account of the unique position within the EU but not part of Schengen, as well as the rather complex paradox between globalization and domestic security, the UK White Paper is a reasonable characterization of refugee politics after September 11. Of course, there is still the question of how the state deals with these new imperatives, of which the answer can also be found in *Secure Borders, Safe Haven*: biopolitics.

In a section entitled "Biometric Registration," the White Paper introduces a series of measures and mechanisms intended to both "detect and deter clandestine entrants," as well as increase the speed and management of legitimate migrants.[31] These measures are carried out by employing "biometrics technology." These technologies of control are there to "discipline" movement and expose human traffick-

ing. The measures themselves are based on a number of technologically advanced scanners:

> X/gamma ray scanners; Heartbeat sensors… which can detect, by its movement, the heartbeat of a person concealed within a stationary vehicle; and, millimetric wave imaging equipment (tested by Eurotunnel)… which senses radiation emitted from within a vehicle.[32]

While these technological controls over movement might fit Foucault's suggestion that the "governmental" is about the politicization of the mundane, bureaucratic, mechanistic elements of power, this seems all but mundane. Not to mention the questions this raises about relations between body and machine,[33] it highlights important steps in biopolitical security being taken by the state. Furthermore, as the White Paper points out, some of this equipment has already been tested by Eurotunnel, which is a private firm responsible for managing the Channel Tunnel rail system. If bio-power is about the relationship between territory, security, and population, then the employment of biometric technologies appears to be a clear example of bio-power. Furthermore, the introduction of private actors into the equation not only indicates the diffuse nature of power in contemporary refugee politics, but it also points to another critical element of the relationship between biopolitics and the globalization-domestic security paradox: by involving private actors, neoliberal ideals of small government, privatization, efficiency, and so on are not sacrificed at the altar of domestic security. However, the scandal surrounding the conversion of the Coniston Hotel takes this contention further.

In mid to late January 2003, residents of some communities in the UK became aware of the transformation of certain hotels and large estate homes into so-called "induction centres." These centres are intended to house asylum seekers for their first two weeks in the UK as their claims are processed. While public opinion was rather robustly against the government move to acquire local hotels and wedding reception facilities in order to house undesirables, it was not completely because of the act itself or the kind of xenophobic fervour whipped up by far-right groups such as the British National Party (BNP). What seemed, at least in some media accounts, to be the most enraging to residents was the fact that the government had taken such steps without community consultation. As one headline proclaimed, "'Back Door' Refugee Centres Anger Residents,"[34] and here "back door" can be read to have a double meaning, as both the "back door" approach the government took in placing these centres into communities, as well as such seemingly insecure facilities acting as "back doors" for asylum seekers to slip into the community. I raise this episode here for a number of reasons.

First, the government's decision to acquire private facilities, run by private actors referred to as "accommodation specialists,"[35] is one way of coping with the paradoxical commitments to neoliberal globalization and domestic security. Here, the state transfers authority to private actors, maintaining small government, privatization, and efficiency. In material terms, this move also released the government from the spatial restrictions of where to place induction and reception centres, therefore enabling it to further its commitment to the dispersal of asylum seekers beyond the southeast of England. Another important consideration in the hotel incident is the public reaction. While the loss of certain amenities to the community, as seemed to be the case with the Coniston Hotel in Sittingbourne, undoubtedly drew criticism, issues of security and privatization of asylum politics were equally troubling.

It is important to note that the episode regarding the conversion of hotels and estate homes into induction centres came less than one week after the murder of Detective Constable Stephen Oake. On January 15, 2003, as part of an anti-terrorist operation in Manchester, Detective Constable Stephen Oake was killed by an Algerian asylum applicant, and as the two articles appearing side by side in *The Times* newspaper the following morning indicate, there was no attempt to distance the issues of terrorism, a police killing, and asylum.[36] If anything, for obvious reasons this incident increased the links between the terrorist threat and the politics of asylum. I raise this here, because it was in this context that the Coniston Hotel incident was first reported, which not only raised suspicions of asylum seekers being in small communities, but also the ability of a private company to take on what appeared increasingly to be an issue of high security. Oddly enough, it seemed even the Consiton's owner was misled into thinking that the hotel would be transformed into a four-star facility, and only learned the real purpose when contacted by a local newspaper.[37] So what do the White Paper, the Coniston incident, and the murder of DC Stephen Oake tell us about the contemporary politics of asylum in the UK?

It is clear that the events of September 11, 2001 have worsened the situation for refugees. As the UK situation demonstrates, while other issues such as the Sangatte camp and the desire to disperse asylum seekers away from the southeast of England have been factors in changing contemporary refugee politics, negotiating the paradox between globalization and domestic security and the increasing (perceived) link, particularly after the death of DC Stephen Oake, between terrorism and the politics of asylum further complicates matters. *Secure Borders, Safe*

Haven is a clear indicator of a move towards the "biopoliticization of refugee politics." The increasing dependence on private actors and the heightened role of "biometric technology" speaks to the diffuse networks of power within refugee politics and the politicization of the natural body of the refugee. As a threat in terms of disease and terrorism, or as merely a heartbeat or a radiation emission, the refugee becomes an object of scientific regulation and discipline. As the "political subjectivity" of the refugee is of little interest to the state, whether as a member of a diasporic community or a symbol of cultural diversity, the refugee is little more than a biological being that requires management and discipline, either to regiment its existence within, or prevent its entrance altogether.

4. Conclusions: Considering Conditions of Possibility

At the heart of this reflection on contemporary refugee politics is the question: how can we think, imagine, and make authoritative claims about contemporary refugee politics? In order to explore the struggle for the rights and political voice of refugees, it is important to examine how refugee politics are conceptualized and what might allow us to rethink it. While Nevzat Soguk's concept of the "paradox of the representable refugee" suggests that paradox is nothing new to refugee politics, it does appear that one of the central elements of post-September 11 refugee politics is a paradox between states' commitment to globalization and domestic security. Certainly one important consideration is the extent to which drawing clean lines between what is domestic and international is increasingly problematic; the central paradox and indeed the very character of refugee politics itself indicates such differentiations are problematic. However, if we are interested in the plight of refugees, the condition of speechlessness they find themselves in, and the extent to which they are subject to a proliferation of controls and disciplines, we must come to terms with the contemporary condition of refugee politics.

In this paper, I have argued that contemporary refugee politics are characterized by a core paradox, between states' commitment to globalization and powerful discourses of threat leading to preoccupations with domestic security. In negotiating this paradox, and coming to terms with the unique pressures of post-September 11 world politics, the UK White Paper, *Secure Borders, Safe Haven* suggests that, at least in part, a biopolitical approach was pursued. *Secure Borders, Safe Haven* clearly indicates the UK government's awareness of the paradox between a commitment to globalization and domestic security, and the extent to which this is also indicative of the increasingly untenable distinction between domestic and international, global and local. Furthermore, this document also indicates the centrality of biopolitics in the contemporary politics of asylum, where the subjectivity of the refugee, or perhaps more aptly put in Soguk's language, the representation or articulation of the refugee, is as little more than a heartbeat or a radiation output. The violent death of Stephen Oake indicates that links between asylum and terrorism are not wholly unfounded, and as the Coniston Hotel episode suggests, these links – real or otherwise – are not lost on the population. And while the hotel incident suggests there is public concern over the state's decision to transfer refugee politics – now steeped in discourses and representations of threat and security – to private actors, the extent to which private firms are readily seizing such responsibilities is also troubling; troubling to the extent that the interests of these actors are unclear, and the ability to draw such actors into the negotiation of refugees' struggle for rights and political voice is questionable at best.

As a reflection on contemporary refugee politics, this paper has attempted to draw out a number of core issues that have altered and challenged the struggle for refugee rights and a political voice. The increasing links, real and otherwise, with the politics of asylum and the politics of the war on terrorism have added complexity and impediments in the way of refugee advocates. In the struggle to resolve paradoxical commitments to the aims of neoliberal globalization and the (alleged) necessities of domestic security, contemporary anti-terrorist legislation in most western states seems to have chosen economic interests at the cost of civil liberties. In an attempt to cope with this complex and paradoxical terrain, states have further entrenched a biopolitics of asylum and refugee politics, where the role of private actors increases, and the biological body of the refugee becomes the political object/subject. In order to even begin to consider how movements and interests can struggle towards the protection, rights, and voice of refugees, the shifted terrain characterized by paradox, diffuse power, biopolitics, and the breakdown of many of the differentiations integral to international relations' account of world politics, and subsequently the conditions of (im)possibility for refugee politics, must be acknowledged. A sensitivity towards the globalization-domestic security paradox, and an account of politics aware of the role of bio-power and the (instrumental) politicization of the biological body of refugees, is a crucial step towards coming to terms with how to (re)think contemporary refugee politics, thus illuminating the shifted terrain upon which the struggle for refugees' protection, rights, and voice is fought.

Notes

1. Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1987).

2. For a recent critical examination of the renaissance of Samuel Huntington's "Clash of Civilization" thesis, see Mark B. Salter, *Barbarians and Civilization in International Relations* (London: Polity Press, 2002).
3. See Peter Andreas and Thomas J. Biersteker, eds., *The Rebordering of North America* (New York: Routledge, 2003).
4. The Conservative Party stance on asylum is a policy area where the party finds itself dangerously close to the xenophobic British National Party. The Conservative leader has argued that the notion of presumed innocence should no longer be considered when it comes to asylum seekers, suggesting that they all be placed in secure facilities upon arrival during such time as required to process them. The Conservatives have also drawn on the increasing prevalence of security discourses in their arguments about asylum. See Anne Perkins, "Terrorists Posing as Refugees, Say Tories," *The Guardian*, 29 January 2003.
5. The theme of Gulliver was introduced in international relations by Rob Walker in *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993), 125–40. The basic assumption is that we are unable to conceptualize the political beyond state sovereignty, but only account for changes in scale. We might conceive of bigger or smaller political organizations, but other than differences of scale, they are reproductions of the same sovereign organization.
6. Nevzat Soguk, "Transnational/Transborder Bodies: Resistance, Accommodation, and Exile in Refugee and Migrant Movements on the US-Mexican Border," in *Challenging Boundaries: Global Flows, Territorial Identities,* ed. Michael J. Shapiro and Hayward R. Alker (Minneapolis: University of Minnesota Press, 1996), 294.
7. Also see Nevzat Soguk, *States and Strangers: Refugees and Displacements of Statecraft* (Minneapolis: University of Minnesota Press, 1999), 15.
8. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1999), 131.
9. Michael Dillon, "The Scandal of the Refugee: Some Reflections on the 'Inter' of International Relations and Continental Thought," in *Moral Spaces: Rethinking Ethics and World Politics*, ed. David Campbell and Michael J. Shapiro (Minneapolis: University of Minnesota Press, 1999), 114.
10. Soguk, *States and Strangers*, 9. For a provocative examination of the issue of the "speechless" condition of refugees, see Peter Nyers, "Body Politics in Motion: Refugees and States of/in Emergency" (Ph.D. dissertation, York University, 2002). Engin Isin's *Being Political: Genealogies of Citizenship* (Minneapolis: University of Minnesota Press, 2002) has raised related points. Indicating the extent to which the refugee is indeed a "political being," Isin argues that the strategies and technologies employed to define citizenship are equally integral to the definition of the others, the beggars, the refugees, and, as such, these figures are "being political," or for the purposes here, "political beings." Isin points out: "The closure theories that define citizenship as a space of privilege for the few that excludes others neglect a subtle but important aspect of citizenship: that it requires the constitution of these others to become possible", 4.
11. Soguk, *States and Strangers,* 18.
12. Soguk, "Transnational/Transborder Bodies," 287.
13. Deleuze and Guattari, 381.
14. Nyers, 149.
15. Michel Foucault in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 265.
16. *Ibid.*, 262.
17. *Ibid.*
18. Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality,* ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 102.
19. See Agamben, *Homo Sacer*.
20. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995), 130–31.
21. Agamben, *Homo Sacer*, 3.
22. Michel Foucault, "Right of Death and Power over Life," in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 260.
23. *Ibid.*, 261.
24. "Well-founded fear" can be found in the Refugee Convention 1951. Also, see Philip G. Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (London: Routledge, 2000).
25. A small play on words here is worth noting. One of the core elements of the politics of asylum in the UK over the past two to three years has centred around the Red Cross Centre at Sangatte, France. According to UK officials (and the firm responsible for running the train through the Channel Tunnel "Eurotunnel"), Sangatte was a launching point for asylum seekers to make nightly forays through the Chunnel in order to seek asylum in the UK. Over a relatively long period of time, the UK government made demands that Sangatte be closed, which finally happened late in 2002 following intensive bilateral negotiation between the UK and France. However, as some have argued, and as real numbers indicate (67,000 asylum claimants came through Sangatte in three years, while the UK total for the same period was 220,000), Sangatte may not deserve such infamy. See Richard Woods, David Cracknell, and Lauren Quaintance, "Asylum Seekers Are Still at the Gates,'" *The Sunday Times*, 8 December 2002.
26. Melissa Kite and Richard Ford, "Tougher Curbs Urged for Asylum-Seekers," *The Times*, 16 January 2003.
27. Re: Sangatte, see note 25.
28. Dublin Convention (September 1997) stipulates that the claims of asylum seekers should only be examined once in the EU, and that the member state responsible for the presence of the asylum seeker is responsible for the examination.
29. *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Home Office, February 2002), 23.
30. *Ibid.*, 25.
31. *Ibid.*, 95.
32. *Ibid.*, 96.

33. See Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Free Association Books, 1991).
34. Lewis Smith, "Back Door Refugee Centres Anger Residents," *The Times,* 20 January 2003.
35. *Ibid.* According to Smith's article, the two private firms employed by the government, Accommodata and The Angel Group, are regularly consulted by the government, and both have yearly turnovers in the tens of millions of pounds.
36. Ian Cobain and Russell Jenkins, "Struggle Ended as Suspect Lashed Out with Knife," *The Times*, 16 January 2003; Melissa Kite and Richard Ford, "Tougher Curbs Urged for Asylum-Seekers," *The Times,* 16 January 2003.
37. Gabriel Rozenberg and Alan Hamilton, "Don't Expect a Welcome Reception at Asylum Hotel," *The Times,* 20 January 2003.

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The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR

Alexander Betts

Abstract

During 2003 there was an immense amount of debate about the possibility of states adopting extraterritorial approaches to asylum processing and refugee protection, and about such policies' compatibility with international refugee and human rights law. The debate has centred on two central policy initiatives: the so-called "UK Proposals" and UNHCR's "Convention Plus." It has so far focused primarily on the practical and legal consequences of these initiatives. What has been less clear is any explanation of the UK's (and other supportive states') motivation in aspiring to de-territorialize refugee protection and of UNHCR's strategy in the evolving consultations. After clarifying the conceptual and political relationship between the two sets of proposals, the article explores the motivation and international relations underlying them, from the perspectives of the UK Government and UNHCR.

Résumé

Dans le courant de l'année 2003, il y a eu beaucoup de débats sur la possibilité que certains états adoptent des approches pour le traitement extraterritorial des demandes d'asile, ainsi que sur la question de savoir si de telles politiques seraient compatibles avec le droit international et les droits humains. Le débat tournait autour de deux initiatives principales : ce qu'on appelle les « UK Proposals » ('La proposition britannique'), et Convention Plus de l'UNHCR. Il a porté jusqu'à présent sur les conséquences pratiques et légales de ces initiatives. Ce qui n'est toujours pas clair, c'est une explication quelconque des motivations de la Grande Bretagne (et des autres états solidaires) en voulant déterritorialiser la protection du droit d'asile, ainsi que la stratégie de l'UNHCR dans les consultations qui évoluent toujours. Après avoir éclairci les liens conceptuels et politiques entre les deux séries de propositions, l'article explore les motifs et les relations internationales qui les sous-tendent, du point de vue du gouvernement britannique et de l'UNHCR.

Introduction

There has been a great deal of, often conceptually and terminologically confused, debate about the "new"[1] extraterritorial approaches to forced migration. Throughout 2003 the details of what came to be called the "UK Proposals" for "transit processing centres" (TPCs) and "regional processing zones" (RPZs) were gradually leaked via the press. They became a concern for NGOs in the context of Home Office policy formation and a subject of intergovernmental negotiation at the EU level.[2] Simultaneously, UNHCR began to reveal details of an initiative which it called "Convention Plus." This banner, initially proposed by Ruud Lubbers in September 2002,[3] was widely used during the fifty-third Session of ExCom in October 2002, before it acquired any substance or detail. At this stage it was simply associated with ideas of creating a series of special agreements on the secondary movement of refugees and

asylum seekers and "greater emphasis on ensuring lasting solutions in regions of origin."[4] It was only in the second half of 2003, in UNHCR's public statements surrounding the EU's Thessaloniki Summit and the publication of the *Agenda for Protection*,[5] that the details of Convention Plus started to become more coherent.

Given the lack of clarity and the drip-fed nature of the details, it is not surprising that the two approaches were regarded as synonymous, especially by the UK media. *The Economist*, for example, defined Convention Plus as an "attempt to separate the concept of protecting asylum-seekers, to which the convention binds them [states], from that of admitting them to the country they want to go to," a definition widely regarded by UNHCR as more applicable to the UK Proposals.[6] When this was written in February, UNHCR had given very little substance to its Convention Plus; yet the British government sought to align the two concepts. For example, in the *New International Approaches To Asylum Processing and Protection* document distributed in March, the Home Office attempted to associate its ideas with UNHCR, arguing that "this new approach draws on the UNHCR's plans for modernisation of the international protection system (Convention Plus)" and that "it would build on work already underway in UNHCR (Convention Plus)."[7] Meanwhile, UNHCR, having constantly used its label in forums such as ExCom and the UN Commission on Human Rights, was forced into a *post hoc* formulation of its content. In doing so it distanced itself from aspects of the UK proposals, constantly making statements about what Convention Plus is *not*. It issued guidelines to NGOs, held a consultation on Convention Plus at the High Commissioner's Forum in June, and gave numerous press briefings clarifying UNHCR's position.[8]

Given the manner in which both sets of policy initiative emerged and evolved during the course of 2003, their details and relationship to one another require clarification and explanation. This article, therefore, seeks to explore two sets of questions. Firstly, what is the conceptual and political relationship of the UK Proposals and Convention Plus? Secondly, what are the underlying motives behind both the UK and UNHCR proposals and their response to one another?

Extraterritorial "Protection": Definitions and Proposals

Given the conceptual confusion, it is important to be clear from the outset about terminology and the relationship that the UK Proposals and UNHCR's Convention Plus have to one another. *Extraterritorial protection*[9] may be defined as: the raft of refugee policies initiated by OECD countries aimed at de-territorializing the provision of protection to refugees in such a way that temporary protection and the processing of asylum claims take place outside of the given nation-state. It can take two distinct forms of policy approaches: firstly, *third-country processing centres* and, secondly, *regional protection areas*. The former was the central characteristic of Australia's "Pacific Solution,"[10] while both aspects (albeit in differing rhetorical form) have at various stages in the public debate been features of the UK Proposals and of UNHCR's Convention Plus.

While UNHCR has attempted to distance itself from the UK Proposals through numerous policy statements, the UK initially sought to identify its proposals with the emerging Convention Plus. Despite differences, the commonalities between the two sets of proposals have become increasingly apparent as UNHCR has clarified the substance of Convention Plus. Unsurprisingly, this has led concerned NGOs, such as Amnesty International, to identify UNHCR as complicit in promoting the substance of the UK Proposals.[11] A conceptual definition of each form of extraterritorial policy will be given in turn, distinguishing at the same time between the UK's and UNHCR's position with respect to each.

Third-Country Processing Centres

Third-country processing centres are centres outside the recipient state to which spontaneous-arrival asylum seekers are sent and where they are effectively detained until their claims are assessed. Upon assessment of the claim, the asylum seekers are either awarded status and returned to the recipient state (or an alternative safe country) or else deported to their country of origin.[12] This is the model that Australia has used on Nauru and Manus Island, as part of its Pacific Solution to deal with spontaneous-arrival asylum seekers. The UK's proposal explicitly drew its inspiration from that model and proposed a centre outside the EU's external borders to be managed by the International Organization for Migration (IOM). It was to be used to screen applicants from the controversial "white list" of states suspected of having "unfounded claims," currently already detained and fast-tracked, for example, in the UK's Oakington Reception Centre.[13] After prior consultation with members of the European Council,[14] the UK delegation proposed this initiative at the EU's Thessaloniki Summit in June 2003, where it recommended proceeding with and extending a pilot project bilaterally agreed with Croatia for such a centre to be built outside of Zagreb. This proposal was rejected by Germany and Sweden.[15] The premise of this proposal was that it would be part of an EU burden-sharing initiative;[16] as the Home Office document, *New International Approaches*, put it, "those granted refugee status would be resettled within the EU, on a burden-sharing

basis."[17] The EU rejection, as well as academic and NGO focus on the proposal's illegality and non-viability,[18] seems to have caused the UK Government to drop this element of the policy. Caroline Flint MP said to the House of Lords Select Committee on EU Affairs (Sub-Committee F) on 29 October, "We are now focusing on the regional protection elements of our earlier ideas. We are no longer pursuing the concept of transit processing centres."[19]

Although UNHCR opposed the location of the EU's TPCs outside EU borders, it launched a counter-initiative to the UK's TPC initiative, which at various times has been explicitly identified with Convention Plus by UNHCR. Ruud Lubbers, for example, writes:

> The UNHCR proposes separating out groups that are misusing the system, namely asylum-seekers from countries that produce hardly any refugees. These asylum-seekers would be sent to one or more reception centres within the EU, where their claims would be rapidly examined by joint EU teams.[20]

Given that even the UK proposals were directed at those from the controversial "white list" of states suspected of having "unfounded claims," the divergence between the two sets of processing-centre proposals is negligible. The key differences are on legal grounds rather than principle. The initial UK proposals set out the legal claim that: "The 1951 Refugee Convention obliges states to provide protection…There is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application."[21] Meanwhile, UNHCR appears to confirm this position, Erika Feller, Director of International Protection, for example, stating that: "If an individual makes a claim in your state to your protection and you are a state party to the Convention it is incumbent on you to ensure that that person has access to protection, whether it is in your country *or somewhere else*"[emphasis added]. However, she makes the distinction that such a transfer of responsibility can only occur under limited conditions. These apply *within* the EU, she claims, because, firstly, there are common directives on human rights that ensure checks and balances and, secondly, the transfer is "from a unilateral responsibility to a system of common responsibility."[22]

Regional Protection Areas

Regional protection areas encompass a broader range of policies which are ostensibly intended to facilitate the provision of temporary protection to refugees within their region of origin, particularly in so-called "first countries of asylum." These proposals, although often vague, have covered two central elements: firstly, the idea of strengthened regional protection capacity and, secondly, a resettlement program based on "protected entry procedures." Both UK and UNHCR policy show considerable overlap, even consensus, in these two areas. For example, the UK's 2002 White Paper, *Secure Borders, Safe Haven,* refers to both elements. It welcomes the European Commission's study on the specific issues of both extending protection to refugees in their region of origin and establishing a European-wide resettlement program.[23] With respect to regional protection it argues that: "we must discourage secondary movements by working internationally for a global system that delivers protection for those who need it."[24] It explains the outline of a resettlement policy: "one possibility is for the UK to set a quota each year working closely with UNHCR to identify resettlement needs. We would set eligibility criteria to be used by UNHCR field officers, identifying suitable candidates."[25] Very similar ideas are central to the vision of Convention Plus as laid out in Goal 3 of UNHCR's *Agenda for Protection*.[26] This goal is summarized as: the desire "to work with States, particularly first-asylum States, to develop specific burden-sharing agreements that would be applied in response to mass influxes and to resolve protracted refugee situations."[27] The central objectives of Goal 3 most relevant to states are those which advocate increased responsibility sharing with the South (objective 1), improved regional protection (objective 2), and the use of resettlement as a burden-sharing tool (objective 6). The similarities and differences between the UK and UNHCR approaches to each of the two areas of "protection in the region" and "protected entry procedures" can be explored in turn.

1. In terms of "protection in the region," the key distinction between the UK and UNHCR policies appears to be one of emphasis. The UK's *New International Approaches* document puts the accent very much on containment or, at least, "management" of "flows." For example, it flagged this element of the initiatives under the heading "measures to improve regional management of migration flows" and emphasized that "improving such protection would not simply benefit those who currently remain in the region: it should also reduce the incentive for the minority who do move on to Europe to do so."[28] Meanwhile, UNHCR has been keen to place emphasis on protection. Lubbers explains, for example, "under the 'regional prong', the UNHCR is proposing a more coherent, wide-ranging effort by donor states to support refugees in the host country."[29] It has acknowledged in the *Agenda for Protection*, however, that these regional protection measures "should aim to reduce the need for asylum seekers and refugees to move on in an irregular manner by making protection available and generating solutions."[30]

However, UNHCR has been keen to distance itself from the language if not the substance of the UK's ideas. It has

attempted to distance its Convention Plus from many of the labels associated with the UK proposals. Janowski's statement, *Setting the Record Straight,* for example, rejects the notion of "safe havens" or "zones," explaining that UNHCR proposes *inter alia* "protection of refugees in the region of origin."[31] Given the observation by Groupe d'Information et de Soutien des Immigrés (GISTI) that the phrase "regional protection zones" invokes connotations of historical protection failures such as the Srebrenica massacre[32] and Schuster's intimation that temporary protection zones might be established "along the lines of Sabra and Shatila,"[33] the desire for clarity of distinction is understandable. UNHCR have, however, claimed that the distinction is more than semantic: Feller points out that the organization does not support the idea of closed camps but does support capacity building.[34]

2. On "protected entry procedures," there appears to be an emerging consensus between the UK and UNHCR in the form of a resettlement scheme. Noll, Fagerlund, and Liebaut define protected entry procedures as the diplomatic representation of a third safe country in the region of origin allowing non-nationals "to approach the potential host state outside its territory with a claim for asylum or other form of international protection" and "to be granted an entry permit in case of a positive response to that claim."[35] Its precedents are in the Danish visa office in Zagreb during the Balkan crisis and proposals that were put to the UN General Assembly by the Danish in 1986 and to the Intergovernmental Conference on Immigration, Refugee and Asylum Policy (IGC) by the Dutch in 1993.[36] In October the UK and UNHCR together outlined a pilot resettlement project agreed with Ghana along the lines of these proposals. Under this scheme, 500 UNHCR-nominated refugees, victims of the Liberian civil war, were to be allowed to come to the UK.[37] Iain Walsh, Deputy Director of the Immigration and Nationality Directorate, explained that:

> The idea is that there will be some refugees in the region, in West Africa, that UNHCR feel that they will not be able to integrate into their areas and where return to their own country is not possible. Between ourselves and UNHCR we have identified a number of persons who are refugees and whom we think it is appropriate for them to spend their long-term lives in the UK.[38]

Beyond the heavy rhetoric and obfuscation that has characterized the debate on extraterritorial protection, it is this policy area that is most likely to emerge in a practicable form from the myriad of proposals. If developed beyond the pilot stage, such initiatives potentially change the basis on which asylum applications are made from a system of spontaneous arrival to one of a quota system based on protection and processing in the region. In this sense, if third-country processing centres are the Pacific Solution element of Australia's asylum policy for dealing with spontaneous arrivals, this aspect of the proposals draws upon the UNHCR quota system by which Australia takes 12,000 refugees per year, particularly via Indonesia.[39] It is in many ways an attempt to return to the quota structure that existed prior to the growth of South-North spontaneous asylum in the 1980s and 1990s. Suhrke explains how this kind of structure facilitated multilateral burden-sharing arrangements for post-World War II resettlement and Vietnamese resettlement after 1975.[40] The UK-UNHCR pilot implies that a similar structure may ultimately be adapted to couple protected entry procedures with an EU or a global burden-sharing system.

Exploring the Motives behind the Policies

In examining ways of reconciling individual rights with state interests, the title of this special issue implicitly highlights a dichotomy common to many contemporary international relations debates: that between state security and human security. That these concepts are often in contradiction was the central premise of the critical security studies project that emerged as a post-Cold War challenge to the state-centric conceptions of security implicit to neo-realist approaches. By focusing on this tension, critical approaches to security have sought to show *how, why,* and *for whom* the "national interest" is constructed[41] and how it often threatens human security both within and outside the state.[42]

In the case of extraterritorial protection policies, there has already been extensive work, by both academics and human rights groups,[43] demonstrating how such policies may threaten the human security of refugees. Noll's work, for example, and its use by Amnesty International in their paper *Unlawful and Unworkable*, highlights the historical human rights consequences of the precedents for third-country processing centres and of the use of concepts such as "safe havens" and containment. It also demonstrates the potential illegalities and impracticalities. What has been less clearly examined is the other side of the critical security studies dichotomy: the motivation behind state advocacy of such policies and the implications that this has for the actions of international organizations. In other words, what is it that has led the UK to identify these approaches as serving their "national interests" and why has UNHCR seen it necessary to adapt to the calls of states for such extraterritorial initiatives? As Eve Lester, Refugee Coordinator of Amnesty International, suggests:

> We have to look at the underlying motives of creating these mechanisms where people are transferred to extraterritorial

> processing centres or to closed reception centres and consider whether they are designed to provide comparable protection or whether they are designed to provide something less than that.[44]

This is a difficult and inevitably exploratory task but it is worthwhile because an understanding of such underlying motives may be the first stage in challenging or re-aligning them if they are regarded as a threat to human rights. The motives of the UK and UNHCR will be explored in turn.

The UK Perspective

Understanding and theorizing about the behaviour of states is conventionally the central preoccupation of international relations (IR) theory. Neo-realists have tried to explain the "national interest" in terms of instrumental rational choice, neo-liberal institutionalists in terms of the interaction of norms and interests, constructivists in terms of the social construction of norms and expectations, Marxists in terms of materialism, critical theorists in terms of elites and power relations, and post-structuralists in terms of discourse.[45] Except at the epistemological extremes, none of these need be mutually exclusive: all offer a partial explanation of international politics.[46]

Although both Steiner and Loescher are right to lament the lack of attention paid to the politics of refugee protection by international relations, a growing body of theory has attempted to conceptualize the motives that lie behind states' provision of refugee protection and its policy formulation.[47] This has implicitly or explicitly drawn upon many of the assumptions of IR theory. For example, Shacknove has examined the ways in which U.S. provision of asylum serves "national interest" through its concern for political stability, economic stability, and foreign policy concerns.[48] Loescher's early work on refugees and security analyzed the way in which recipient states often derived positive benefit from the provision of asylum during the East-West migratory context of the Cold War because of its symbolic use.[49] Meanwhile, in the post-Cold War era of predominantly South-North forced migration, Loescher argues that, without the past strategic interests of the Cold War, "refugees were perceived increasingly as burdens, particularly if they made a claim for asylum in the West."[50] However, as Steiner suggests, this approach hardly explains why states continue to provide asylum or why they choose the specific policies that they do.[51]

This has, however, begun to change. Steiner has shown, by looking at political debate on asylum in Germany, Switzerland, and the UK, how policy has been formed through a trade-off between "national interests" in terms of, for example, "internal harmony" and "effective governance" working in favour of restrictionism on the one hand and normative and ethical concerns maintaining the basis of the asylum system on the other.[52] In the context of the EU burden-sharing debate, Thielemann has looked at the dynamics by which institutional and legal norms and the interests of political actors shaped the motives behind burden sharing.[53] Meanwhile, the present author has looked at the benefits states derive from different types of refugee protection, both independently and as an international public good, by upholding a regime structure from which they derive security.[54]

These broadly theoretical approaches cannot by themselves explain the motives behind a specific policy shift such as New Labour's seemingly dramatic move towards advocating extraterritorial approaches to asylum. In looking at the formulation of public policy on asylum and migration in Germany and the UK, Boswell identifies factors that explain the formulation of policy over time: how refugees are constructed in public discourse, the international context, the perceptions and interests of the electorate, and the constraint of "embedded liberalism."[55] Indeed this provides a useful starting point for assessing public policy evolution.

Assessment of New Labour's asylum and immigration policy is no easy task and is, necessarily, speculative in part. Flynn recently tried to explain the contradiction between the Government's increasingly liberal "economic migration" policy and its increasingly restrictionist asylum policy by arguing that New Labour's approach to asylum and migration is motivated by a utilitarian logic which attempts to act almost exclusively in favour of economic performance.[56] In response others have suggested that this is a massive over-simplification and have pointed to factors such as the party's search for a "silver bullet" to "solve" the asylum "problem" through increasingly radical solutions.[57] Whatever explanation one provides for Government policy, short-term political and institutional responses to managing media responses will inevitably play a part. However, Schuster rightly warns, "One should be wary of characterising this process as a completely *ad hoc* response to events."[58] In reality, policy explanations will lie somewhere between monocausal metatheories and regarding policies as simply cyclical and *ad hoc* institutional reflexes.

It is with this in mind that this section attempts to explain the changes underlying the Government's perception of the asylum "problem" across four areas: economic cost, social cost, political cost, and international context. These categories overlap to a great extent with the central elements of policy input identified by Shacknove and Boswell, and build upon the theoretical model outlined by the present author in a UNHCR Working Paper.[59] Within each of these exploratory categories, the interaction between public, media, and political perception will be explored, questioning

whether the construction of these "costs" provides a "logic" for extraterritorial protection.

Economic cost

Noll reflects on the relationship between economic cost and extraterritorial protection and identifies something of a quandary. In examining the UK proposals for third-country processing centres in the light of empirical evidence from Australia's Pacific Solution, he argues that, far from reducing asylum costs, extraterritorial processing is vastly more expensive than the domestic processing of spontaneous arrivals, and that it is without any significant deterrent effect.[60] This is indeed a paradox.

On the one hand, the UK proposals have arisen in the context of a national debate that has appeared to privilege, and even fetichize, the "cost" and "inefficiencies" of the current system. A series of recent headlines is testimony to this obsession: "Asylum Cost under Fire" (BBC), "Asylum Error to Cost UK Millions" (*Guardian*), "Letwin: Asylum Cuts Will Fund Policing" (*Guardian*), "Asylum Seeker Dispersal 'A Waste of Money'" (*Guardian*), "Asylum Cost Hits Eurotunnel" (*Telegraph*).[61] Similarly, one of the explicit motivating factors behind the Government's extraterritorial approaches has been the allocation of resources. Caroline Flint MP has referred to the "imbalance" between UNHCR's US$900 million annual budget to provide protection to 12 million refugees and 5 million IDPs compared with the US$10 billion spent by just fifteen Western states on providing asylum for 500,000 asylum seekers.[62]

On the other hand, the "UK proposals" explicitly draw their inspiration from the Australian model, for which there is conclusive evidence that it raises the financial costs of processing asylum claims. For example, the majority of the AUD$1.2 billion refugee budget increase in 2002–03 has been allocated to offshore processing, with $430 million being allocated to processing in third countries in the Pacific (currently Nauru and Manus Island) and $455 million on processing in Australian offshore locations (such as Christmas Island and the Cocos Islands) over the period 2002–03 to 2005–06. A further $219 million was allocated for the construction of the facilities and $75 million for transit costs.[63] In terms of the comparative efficiency of domestic and offshore processing, the average cost to the taxpayer of offshore processing was $293 per day on Christmas Island and $236 on the Cocos Islands, against $87 per day at Port Hedland, $65 per day in Sydney, and $102 per day at Woomera, for example.[64] Similarly, the Refugee Council, basing its conclusion on the UK's recent expenditure on forcible removals, estimates that the transport costs alone of proceeding with its extraterritorial proposals would require an increase of £1.5 billion in asylum expenditure.[65]

Similarly, with respect to regional protection areas, the Immigration Law Practitioners' Association (IPLA) claims, "Even if there is a political imperative to reduce costs in relation to asylum, it is IPLA's view that the proposals for RPZs are unlikely to make any costs savings at all and indeed are likely to be cost intensive." The primary explanation they offer for this is, firstly, that constructing such an approach will require an additional layer of bureaucracy and, secondly, that it will create costs associated with identifying and returning asylum seekers to, say, an African refugee camp.[66] The former explanation is clearly true as it will, particularly in the initial stages, require massive coordination between the host state, the UK, and UNHCR (and any other agencies involved). The latter reason depends very much on how the scheme is implemented. However, given that the deterrent effect of protected entry procedures relies very much on "successfully" dismantling alternative routes to spontaneous asylum[67] and that deportation costs have already proved very high under the *status quo*,[68] the prospects of cost-saving seem extremely limited.

Social and political cost

The perceived cost of hosting asylum seekers domestically is more than merely financial. Government policy will also be influenced by perceptions of social and political cost. The shift towards extraterritorial approaches is most appropriately seen as a continuation of the way in which the Government has sought to define and manage the "problem" of asylum since the massive growth in numbers of spontaneous-arrival asylum seekers from the South at the end of the 1980s and during the early 1990s. Since 1993, when the first piece of legislation exclusively aimed at asylum was introduced, the Government, rather than challenging media portrayals of refugees as a threat to the welfare state, national identity, and social cohesion, has sought policies that implicitly reify refugees as a "burden" by attempting to reallocate (or shift) that "burden." Indeed, Robinson's work on the "burden-sharing" debate in the UK can be usefully extended to understand the logic behind extraterritoriality.[69]

Until the late 1990s the overwhelming majority of asylum seekers and refugees were spatially concentrated in London and the South East.[70] This created what Robinson calls "sites of struggle" such as Dover and a number of London boroughs, where local media framing and hence public perceptions of rising economic costs created high levels of tension and violent clashes between local people and asylum seekers. With over 80 per cent of asylum seekers concentrated in the southeast, the Government began its policy of dispersal, formalized in the 1999 Asylum and Immigration Act, through which it established ten regional consortia to which asylum seekers were sent.[71] As Boswell

explains, dispersal aimed not only to redistribute financial costs, but also to reduce the social tensions arising from local concentration by physical transfer of the "burden."[72]

The problem according to Boswell, however, was that far from reducing social tension, dispersal exacerbated inter-ethnic tensions because of the way in which it was carried out: many of the selected "cluster areas" were poorly chosen and often had already-resident ethnic minority groups; the new influx triggered significant inter-ethnic tensions involving not only the asylum seekers but also the local ethnic minority residents. She gives the example of Hull where, following the dispersal of 1,000 asylum seekers in spring 2001, there was a significant increase in racist attacks.[73] Similarly, in Glasgow, tension on the Sighthill Estate ultimately led to the murder of a Kosovar asylum seeker.[74] These incidents achieved massive media attention which discredited the dispersal policy. That the "cluster areas" were ill-chosen is illustrated by the correlation between the areas chosen and the subsequent successes of the British National Party (BNP) in local elections: of the eighteen council seats won by the party by September 2003, half had been areas of the dispersal scheme: five in Burnley, two in Sandwell, one in Kirklees, and one in Stoke-on-Trent.[75] In areas of inter-ethnic tensions the BNP was able to play the anti-asylum card with slogans such as: "While the dumping of asylum-seekers on our communities is fundamentally the fault of the Government, BNP Councillors will do everything in their power to prevent asylum-seekers being dumped in our areas."[76]

Rather than challenge directly the construction of this "problem" by the extreme right and the media, the Government's response has been to accept the problem on these terms. It is in this context that the narrowing of physical space available to asylum seekers has been foreclosed. Robinson explains, drawing on Sibley, how "societies purify space by identifying 'residues' – the wrong things in the wrong place – and by eliminating them, or else moving them elsewhere. The nation state is one of the key actors in such spatial exclusion because it values conformity and social control." He argues that through media portrayal of asylum seekers the physical space available for the domestic provision of refuge has been eroded.[77]

Further exemplification may be drawn from the public response to post-dispersal policies such as the attempts to establish large-scale reception centres along the lines of those commonly found in continental Europe. Attempts to transform an Ministry of Defence site in Bicester into a reception centre for 750 asylum seekers have been scuppered by the challenge of the Bicester Action Group, which has gained widespread national support and extended its campaign to oppose all rural asylum centres.[78] Similarly, on the outskirts of Newport in south Wales, the rural community of Langstone has formed Langstone Action and has mobilized to prevent a reception facility being established in the village. The link between media influence and fear is evident in comments by local residents, such as:

> I am not prejudiced, by any stretch of the imagination, but you have only got to read in the papers what's happening with asylum-seekers and it does make you worry. It is fear of the unknown. A lot of mums are worried about strangers not from the area hanging around. People are concerned about house prices.[79]

Such reactions, unchallenged by the Government, clearly limit the physical space that it is politically acceptable and electorally desirable for MPs to allocate to asylum seekers. Instead they have meant that within the context of asylum policy, political capital is more easily gained by "playing the numbers game." Alarmist and exclusionary statements have become increasingly commonplace. For example, Chris Mullin MP, Chair of the House of Commons Home Affairs Select Committee, declared the figure of 110,700 asylum seekers entering the UK in 2002 was "unsustainable" and gave the following catalogue of "inevitable" consequences:

> If allowed to continue unchecked, it could overwhelm the capacity of the receiving countries to cope, leading inevitably to social unrest. It could also, and there are signs this may already be happening, lead to a growing political backlash, which will in turn lead to the election of extremist parties and extremist solutions.[80]

That "physical presence" has, within the discourse, been constructed as the "problem" is evident by the Government's "fetichization" of numerical targets for "asylum cuts": in October 2002, David Blunkett set "targets" for halving the number of asylum applicants from a baseline of 8,900 claims per month to 4,450 by September 2003. By August 2003, with a reduction to 5,000 per month, he was able to proclaim "the kind of progress we have made is already a matter for celebration."[81] This was achieved through measures such as the closure of Sangatte, the imposition of visa restrictions on Zimbabwe, and extending the white list to a further seventeen states.[82] The "numbers game" is a direct consequence of increased identification of the "asylum burden" not with economic cost but with physical presence. In February, Tony Blair argued, "In the end the only way of dealing with this is to stop the numbers coming in. Once people get in, unless you can discover what country they have come from and get that country to agree to take them back, then it is extremely difficult to get them back."[83]

Linked to this is the political desire for control. As Schuster argues, the driving force behind UK asylum policy is "the need for control, to assert the sovereign power of the state and to ensure its stability by legitimating that control."[84] Government discourse has been filled with such references. For example, in the foreword to the 2002 White Paper, the Home Secretary refers to the need for "trust" and "integrity."[85] The need for "end-to-end credibility" is explicitly given as an underlying motive behind the proposals for a resettlement program in the Executive Summary.[86] Meanwhile, the *New International Approaches* document gives falling public support for the *status quo* as one of its justifications for the "new" approaches.[87]

It seems evident that the Government believes reassertion of control would restore public credibility. Blunkett says, " I believe that men and women of this country will welcome those from across the world if they know what we are doing is trusted, and they can be confident in its administration."[88] The Australian precedent for extraterritorial protection offers evidence of how a qualitative distinction can be created between two sets of asylum seekers. There, the 12,000 quota refugees are seen as qualitatively different from the "queue jumpers" or spontaneous arrivals, who are regarded as pariahs.[89] In the aftermath of September 11, high-profile media stories mean that spontaneous-arrival asylum seekers have been increasingly identified as a security threat. Reports about the discovery of ricin in a flat in London occupied by asylum seekers[90] and the use of the system by former members of the Taliban,[91] for example, create popular demand for "control" that can be met by a policy that externalizes the processing structure. In this context, the Government may believe that a public perception of increased control can be attained through the type of qualitative distinction drawn in Australia – between "threatening" spontaneous arrivals, on the one hand, and the externally vetted quota refugees on the other.

The International Context

Equally important to the UK Government is the imperative to work broadly within the constraints of international norms. Steiner's analysis of the role of legal norms and ethical concerns, grounded in liberalism and Judeo-Christian heritage,[92] Boswell's analysis of the "constraints of 'embedded liberalism'," [93] and the work on the role of norms[94] all imply that the international legal framework and, in particular, the 1951 Convention provide a regime structure that liberal democratic states are extremely reluctant to abandon. This is both because it forms part of their very identity as liberal democratic states, and at the same time upholds the collective action that underpins this regime structure and so provides collective (public good) security benefits.

The importance of these normative constraints in restricting the extent to which the UK has been prepared to pursue its extraterritorial initiatives unilaterally is revealing. The UK has attempted to work *with* UNHCR to negotiate its extraterritorial policies rather than abandon UNHCR involvement. It is notable that in the end the only emerging pilot project is the result of a joint UK-UNHCR initiative. Meanwhile, the UK has attempted to justify (rightly or wrongly) the legality of its proposals through reference to the 1951 Convention – implying that it still regards this as the basis of refugee protection.

Similarly, within the EU context, the Government's abandonment of the TPC proposals after their rejection by Sweden and Germany at Thessaloniki shows how the normative structures (and issue-linkages existing within the EU) restricted the potential for the kind of unilateralism available to the Australian and U.S. governments in establishing their third-country processing centres. This contrast highlights the fact that the norms and ethics of some EU states may positively constrain the initiatives by other member states to place restrictions on asylum provision.

UNHCR: Between Catalyst and Barometer

It is extremely difficult to infer precisely what kind of diplomatic dialogue has taken place between UNHCR and the UK Government over extraterritorial protection. What is clear, however, is that dialogue has taken place both as part of UNHCR's Global Consultations and more specifically in relation to the UK proposals and Convention Plus. UNHCR is necessarily in a difficult position: on the one hand it is an intergovernmental organization representing its member states and reliant upon their voluntary donations; on the other, it holds a mandate to uphold the 1951 Convention and provide protection to refugees. Where these dual imperatives come into conflict, as they increasingly do, UNHCR must find a strategic balance between the role as a barometer *of* state policy and that of catalyst *for* constructive influence on state policy, trying to lead and ensure refugee protection without alienating major donors.

Loescher explains how the emergence of South-North "jet-age" refugees and the ensuing unwillingness of states to admit refugees has brought UNHCR into conflict with states, in such a way that it has "ultimately lost the fight to maintain its position as the principal source of legitimacy and influence over refugee and asylum policy in Europe." He argues that this increasingly forced Sadako Ogata as UN High Commissioner for Refugees to frame policies in terms of state interests.[95] Chimni further argues that, as an international organization, UNHCR relies upon the interests of a small coalition of hegemonic Northern states and that it "survives only if it continues to serve these interests." He

suggests, for example, that during the 1990s UNHCR has "gone along with" initiatives such as "safe havens" and "safety zones" and has "sought to operationalize the containment of powerful donor countries" as a consequence of donor dependency.[96] Meanwhile, Barutciski argues that, in the case of Bosnia, UNHCR was "subverted" to fulfill the containment aims of the EU states with its "safe havens" fulfilling the political objectives of its major donors.[97] Dubernet, too, demonstrates how, in the case of Iraq, Somalia, and Bosnia, protection of IDPs administered by UNHCR (among others) was a tool of containment that failed to serve the human security interests of those displaced.[98] The present author has shown the empirical link between earmarked donations to UNHCR, based on state interests in containment, and the activities of UNHCR.[99]

Loescher, however, is marginally more optimistic about the role of UNHCR. He argues, "States remain the predominant actors. But this does not mean that international organizations like the UNHCR are completely without power or influence;" and "UNHCR has not solely been an instrument of state interests." For him, although state interests are the dominant factor, UNHCR has played a subtle role of "persuasion and socialisation."[100] So, in the context of the extraterritorial protection debate, how has UNHCR balanced the roles of barometer and catalyst?

UNHCR is aware that Northern states have concerns about asylum. Lubbers acknowledges, "There are genuine concerns about the way the system is being managed, about the role of smugglers and about those who misuse the system by falsely portraying themselves as asylum seekers."[101] Meanwhile, the *Agenda for Protection* acknowledges that an element of the motivation behind strengthening protection capacities should "aim to reduce the need for asylum-seekers and refugees to move on in an irregular movement by making protection available and generate solutions."[102] It is the use of words such as "irregular" to describe spontaneous arrivals, with its implication that regional protection and spontaneous asylum are mutually exclusive and its reinforcement of the logic of containment, that is likely to worry those who fear the *Agenda* is an attempt to pander to exclusion. This is exactly what UNHCR must avoid if it is to avert the disasters that came from containment in the 1990s.

The concern that UNHCR has been a passive barometer of UK interests throughout the debate has been put by Amnesty International. For example, Eve Lester, in discussing the proposal for third-country processing centres, said, "I know that the UNHCR position is quite compliant," impelling UNHCR to a better fulfillment of its obligations under Article 35 of the Convention to supervise state compliance with the Convention.[103] Amnesty's *Unlawful and Unworkable* was particularly concerned with the extent to which UNHCR's "counter-proposal" replicated many of the problems of the UK proposals,[104] for example, oversimplifying the review procedure and undermining judicial supervision. The report also expressed alarm at the UK's overt statement in its *New Vision* paper that it hoped to use Convention Plus to turn UNHCR "into the organisation we would wish it to be."[105]

Convention Plus appears to represent a compromise of UNHCR's mandate in order to meet the interests of restrictionism, though, an alternative way of reading it is that UNHCR is adapting to the *realpolitik* of state demands in order to influence them and fulfill its mandate subject to these constraints. The two key components of its mandate are to uphold the Convention and to ensure protection to its "population of concern" (predominantly refugees and IDPs in the South). On the first component, it would be easy to read Convention Plus as a dilution of the original Convention when faced with statements such as, "The 1951 Refugee Convention remains the cornerstone of the international refugee protection regime, yet it alone does not suffice. The *Agenda for Protection* is thus about building on the Convention. I call this the 'Convention Plus' approach."[106] Yet, it could equally be interpreted as adaptation to ensure that states remain within the broad framework of the regime. Indeed, if any aspect of the debate has been encouraging, it has been the extent to which the UK, in spite of its proposals, has appeared willing to remain within the structure and has adapted its policies as a result of debate over the legality of its proposals under the Convention. On the second component of its mandate, UNHCR has managed, in part, to shift the debate away from simply processing towards protection in the region. If it can successfully direct states towards improved responsibility sharing with the South, then it may increase both voluntary donations and protection capacity.

Indeed UNHCR has not been passive in its relationship to the UK proposals, but has succeeded in contesting, and influencing, the UK. Erika Feller's words are indicative:

> We do not like Regional Protection Areas. We have said it very clearly. What we do like, and I think this is something that one has to give a lot of credit to the UK for, is the innovation it has created towards improving protection in the region of origin.[107]

It shows how, once UNHCR improved its initially disastrous public relations campaign and clarified Convention Plus, it was able to engage constructively with the commonalities and differences between the two sets of proposals. It is unclear how much influence UNHCR has had on the UK; its abandonment of the transit processing centres, for ex-

ample, may owe more to EU rejection in Thessaloniki than UNHCR diplomacy. However, whatever arguments one might make about its counter-proposal and Convention Plus, it is clear that it has not been a passive agent or tool of the UK or of the partner countries (Denmark and the Netherlands) that backed the UK's proposals. This augurs well, though, only if UNHCR can maintain this influence and avoid being used as a tool of containment as it has been in the past.

Conclusion

The relationship between the UK proposals and UNHCR's Convention Plus is a complex one, both conceptually and politically. In both cases, the substance of the proposals has been clouded by obfuscation and poor public relations. However, by the end of 2003, the abandonment of the UK's proposal for transit processing centres on the EU borders means that the debate centres upon the future prospects for regional protection areas. In particular, the UK and UNHCR appear to be moving towards a resettlement policy based on "protected entry procedures." Although the rhetorical emphasis of UNHCR has been mainly on protection and that of the UK mainly on containment and processing, they have reached sufficient consensus to initiate a pilot project for refugees from Liberia.

Two major concerns stem from the direction of the debate: firstly, what impact it will have on spontaneous-arrival asylum, which remains an important channel for many people fleeing human rights abuses; secondly, whether it will be a reversion to the containment strategies of the 1990s, when UNHCR became a tool for its main donor states' policies of exclusion. A tentative identification of the motives underlying the proposals made by both the UK Government and UNHCR provides a starting point for understanding possible methods of contestation that may contribute to avoiding these risks.

The UK's proposals stem, not merely from an identification of asylum seekers with economic cost, but from the nexus of social and political costs associated with their physical presence and the diminishing availability of space in which they can be accommodated in a way that is *politically* sustainable. Since the massive increase in South-North asylum movement, the UK Government has been trying to shift the burden of asylum domestically in the way that it has seen to be the least electorally damaging (or most electorally enhancing). However, the successive failures of both dispersal and of rural reception centres and the emerging media-state securitization of the post-9/11 spontaneous-asylum "threat" have all removed the "space" available for asylum, leaving extraterritorial burden shifting as amongst the only politically "feasible" strategies. As Robinson points out, however, this is not an inevitable representation; it emerges from an elite media-political nexus that encourage this particular definition of the "problem." As he suggests, this can most appropriately be contested by reconceptualizing the "problem," re-legitimating asylum seekers, changing the tone of national debate, managing the media, and changing public perception through, for example, education and community involvement.[108]

UNHCR, meanwhile, has been faced with the uneasy balancing act of recognizing these state interests and working within their parameters, on the one hand, and challenging them on the other. The debate over extraterritorial protection is unlikely to be the last time it is faced with the need to make strategic decisions over whether its mandate is best met through innovation, adaptation and compromise, or advocacy of elements of the *status quo*. Although the details of its consultations with the UK have not been made public, it has successfully managed to shift much of the debate from processing and containment to protection. Whether this is rhetorical or substantive, only time will tell. However, the willingness of the UK to couch all its proposals in relation to the Convention and to negotiate with UNHCR imply that UNHCR continues to maintain its legitimacy and constructive influence on the policy of individual states.

Notes

1. The word "new" is in inverted commas because, despite the claims that these approaches are "new," extraterritorial initiatives draw on a legacy of precedents, notably Australia's "Pacific Solution" and the U.S.'s use of its naval base on Guantanamo Bay to process Haitian asylum seekers in the case of "transit processing centres," and so-called "safe havens," "humanitarian corridors," "protected entry procedures," and in-country protection in the case of "regional processing zones." Gregor Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones" (working paper, June 2003), <http://www.jur.lu.se/forsake/Noll.nsf> (accessed August 1 2003).
2. *Ibid.*
3. *Lubbers Proposes 'Convention Plus'* (Ukraine's UN Office, September 13, 2002), <http://www.un.kiev.ua/en/pressroom/pressreleases/35/> (accessed May 31, 2003).
4. International Service for Human Rights, monitoring notes for the 53rd Session of ExCom.
5. *Agenda for Protection*, <http://www.unhcr.ch> (accessed December 5, 2003).
6. "Special Report on Asylum," *The Economist*, March 15, 2003, 35–38.
7. *New International Approaches to Asylum Processing and Protection*, March 2003, <http://www.homeoffice.gov> (accessed May 31, 2003).
8. Amnesty International, *Observations to UNHCR's Consultations on Convention Plus*, March 7, 2003; Kris Janowski,

"UNHCR Asylum Policy: Setting the Record Straight," June 2003, <http://www.unhcr.org.uk/press/press_releases2003/pr2oJun03.htm (accessed August 1, 2003).

9. The word "protection" is used rather than "processing" since regional protection areas, for example, need not imply the processing of asylum claims.
10. Although Christmas Island and the Cocos Islands, for example, are technically Australian territory.
11. This has been expressed both in both Amnesty International's papers, such as *Unlawful and Unworkable: Amnesty International's Views on Proposals for Extra-Territorial Processing of Asylum Claims*, <http://web.amnesty.org/library/index/engior610042003>, and in statements such as those of Eve Lester, Refuge Coordinator of A.I.'s International Secretariat at, for example, Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union, which conducted an inquiry into the proposals for new approaches to the asylum process.; see <http://www.parliament.the-stationery-office.co.uk/pa/ld/lduncorr.htm> (accessed December 10, 2003).
12. Amnesty International, *Unlawful and Unworkable*, 7.
13. *Secure Borders, Safe Haven*: *Integration with Diversity in Modern Britain* (White Paper, February 2002), 13.
14. The leaked letter from Tony Blair to European Council President Costas Simitis revealed that the other EU heads of state were involved in discussion of the proposals, March 10, 2003, <http://www.asylumrights.net/> (accessed August 1, 2003).
15. "Europe's Asylum Policy Shameful, Says UN," *Guardian*, June 20, 2003, 4, <http://www.guardian.co.uk>.
16. For the theoretical background on this debate see "European Burden-Sharing and Forced Migration,"special issue, *Journal of Refugee Studies* 16, no. 3 (2003).
17. *New International Approaches*, 5.
18. See, for example, Refugee Council, *Unsafe Havens, Unworkable Solutions*, May 2003, <http://www.refugeecouncil.org.uk/downloads/policy_briefings/uns afehav_lv_may03.pdf>.
19. Statement to Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union, October 29, 2003.
20. Ruud Lubbers, "Put an End to Their Wandering," *Guardian*, June 20, 2003, 22.
21. *New International Approaches,* 6.
22. Statement to Sub-Committee F (Social Affairs, Education and Home Affairs) of the House of Lords Select Committee on the European Union, October 22, 2003.
23. *Secure Borders, Safe Haven*, 48.
24. *Ibid.*
25. *Ibid*., 53.
26. UNHCR's *Agenda for Protection* is the outcome of its so-called Global Consultations; it is divided into six goals. Goal 3 is "Sharing Burdens and Responsibilities More Equitably and Building Capacities to Receive and Protect Refugees."
27. *Agenda for Protection*, Overview, 13.
28. *New International Approaches*, 2.
29. Ruud Lubbers,"Put an End to Their Wandering," 22.
30. *Agenda for Protection,* 56.
31. Janowski.
32. Groupe d'Information et de Soutien des Immigrés (GISTI) state that "instauration de 'zones de protection régionale'… L'idée est de les [des refugiés] empêcher de poursuivre leur route jusqu'à l'intérieur de l'Union, en leur assurant une 'sécurité' sur place. L'histoire, avec Srebrenica par exemple, nous a appris ce qu'il en était parfois de ces garanties internationales de protection." *Comment l'Europe Se Sanctuarise en Créant des Camps Hors de ses Frontières*, June 4, 2003, <http://www.gisti.org/doc/actions/2003/asile/danger.html>.
33. Lisa Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2003), 277.
34. Erika Feller, Director of International Protection, UNHCR, addressing the House of Lords Select Committee on EU Affairs Sub-Committee F, October 22, 2003.
35. Gregor Noll, Jessica Fagerlund, and Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, European Commission 2002, 3, <http://europa.eu.int/comm/justice_home/doc_centre/asylum/common/asylum_study_dchr_2002_en.pdf>.
36. *Ibid*., 24–30.
37. Alan Travis, "Blunkett Announces First UN Refugees," *Guardian*, October 3, 2003, <http://www.guardian.co.uk>.
38. Iain Walsh, Deputy Director of the Immigration and Nationality Directorate of the Home Office, addressing the House of Lords Select Committee on EU Affairs Sub-Committee F, October 29, 2003.
39. Sarah Stephens, "Fewer Refugees to Be Allowed to Stay," *Green Left Weekly*, May 15, 2003, <http://www.greenleft.org.au>.
40. Astri Suhrke, "Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action," *Journal of Refugee Studies* 11, no. 4 (December 1998): 396–415.
41. Jutta Weldes, *Constructing National Interests: The United States and the Cuban Missile Crisis* (Minneapolis: Minnesota, 1999).
42. Keith Krause and Michael Williams, eds., *Critical Security Studies: Concepts and Cases* (London: UCL, 1997); Ken Booth, "Security and Emancipation," *Review of International Studies* 17 (1991): 313–26; Bill McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (Cambridge: Cambridge University Press, 1999).
43. For example, Amnesty International, Refugee Council, ILPA, and GISTI have all produced reports examining the impact in terms of human rights, as has Noll's *Visions of the Exceptional,* in particular.
44. The House of Lords Select Committee on EU Affairs Sub-Committee F, November 12, 2003.
45. See, for example, Scott Burchill, Richard Devetak, Andrew Linklater, Matthew Paterson, Christian Reus-Smit, and Jacqui True, eds., *Theories of International Relations* (Basingstoke: Palgrave, 2001).

46. International relations theory is polarized around a so-called "inter-paradigm debate" between so-called "positivists" and "post-positivists." This dichotomy is particularly apparent in, for example, Steve Smith, Ken Booth, and Marysia Zalewski, eds., *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 2000). In reality, nearly all IR scholars use both empirical evidence and interpretivist methodology to varying degrees. Where they differ tends to be in the objects of analysis they privilege and the assumptions they make.
47. Niklaus Steiner, "Arguing about Asylum: The Complexity of Refugee Debates in Europe," *New Issues In Refugee Research*, Working Paper No. 48 (Geneva: UNHCR, 2001); Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001), 4.
48. Andrew Shacknove, "American Duties to Refugees: Their Scope and Limits," in *Open Borders? Closed Societies?* ed. Mark Gibney (New York: Greenwood Press, 1988).
49. Gil Loescher, "Introduction: Refugee Issues in International Relations," in *Refugees and International Relations*, ed. Gil Loescher and Laila Monahan, (Oxford: Clarendon, 1990), 11–17; Gil Loescher, *Refugee Movements and International Security,* Adelphi Papers 268 (London: Brassey, 1992); Gil Loescher, *Beyond Charity* (Oxford: Oxford University Press, 1993), 18–23.
50. Loescher, *The UNHCR and World Politics,* 13.
51. Steiner, 16.
52. *Ibid*., 8.
53. Eiko Thielemann, "Between Interests and Norms: Burden-Sharing in the European Union," *Journal of Refugee Studies* 16, no. 3 (2003): 253–73.
54. Alexander Betts, "Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory," *Journal of Refugee Studies* 16, no. 3 (2003): 274–96.
55. Christina Boswell, "Explaining European Public Policy Responses to Asylum and Migration" (paper presented at the UNHCR-WIDER Conference on Poverty, International Migration and Asylum, Helsinki, 27–28 September 2002).
56. Don Flynn, "*Tough as Old Boots": Asylum, Immigration and the Paradox of New Labour Policy* (London: JCWI, 2003), <http://www.jcwi.org.uk> (accessed December 10, 2003).
57. This was the opinion expressed by Richard Williams of the Refugee Council at the Immigration Rights Project discussion forum where Don Flynn's paper was discussed, December 4, 2003.
58. Schuster, 175.
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L'étrange étranger: l'avenir incertain de l'immigration canadienne

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Résumé

L'objectif de cet article est d'apporter une réflexion sur la place que nous devrions accorder aux réfugiés dans la société canadienne, tout en considérant les enjeux sécuritaires. La crainte de nouveaux attentats terroristes a poussé les gouvernements nord-américains à se replier sur eux-mêmes et a exacerbé le sentiment négatif envers les étrangers. Ce sentiment s'impose également en défaveur des réfugiés. La confusion entourant les catégories de personnes désireuses de franchir la frontière canadienne précarise le sort des réfugiés qui tentent légitimement de trouver asile au Canada. Cet article porte principalement sur la perception négative que certaines initiatives gouvernementales posent sur les réfugiés. Plus précisément, l'auteur met en question les orientations prises par le nouveau gouvernement en place, depuis le 12 décembre 2003, dont la création d'une agence des services frontaliers qui s'apparente à l'organe américain, le Homeland Security.

Abstract

This article aims at presenting a reflection on the place to be accorded to refugees in the Canadian society, while at the same time being mindful of security considerations. The fear of new terrorist attacks has prompted North American governments to look inwards and has exacerbated negative feelings towards foreigners. This feeling weighs heavily against refugees. The confusion surrounding what categories of people are trying to cross the Canadian border renders even more insecure the fate of refugees who are seeking asylum in Canada through legitimate ways. This article deals mainly with the way certain government initiatives cast a negative light on refugees. More specifically, the author questions the direction taken by the new government that came into power on 12 December 2003, including the setting up of an agency for border services similar to the US Home Security agency.

Introduction

Dans les civilisations grecque et romaine, l'étranger était qualifié de barbare, parce que différent. Depuis les événements du 11 septembre 2001, une conscience déjà en éveil atteint son apogée et pose maintenant comme prémisse la peur de l'autre. L'autre, c'est la menace, c'est le danger. L'autre, c'est l'étranger. La vision que nous avons de l'étranger est confuse. Nos préjugés, nourris par les médias et non démentis par le gouvernement, entretiennent une perception de l'autre telle que nous ne distinguons plus le vrai du faux. Or, parmi ces étrangers, il y a l'investisseur, le migrant travailleur et sa famille, il y a l'étudiante et son conjoint, le diplomate, le réfugié et il y a les criminels, de profils divers. Ces criminels sont, par exemple, des auteurs d'acte d'espionnage, des auteurs d'acte visant le renversement d'un gouvernement par la force, des auteurs d'acte terroriste, des auteurs de violations graves contre les droits de la personne, tels que les génocidaires et des auteurs d'acte de violence contre la vie ou la sécurité d'autrui au Canada[2]. Au Canada, en moyenne 220 775 immigrants et réfugiés par année sont accueillis, contre 8 700 personnes renvoyées du pays parce qu'elles n'ont plus l'autorisation de demeurer au Canada ou pour des raisons criminelles[3]. Il est vrai que l'intégrité physique d'un État est cruciale pour le bien-être des ressortissants et que la protection de celui-ci relève légitimement de l'autorité étatique, mais jusqu'où doit aller notre méfiance envers l'autre? La sécurité publique et la protection des réfugiés apparaissent comme des problématiques paradoxales. Leurs natures intrinsèques et les ques-

tions qu'elles doivent résoudre sont généralement en opposition. Sans réconcilier parfaitement ces deux pôles d'intérêt, nous pensons qu'il est nécessaire d'établir un équilibre entre eux, de tracer une limite au-delà de laquelle la logique sécuritaire ne pourra plus s'imposer comme un repère unique.

La problématique des réfugiés est complexe, puisque abuser du système de détermination du statut de réfugié demeure possible. Au regard du droit international, le réfugié se définit par la crainte qu'il a d'être persécuté du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou du fait de ses opinions politiques[4]. Le système de détermination du statut de réfugié au Canada repose sur l'analyse de critères à la fois objectifs et subjectifs. Les réfugiés font partie d'une catégorie d'immigrants que les mécanismes de contrôle en immigration gèrent difficilement, et ce, contrairement à la sélection des immigrants où des contrôles sont faits avant leur arrivée et se basent sur des critères plus objectifs tels l'âge, l'emploi et les ressources financières. Par conséquent, les fraudeurs, les passeurs et autres criminels arrivent plus aisément à leurs fins en utilisant le système de revendication du statut de réfugié. Il existe par ailleurs toute une catégorie de personnes qui, sans se conformer à la définition de réfugié, essaie d'entrer au Canada dans l'espoir d'une vie meilleure. Du point de vue légal, la seule « obligation humanitaire " qu'ils peuvent *a priori* invoquer, c'est le système de détermination du statut de réfugié. Ce mélange de populations (criminels, pauvres et réfugiés) brouille la vision que nous entretenons sur les réfugiés. Pourtant, un revendicateur du statut de réfugié sur deux se voit reconnaître le statut de réfugié, ce qui revient à dire qu'au moins 50 pour cent des demandeurs parviennent à établir qu'ils ont légalement le droit de trouver refuge au Canada[5].

Le contrecoup engendré par les événements terroristes sur les politiques d'immigration au Canada a un impact significatif sur les personnes qui peuvent légitimement demander refuge au Canada. Plusieurs initiatives politiques décidées depuis l'automne 2001 se présentent comme des moyens de se prémunir contre d'éventuels actes terroristes. À notre avis, la création d'une agence des services frontaliers au sein du ministère de la Sécurité publique et de la Protection civile, annoncée le 12 décembre 2003, s'inscrit dans cette catégorie de décisions. Parmi les mesures préconisées, certaines visent l'entrée des étrangers au pays et l'exercice d'un contrôle resserré sur les nouveaux arrivants. Ces initiatives sont valables dans la mesure où elles ne préjudicient pas le droit légitime et fondamental d'une personne de trouver refuge au Canada, lorsque le droit – par ailleurs, toujours en vigueur – l'y autorise.

Selon nous, le problème central de la protection des réfugiés au Canada relève prioritairement de la perception que nous avons des étrangers. L'être humain n'est généralement pas porté vers ce qui est différent; il préfère s'associer avec ses semblables. Ce penchant naturel, accentué par les événements du 11 septembre 2001, s'observe à la fois auprès de la population et chez certains décideurs politiques du domaine de l'immigration. Par ailleurs, un problème connexe réside dans notre indifférence pour les enjeux globaux. Il y a suffisamment de problèmes à régler au Canada, pourquoi alors nous embêter avec des problèmes transnationaux? À quoi sert-il de coordonner des efforts et de mobiliser des ressources en vue d'aider des ressortissants de pays situés à des milliers de kilomètres du Canada, lesquels maintiennent des pans entiers de leur population dans la misère humaine et n'ont souvent pas grand-chose à faire de l'État de droit? La présente réflexion ne prétend pas offrir des réponses définitives et complètes à ces préoccupations. Nous souhaitons plutôt proposer certaines avenues qui invitent à surpasser une logique narcissique. La perception *a priori* négative et obtuse que nous entretenons des étrangers et notre rapport aux enjeux globaux constituent la trame de fond de l'analyse relative à la problématique des réfugiés que nous avançons dans ce texte. Ils permettront de jeter un éclairage différent sur le maintien d'un équilibre fragile entre la sécurité nationale et la protection des réfugiés.

Afin de mener à terme la réflexion envisagée, cet article décrit les mécanismes du système d'immigration sous le nouveau gouvernement en place depuis le 12 décembre 2003 et remet en question les orientations de ce dernier[6]. Il s'agit d'en entrevoir les conséquences, potentiellement néfastes, sur les étrangers et, plus particulièrement, sur les réfugiés. Afin de comprendre les rouages de l'institution juridique du statut de réfugié au Canada, nous présenterons les mécanismes de protection des réfugiés en vigueur au Canada et l'effet de ces mécanismes sur le sort des réfugiés (« Mauvaise conceptualisation de la détermination du statut de réfugié au Canada »). En deuxième lieu, nous verrons dans un premier temps certaines initiatives gouvernementales faisant obstacle à l'accueil des réfugiés par delà des frontières canadiennes (« La désappropriation du problème des réfugiés »). Dans un troisième temps, nous verrons quels sont le mandat et la structure des ministères de la Citoyenneté et de l'Immigration, d'une part, et de la Sécurité publique et de la Protection civile, d'autre part, et ce, aux fins de mieux saisir les orientations et les conséquences du virage entrepris par le gouvernement Martin en matière d'immigration (« L'américanisation de l'immigration canadienne »). Nous sommes d'avis que les préoccupations sécuritaires soulèvent des questions extrêmement complexes et exigent des solutions réfléchies, nuancées et

plurivalentes, à la mesure de la situation à laquelle elles sont censées s'appliquer.

I. Mauvaise conceptualisation de la détermination du statut de réfugié au Canada

Conférer l'asile à un revendicateur du statut de réfugié n'est pas chose facile. Depuis 1951, les États ont la charge d'établir un processus national de détermination du statut de réfugié. Les désaccords politiques et la difficulté de gérer une détermination internationale, exercée d'abord par l'administration des Nations Unies pour le secours et la reconstruction (entre 1943 et 1947) et, ensuite, par l'Organisation internationale pour les réfugiés (entre 1947 et 1950), ont poussé les États à mettre sur pied un mécanisme visant l'examen des demandes d'asile dans leur juridiction respective[7]. En récupérant la responsabilité de déterminer qui peut se voir accorder le statut de réfugié, les États parties[8] à la *Convention relative au statut des réfugiés* (ci-après « *Convention* ») se sont toutefois heurtés à d'autres obstacles, telle que la mise en œuvre d'un processus interne qui soit efficace et accessible tout en préservant son intégrité.

Nous constatons trois étapes cruciales à l'obtention du statut au Canada : l'entrée sur le territoire canadien et l'admissibilité au système de revendication du statut de réfugié, le système de détermination de la Commission de l'immigration et du statut de réfugié et celui de l'examen des risques avant renvoi. Chacune de ces étapes comportent des mécanismes visant à filtrer les « faux » demandeurs des « vrais ». Le problème rencontré dans ces mécanismes internes en est un de conceptualisation du processus de détermination. En effet, le système est conçu tant pour accueillir le « vrai » réfugié que pour expulser le fraudeur. Mais où doit-on tracer la ligne? Quelle fonction donne-t-on réellement au système de détermination du statut du réfugié : celle de se concentrer essentiellement à filtrer les faux demandeurs ou celle de maximiser ces efforts sur l'octroi de la protection? Nous sommes conscient qu'il ne faut pas perdre de vue que le système doit permettre le filtrage des criminels graves, mais tous les « faux » demandeurs d'asile ne représentent pas une menace pour la sécurité du Canada. Nous ne prétendons pas, non plus, qu'il faille faire fi des demandes d'asile non fondées et accepter tous les demandeurs d'asile. La solution se situe plutôt dans les objectifs que l'on se donne pour protéger les populations persécutées. Il nous semble également que la conception du système est fortement alimentée par une mauvaise perception des réfugiés et, plus particulièrement, celle des demandeurs d'asile, ce qui a pour effet d'orienter le système de protection vers un système inquisiteur et accusatoire, de plus en plus légitimé par la peur de l'étranger représentant une menace potentielle pour la sécurité des citoyens.

Au Canada, l'accueil réservé aux demandeurs d'asile soulève, à notre avis, un questionnement sur notre façon de percevoir les réfugiés. Une fois rendu à la frontière canadienne, le réfugié est tenu d'informer les autorités canadiennes de sa situation précaire dans son pays de nationalité et d'indiquer qu'il souhaite faire une demande de statut de réfugié[9]. L'agent d'immigration au point d'entrée consignera les informations fournies par le demandeur dans ses notes (« notes du point d'entrée »)[10]. Il confisquera également les documents de voyage et d'identité de la personne. Du fait de sa revendication, le demandeur d'asile est considéré d'emblée comme inadmissible à séjourner au Canada. Cette inadmissibilité de droit est cependant suspendue jusqu'à ce qu'une décision soit prise au regard de sa qualité de réfugié[11]. Cette qualification péjorative qu'est l' « inadmissibilité pendante »[12] du revendicateur du statut de réfugié se présente comme un regard initialement négatif sur les réfugiés.

Une fois au pays, le ministère de la Citoyenneté et de l'Immigration (ci-après « Ministère ») est responsable d'évaluer la recevabilité de la demande de statut de réfugié devant le tribunal quasi judiciaire, soit la Section de la protection des réfugiés, sur foi des renseignements donnés par le demandeur d'asile. La recevabilité implique l'examen de critères allant de la criminalité à l'octroi antérieur du statut de réfugié[13]. Une demande d'asile jugée recevable par le Ministère doit être entendue devant un commissaire de la Section de la protection des réfugiés. Le traitement d'un dossier devant l'organisme quasi judiciaire prend jusqu'à un an[14].

La longueur du délai peut sembler problématique. Nous suggérons toutefois que la qualité du processus ne doit pas être affectée en vue d'accroître l'efficacité du processus. L'absence de nouvelles ressources financières et de décideurs, au sein du système de détermination du statut de réfugié, combinée avec un souci de restreindre le délai, peut mener à l'effritement du régime de protection des réfugiés. À notre avis, toute restructuration du régime en vigueur devra nécessairement tenir compte de l'indépendance institutionnelle, c'est-à-dire de la protection de l'impartialité des décideurs. Mais ce qui inquiète le plus, c'est la façon dont les procédures et les audiences auprès des revendicateurs du statut de réfugié sont menées.

Au Canada, c'est la Commission de l'immigration et du statut de réfugié (ci-après « Commission ») qui est responsable de déterminer le statut de réfugié aux demandeurs d'asile. Plus précisément, il s'agit de la Section du statut de réfugié qui porte le nom de Section de la protection des réfugiés depuis l'adoption de la nouvelle loi sur l'immigration en 2002[15]. La Commission a vu le jour en 1989 à la suite des recommandations de la Cour suprême du Canada dans

l'arrêt *Singh* c. *Ministre de l'Emploi et de l'Immigration*[16]. Depuis la création de la Commission de l'immigration et du statut de réfugié, le revendicateur du statut de réfugié se présente devant un commissaire qui étudie le dossier écrit et entend le revendicateur[17]. Le commissaire accorde ou refuse le statut de réfugié au revendicateur[18]. Bien que le système soit construit sur une procédure non contradictoire, certains auteurs jettent un éclairage troublant sur la façon dont sont menées les audiences, parfois contradictoires et inquisitrices[19]. Au-delà des procédures imposées, nous croyons que le sort du demandeur d'asile dépend essentiellement de la prédisposition du décideur qui entend l'affaire. En d'autres termes, sa perception des réfugiés et sa connaissance des réalités culturelles et historiques du demandeur d'asile affectent le jugement du décideur.

Lorsque le demandeur est débouté, il peut disposer d'un recours judiciaire devant la Cour fédérale. En effet, la Cour fédérale a compétence, d'une part, pour réviser les décisions qui n'ont pas été rendues en conformité avec les principes de justice naturelle et, d'autre part, pour examiner l'indépendance avec laquelle une décision administrative a été prise[20]. La possibilité d'être entendu par un organe judiciaire est cruciale, puisqu'elle permet de corriger un processus décisionnel déviant. Même si la compétence de la Cour fédérale se limite généralement aux paramètres décisionnels, son pouvoir de surveillance agit comme un filet de sécurité d'autant plus important que la division d'appel de la Section de la protection des réfugiés créée par la *Loi sur l'immigration* n'a toujours pas été constituée[21]. Le revendicateur du statut de réfugié qui n'obtient pas gain de cause devant la Section de la protection des réfugiés et devant la Cour fédérale dispose d'un dernier recours portant sur le risque de retour dans son pays d'origine. Il doit pour cela attendre l'exécution de son renvoi[22].

L'examen des risques avant renvoi constitue un nouveau programme administratif qui a été mis en œuvre par la *Loi sur l'immigration* en 2002[23]. Les articles 112 à 116 de cette loi régissent l'application dudit programme. Celui-ci consiste à examiner les conditions géo-politiques du pays d'origine aux fins d'établir ou d'exclure l'existence de risques de persécution, de torture ou de mauvais traitements allégués par la personne sur le point d'être renvoyée. Les motifs de risques sont énumérés aux articles 96 et 97 de la *Loi sur l'immigration* et constituent également les motifs de protection devant la Commission. Les agents qui accordent ou qui rejettent la demande de protection dans le cadre de ce programme sont des fonctionnaires fédéraux, contrairement aux décideurs de la Section de la protection des réfugiés qui sont nommés par le gouvernement.

La finalité de l'examen des risques avant renvoi vise à combler les lacunes du système de renvoi des personnes qui n'ont plus l'autorisation de demeurer au Canada, mais qui craignent pour leur vie, leur sécurité et leur liberté[24]. Le renvoi consiste à expulser les étrangers dont les visas d'étude ou de travail sont expirés, les demandeurs d'asile déboutés et les criminels qui ne sont pas ou plus citoyens canadiens[25]. L'exécution des renvois exige beaucoup de temps et de ressources. Plusieurs mois peuvent s'écouler entre la décision finale de la Section de la protection des réfugiés et l'exécution du renvoi des individus concernés. Il est difficilement concevable d'exécuter tous les renvois dans un temps limité, à moins bien sûr de créer une police fédérale superpuissante qui traquerait les immigrants indésirables. Tel que nous le verrons, cette vision interventionniste de l'usage des forces policières n'est toutefois pas étrangère aux propositions du nouveau gouvernement (voir partie III).

Ici, la perception et la connaissance des conditions du pays d'origine du demandeur d'examen des risques avant renvoi sont primordiales, puisque la plupart des demandes sont traitées par écrit. Par ailleurs, l'évaluation du risque dépend à elle seule d'un décideur unique travaillant pour le Ministère. Ce programme étant nouveau, il nous est difficile d'évaluer son efficacité à protéger en dernier recours les personnes à risque. Toutefois, nous pouvons d'ores et déjà se questionner sur le degré d'indépendance offert à ses décideurs (voir partie III).

Aucun système n'est parfait, alors pourquoi ne pas accepter que, parmi les demandeurs d'asile reconnus réfugiés, il y a nécessairement des gens qui n'ont pas de revendications bien fondées au sens de la *Convention*. Par conséquent, le système devrait admettre ces personnes comme une conséquence du système et concentrer ses ressources sur la protection. La Commission et l'examen des risques avant renvoi ne sont pas seuls à participer au processus de détermination. Le demandeur d'asile doit passer par de nombreuses étapes avant de faire entendre le fond de sa revendication. La deuxième partie se concentre justement sur ces étapes, puisqu'elles sont aussi responsables de la difficulté pour les revendicateurs du statut de réfugié de demander la protection du Canada, et ce, avant même que le réfugié n'arrive au Canada.

II. La désappropriation du problème des réfugiés

La méconnaissance des mouvements migratoires et des conditions précaires et vulnérables des réfugiés alimentent l'indifférence des pays occidentaux face aux enjeux globaux qui relèvent de la lutte pour les droits fondamentaux. Afin de mieux gérer l'immigration, certains États, comme le Canada, ont mis en place des mécanismes de filtrage en vigueur à l'extérieur de leurs frontières, créant ainsi des difficultés supplémentaires aux mouvements des réfugiés. Ces méca-

nismes visent à contrôler l'arrivée des immigrants en imposant aux transporteurs et aux immigrants l'obligation de voyager « légalement », c'est-à-dire munis de documents authentiques de voyage. Les obstacles rencontrés entre la sortie du réfugié de son pays d'origine jusqu'à son arrivée dans un pays d'asile sont de taille. Ils imposent des fardeaux souvent coupés de la réalité des réfugiés en visant, sans discrimination, tous les étrangers désireux de venir au Canada. Cette réalité, que vivent les réfugiés, consiste à ne pas avoir les documents requis sur soi, à fuir à n'importe quel prix, à voyager à n'importe quelle condition, à transiter de nombreuses fois et à posséder un vocabulaire différent de la technicité juridique du droit de l'immigration.

Pour être réfugié, il faut nécessairement se trouver à l'extérieur de son pays de nationalité et être incapable de se réclamer de la protection de son pays. Ces préalables se fondent sur un principe bien connu en droit international, celui de la souveraineté des États. La personne, qui craint avec raison la persécution selon les cinq motifs de la *Convention*, doit donc s'exiler hors de son pays d'origine pour demander la protection d'un autre pays[26]. Si le réfugié se réclame de la protection du Canada, les autorités canadiennes entrent alors en jeu[27]. Toutefois, avant même d'atteindre la frontière canadienne, les réfugiés rencontreront des obstacles majeurs. Il faut se rappeler ici les causes de persécution de même que la situation géographique du Canada. Les guerres civiles, les guerres entre nations, les gouvernements oppresseurs et corrompus, de même que la pauvreté sont les principales causes d'exil des réfugiés[28]. Les ressortissants, fuyant pour les raisons énumérées dans la *Convention* – à savoir la race, la nationalité, la religion, l'appartenance à un groupe social et les opinions politiques –, proviennent pour la grande majorité de l'hémisphère Sud[29].

Or, le Canada se trouve géographiquement éloigné de ces pays. Peu nombreux d'ailleurs sont les réfugiés qui arrivent au Canada sans passer par l'Europe ou les États-Unis. D'un point de vue pratique, la plupart des réfugiés transitent de fait par d'autres pays avant d'atteindre le Canada[30]. Considérant les conditions dans lesquelles les réfugiés quittent leur pays d'origine, ceux-ci ne voyagent pas nécessairement avec des documents de voyage valides, lorsqu'ils ne voyagent pas carrément avec des documents falsifiés ou empruntés[31]. Nous expliquons, ci-après, en quoi ces particularités constituent des obstacles à l'obtention du statut de réfugié au Canada.

Depuis 1989, le Canada pratique ce qu'on appelle l'interception des passagers en destination pour le Canada qui ne possèdent pas de documents de voyage valides[32]. Cette pratique consiste à intercepter les documents frauduleux et à avertir la compagnie aérienne de la présence de passagers voyageant avec des documents invalides. En effet, la compagnie recevra une amende sévère si elle fait monter à bord un passager avec des documents de voyage non valables[33]. L'interception a généralement lieu dans des points de transit stratégiques, tels que Heathrow, Paris et Rome[34]. L'objectif avoué de cette pratique est d'empêcher les migrants illégaux – mais non nécessairement illégitimes – de parvenir à la frontière canadienne, et ce, alors qu'ils se trouvent dans l'État de transit. Entre 1996 et 2002, environ 40 000 personnes munies de documents frauduleux ont été interceptées[35].

La difficulté pour les réfugiés est qu'ils sont souvent confondus avec cette catégorie de migrants illégaux, parce qu'ils voyagent fréquemment avec des documents frauduleux. Lorsque ces personnes sont interceptées, elles sont la plupart du temps confiées à la discrétion des autorités étrangères, puisque les agents canadiens travaillant à l'étranger ne possèdent pas la compétence permettant de déterminer la qualité de statut de réfugié hors du territoire canadien[36]. La personne se retrouve donc dans une situation où elle doit choisir entre retourner chez elle ou s'adresser aux autorités de l'État de transit. Cela nous amène à traiter d'une seconde pratique, à savoir celle des accords bilatéraux ou multilatéraux établissant un mécanisme de reconnaissance mutuelle des décisions prises en matière de détermination du statut de réfugié[37]. Ce que ces ententes reconnaissent implicitement, ce sont les systèmes de détermination adoptés par d'autres juridictions nationales, en déchargeant ainsi le fardeau de reconnaissance sur des mécanismes étrangers et aussi différents, parfois moins avantageux pour le demandeur d'asile. Ce transfert de responsabilité est particulièrement vrai pour le Canada, étant donné qu'il entend mettre en œuvre un accord à cet effet avec les États-Unis. En effet, le Canada reçoit plus d'un tiers des demandeurs d'asile par voies terrestre, maritime ou aérienne, en provenance des États-Unis[38].

Prenons l'exemple de *l'Entente entre le gouvernement du Canada et le gouvernement des Etats-Unis d'Amérique pour la coopération en matière d'examen des demandes d'asile présentées par des ressortissants de tiers pays* (ci-après, "*Entente sur les tiers pays sûrs*") qui n'est pas encore en vigueur, mais qui relève d'une volonté politique ferme, puisqu'un projet de règlement a déjà été publié dans la Gazette du Canada, Partie I, le 26 octobre 2002[39]. Cet accord exige que le revendicateur du statut de réfugié se trouvant aux Etats-Unis (même en transit) s'adresse aux autorités américaines, et que celui qui se trouve sur le territoire canadien s'adresse aux autorités canadiennes. Une décision négative américaine peut ne pas être en conformité avec les interprétations canadiennes (notamment les exigences de la *Charte canadienne des droits et libertés*)[40], mais il est en principe impos-

sible pour le revendicateur aux Etats-Unis d'avoir recours à la juridiction canadienne. Des exceptions sont toutefois permises pour des personnes ayant des membres de leur famille établis dans l'un ou l'autre des deux pays, ainsi que pour les mineurs non-accompagnés[41]. De ce fait, un demandeur d'asile se trouvant aux Etats-Unis mais ayant de la famille au Canada, ou un enfant isolé, pourra se présenter à la frontière canadienne et demander l'asile au Canada, même si sa demande a déjà été refusée aux Etats-Unis. Si un revendicateur qui se trouve sur le territoire américain tient à faire une demande d'asile au Canada mais n'a pas de famille au Canada, il devra traverser la frontière de manière illégale, ou entrer au Canada par voie maritime ou aérienne, puisque l'*Entente sur les tiers pays sûrs* se limite aux points d'entrée frontaliers, c'est-à-dire terrestres[42].

Bien que la gestion des flux migratoires nécessite une collaboration internationale, elle ne doit pas faire obstacle à l'arrivée des réfugiés en sol canadien. Aussi, peut-on voir dans l'interception et la reconnaissance d'un système de détermination étranger une déresponsabilisation à l'endroit des problèmes globaux, que l'on trouve plus commode de voir régler par les autres États. Les mesures d'interception illustrent, par ailleurs, l'inadéquation d'une solution aménagée pour un problème donné – celui des migrants illégaux – avec celle que requiert la précarité des réfugiés en transit et que l'on continue à confondre avec une catégorie de migrants qui ne peut aucunement prétendre à un droit d'entrée sur le territoire canadien.

Ces pratiques ont un effet pervers sur le sort des réfugiés, puisqu'il n'existe aucune assurance que leurs droits seront protégés adéquatement. Les autorités nationales de l'endroit où se trouve le réfugié ont cette responsabilité, mais qu'en est-il du réfugié persécuté par un agent non étatique qui se retrouve en France[43] et dont le transit pour le Canada est refusé? Qu'en est-il du réfugié dont la famille se trouve au Canada, mais dont l'accès est bloqué à Heathrow? Qu'en est-il de tout ceux et celles qui pourraient maintenant se réclamer de la protection du Canada au soutien des motifs élargis de torture et de traitements inhumains s'ils étaient en sol canadien[44]? Tout aussi préoccupantes sont les nouvelles propositions du gouvernement Martin de mettre sur pied une agence frontalière qui, comme nous l'avons mentionné, affecteront plus de la moitié des demandeurs d'asile au Canada.

III. L'américanisation de l'immigration canadienne

Depuis le 12 décembre 2003, soit le jour de la nomination du Cabinet, le nouveau chef du gouvernement a créé l'Agence des services frontaliers du Canada (ci-après « Agence ») afin d'assurer une meilleure sécurité économique et publique au pays[45]. Cette agence fera partie du ministère de la Sécurité publique et de la Protection civile, également mis en place par le nouveau chef du gouvernement. Suivant le communiqué rendu public par le premier ministre le 13 décembre 2003, la création de l'Agence vise à mettre « à profit l'initiative sur la frontière intelligente et les progrès importants qui ont été réalisés pour accélérer le commerce et les déplacements, tout en améliorant la sécurité en ce qui a trait aux arrivées à haut risque, et en continuant de travailler en étroite collaboration avec les entreprises, les syndicats, les groupes représentant les immigrants et les réfugiés ainsi que d'autres intervenants pour mettre en œuvre ces changements[46] ».

La constitution d'une telle agence pose des problèmes importants dans la gestion et l'accueil des réfugiés au Canada. La protection de leurs droits et de leurs besoins nous semble compromise par le contrôle d'un organe frontalier chargé d'administrer les entrées et les sorties en vue d'accroître la sécurité physique du Canada, agissant ainsi comme premier contact. Avec la création de l'Agence des services frontaliers, l'accès des réfugiés – ainsi que des autres immigrants – se fera par des agents « sécuritaires », dont le mandat premier ne consiste clairement pas à assurer la protection des droits fondamentaux de populations menacées ni à mettre en œuvre « l'obligation humanitaire » du Canada à leur endroit. Les fonctions précises dans l'administration des affaires de l'immigration de l'Agence sont à déterminer. Toutefois, les communiqués laissent présager que l'Agence exercera un contrôle accru et sans discrimination des déplacements des étrangers, dont les demandeurs d'asile. En ce sens, il est possible que l'Agence soit responsable de l'admission de toutes les personnes désireuses d'entrée au Canada, et ce, même s'il s'agit de revendicateurs du statut de réfugié. La question particulière de l'admissibilité au pays relève actuellement des services d'interdiction et d'exécution de la loi[47].

Le contexte dans lequel s'inscrit la création de l'Agence nous permet de faire un rapprochement avec la gestion des Américains des entrées au pays. L'initiative frontalière entre le Canada et les États-Unis est prévue par la *Déclaration sur la frontière intelligente*[48] et prévoit, entre autres choses, un contrôle accru des passages à la frontière canado-américaine, de même que l'échange de renseignements relatifs aux ressortissants qui ne sont pas dotés de la citoyenneté canadienne ou américaine[49]. La récente *Déclaration d'entente mutuelle d'échange d'information* tient compte des principes édictés dans la *Déclaration sur la frontière intelligente* et comporte une annexe applicable à l'échange d'information portant sur les demandeurs d'asile en vue de resserrer l'accès aux revendicateurs du statut de réfugié. Il est intéressant de noter que cette annexe a été signée par le ministère de la Citoyenneté et de l'Immigration du Canada

et *The Bureau of Citizenship and Immigration Services of the U.S. Department of Homeland Security*[50].

Nous n'avons encore que très peu d'information sur le mandat de l'Agence[51], mais il est permis de croire que son rôle pourrait correspondre à celui du *Homeland Security* américain, lequel a été mis sur pied pour défendre le pays contre toute intrusion néfaste à la sécurité des États-Unis[52]. En effet, le *Department of Homeland Security* est une réponse directe aux attaques terroristes du 11 septembre 2001. Le président George W. Bush a regroupé sous un seul organisme la coordination de 22 organes existants afin de « protéger la nation contre les menaces portées à la patrie »[53]. Le 1er mars 2003, le gouvernement américain transférait la responsabilité des services et des bénéfices à l'immigration, telles que l'acquisition de la citoyenneté et les autorisations de travailler au *U.S. Citizenship and Immigration Services,* un organe du *Department of Homeland Security*. Les fonctions d'enquête et de mise en exécution des lois d'immigration fédérales et des lois concernant la sécurité de l'air sont maintenant du ressort du *Bureau of Immigration and Customs Enforcement*. De son côté, le *Bureau of Customs and Border Protection* assume la protection des frontières américaines au sein du *Department of Homeland Security*[54].

Pour mieux cerner les paramètres de l'Agence, nous tenterons de comprendre la constitution du ministère responsable de l'Agence et les organismes qu'elle chapeaute. Le ministère canadien de la Sécurité publique et de la Protection civile a pour mandat d'assurer « la sécurité de la population canadienne, de même que les autres activités visant à la mettre à l'abri des catastrophes naturelles et des atteintes à sa sécurité ou, le cas échéant, à y remédier[55] ». Ce nouveau ministère coordonnera les activités visant la protection physique des Canadiens et des Canadiennes. Pour ce faire, il chapeautera les activités du Bureau de la protection des infrastructures essentielles et de la protection civile, de la Gendarmerie royale du Canada (GRC), du Service canadien du renseignement de sécurité, du Service correctionnel du Canada, de la Commission nationale des libérations conditionnelles, du Centre des armes à feu et de l'Agence précitée[56]. Le Bureau des infrastructures essentielles et de la protection civile relevait auparavant du ministère de la Défense nationale et était mandaté depuis le 5 février 2001 pour veiller au maintien des secteurs de l'énergie et des services publics, des communications, des transports, de la sécurité et du gouvernement[57].

Quant à l'Agence des services frontaliers, elle dirigera les activités de l'Agence des douanes et du revenu du Canada, des services de renseignements, des fonctions d'interdiction et d'exécution de la loi, dont les renvois des étrangers illégaux, des services d'inspection des passagers et des importations initiales aux points d'entrée[58]. À cela s'ajoute la création d'un poste de conseiller à la sécurité nationale auprès du premier ministre, dont le rôle principal consistera à assister le ministre de la Sécurité publique et de la Protection civile dans l'exécution de ses fonctions[59]. Le premier objectif de ces nouvelles entités sera de protéger les citoyens canadiens contre les menaces extérieures. Cette réorganisation témoigne d'une orientation marquée du gouvernement en faveur d'un protectionnisme plus resserré. Il est, par ailleurs, possible d'affirmer que le gouvernement a opté pour une certaine fermeture des frontières aux étrangers, puisqu'il ressort des propos tenus à l'occasion de la création des nouveaux organes que seule la protection des Canadiens et des Canadiennes compte à présent. La recherche d'un équilibre acceptable entre la protection de la sécurité collective et celle des immigrants et des réfugiés est, pour l'instant, absente du programme politique.

Un autre indice de la radicalisation des contrôles frontaliers réside dans la faculté de l'Agence d'étendre ses pouvoirs en matière d'enquête. En vertu de la *Loi sur les armes à feu* et du *Règlement sur les armes à feu des agents publics*, l'Agence pourra augmenter la capacité des agents d'enquêter sur les immigrants illégaux et les criminels[60]. Dans les faits, lesdits agents pourraient être autorisés à porter une arme. Il s'agit là de pouvoirs dont ils ne disposent pas en vertu du régime actuel[61]. Ces pouvoirs augmenteront l'efficacité des mesures de renvoi et de l'exécution de la loi. Ils s'apparentent également à ceux que possèdent les corps policiers.

Toutefois, ce qui inquiète davantage, c'est le transfert du programme précité de l'examen des risques avant renvoi, sous la coupe de l'Agence des services frontaliers (ce programme est actuellement du ressort du ministère de la Citoyenneté et de l'Immigration). Le programme administratif étant relié, par les opérations, à l'exécution des renvois et à l'examen des risques avant renvoi, il intégrera l'Agence au même titre que les renvois. Cette logique témoigne clairement de l'association d'idée entre « danger » et « étranger », et jette un doute sérieux sur la volonté réelle d'accorder une protection aux personnes vulnérables. Elle précarise, au demeurant, l'indépendance institutionnelle des décideurs du programme de protection. En effet, comment garantir l'indépendance décisionnelle de décideurs relevant d'une autorité dont l'unique mandat, *a priori*, consiste à assurer la sécurité du territoire et l'expulsion des indésirables? Un possible conflit d'intérêt nous semble flagrant entre, d'une part, la protection nécessaire des personnes à risque de persécution, de torture ou de mauvais traitement dans leur pays d'origine et, d'autre part, la mise en œuvre de préoccupations sécuritaires.

Il importe également de s'interroger sur la place qu'occupera le ministère de la Citoyenneté et de l'Immigration

dans ce nouvel environnement politique. Le communiqué précité du premier ministre indique que le Ministère « demeurera responsable de la politique d'immigration afin de protéger les intérêts des immigrants et des réfugiés[62] ». De fait, les politiques d'immigration portent généralement sur les critères de sélection des immigrants et des réfugiés. Le rôle des agents d'immigration restera à définir, et il est à souhaiter que les « intervenants du milieu » soient consultés. Il ressort du communiqué que les agents de Citoyenneté et Immigration demeureront présents *a priori* aux points frontaliers majeurs, aux fins d'appliquer les critères actuels d'immigration[63]. La question de savoir qui aura préséance et quelle politique primera, en cas de désaccord entre un agent d'immigration et un agent de l'Agence des services frontaliers, demeure irrésolue. Le terme « intervenant du milieu » n'a pas été défini dans le communiqué, mais il semble que le gouvernement entende consulter, notamment, les groupes représentant les immigrants et les réfugiés. Il faut espérer que soit entendue une vaste représentation des groupes et des individus informés de la situation, des besoins et des droits des immigrants et des réfugiés.

Pour l'heure, la préoccupation centrale de la sécurité nationale menace la protection nécessaire des intérêts légitimes des réfugiés et des immigrants. Avec les nouvelles mesures mises en place, il devient difficile d'envisager un juste équilibre entre les enjeux sécuritaires et humanitaires. Aussi, l'existence du ministère de la Citoyenneté et de l'Immigration n'empêche-t-elle pas l'analogie entre les régimes canadien et américain, puisque la priorité semble pencher en faveur du renforcement des mesures sécuritaires gérées par un ministère indépendant du ministère de la Citoyenneté et de l'Immigration. Il est vrai que la présence d'un ministère de l'immigration indépendant de l'Agence diffère de la structure américaine, mais les fonctions et l'exécution d'immigration s'entrecoupent et incombent souvent à la mise en exécution de la loi. Le nouveau ministère de la Sécurité Publique et de la Protection civile nous apparaît donc comme une réplique du *Homeland Security* américain où il est question d'appliquer toutes les politiques qui s'apparentent de près ou de loin à la criminalité et à l'examen des étrangers au pays.

Conclusion

Afin de saisir l'évolution qu'est en train de subir le droit des réfugiés au Canada, à l'initiative des changements décidés par le nouveau gouvernement en matière d'immigration, nous avons examiné le rôle de divers acteurs, ainsi que les récentes initiatives ayant un impact sur la détermination du statut de réfugié. La réorganisation, rendue publique par Paul Martin le 12 décembre 2003, entraînera une période de transition. Il convient de souligner que les informations communiquées jusqu'à ce jour au sujet de cette transition, ainsi que des fonctions des nouvelles entités, sont imprécises. Cet état de fait est d'autant plus critiquable que le nouveau gouvernement ne dispose d'aucun mandat électoral pour opérer de tels changements d'orientation dans la politique publique d'immigration du Canada. Pour le moment, il semble que la structure établie par le précédent gouvernement subsiste, mais que des changements sont clairement envisagés[64]. Tels que nous les comprenons, ces changements portent, pour l'essentiel, sur l'octroi de pouvoirs d'investigation élargis aux agents de l'Agence des services frontaliers et sur la centralisation des questions sécuritaires dans cette seule agence. Si de telles modifications ne semblent pas affecter, de prime abord, le régime applicable à la détermination du statut de réfugié, nous sommes d'avis qu'elles provoqueront un resserrement du droit d'entrer au pays et laisseront encore moins de possibilités qu'il n'y en a déjà à un réfugié de trouver l'asile au Canada.

D'une manière générale, les mécanismes de détermination du statut du réfugié prévus par le droit interne permettent aux États de ne reconnaître la qualité de réfugié à une personne requérante que lorsque celle-ci respecte le processus administratif et/ou judiciaire mis en place par l'État visé. Bien que nous reconnaissions ici l'expression du principe de souveraineté, il est difficile de comprendre le traitement réservé aux réfugiés par le Canada et très certainement par d'autres juridictions nationales[65]. À partir du moment où une personne qui est à la frontière canadienne se réclame de la protection du Canada jusqu'à la reconnaissance de son statut de personne protégée, le Canada se préoccupe peu du sort des demandeurs d'asile. Ils sont d'ailleurs perçus par la société et de nombreux fonctionnaires gouvernementaux comme des gens qui abusent d'un système généreux et des richesses d'un pays économiquement bien nanti. De plus en plus, nous assistons à des mesures de renforcement aux frontières canadiennes et le gouvernement fait toujours plus reposer la responsabilité des malheurs de ce pays sur les étrangers. Loin d'être bienvenus, ceux-ci constituent un danger. Chaque personne qui se présente à la frontière et qui n'est pas citoyenne canadienne est perçue d'emblée comme une menace potentielle à la sécurité du pays. Désormais, ce ne seront plus des agents d'immigration qui seront postés à la frontière, mais des agents relevant d'une agence de sécurité. Il s'ensuit un examen scrupuleux des origines et des raisons du séjour de l'étranger au Canada. S'il n'est pas muni de documents valides, son fardeau sera plus grand. Il est nécessaire qu'un examen soit fait, mais la présomption négative qui repose sur les étrangers à la frontière grandit et reflète une réalité bien triste : étrangers, restez chez vous!

Des propositions de réforme ont été avancées par le ministère de la Citoyenneté et de l'Immigration pour accroître l'efficacité du processus de détermination du statut de réfugié[66]. Ces initiatives sont également poursuivies par le nouveau gouvernement. Celui-ci désire réformer le processus « afin de mettre en place un système rationalisé et plus prévisible[67] ». Bien que nous ne nous y soyons pas penché, la réforme envisagée porte également sur les procédures de nomination des décideurs de la Section de la protection des réfugiés, ce qui favoriserait l'indépendance personnelle des décideurs[68]. Cela ne constitue pas forcément une solution effective dans la mesure où, selon nous, une vraie réforme ne peut être possible que par un changement de perception à l'égard des étrangers et, plus particulièrement, des réfugiés. L'orientation sécuritaire du nouveau gouvernement n'est pas sans renforcer une conception diamétralement opposée à l'accueil des populations vulnérables. Nous croyons qu'une réforme est nécessaire pour faciliter l'entrée et l'intégration des réfugiés au Canada. Celle-ci devrait également permettre une meilleure cohésion des acteurs institutionnels du système de détermination du statut de réfugié, c'est-à-dire le ministère de la Citoyenneté et de l'Immigration, ainsi que la Commission de l'immigration et du statut de réfugié. Dans l'état actuel des choses, on peut toutefois se demander quelle réforme nous attend : une réforme qui assoit davantage la légitimité des impératifs sécuritaires ou une réforme en profondeur qui nécessite une ouverture sur l'autre et un changement des mentalités?

L'objectif de cet article était d'apporter une réflexion sur la place que nous devrions accorder aux réfugiés dans la société canadienne, tout en considérant les enjeux sécuritaires. Nous constatons un déséquilibre en faveur des questions sécuritaires et nous croyons fermement que la protection des réfugiés ne va pas à l'encontre des préoccupations sécuritaires, si l'on adopte un regard différent sur cette problématique. Il suffit de comprendre les problèmes de perception et de conscientisation pour découvrir de nombreuses solutions à la situation précaire dans laquelle se trouve le droit des réfugiés. Les initiatives allant dans le sens de la coopération internationale ou, mieux encore, dans celui de la diminution de la pauvreté et l'enraiement des dettes des pays pauvres sont toutes des réponses durables au problème de l'exil des populations. En effet, les guerres civiles et internationales, les dictatures, la corruption et la pauvreté sont des situations qui mènent à la persécution des citoyens et entraînent la fuite des réfugiés vers des États où leur vie, leur sécurité et leur liberté ne risquent pas d'être menacées. Ces mêmes causes provoquent également le déplacement de populations pour des raisons autres que celles qui sont prévues dans la *Convention relative au statut des réfugiés*. Tout est une question de mesure entre les efforts déployés pour assurer l'ordre et la sécurité, et la place consacrée aux enjeux humanitaires, c'est-à-dire à la défense de la dignité humaine; celle-là même que le Canada promeut sur la scène internationale et a consacrée comme un pilier de son identité nationale dans le texte juridique le plus important au pays, la *Charte canadienne des droits et libertés*[69].

Notes

1. Les idées dans cet article sont celles de l'auteur uniquement. L'auteur remercie M^e^ Mélanie Deshaies pour son soutien inconditionnel et le professeur François Crépeau pour son aide précieuse.
2. Articles 34 et 35 de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27.
3. Moyenne établie sur les dix dernières années. Citoyenneté et Immigration Canada. Au service du Canada et du monde, <http://www.cic.gc.ca/francais/ministerebrochure/service.html> (consulté le 28 décembre 2003).
4. *Convention relative au statut des réfugiés*, adoptée le 28 juillet 1951 par la résolution 429(V) A.G.N.U, article premier.
5. Entre 1990 et 1999, le taux de reconnaissance est de 52,1 %. Le taux de reconnaissance a été établi d'après le nombre de réfugiés à qui le statut de réfugié selon la Convention ou un statut humanitaire a été accordé. Voir l'Annexe 9 du Haut-Commissariat des Nations Unies pour les réfugiés, *Les réfugiés dans le monde* (Paris : Autrement, 2000), 321.
6. L'ancien Premier ministre à la tête du Parti libéral, Jean Chrétien, a quitté la vie politique. Le vainqueur de la course à l'investiture du Parti libéral tenue en novembre 2003 fut Paul Martin. Celui-ci agit à titre de chef du gouvernement canadien et a mis en place un Cabinet des ministres nouvellement constitué.
7. Haut-Commissariat des Nations Unies pour les réfugiés, *Les réfugiés dans le monde*, *supra* n. 5, chap. 1, 13–35.
8. 1969 marque la ratification par le Canada de la *Convention relative au statut des réfugiés* de 1951 et de son *Protocole relatif au statut des réfugiés*, adoptée le 16 décembre 1966 par la résolution 2198 (XXI) A.G.N.U.
9. Une personne peut également craindre avec raison la persécution si elle retourne dans son pays d'origine alors qu'elle se trouve au Canada.
10. Ce sont les notes du point d'entrée qui seront transmises à la Section de la protection des réfugiés, afin d'examiner la vraisemblance des faits et la crédibilité du demandeur d'asile.
11. *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, par. 49(2).
12. Cette expression est de nous.
13. *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, art. 101.
14. Ce délai comprend l'arriéré des dossiers en cours, l'analyse du dossier, la recherche documentaire, l'audience et la prise de décision. Dans un discours prononcé en mai 2002, le président

de la Commission de l'immigration et du statut de réfugié, Peter Showler, a posé comme objectif un délai de 6 mois dans le traitement des demandes d'asile devant la Commission : « Idéalement, les revendications du statut de réfugié doivent être tranchées dans les six mois de la saisine de la CISR. Ce délai est suffisant pour l'accomplissement de toutes les formalités de procédure et pour la collecte des renseignements nécessaires à l'instruction dans la plupart des cas. Des dossiers exceptionnellement complexes peuvent demander davantage de temps, mais pour les affaires de complexité moyenne, un délai de six mois représente un objectif réaliste. Cet objectif ne pourra être atteint que si la CISR dispose de ressources suffisantes pour faire face à la quantité de demandes dont elle est saisie. » Peter Showler, « Le jugement des demandes d'asiles : sélection et formation des Commissaires », exposé à la conférence annuelle de l'Association canadienne des professeurs de droit, Toronto, 24–26 mai 2002. Le *Rapport sur le rendement de la Commission de l'immigration et du statut de réfugié* indique que le délai moyen est passé de 10 mois à 12,5 mois de 2000 à 2003, et que le délai continuera de s'allonger à cause des arriérés. Commission de l'immigration et du statut de réfugié, *Rapport sur le rendement* pour la période se terminant le 31 mars 2003, <http://www.irb.gc.ca/fr/recherchepub/pub/rendement/pr0203_ f.pdf >, 34 (consulté le 7 janvier 2004).

15. *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, art. 170 et suivants.
16. *Singh* c. *Ministre de l'Emploi et de l'Immigration*, [1985] 1 R.C.S. 177. Dans cette décision rendue en 1985, la Cour a examiné les procédures administratives en vigueur à cette époque en matière de détermination du statut de réfugié. Elle a notamment jugé que la procédure de détermination du statut de réfugié allait à l'encontre des exigences de justice fondamentale, prévues à l'article 7 de la *Charte canadienne des droits et libertés* constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, C.11, dont le droit d'être entendu du demandeur d'asile.
17. Avant la création de la Commission, le demandeur d'asile présentait par écrit sa revendication. Ce dernier était ensuite interrogé, sous serment, par un fonctionnaire qui transcrivait les réponses du demandeur dans ses notes. Le Comité consultatif sur le statut de réfugié émettait un avis au ministre sur foi des notes du fonctionnaire et de la demande écrite du revendicateur de statut de réfugié. Un délégué du ministre entérinait ou non l'avis, et par conséquent la demande d'asile était acceptée ou rejetée. *Loi sur l'immigration de 1976*, 1976-77 (Can.), chap. 52, art. 45 à 48.
18. Précisons que l'ancienne loi sur l'immigration prévoyait une audience devant deux commissaires. Seul l'accord exprès du demandeur d'asile permettait d'entendre sa demande devant un seul commissaire. *Loi sur l'immigration,* L.R. 1985, c. I-2, par. 69.1 (7) et (8).
19. C. Rousseau, F. Crépeau, P. Foxen, F. Houle, « The Complexity of Determining Refugeehood – A multidisciplinary analysis of the decision-making process of the Canadian Immigration Refugee Board », *Journal of Refugee Studies* 15, n° 1 (2002) : 43–70.
20. Article 72 de la *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, et l'article 18.1 de la *Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7.
21. L'article 171 de la *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, prévoit l'existence de la Section d'appel des réfugiés. Cette Section a pour finalité de juger les décisions de la section de première instance sur le fond. Toutefois, l'entrée en vigueur de la *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, par décret le 27 juin 2002 ne comprend pas l'entrée en vigueur de l'article 171.
22. *Règlements sur l'immigration et la protection des réfugiés*, DORS/2002-227, art. 160.
23. La *Loi sur l'immigration et la protection des réfugiés*, *supra* n. 2, de 2002, abroge le programme du demandeur non reconnu du statut de réfugié pour le remplacer par un programme plus large qu'est l'examen des risques avant renvoi. En effet, il ne s'agit plus d'analyser seulement les dossiers de demandeurs d'asile déboutés, mais également toute personne qui craint pour sa vie, sa liberté ou sa sécurité si elle retourne dans son pays d'origine.
24. Citoyenneté et Immigration Canada, *Projet de loi C-11: analyse article par article*, sect. 3, art. 112, <http://www.cic.gc.ca/francais/pdf/pub/c11-article.pdf> (consulté le 7 janvier 2003). Voir également les commentaires en *obiter* des juges Cory et Major de la Cour suprême sur la création d'un examen des risques de retour peu de temps avant le renvoi dans *Pushpanathan* c. *Canada (ministère de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982.
25. Il y a trois types de mesures de renvoi : l'interdiction de séjour, l'exclusion et l'expulsion. Leur mise en application est décrite à l'article 223 et suiv. des *Règlements sur l'immigration et la protection des réfugiés*, *supra* n. 22.
26. Cette protection subsidiaire ne peut être accordée que par les États signataires de la *Convention relative au statut de réfugié*. En date du 31 décembre 1999, il y avait 131 États signataires de la *Convention relative au statut des réfugiés, supra* n. 4, et du *Protocole relatif au statut des réfugiés, supra* n. 8. Haut Commissariat des Nations Unies pour les réfugiés, *Les réfugiés dans le monde*, 23, *supra* n. 5.
27. Il existe un programme de rétablissement des réfugiés qui permet de reconnaître la qualité de réfugié à une personne qui se trouve dans son pays d'origine. *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, art. 95.
28. Haut Commissariat des Nations Unies pour les réfugiés, *Les réfugiés dans le monde*, *supra* n. 5.
29. Les principaux groupes de réfugiés, entre 1980 et 1999, sont ressortissants des pays suivants : Afghanistan, Angola, Arménie, Azerbaïdjan, Bhoutan, Bosnie-Herzégovine, Burundi, Cambodge, Chine et Congo. *Ibid*, annexe 5, 314.
30. Il y a également toute la question des bateaux chinois qui ont accosté les côtes de l'Ouest canadien à la fin des années 1990 dont nous ne traitons pas ici. Voir entre autres le *Rapport ministériel sur le rendement* pour la période s'étant terminée le

31 mars 2000, Citoyenneté et Immigration Canada déposé par l'Honorable Elinor Caplan, <http://www.cic.gc.ca/francais/pdf/pub/rmr2000.pdf> (consulté le 14 janvier 2004).

31. Peter Showler, « Le jugement des demandes d'asiles », *supra* n. 14.
32. Le réseau des agents de contrôle de l'immigration est né d'une stratégie de contrôle de l'immigration qui visait à mieux protéger l'intégrité du processus de détermination du statut de réfugié et le programme d'immigration. Citoyenneté et Immigration Canada, Examen du réseau des agents de contrôle de l'immigration – Rapport final, août 2001, <http://www.cic.gc.ca/francais/recherche%2Dstats/verification/aci/101introduction%2Df.html> (consulté le 7 janvier 2004).
33. *Loi sur l'immigration et la protection des réfugiés, supra* n. 2, art. 148. Le paragraphe 148(1) dresse les obligations des transporteurs, qu'ils soient aériens ou terrestres. Le transporteur ne peut, entre autres, amener au Canada des personnes qui ne sont pas munies des documents prescrits par la *Loi sur l'immigration.*
34. À l'étranger, plus de 74 employés participent à l'interception de plus de 60 % des individus qui n'ont pas les documents requis avant qu'ils ne s'embarquent à destination du Canada. Voir la déclaration du ministre Denis Coderre, anciennement ministre de l'Immigration, faite lors de son allocution devant le Comité permanent de la Citoyenneté et de l'Immigration, le 20 mars 2003, <http://www.cic.gc.ca/francais/nouvelles/discours/comite.html> (consulté le 7 janvier 2004).
35. Information accessible sur le site officiel du ministère de la Citoyenneté et de l'Immigration, <http://www.cic.gc.ca/francais/pub/11sept.html> (consulté le 23 février 2004).
36. Au-delà de l'absence de juridiction, les agents de contrôle ont des fonctions qui contredisent la détermination du statut de réfugiés.
37. Il existe également une reconnaissance unilatérale du système de détermination d'un État par un autre. C'est le cas de la Grande-Bretagne qui a reconnu unilatéralement le Canada et les États-Unis comme des États fiables en matière de détermination du statut de réfugié. Voir *Salas* v. *Secretary for Home Department*, [2002] E.W.J. n^{o} 4340.
38. Information disponible sur le site du Conseil Canadien pour les Réfugiés : « En 2001, 35 % des demandes du statut de réfugié faites au Canada provenaient de gens qui étaient entrés à partir des États-Unis. » <http://www.web.net/~ccr/Tierspays.htm> (consulté le 23 février 2004).
39. Le 30 août 2002, le Canada et les États-Unis ont arrêté et paraphé la version finale de l'*Entente sur les tiers pays sûrs*. Le 26 octobre 2002, le projet de *Règlement modifiant le Règlement sur l'immigration et la protection des réfugiés* concernant l'alinéa 101(1)e) de la *Loi sur l'immigration et la protection des réfugiés* fut publié dans la Gazette du Canada, Partie I, vol. 136, n^{o} 43. Voir également le communiqué du 1er mai 2003 du ministre de la Citoyenneté et de l'Immigration au sujet du Rapport sur le règlement relatif aux tiers pays sûrs du Comité permanent de la citoyenneté et de l'immigration de la Chambre des communes. Citoyenneté et Immigration Canada, « Réponse du gouvernement au *Rapport* du Comité permanent de la citoyenneté et de l'immigration", mai 2003, <http://www.cic.gc.ca/francais/pub/pays-surs.html> (consulté le 7 janvier 2004).
40. Partie I de la *Loi constitutionnelle de 1982*, *supra* n. 16.
41. Il existe de nombreuses exceptions à l'*Entente sur les tiers pays sûrs* prévues à l'article 4 (voir également art. 159.5 et 159.6 du projet de règlement), notamment les mineurs non accompagnés, les membres de la famille et la possibilité pour les parties de déroger au principe pour intérêt public (art. 6). Le projet de règlement ajoute également que les apatrides sont exclus de l'application de l'entente (art. 159.2, *Règlement modifiant le Règlement sur l'immigration et la protection des réfugiés*, *supra* n. 39).
42. Article 159.4 du projet de *Règlement modifiant le Règlement sur l'immigration et la protection des réfugiés*, *supra* n. 39.
43. Certains pays d'asile comme la France ne reconnaissent que les réfugiés persécutés par des agents étatiques. En France, l'auteur de la persécution doit être étatique, mais il existe quelques exceptions à ce principe. Voir P. Delouin et P. Vianna, « Droit d'asile en France : état des lieux (partie 4) », *Cultures et conflits,* n^{o} 23 (hiver 2002), accessible à <http://www.conflits.org/article.php3?idarticle=401> (consulté le 18 février 2004).
44. L'article 97 de la *Loi sur l'immigration et la protection des réfugiés, supra* n. 2 prévoit des motifs dits élargis de protection. Bien que ces motifs n'entrent pas dans la définition du statut de réfugié (art. 96), les individus, qui risquent la torture et les mauvais traitements, ont droit à la protection du Canada au même titre que les demandeurs d'asile reconnus réfugiés (art. 95).
45. Citoyenneté et Immigration Canada, « Avis sur la création de l'Agence des services frontaliers du Canada », <http://www.cic.gc.ca/francais/ministere/avis-asfc.html> (consulté le 28 décembre 2003).
46. Communiqué du Premier ministre, *Le Premier ministre annonce la composition du Cabinet*, le 13 décembre 2003, <http://pm.gc.ca/fra/news.asp?id=8> (consulté le 28 décembre 2003), point 4 de la section « Assurer la santé et la sécurité du Canada ».
47. Citoyenneté et Immigration Canada, « Instruments de délégation de la *Loi sur l'immigration et la protection des réfugiés* » signé le 10 juillet 2003, *Désignation et Délégation*, module 6, col. 4 aux points 17 et 27 sur l'application des par. 15 (1) et (4) de la *Loi*, <http://www.cic.gc.ca/manuals-guides/francais/il/il03f-annB.pdf .
48. La *Déclaration sur la frontière intelligente* fut signée par les deux pays le 12 décembre 2001. *Déclaration sur la frontière intelligente*, signée par le ministre Manley et le gouverneur Ridge le 12 décembre 2001, <http://www.canadianembassy.org/border/declaration-fr.asp?format =print> (consulté le 14 janvier 2004).
49. Il existe plusieurs ententes entre les États-Unis et le Canada : *Vision de la frontière*, l'*Accord sur la frontière commune*, la *Déclaration conjointe de coopération sur la sécurité des frontières*

et le contrôle de la migration régionale et la *Déclaration sur la frontière intelligente*, *supra* n. 48. La plupart de ces ententes ont été conclues après le 11 septembre 2001.

50. *Annexe concernant l'échange d'information sur les demandeurs d'asile afin d'accroître le contrôle des revendicateurs du statut de réfugié*, Citoyenneté et Immigration Canada, <http://www.cic.gc.ca/francais/politiques/smu/smu-ins-dos.html> (consulté le 7 janvier 2004).
51. Les seules informations que nous ayons pu trouver sur l'Agence des services frontaliers se trouvent sur les sites du Premier ministre (<http://pm.gc.ca>), du ministère de Citoyenneté et Immigration Canada (<www.cic.gc.ca>) et du site officiel du ministère de la Sécurité publique et de la Protection civile (<www.sgc.gc.ca>).
52. "The new department's first priority is to protect the nation against further terrorist attacks. Component agencies will analyze threats and intelligence, guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation for future emergencies." Department of Homeland Security, site officiel, <http://www.dhs.gov/dhspublic/theme_home1.jsp> (consulté le 7 janvier 2004).
53. Traduction libre. Department of Homeland Security, site officiel (consulté le 20 février 2004).
54. Department of Homeland Security, site officiel (consulté le 20 février 2004).
55. Communiqué du Premier ministre daté du 13 décembre 2003, *supra* n. 46, point 1 de la section « Assurer la santé et la sécurité du Canada ».
56. Ministère de la Sécurité publique et de la Protection civile, site officiel, rubrique « Aperçu de notre organisation », <www.sgc.gc.ca> (consulté le 7 janvier 2004).
57. <http://www.ocipep.gc.ca/whoweare/index_f.asp> (consulté le 7 janvier 2004).
58. *Avis sur la création de l'Agence des services frontaliers du Canada*, *supra* n. 45.
59. Communiqué du Premier ministre daté du 13 décembre 2003, *supra* n. 46, point 8 de la section « Assurer la santé et la sécurité du Canada ».
60. *Loi sur les armes à feu*, L.C. 1995, ch. 39; *Règlement sur les armes à feu des agents publics*, DORS/98-203.
61. La structure du ministère de la Citoyenneté et de l'Immigration et la *Loi sur l'immigration* ne permettent pas l'habilitation de tels pouvoirs. Pour ce faire, il faut être constitué en agence et posséder un numéro d'identification enregistré. *Règlement sur les armes à feu des agents publics*, *supra* n. 60, art. 6.
62. Communiqué du Premier ministre daté du 13 décembre 2003, *supra* n. 46, point 5 de la section « Assurer la santé et la sécurité du Canada ».
63. Communiqué du Premier ministre daté du 13 décembre 2003, *supra* n. 46, point 5 de la section « Assurer la santé et la sécurité du Canada ». Le terme immigration semble exclure toute juridiction en matière d'admissibilité aux frontières et porte plutôt sur les critères de sélection des immigrants et des réfugiés.
64. Nous n'avons constaté aucun changement dans l'organisation présente sur le site officiel du ministère de Citoyenneté et Immigration Canada (<www.cic.gc.ca>), sauf en ce qui concerne l'annonce d'une nouvelle agence.
65. Par exemple, le projet d'instaurer des zones extraterritoriales ou zones régionales où les réfugiés pourront trouver asile. Ce projet fut, entre autres, proposé par la Grande-Bretagne et secondé par d'autres pays européens.
66. Citoyenneté et Immigration Canada, *Rapport sur les plans et priorités 2003-2004*, section III, sous-section B : « Accroître la confiance du public dans la gestion de l'accès au Canada », <http://www.tbs-sct.gc.ca/est-pre/20032004/CI-CI/CI-CIr34f.asp#s3b3> (consulté le 7 janvier 2003).
67. Communiqué du Premier ministre daté du 13 décembre 2003, à Ottawa, <www.pm.gc.ca> (consulté le 28 décembre 2003).
68. Le libellé du Communiqué du Premier ministre daté du 13 décembre 2003, *supra* n. 46, point 6 de la section « Assurer la santé et la sécurité du Canada », précise que la réforme a pour but d' « assurer la qualité et l'efficacité de la Commission de l'immigration et du statut de réfugié ».
69. Partie I de la *Loi constitutionnelle de 1982*, *supra* n. 16.

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Fear and Loathing Down Under: Australian Refugee Policy and the National Imagination

Richard Wazana

Abstract

This paper looks at Australia's refugee policy in light of incidents that took place in the summer of 2001, with the refugees aboard the Tampa. Analyzing the discourse that resulted from these incidents, I show how Australia believes it is a nation under threat that prides itself as generously welcoming as many refugees as it can and who, of late, is only trying to protect its borders from so-called refugees who really are "queue jumpers." I contrast this view with what emerges from the facts: that Australia's racialized past makes it very easy for it to believe that it is under siege from refugees, and that it has done all that is legally possible to disinvest itself from its international obligations. This has meant turning boats away at sea, excising certain territories from its jurisdiction, and interning the refugees who arrive in Australia. Through this analysis, I argue that the current policy is a re-emergence of the earlier White Australia policy.

Résumé

Cet article examine la politique australienne sur le droit d'asile et les réfugiés à la lumière d'incidents survenus à l'été de 2001 avec les réfugiés du Tampa. *J'analyse le discours qui a découlé de ces incidents et je montre comment l'Australie est convaincue qu'elle est une nation assiégée; qui, en même temps, s'enorgueillit du fait qu'elle accueille généreusement autant de réfugiés qu'elle le peut; et qui, récemment, a dû boucler ses frontières contre les soi-disant réfugiés qui ne sont en fait que des resquilleurs. Je compare ce point de vue avec les faits suivants : que le passé racisé de l'Australie fait que ce pays succombe facilement à la notion qu'il est assiégé par des réfugiés; et qu'il a fait tout ce qui était légalement possible pour se départir des ses obligations internationales. Cela s'est traduit par le renvoi de bateaux en haute mer, l'excision de certains territoires de sa juridiction et l'incarcération des réfugiés qui débarquent en Australie. À travers cette analyse, je soutiens que la présente politique est en fait une réapparition de la politique de l'Australie pour les Blancs.*

> *Apparently nobody wants to know that contemporary history has created a new kind of human being – the kind that are put in concentration camps by their foes and in internment camps by their friends.*
>
> Hannah Arendt[1]

Introduction

The twentieth century is often referred to as the century of the refugee. Beginning with World War I, and brought to the world's attention after millions were forced to flee their homelands during and after World War II, and continuing into the last years of the past century with conflicts in central Africa and Europe, refugees are arguably the largest group needing protection in the world today. The United Nations states that there are somewhere around 15 million refugees in the world today, 80 per cent of whom are women and children, and that number is constantly growing due to new or aggravated conflicts all over the world. Moreover, according to Britain's Home Office, over 30 million people are smuggled across international borders annually in a trade worth between $12 billion and $30 billion (in U.S. dollars).[2]

In the western world, this refugee "crisis" plays out on many fronts. For instance, many countries from which refugees hail already have sizable populations in western Europe, North America, and Australia. Thus, for these communities, the issue is close to their heart, as they lobby their governments to accept more refugees. On the political front, the question of refugees, like immigration, is a delicate one that often has dire consequences during elections. Politicians understand that the public has a fragile tolerance for refugees, one that can tip quickly into intolerance when a boatload of refugees lands at their shores. In these instances, refugees become a political issue more than a humanitarian concern and the refugees themselves often get lost in the debate.

This is what has happened in Australia in recent years. Australia's geographical position, as a bastion of "western civilization" in a sea of Asian countries, has had important ramifications for the country's sense of identity and its fears around how many "foreigners" it is ready to receive. Invaded by Britain as a solution to its penal crisis – namely, that British jails were full, and it needed to find somewhere to house its convicts – Australia became a British colony, filled with convicts, soon followed by "voluntary" migrants needed to fill the land.

The presence of First Nations Peoples preceding that of the convicts is not often referred to other than in Australia's official multiculturalism policy. In fact, on the web site of Pauline Hanson's One Nation Party, Australia's extreme right-wing political party, the history section starts with the arrival of the convicts, in classic *terra nullius* tradition. First Nations Peoples, along with immigrants, are seen as financial burdens that the state has unfortunately decided to carry, to the detriment of Anglo-Australians. The One Nation Party holds special disdain for refugees who increasingly are landing – or, at least, trying to land – on Australian shores. Labeled "queue jumpers," refugees are depicted as scoundrels who have willingly paid exorbitant sums of money to get on "pleasure cruises" in search of a better country.[3]

The fact that the vast majority of these refugees come from countries where there is no "queue," where there is no Australian immigration or U.N office, and that upon arrival in Australia, up to 97 per cent of them are found to be *Convention* refugees[4] – none of this seems to matter to a country that has increasingly been willing to use aggressive military maneuvers in order to keep these refugees at bay.

Indeed, the irony is that, once again, Australia is becoming a penal colony for involuntary migrants. The events leading up to what is now referred to as the "*Tampa* incident" reveal that Australia is ready to go to great lengths to keep refugees away from its shores. By setting up detention centers on Australian territories in the Pacific Ocean from which migrants can no longer apply for refugee status, as well as on impoverished islands, Australia is officially warehousing refugees – not to say smuggling – in an effort to process refugee applications away from its shores. What the Australian government has termed the "Pacific Solution" amounts to an overtly racist reaction to a few thousand persecuted refugees fleeing abominable conditions at home.

This paper will examine these recent developments as indicative of a new governmental approach to refugees, one that is unfortunately not used exclusively in Australia. Indeed, assaults at sea are common in the Mediterranean, where boatloads of North African and European migrants are routinely turned away, when they are lucky not to have drowned.[5] I will attempt to bring Australian history back full circle, by showing that recent policies are indeed not new but recycled in a gentler form from its "White Australia" era, when official policy was to restrict immigration to white Europeans. I will moreover analyze popular discourse in Australia to show how Australia perceives itself as a nation under attack that is doing its best to protect "real" refugees while discouraging the inhuman smuggling of human beings. Finally, I will clearly show how the law is used to spatially restrict and control the movement of these refugees, keeping them away from the general population, in spaces that are clearly marked as degenerate.

The Tampa *Incident*

In August of 2001, over 1,500 refugees landed on Australian shores within eleven days. One boat, carrying 360 people, landed on Christmas Island on August 22, reportedly representing the biggest boatload of asylum seekers ever to reach Australia.[6] Immediately, cries from the opposition party spread fears among the public that Australia had lost control over human smuggling. Five days later, on August 27, the government of Prime Minister John Howard showed that it was not going to let the opposition gain crucial votes, two months away from an election.

On August 27, the *Tampa*, a Norwegian freighter, entered Australian waters carrying 430 people, mostly from Afghanistan. The freighter had rescued the passengers from a sinking Indonesian ferry the previous day, and had been on its way to Singapore when the passengers demanded that they be taken to Christmas Island, an Australian territory in the Pacific Ocean, northeast of Australia. The Australian government refused them permission to enter its waters, claiming that they should have been taken to the nearest port of call. In effect, the Australian government claimed that this was essentially a problem to be resolved between the Indonesian government, whose ferry the refugees were

initially transported on, and the Norwegian government, whose ship they were currently on.

The ridiculousness of this claim did not escape the ship's captain, who replied that there were not enough provisions on board to allow the migrants to reach the nearest Indonesian port. Howard's government responded that they would provide food, water, and medical supplies to allow the ship to make that trip. On August 29, the *Tampa*'s captain took the ship into Australian waters, only to be stopped by Australian naval ships. Meanwhile, New Zealand had said they would examine the passengers' refugee claims so long as other countries did the same. The fact that Australia asked the tiny impoverished nation of East Timor to allow the ship to dock there in order to process the applications shows how determined the Howard government was to ensure that the migrants did not land on its shores.

Finally, on September 1, New Zealand and the tiny Pacific island of Nauru offered to house the refugees while they processed their applications. New Zealand proposed to take in 150 refugees – women, children, and families – and Nauru would take the rest – mostly men. New Zealand agreed to accept all those found to be genuine refugees; Nauru, however, signed a Statement of Principles on September 10, stating that it would "provide a temporary processing site" for the migrants "with the understanding that the refugees would be processed and out of the country by May 2002."[7] For this "humanitarian gesture," Australia would compensate Nauru with a $30 million aid package, more money than they had received in the ten previous years combined.[8]

Before examining in depth the Australian government's "Pacific Solution," let us finish our story. On September 3, the passengers of the *Tampa* were transferred onto the *Manoora*, an Australian troopship, to be taken to Papua New Guinea, a journey that was expected to take a week, from where they would be transferred to Nauru and New Zealand. By then they had already spent nine days aboard the *Tampa*. Meanwhile, on September 7, Australian Coastwatch officials spotted a wooden boat on its way to Ashmore Reef. The *Aceng* was warned that its passengers faced detention and its crew up to twenty years in prison if it landed on Australian coast; when the boat refused to turn back, Australian Navy personnel boarded the boat in international waters. After agreeing to turn around, the *Aceng* played a cat and mouse game with Australian naval ships, until the *Manoora* intercepted it.

Australian naval crew transferred the 200 passengers – believed to be Iraqis – of the *Aceng* onto the *Manoora*, and they continued on their way to Papua New Guinea. When Australia's Federal Court ruled that the government had illegally detained the group from the *Tampa*, the government filed an appeal, and Howard ordered the *Manoora* to bypass Papua New Guinea and head straight to Nauru. On September 17, the *Manoora* arrived at Nauru, the same day that the Federal Court ruled that the government had acted fairly in its early decision.[9] On September 19, 100 of the Afghan refugees disembarked the *Manoora* and set foot on dry land for the first time in over one month. The plan was to disembark 100 at a time off the *Manoora*, to facilitate transportation to the refugee camps. However, things did not go as planned.

On September 21, the 200 Iraqi and Palestinian refugees refused to disembark, insisting that they be taken to Australia. The standoff lasted two weeks, and eventually Australian soldiers forcibly removed twelve remaining Iraqis, despite the fact that Nauru had insisted they would accept only voluntary arrivals. The first six Iraqis were removed after they were fooled into believing that there were Australian negotiators waiting for them; meanwhile, at home in Australia, one Australian politician suggested that food be withheld until they disembark. The Iraqis eventually held a sit-in on the bus transporting them to the refugee camps; the operation was suspended by the Nauru government, and it was only resolved after further negotiation. The entire incident was marked by intense media attention, harsh international condemnation, and much diplomatic rancour.

The Refugee as the "Bricoleur"

In attempting to understand why a country would go to such lengths to prevent a few unfortunate souls from landing on its shores, it is useful to draw upon Levi-Strauss's conceptual dichotomy of the "engineer" and the "bricoleur," as it is used by Radhika Mohanram.[10] Mohanram conceptualizes the black body, the bricoleur, as being close to nature, irrational, emotional, and thus always raced. The engineer, on the other hand, is rational, scientific, mobile, and therefore always white. This notion of the raced body tied to the land is not novel, having been used to discredit urban Aboriginals, claiming that once they leave the land, they cease to be Aboriginal. This clever Catch-22 – urban aboriginals are no longer Aboriginals and thus relinquish their rights as Aboriginals, and Aboriginals who live on reserves have rights that are frozen in time, thus keeping them in abject poverty – has been used to further oppress First Nations Peoples in Canada.

Applied to the refugee, the concepts of "bricoleur" and "engineer" are very useful. Clearly, the refugee is the bricoleur and the white westerner is the engineer. I would go so far as to say that even when coming from "white" countries, as in the former Yugoslavia, the bodies of refugees are raced, to the same extent that Razack shows that the prostitute, whether white or black, is inherently raced, and thus

blackened.[11] The refugee, being a bricoleur, is not supposed to leave her land, all the more so since she is black and female. Mohanram writes that whereas "whiteness has the ability to move" and that "ability to move results in the unmarking of the body," "blackness is signified through a marking and is always static and immobilizing."[12] By plotting to leave her "degenerate" country and enter another, altogether "privileged" country without permission, the refugee transgresses the unstated law of the white man: "Thou shall not leave thy land (unless it serves our purpose)." The implicit corollary is that only the white man and his money shall travel and conquer. Moreover, this rebellion goes against the bricoleur's inherent relationship with nature, since, whereas the bricoleur is always pre-capitalistic, the engineer is "always located within modernity and capitalism."[13]

Because the refugee transgresses, she must be intercepted and her body must be disciplined through internment, sending a clear message to other potential refugees of what awaits them should they dare leave their country and try their fate elsewhere. This has been played out on Australian soil and in Australian waters for the past ten years. The interception of boats, the internment of refugees, and the reprisals while interned can be seen as just actions on behalf of the white man putting the black man in his place. The internment camps in Australia and on remote islands thus serve not only as processing centers for sifting the "real" from the "fraudulent," but also for disciplining bodies out of place. As Mohanram states, "racial difference is also spatial difference, the inequitable power relationships between various spaces and places are rearticulated as the inequitable power relations between races."[14] Moreover, as we shall see later, the conditions in these camps serve to mark these spaces, and the bodies who inhabit them, as degenerate, an essential part of this process.

What Mohanram shows through her discursive analyses of texts is that the condition of the refugee is intimately tied to that of the white settler. For one, we can argue, as many academics have, that "we are here because you were there," something that North Africans in France and South Asians in England have been saying for a long time. Moreover, Mohanram teases out this relationship, concluding that "the ecological immobility of the indigenous person ... functions to locate the settler as mobile, free, taking his environment with him in ships, boats, planes, and on the soles of his shoes."[15] In what follows, I will attempt to demonstrate how these concepts play out in Australian refugee policy.

Tropes at Play in Australia

There are a number of tropes operating in Australia's media, political parties, and popular culture around refugees, border protection, generosity, and Australian culture. These tropes make it possible for a large, sparsely populated country like Australia to call for a zero-sum immigration system. The first trope surrounds the belief that Australian culture (read, white and Anglo-Saxon) is under a constant and growing threat, and that without adequate measures for protection, it will vanish. This belief is not new. One of the first issues raised among settlers to Australia is whether a White Australia was possible; that is, whether the Australian climate and geography were suitable for white settlers.[16] Today, this obsession has transformed itself into various measures meant to "protect" Australian culture and traditions, including an inhuman refugee policy.

A second trope, flowing directly from the first, is the belief that Australia, as a nation under attack, has the right to control its borders. Since Australia believes that it is under threat, it claims the right to protect itself, part of which means the right to close its borders should it choose to. The irony of the claim that Australia's sovereignty is being challenged is that the Australian government has amended existing laws and passed many new laws over the last ten years – although, especially during the past two years – in order to police, monitor, and control the "free" movement of refugees. To claim that it has lost its right to manage its internal affairs thus flies in the face of well-known facts. Nonetheless, this illusion of self-preservation is important for the Australian collective imagination.

A third trope is the belief that those seeking asylum in Australia are not refugees but are people seeking a better life, and that even if they are refugees, they are queue jumpers. This trope, very popular among media, politicians, and the public, is used to devalue and trivialize an international human disaster at a local level and to justify changing existing human rights law at an international level. Moreover, the concept of queue jumping is used in total ignorance of the realities of different persecuted peoples abroad, as well as how western countries contribute to political and/or economic instability that results in forced migration.[17]

Finally, the fourth trope is built around Australia's generosity as a recipient of refugees, its international record, and its actions around stopping the illegal smuggling of refugees. Australia prides itself in believing, and constantly reiterates in all official publications, that it is the most generous country in the western world when it comes to accepting refugees. This stands in sharp contrast to the international publicity campaigns that have striven to deter refugees from attempting to enter Australia, legally or illegally, as well as to the conditions in detention camps where "illegal" refugees are detained upon arrival. Moreover, it has turned international condemnation on its side by argu-

ing that what are perceived as harsh and inhumane measures meant to keep refugees out of Australia are really a concerted effort to put an end to the immoral human smuggling industry.

"Australia under Attack"

Let us start by examining the first trope – the belief that Australian culture is under threat. This is a dominant theme in the Australian psyche, one that goes back to the beginning of the twentieth century, when the Immigration Restriction Act was passed. The Act, which became law in 1901, was passed in the first year of Federation, in an attempt to prevent "coloured aliens" from entering Australia and restrict population growth to European settlers. The Act institutionalized the notion that Australians were members of the "British race," and officially started an immigration policy known as the White Australia Policy, which was kept in place until it was dismantled in 1973.

When the Immigration Restriction Act was passed, it mostly targeted Chinese immigration, but also immigration from the Pacific Islanders, who were the main labour force of the Queensland sugar industry. With the new law, it became imperative for the white man to take over that work, hence the obsession with climate and colonization. Australia also started to generate dialogue among medical and tropical experts, who researched whether a "White Australia" was possible.[18]

Writing about tropical medicine and colonialism, Alison Bashford says that the "Tropics" is "an idea which stands for hot spaces and also colonial spaces, where 'White man' does not quite fit in, but over which White man or White culture desires control."[19] She analyzes the public health discourse at the beginning of the century and claims that health, hygiene, and cleanliness were "an effective mode for the expression of racism" and became "one significant way in which the "whiteness" of White Australia was conceptualized."[20] During the thirty years that followed, immigration policy and tropical research were intimately linked and colluded to defend the White Australia Policy. Part of this work, of course, consisted in pathologizing the Pacific Islanders and the Chinese as being contaminated and impure. These discourses continue today, as we will later see, and serve as justification for the internment of Afghani and Iraqi refugees.

Before these refugees appeared on Australian shores, it was largely Asian immigration that was cause for obsession. Morris argues that "phobic narratives" have dominated political debates in Australia for a long time, mostly centred on Indonesia.[21] Media and political discourse around Indonesia have always focused on the concepts of fear and threat. By describing Indonesia as "having a population ten times that of Australia, as having a high birth rate … and as having insufficient space for its large population on some of its islands," Indonesia is constantly depicted as a "dormant volcano" that could erupt any day.[22]

These phobic narratives, says Morris, are a combination of agoraphobia, a fear of opening up the Nation to a devouring Other, and claustrophobia, a fear of being shut away from a dynamic and prosperous world. Thus, while multiculturalism is celebrated and promoted by the Australian government's official policy, there is always the need of "reminding white Australians of the effects of excessive ethnic diversity" because the "open-ended project of multiculturalism threatens this capacity for action and self-confidence."[23]

This constant ambivalence towards multiculturalism, and the accompanying fears and anxiety, have been played out very recently in the context of soccer in Australia. Danforth, through extensive research into soccer commentating, press clippings, and public discourse, examines "Australian soccer as a source for the study of different narratives of the Australian nation."[24]

Known as an "ethnic" game that is often called "wog-ball," soccer in Australia is a perfect venue for examining the above-mentioned fears and anxieties around multiculturalism. Most club teams until recently had "ethnic" names, such as "South Melbourne Hellas," "Preston Makedonia," and "Heidelberg Alexander." For obvious reasons, these clubs are largely populated by European immigrants who have led the charge of Australian soccer for decades. This trend generated some fears among government officials that "old world" conflicts, such as that between Greece and Macedonia, were being played out on the soccer pitch. More importantly, they feared that as long as soccer was associated in the Australian consciousness with ethnicity, it would never enter the mainstream.

In an effort to Australianize the world's most popular game, and in an attempt to draw international sponsors and win lucrative television contracts, the Australian Soccer Federation decided to "de-ethnicize" soccer in Australia by abolishing what they called the "ethnic club system." According to the Federation, the club system, by which each individual club is associated with a particular ethnic group, has served to alienate the mainstream and is responsible for ethnic violence. As far back as the early eighties, the National Soccer League observed that the League needed "a new image … so it can be identified as Australian."[25] It also recommended that "club names should be amended where necessary to prevent ethnic recognition."[26]

In 1992, this resulted in the Australian Soccer Federation's decision to ban all teams with "ethnic" names from the National Soccer League. No team would be allowed to

play if it carried the name of a foreign country, state, or place or any name with "political implications." Instead, teams would renamed based on the Australian region from which it came, so that "Hellas" was replaced by "South Melbourne." The commissioner of the Federation justified the move by saying that "the public perception is that we're a 'wog' sport and that we won't be accepted by the establishment nor achieve our marketing goals because of that perception."[27] Soccer, to be successful, needed an acceptable image of Australianness, one void of ethnicity.

What becomes very clear when reading these texts on ethnic groups, Anglo-Australians, and the nation is that "only a very weak and superficial form of multiculturalism is acceptable in Australian society."[28] What is ironic is that soccer in Australia had to be "de-ethnicized" before it could be proclaimed by the National Soccer League as an expression of Australian multiculturalism. Multiculturalism, states Danforth, "in this sense is little more than a euphemism for assimilation."[29]

Multiculturalism is perceived as such a threat to Australian culture that a number of authors believe that, as white Australians, they can no longer be published. Perera and Pugliese relate how, in order to overcome the "'handicap' of British ancestry," white authors and painters have impersonated "ethnic" or First Nations personalities and have achieved considerable success before they were denounced.[30] Nearing pathological dimensions, these artists received a fair amount of support from the establishment, even after being outed, blaming a society where "Anglo-Australians had become 'the most disenfranchised' citizens of the country."[31]

However, not all members of Australian society are willing to tolerate even an insipid form of multiculturalism. Pauline Hanson's extreme right-wing party, the One Nation Party, has of late called for the abolition of multiculturalism as the official government policy. The reasons for this are many.

The first is that, according to One Nation Party, "multiculturalism actively encourages separatism."[32] Hanson claims that prior to the policy of multiculturalism, "migrants were assimilated into mainstream Australia with little disruption." However, since multiculturalism has been in place, it has created ethnic ghettoes, which have generated suspicion in the "wider community."

Second, Hansonites decry the costs of multiculturalism to the taxpayers. Estimated at a cost of $6.9 billion, they claim that "the policy of multiculturalism must be abandoned immediately and its infrastructure dismantled." Moreover, "those who wish to celebrate their own culture must do so at their own expense, not at that of the taxpayer. There can only be one Australia and only one Australian flag." The latter comment is possibly a reference to the waving of Greek and Macedonian flags at soccer games, which the Federation banned in 1996.

The One Nation Party discourse is full of contradictions. While they claim that a society cannot survive with "separate societies" within its borders, and that "disharmony, suffering and war in many countries" is the direct result of one culture "trying to impose their laws, religion and beliefs on other peoples of a different culture," they are entirely blind to the fact that they are reproducing this oppression in their own country.

Fourth, the belief that Australia and its culture are under threat is stated in no such ambivalence: "Every variety of culture in Australia today has a mother country where their particular culture can survive and develop. Our unique Australian culture and identity has nowhere else in the world in which to survive. Destroy it here and it is gone forever." Hanson believes that migrants who choose Australia should "have a genuine desire to embrace and enjoy Australia's cultural values, life style and freedoms *as they have evolved*" (emphasis added). This implies that newcomers to Australia are free to enjoy *existing* culture, but not to bring their own or expect their own to be recognized. Followed to its logical conclusion, retroactively, such a policy means that First Nations culture is the only one that should be celebrated since it is the only one that *existed* in Australia prior to colonization. Hanson takes care of that dilemma by erasing First Nations presence from the colonial map. She does this by listing, alongside the British, the convicts, and the Chinese, Aboriginal "migration" to Australia. By placing First Nations Peoples on an equal footing with immigrant groups and white settlers, Hanson dehistoricizes them and removes them from the collective consciousness, conveniently erasing from memory hundreds of years of genocide.

This is common practice among white settler society; it is a historical amnesia necessitated by the colonial project. As Kay Schaffer writes:

> ...the history of Australia was built on the notion of the land as terra incognito, terra nullius – unknown, untamed, unoccupied and open to the progressive mastery of colonization. That process of colonization relied upon the imagined absence of indigenous peoples, and also at the same time inscribed them in "our" history as remnants of a static primordial past.[33]

Although there are many tropes at his disposal, including the Aboriginal as savage, devoid of rights and incapable of government, the white settler always calls on the trope of erasing Aboriginals from the land in order to facilitate the rewriting of history devoid of spilled blood.

Perhaps the cleverest spin on the anti-immigration rhetoric is that leveled by Hanson and others around issues of ecology and sustainability. There are a number of organizations opposed to immigration on grounds that Australia cannot sustain any further growth. However, for groups such as Australians against Further Immigration, "so-called ecological concerns are but a very thin veil for a more-than-obvious racist nationalist agenda of excluding a particular part of the world from the White-imagined nation.[34]

On One Nation's web site, one repeatedly reads that Australia is the "oldest driest continent," suffering severe soil degradation and climatic uncertainty. Moreover, with "only 10% of our huge land mass" being arable, Australians are putting their country at risk by reducing the goods available for export. Hanson goes on to decry the lack of reliable water supply and the overwhelming growth of cities, using the example of Los Angeles as a threat of what is to come should Australians not act now. However, attempts to downplay the anti-immigrant sentiment are quickly lost as Hanson states that government policy will lead to the "Asianization of Australia," and that with 70 per cent of new immigrants coming from Asia, within twenty-five years, "Australia will be 27% Asian."

Viewed in this light, racism in Australia emerges as "constitutive and not marginal to the construction of a white and Anglocentric Australian national identity."[35] Moreover, playing on the perceived threats from abroad and within, Hanson's call for compulsory military service must be seen "not only as a call to mobilize against a threat from the Asian North, but also as symptomatic of a fear to protect against the Asian alien who is already within the nation's borders."[36]

Academics are not exempt from such inflammatory discourse, contributing to the fear of the invading Other. Irwin Stelzer, in an attempt to propose an immigration policy for the future, states that assimilation must be the chosen path for newcomers to a country. Moreover, perpetuating the "white nation under threat" rhetoric, he states that "respect for ethnic origins and traditions *must not be allowed to destroy* the cultures of the countries that receive immigrants fleeing from less attractive place."[37] (emphasis added). In this way, Stelzer, Hanson, and the "disenfranchised" Anglo-Australians perpetuate the myth that the White nation is being flooded by the Other, in a reverse colonialism.

"The Right to Protect Its Borders"

Having examined the discourse surrounding the "threats" facing Australian culture, we now move on to the second trope, that of Australia's right to protect its borders. This is a natural sequence of events: if one believes that one is under attack, one will naturally want to defend oneself. From Howard, the Prime Minister, down to the average racist, Australians decry the right to protect themselves from invading hordes. Addressing Parliament during the *Tampa* crisis, Howard said the following: "Every nation has the right to effectively control its borders and to decide who comes here and under what circumstances, and Australia has no intention of surrendering or compromising that right."[38]

Although Australian politicians and academics are always acting as if their country were being prevented from managing its internal affairs, the reality is that since 1992, when detention became automatic for all "illegal" entrants, Australia has passed numerous laws and amended many others in an attempt to ensure no "illegal" migrants reach its shores, and that, should they succeed, their rights would be stripped down to the bare minimum. The mandatory detention policy was set into legislation in 1992 with the Migration Reform Act, and was endorsed through a major parliamentary review in 1994. Mandatory detention applies to visa overstayers – the biggest offenders being from the U.S. and the UK – as well as unauthorized arrivals.

In this way, the law conveniently creates two categories of migrants – one good and one bad, one deserving and one not. This is not particular to Australia. As Razack says, in the context of reforms to the Canadian Immigration Act, "the stringent control to keep people out, all the while claiming to be the most generous, depends for its logic on a careful delineation of who is deserving and who is not."[39] Creating such categories becomes the only way of justifying in the face of international condemnation, the acceptance of some and the refusal of others. This discourse of fairness and unfairness resonates intensely with the average citizen, which no doubt explains the government's reliance on it. It also helps to situate the illegal refugee in a context of lawlessness and degeneracy, juxtaposed with the nation itself, seen as lawful and civilized.

In 1999, the Migration Act of 1958 was amended to make it an offence "for a person to carry non-citizens to Australia without documentation."[40] The Migration Legislation Amendment Act made it an offence for a person to "organize or facilitate the bringing or coming to Australia of a group of 5 or more persons where s/he knows they would become illegal immigrants."[41]

Also in 1999, the Border Protection Legislation Amendment Act permitted an Australian ship or a customs vessel "to request to board a foreign ship within the 'territorial sea', 'contiguous zone' and, in limited circumstances, the 'high seas.'"[42] Where the request to board is denied or ignored, a customs vessel may "pursue the foreign ship to 'any place outside the territorial sea of a foreign country.'"[43] In the process, an officer can use necessary force consistent with international law, including where necessary "and

after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding."[44] Having boarded the ship, the Act allows the officer to search and arrest anyone that it suspects of contravening Australian migration laws.

Anyone who has seen television footage or newspaper pictures of these boats knows how overcrowded, unstable, and dangerous they are; often, the passengers are rescued after the boat has sunk, and often, the passengers die.[45] The thought of pursuing a rickety boat in rocky waters in an attempt to board it seems to me to constitute criminal negligence, putting the lives of hundreds of people at risk. Moreover, to anyone familiar with Jewish Holocaust literature, one cannot escape the eerie similarities between Jewish refugees trying to flee Nazi Germany and modern-day refugees and migrants fleeing oppressive regimes and abject poverty.[46]

First, the phrase "Pacific Solution" harks back to the Nazis' "Final Solution," used euphemistically to concoct the extermination of European Jewry as an answer to the "Jewish problem." Interestingly, at the famous 1938 Evian Conference, where this "problem" and its refugee implications were discussed by the international community, the Australian representative, T.W. White, had this to say: "it will no doubt be appreciated that as we have no racial problem, we are not desirous of importing one."[47] A similar conference was held in February 2002 in Bali, to determine what to do about the "outflow" of refugees on boats to Australia. As this paper illustrates, Australia's reaction is hardly more humane.

Australia has termed its recent approach of directing migrant boats to deserted and decrepit Pacific islands the "Pacific Solution," and this "solution," while stopping short of murder, has the unfortunate similarity of interning its victims. Moreover, as stated above, this "solution" is directly responsible for the capsizing of unsafe ships attempting to reach Australia's shores. In addition, as many activists have pointed out, the tightening of legal migration in Australia and elsewhere is forcing people to resort to unsafe methods of migration, often with tragic results.

Second, the descriptions of conditions aboard migrant ships carrying hundreds of passengers are eerily similar to those of Jews on trains headed to the concentration camps. On these trains, like on these boats, people were crammed like cattle for days on end, with no food and little oxygen. Many thought they would never survive the transport, and many in fact fainted from exhaustion and died on board. They lay in their own and others' urine and feces, all in a strategic attempt to break down their defenses before they arrived at the camps. One could argue that the conditions during the transit that most refugees endure today are so similar to that of slaves or prisoners that it makes it that much easier to treat them as such upon their arrival.

Third, the conditions in detention camps are not unlike those inside work camps. This is a quote from Bruno Bettelheim's *The Informed Heart*, in which he describes conditions where he was interned:

> Prisoners were clothed, housed and fed in total inadequacy; they were expose to heat … Every single moment of their lives was strictly regulated and supervised. They had no privacy whatsoever, were never allowed to see a visitor, lawyer, or minister. They were not entitled to medical care: sometimes they got it, sometimes not … No prisoner was told why he was imprisoned, and never for how long.[48]

As we will see later, this is really no different from the conditions under which refugees are detained in Australia.[49]

In October 1999, the Howard government introduced a major change in its refugee protection policy, with the introduction of the Temporary Protection Visa (TPV). As a result, asylum seekers who enter Australia "legally" and who meet the United Nations standard for refugee protection are eligible for permanent protection visas. However, all those who arrive "illegally," whether by air or by sea, can only be granted TPVs. Initially these visas are valid for three years, subject to renewal after that time. TPV holders are eligible to work and to receive some, but not all, medical and other services provided to permanent visa holders. In addition, TPV holders cannot leave Australia, and cannot bring their family for a visit, thus creating economic and emotional strains on family members. The rationale behind the TPV is that should the situation in the migrant's home country improve during the three years, s/he can be sent back.[50] There is no time here to elaborate on the number of international treaties that this policy contravenes but, needless to say, there are many.

Having failed to stop the outflow of migrants reaching its shores, the Australian government enacted some more laws in 2001 and amended the Migration Act. By "excising" from its migration zone certain territories, Australia has effectively cut off any unauthorized arrival from applying for a visa. Thereby, Ashmore and Cartier Islands, Christmas Island, Cocos Islands, and other offshore resources and installations were all excised from the Australian migration zone. Thus, any refugee arriving on these islands is unable to apply for visas of any kind, unless the immigration minister decides otherwise. Even persons who apply under Australia's offshore refugee and humanitarian program are only eligible for permanent protection after four and one-half years of a temporary visa.

Even though the government has said it will process refugee claims on these islands, through UN offices, all paid for by the Australian government, third-country resettlement may be the "preferred outcome." Moreover, this amendment makes it impossible for a migrant to apply for protection if, since leaving his or her country, the migrant has resided "for a continuous period of at least 7 days in a country in which he or she could have sought and obtained effective protection" either from that country or from UNHCR offices located in that country.[51] This also makes it impossible for TPV holders to apply for permanent visas if they spent at least seven days in a country capable of protecting them. This policy is thus creating a situation of legal limbo for thousands of Australian residents who have no hope of obtaining landed status, unless this amendment is changed. In effect, anyone now arriving "illegally" on Australian soil, via a third country, can never obtain permanent protection in Australia, without ministerial consent.

The result is neatly summarized by the U.S. Committee for Refugees:

> The system, therefore, sets up a tiered approach under which, for example, Afghans in Pakistan who are accepted for resettlement in Australia would have immediate access to permanent visas, Afghans accepted from Indonesia would have access to temporary visas with the possibility of permanent visas after four-and-a-half years, and Afghans who arrive unlawfully at Christmas Island would, if found to be refugees, have access only to three-year temporary protection visas.[52]

Other laws or amendments were introduced since 2001. The Migration Legislation Amendment Act 2001 put certain limits on the UN Convention Relating to the Status of Refugees, fearing that Australian courts had been expanding the refugee definition beyond the original intention of the convention.

The Border Protection Act 2001 legally validated all acts that were carried out with regard to the *Tampa* and the *Aceng*. Exemplifying its fears of being flooded and of an inability to control its borders, the government claimed that this amendment "puts beyond doubt that decisions about who can and who cannot enter Australia is within the sovereign power of the Australian government."[53]

The Migration Legislation Amendment Act gave government the right to restrict access to judicial review in migration matters in "all but exceptional circumstances," thereby severely limiting access to appeals. A corollary prohibits all class actions in migration litigation.

The assembly of these laws makes Australia the first "western" country to put such "broad and significant legal effort behind the rhetoric of discouraging the 'spontaneous' arrival of asylum seekers in favor of the more orderly, predictable, discretionary, and political system of selecting refugees for resettlement from abroad."[54] For the purpose of this essay, it is only one indication of the extent of Australia's fears and anxieties around the "invasion" of its shores by foreigners.

"The Boat-People Are Not Refugees"

Incessant questioning of the "real" identities of these migrants constitutes the third trope. Pauline Hanson's One Nation Party especially plays on the notion that the boats landing on Australian shores carry not refugees but instead economic migrants. Claiming that migrants bypass other countries of safe haven because "it would be nice to sail on to Australia," Hanson states that Australia is not responsible for people who pay for passage on "organized cruises" that find their way to Australia bypassing other points of refuge. Propagating the mythical concept of the "queue," Hanson's text delegitimizes the refugee and claims all of them to be migrants.

Elected officials are not exempt from this rhetoric. On January 7, 2000, the Premier of Western Australia, Richard Court, said the following about the release of Afghani refugees: "We're not even talking about genuine refugees, we're talking about people who are smart alecs," adding that they "should be turned around straight away."[55] The Minister of Immigration has not been much better, especially in front of domestic audiences. He has accused TPV holders of "using our good feelings to get money to send out of Australia," and "using the money that is provided for food to buy mobile telephones and then go to charities to try to top up their income."[56]

However, as William Maley argues, the notion of a queue is mythical and exploited by all recalcitrant western nations. The 1951 Convention Relating to the Status of Refugees, he states, does not establish a queue for refugees to join; therefore, to "describe those who arrive by boat as 'queue jumpers' is a complete non-sequitur."[57] Maley writes in great detail on the political and social realities of most Afghani refugees, emphasizing that Afghan Hazaras, as the most persecuted ethnic group under the Taliban regime, make up the vast majority of Afghani refugees.

Although Australia does have its Refugee and Special Humanitarian Program, applicants face lengthy processing delays of well over a year. This is intolerable in a country like Iran, where many Afghani refugees are located. In December 1999 alone, the Iranian government deported 1,682 Afghani refugees, "more than the total number of Afghans who arrived in Australia by boat over the last ten years."[58] Moreover, until very recently, there has not been

an Australian immigration official at the Australian Embassy in Iran to process visa applications. Thus, as Maley suggests, "One can argue that the people smugglers are actually doing a better job than the Australian Government in assisting those Afghans in greatest danger, since the vast majority of those who arrive by boat are found to be Convention Refugees."[59]

Second, at the Australian High Commission in Pakistan, because most places are allotted to the Special Humanitarian Programme, for which one must be nominated by a sponsor or have some prior connection to Australia, few Hazaras are chosen.

Third, even those who do find a sponsor can still be denied if their medical situation is precarious, as have many elderly Afghans in Pakistan, according to Maley. Fourth, the presence of Pakistani staff at the Australian High Commission in Islamabad has prompted great suspicion among Afghans, justifiable or not. And finally, the queue to which Australians repeatedly refer is in the hands of Australian immigration officials, and is interpreted at their discretion. This has caused some to say that Australia's resettlement program is not a place in a queue but a ticket in a lottery.

The situation in Indonesia, from which almost all boats arriving in Australia come, is no better for refugees. For starters, at the end of 2001, there were 1.3 million internally displaced persons throughout Indonesia, plus over 100,000 East Timorese refugees in Indonesia's West Timor. Moreover, Indonesia is not a signatory to the 1951 Convention, and therefore has no system for granting refugee status. The UNHCR has an office in Djakarta, with only three staff to assess refugee claims, and very few interpreters for facilitating the interviews; they travel to where refugees are, and if the refugees are found to be *Convention* refugees, they are brought to the capital. However, integration in Indonesia is not feasible since it lacks an asylum system. Therefore, "resettlement to a third country has become the only available solution and is being pursued by UNHCR."[60] As of November 2001, as many as 4,000 refugees and asylum seekers were in Indonesia.

This brings us to the point of considering how many refugees who land on Australian shores actually qualify as *Convention* refugees. According to most estimates, between 92 and 97 per cent of Iraqi and Afghani boat people respectively are eventually found to be *Convention* refugees, prompting even Australian government officials to question whether detaining them in the first place is not "pointlessly punitive."[61] What has most people up in arms is the fact that the number of boat people has increased significantly over the past few years. Whereas there were 4,414 boat arrivals from 1989 through 1998, there were almost twice as many, 8,316, from 1999 through 2001. As we will see below, however, these figures pale in comparison to the number of refugees taken in by other countries, both voluntarily and involuntarily.

"Australia Is Leading the Good Fight"

This brings us to the final trope, that of Australia being the leader in refugee rights, a most generous nation leading the fight against human smuggling. Australia prides itself in being the most generous "western" country to accept refugees, especially because of its record in the 1970s and 1980s when it accepted a number of Indochinese refugees, mostly because of the proximity.

This generosity, however, is perverted by One Nation Party's words. They claim that because Australia can only accept 12,000 refugees per year (about 0.1 per cent of refugees), the policy should be scrapped. Defying all logic, they assert, "any program that helps only 0.1 % of refugees and costs billions of dollars is unfair and immoral." This makes it sound like they care enormously and are outraged that Australia does not take in more refugees. However, immediately following this, they state that they believe in "providing temporary refuge until the danger in the refugee's country of residence is resolved," after which the refugee should be returned. This doublespeak and hypocrisy fills the Web site of Australia's extreme right party.

In official government materials, the message is not so blunt. Howard and his cronies constantly pat themselves on the back for the fact that they are leading the world in strategizing around stopping the flow of human smuggling. Again, though, the doublespeak is obvious for all to see. During the Tampa crisis, Howard, in a ministerial statement, said that something must be done to ensure that people "who seek to be treated as refugees" are fairly assessed. "We stand ready to shoulder our burden in relation to refugees," he goes on to say, "but it must occur in a fair and proper fashion, and plainly what is happening with people-smuggling is that the principle of fairness is being grossly violated."[62]

In this obsessive hunt for "fairness," the people in question, the refugees, get lost in the process. When observing what is happening to these bodies once on Australian soil, what becomes clear is that fairness is the last thing on anyone's mind; discipline and punishment are the agenda of the day here. David Goldberg says, "Degeneracy, then, is the mark of a pathological Other, an Other both marked by and standing as the central sign of disorder."[63] When investigating the conditions in the detention camps that hold these refugees until their status is determined, one becomes vividly aware of the space of detention as one that marks the bodies as degenerate.

Let us look at Nauru, the tiny desolate Pacific island of 11,500 inhabitants that has received more money from

Australia in the last year to house and process refugees than they have in the past ten years combined. Although refugees were supposed to be housed in modern, air-conditioned housing built for the Olympic Games, landowners eventually changed their minds after requests for additional compensation were turned down. Instead, they are housed in "'blocks', with a corrugated iron roof, sides of plastic sheeting and green nylon mesh."[64] To get an idea of how poor this island is, one only has to realize that in recent months, because of cash-flow problems, it has completely run out of essential commodities, such as fruit, flour, sugar, rice, and fuel. No wonder it agreed to house refugees, given the funds that Australia promised!

Numerous international observers to Nauru have been appalled at the conditions that they have seen,[65] and the Labour Party has called for a judicial inquiry into all detention facilities. Most of these centres are in dry, arid land, with no protection from the humidity or the heat. The government cares so much for these refugees that some are allowed only twenty minutes of freedom every day. According to one observer, instead of treating the refugees for various diseases, "the government is locking them up in camps that are hot, cramped and lacking in facilities for proper hygiene and medical treatment, increasing the risks of spreading and prolonging diseases."[66] By keeping the refugees in close quarters, the government ensures that diseases like tuberculosis spread among the refugees, after which they can justify their detainment, for the safety of the general population. Marked as contaminated and diseased, the refugees are thus interned as a public health risk.

Of course, the location of these camps, on islands and in Australia proper, guarantees that they never enter in contact with the rest of the population. Woomera, the largest camp in Australia, is hundreds of kilometres inland, in the middle of the Australian desert. Various reports have confirmed that refugees are forced to line up for hours in the blazing sun in order to get food. Not surprisingly, violence and protest are erupting in these camps, with well-known reports of refugees sewing their lips closed in protest. To make these camps even greater sites of violence, there have been numerous reports of sexual assault made by refugees against staff, who are outsourced by the Australian government to a private firm.

Interestingly, refugees are kept in lifeless spaces where nothing grows, where things are either dead or dying, not unlike how First Nations Peoples have been constructed through time. Nauru is an island that, due to years of phosphate mining, not only is largely inhabitable, but also has a lunar topography. And Woomera, in the middle of the Australian desert, is hundreds of kilometres away from civilization, situated in an old army camp. Situated in such environments, the refugee is easily transformed into a lifeless prisoner. I would argue here that the refugee, like Kawash's homeless body, is made into an abject body, "against which the proper, public body of the citizen can stand."[67] Like the homeless, the refugee is not only "without home, but more generally without place."[68] Constantly in flux, the refugee has nowhere to go, and is wanted nowhere.

Like the homeless body, the refugee, when "caught," is "squeezed into a tiny space … cordoned off and sealed."[69] The homeless is caged like an animal, and when s/he rebels, s/he is greeted with violence. Similarly, while we are more preoccupied with eliminating the homeless body than with the conditions of homelessness,[70] we are also more concerned with erasing the refugee than with solving the ills that create the conditions for refugee crises in the first place. Thus, the refugee is greeted with "violent processes of containment, constriction, and compression that seeks not simply to exclude or control … but rather to efface their presence altogether."[71] Just as Kawash demonstrates how the law has been used to legislate the homeless out of existence, there is ample evidence to demonstrate how the Howard government has relied excessively on the law in order to prevent refugees from landing on Australian shores, and should they succeed, to treat them in such a way as to send a clear message to others contemplating the same move.

Conclusion

Hannah Arendt, over fifty years ago, wrote that the refugee is "an anomaly for whom there is no appropriate niche in the framework of the general law," an "outlaw by definition," completely at the mercy of the police.[72] It is indeed ironic that since Arendt wrote this, while numerous international treaties and conventions have been signed to protect refugees and migrants, the social, economic, political, civil, and human rights of these very people have been substantially curtailed. The Australian experience shows to what extent this is true.

Having transgressed the white man's most important law, "thou shall not leave thy land," the refugee is at the mercy of countries whose haste in making laws that legalize their brutal treatment are matched only by the haste with which they would love to send the refugees back to sea.[73] Just as Kawash's homeless body is marked as "filth," so too is the refugee, through her capture, internment, and treatment while interned. The internment camp, a site of violence, becomes a "racial slum …doubly determined, for the metaphorical stigma of a black blotch on the cityscape bears the added connotations of moral degeneracy, natural inferiority, and repulsiveness."[74] Thus constructing the refugee as a degenerate site of lawlessness, governments make it

feasible to treat her like a prisoner. Ironically, one could argue, as Arendt does, that "it seems to be easier to deprive a completely innocent person of legality than someone who has committed an offense."[75] What Arendt did not realize is that the refugee's greatest offence, the presumption of leaving one's land and, thereby, one's fate, is already committed before she falls into the hands of her "saviour." Instead of being saved, however, the refugee who arrives in Australia is the victim, once again, of human smuggling, this time at the hands of a government that claims to be acting "for their own good."

Notes

1. Hannah Arendt, "We Refugees," 1943, cited in Nicholas Xenos, "Refugees: The Modern Political Condition," *Alternatives* 18 (1993): 419–30.
2. Irwin Stelzer, "Immigration Policy for an Age of Mass Movement," *Policy* 17 (2001–2002): 3–10.
3. This is taken from the One Nation Party Web site, <http://www.onenation.com>.
4. According to the 1951 Convention relating to the Status of Refugees.
5. Michael Pugh argues that the plight of refugees and migrant smuggling is a welfare issue, not least because thousands perish at sea every year. Michael Pugh, "Mediterranean Boat People: A Case for Co-operation?" *Mediterranean Politics* 6 (2001).
6. Most of the information from the *Tampa* incident was obtained from Jana Mason, *Sea Change: Australia's New Approach to Asylum Seekers*, (Washington, D.C.: U.S. Committee for Refugees / Immigration and Refugee Services of America, February 2002).
7. "Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution" (Oxfam, February 2002), 9.
8. *Ibid.*, 13.
9. I cannot do justice here to the intricate legal debacle that unfolded during this entire ordeal, and it is worthy of a paper on its own.
10. Radhika Mohanram, *Black Body: Women, Colonialism, and Space* (Minneapolis: University of Minnesota Press, 1999).
11. Sherene Razack, "Race, Space, and Prostitution: The Making of the Bourgeois Subject," *Canadian Journal of Women and the Law* 10 (1998): 338–76. Illegal migration, like prostitution, also involves countless numbers of dead bodies which no one wants to talk about.
12. Mohanram, 4.
13. *Ibid.*, 11.
14. *Ibid.*, 3.
15. *Ibid.*, 15.
16. Alison Bashford, "'Is White Australia Possible?' Race, Colonialism and Tropical Medicine," *Ethnic and Racial Studies* 23 (2000): 248–71.
17. There is no space here to examine the connection between Australia's foreign economic policy and forced migration; needless to say, they are not unrelated. Saskia Sassen, in *Globalization and Its Discontents* (New York: New Press, 1998) does a great job of linking U.S. economic activity abroad and mass movements of migration, and shows that contrary to what one would expect, mass migration has consistently come from countries where American investment is prevalent.
18. See above, note 16.
19. Bashford, 253.
20. *Ibid.*, 247.
21. Cited in William Maley, "Fear of the Dark: Indonesia and the Australian National Imagination," *Australian Journal of International Affairs* 55 (November 2001): 371–88.
22. *Ibid.*, 385.
23. *Ibid.*, 374.
24. Loring M. Danforth, "Is the 'World Game' an 'Ethnic Game or an 'Aussie Game'? Narrating the Nation in Australian Soccer," *American Ethnologist* 28 (2001): 363–87.
25. *Ibid.*, 373.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*, 376.
29. *Ibid.*, 378.
30. Suvendrini Perera and Joseph Pugliese, "'Racial Suicide': The Re-licensing of Racism in Australia," *Race and Class* 39 (1997): 1–19.
31. *Ibid.*, 9.
32. All citations from Pauline Hanson or the One Nation Party are taken from their Web site, <http://www.onenation.com>.
33. Cited in Mohanram, 143.
34. Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Sydney: Pluto Press, 2000), 165.
35. Perera and Pugliese, 10.
36. *Ibid.*
37. Stelzer, 8.
38. Ministerial Statement, August 29, 2001.
39. Sherene Razack, "Making Canada White: Law and the Policing of Bodies of Colour in the 1990s," *Canadian Journal of Law and Society* 14 (1999): 178.
40. Border Protection Bill 2001 (Bills Digest No. 62 2001–2002) at 1.
41. *Ibid.*
42. *Ibid.*, 2.
43. *Ibid.*
44. *Ibid.*
45. On October 20, 2001, more than 350 asylum seekers, mostly Iraqi refugees, drowned off the coast of Java. Among the dead were 300 women and children who were under the deck of the overcrowded, sinking vessel.
46. In no way am I comparing the regimes which refugees are fleeing today to Nazi Germany; my point is to compare the conditions during transport and upon arrival.
47. Cited in William Maley, "Security, People Smuggling, and Australia's New Afghan Refugees," *Australian Journal of International Affairs* 55 (2001): 351.
48. Bruno Bettelheim, *The Informed Heart* (New York: Free Press, 1960), 109.

49. William Maley notes that although Hazaras from Afghanistan are fleeing due to economic and cultural persecution, so too were Jews in Germany before they were eventually interned and exterminated. Although I don't want to push the analogy too far, and obviously there are some key differences between modern-day refugees and Jews in Nazi Germany, my entry point in this subject area was reading about the conditions in the boats that transport refugees. My immediate reaction was that to send back a boat full of refugees who have come from so far, and have traveled under such inhuman conditions for so long, constitutes cruel and unusual punishment, and puts us on a par with those who profit from such misfortune as well as with regimes that make it necessary for these people to leave in the first place.
50. In recent times, Australia has, as unofficial policy, offered money to tempt refugees to return to their country. As much as $3,000 U.S. has been offered to, and accepted by, many Afghanis who have chosen to go back home rather than to rot in a detention centre in Australia.
51. U.S. Committee for Refugees, 36.
52. *Ibid.*
53. U.S. Committee for Refugees, 37.
54. U.S. Committee for Refugees, 38.
55. Maley, 351.
56. *Ibid.*, 363.
57. *Ibid.*
58. *Ibid.*, 364.
59. *Ibid.*
60. U.S. Committee for Refugees, 13.
61. Adrienne Millbank, "The Detention of Boat People," Current Issues Brief 8 2000–2001, February 27, 2001; online: <http://www.aph.gov.au/library/pubs/cib/2000-01/01cib08.htm>.
62. Ministerial Statement, August 29, 2001.
63. David Goldberg, "'Polluting the Body Politic': Race and Urban Location," *Racist Culture: Philosophy and the Politics of Meaning* (Cambridge: Blackwell, 1993): 200. The Australian government came under considerable pressure to explain why it spread rumours of refugees throwing their babies overboard to attract the attention of Coastwatch, long after it knew this was not true. I would argue it did so in order to mark the refugees even before they landed. For more information, see <http://www.truthoverboard.com.
64. U.S. Committee for Refugees, 9.
65. John Pace, former UN High Commissioner for Refugees official, described the situation in Nauru as "hell" and the "Pacific Solution" as "unsustainable and inhumane." John Pace, "Áustralia: Asylum Seekers – Where to Now?" report for Amnesty International, December 5, 2001.
66. Jake Skeers, "Refugees Face 'Hell' in Australia's Offshore Detention Camps," December 27, 2001; online: World Socialist Web site, <http://www.wsws.org/index.shtml>.
67. Samira Kawash, "The Homeless Body," *Public Culture* 10 (1998): 325.
68. *Ibid.*, 327.
69. *Ibid.*, 330.
70. The political platform of some of Toronto's mayoral candidates is a prime example.
71. *Ibid.*
72. Hannah Arendt, "The Decline of the Nation-State and the End of the Rights of Man," in *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1951), 283.
73. "Sink all boats" is a common phrase in Australia.
74. Goldberg, 192.
75. Arendt, "The Decline of the Nation-State," 295.

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Towards a Common European Asylum System: Asylum, Human Rights, and European Values

Harold Shepherd

Abstract

The turn of the millennium has been met with a considerable amount of work in the area of refugee protection, culminating in the UNHCR's Agenda for Protection and Convention Plus initiatives. In addition, in 1999 the European Union embarked on a five-year program to develop a Common European Asylum System as mandated by the Treaty of Amsterdam. Work done by the European Commission sought to incorporate asylum into broader issues of immigration, border security, and foreign relations. As a result, entitlements were generally limited to those that have been mandated by applicable international, European, or domestic law. Some exceptions were further reduced at the political level. Functional values of bureaucratic efficiency and pragmatic political considerations converged to create the lowest common denominator. On the other hand, voices in civil society were raised to protest this approach, advocating that normative values that underpin international human rights law should serve as the interpretative context. In light of this debate, this may be an appropriate time for the international community to revisit the question of status for those not described in the Geneva Convention.

Résumé

Le tournant du millénaire a vu beaucoup de travail accompli dans le domaine de la protection des droits des réfugiés, débouchant sur les initiatives de l'UNHCR, Agenda pour la protection et Convention Plus. En plus, en 1999, l'Union Européenne a lancé un programme étalé sur cinq ans et visant à développer un système européen commun sur le droit d'asile comme mandaté par le Traité d'Amsterdam. Le travail déjà accompli par la Commission Européenne visait à inscrire le droit d'asile dans les questions plus larges de l'immigration, de la sécurité aux frontières et des relations extérieures. Par conséquent, les critères d'admissibilité furent généralement limités à ceux déjà mandatés par les lois internationales, européennes ou domestiques applicables. Certaines exceptions subirent une réduction supplémentaire quand ils arrivèrent au niveau politique. Les valeurs fonctionnelles de l'efficacité bureaucratique se sont donc alliées à des considérations politiques pragmatiques pour produire le plus petit dénominateur commun. D'autre part, des voix se sont élevées dans la société civile pour protester contre cette approche, arguant que les normes qui sous-tendent le droit international en matière de droits de la personne devraient servir de cadre interprétatif. À la lumière de ces débats, il se peut que ce soit le moment opportun pour la communauté internationale de revoir le statut de ceux qui ne sont pas décrits dans la Convention de Genève.

Europe is now in the process of trying to reinvent itself in an era of globalization as an interdependent community of shared values, markets, labour, and capital. In order to achieve this goal, the European Union has set about the task of creating an area of freedom, security, and justice with open internal borders. The result of advances made in this area has led to the phenomenon of secondary

migration within Europe. Pull factors relating to reception conditions, asylum determination procedures, and interpretation of refugee law, in addition to such other factors as language and colonial ties, led to a perceived disparity among States with respect to assuming responsibilities towards asylum seekers. Concern about "burden sharing" and "asylum shopping" led to discussions about how best to address what was perceived to be a problem. Rules governing State responsibility for deciding asylum claim and plans for a European Refugee Fund were developed. In order to decrease the incentive to make asylum claims in Europe elsewhere than the country of admission and in order to promote consistency, a comprehensive program for a Common European Asylum System has been proposed, with implementation of minimum standards by May of 2004. This project requires the balances of competing interests – those of the individual rights of asylum seekers with those of the community at large. The degree to which both have been accommodated in a way that is both consistent with international human rights principles and with responsible use of finite resources is a matter of debate, as will be evident in the following analysis.

Legal Framework

The European Union [the EU] was established on November 1, 1993, by the *Treaty of the European Union*[1] that was signed at Maastricht on February 7, 1992 [the *Maastricht Treaty*]. It includes as one of its objectives the free movement of persons. As a corollary to this principle, asylum policy was made an issue of common interest as part of co-operation in the areas of justice and home affairs under Article K.1 of Title VI. As part of the "third pillar" of the EU, asylum policy was a matter of intergovernmental agreement. A significant development took place when the *Treaty Establishing the European Community*[2] was amended by the *Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain related Acts,* signed on October 2, 1997, and entered into force on May 1, 1999 [the *Treaty of Amsterdam*].[3] In particular, the *Treaty of Amsterdam* moved asylum from the third pillar of intergovernmental co-operation as a matter of justice and home affairs to the first pillar of community law. Article 63 of the amended *Treaty Establishing the European Community*[4] [the TEC] allowed five years to implement a common asylum policy that would be binding on Member States. Article 67 provides that during the five-year transitional period implementation is to be done by unanimous vote of the Council based on a proposal from either the European Commission or a Member State after consultation with the European Parliament. After five years, Members States lose their right to bring proposals directly to the Council. Instead, a proposal must be made to the European Commission which then considers whether to submit it to the Council. Except in designated areas such as visa policy, the Council shall act on the Commission's proposals. This strengthens the Commission's hand considerably after May of 2004.

In the matter of asylum, Article 63 requires that common standards be implemented with respect to state responsibility for considering asylum applications, minimum reception standards, minimum qualification standards, and minimum procedural standards for granting or withdrawing refugee status. With respect to refugees and displaced persons (which are not subject to the five-year implementation requirement), it mandates minimum standards for temporary protection and mechanisms to promote responsibility sharing among Member States.

The European Council met at Tampere from October 15 to 16, 1999, to establish measures to implement Article 63 by means of a Common European Asylum System. The decision was made to achieve this goal in two phases. In the short term, common standards would be developed for implementation by each respective national asylum determination system (sometimes referred to as "Tampere I"). In compliance with the five-year requirement imposed by Article 63, these provisions must be implemented by May of 2004. The long-term plan is to create a common asylum procedure and a uniform European Union refugee status (Tampere II).

In addition to policy support from the Immigration and Asylum Committee of Justice and Home Affairs, an governmental asylum consultation group has been created to act as a forum to promote consistency in asylum determinations within Europe. After the dissolution of CIREA (Centre for Information, Reflection and Exchange on Asylum) in June of 2002, the European Union Network for Asylum Practitioners (EURASIL) was created. Representatives from national asylum-determination authorities meet six to eight times per year with invited international partners to exchange information and experiences in deciding asylum claims.

Responsibility Sharing and the Dublin Convention

The *Schengen Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*[5] was signed on June 19, 1990 [the *Schengen acquis*]. However, it did not come into force until 1995 with ratification by ten States. This was later expanded to thirteen EU Member States in addition to

Norway and Iceland. Ireland and the United Kingdom declined to ratify or accede to this Convention. It provides for free movement among states with a common external border (subject to the temporary imposition of border controls for reasons of public order, as France has done to combat the entry of drugs from the Netherlands and Belgium).

The *Schengen acquis* was integrated into the European Union by means of the *Treaty of Amsterdam* on May 1, 1999, through a protocol. On May 18, 1999, Norway, Iceland, and the European Union entered into an agreement to permit these two non-EU countries to continue to participate. In order to operationalize a common external border, the Schengen Information System (SIS) was established in 1995 and is now used by thirteen EU states, plus Norway and Iceland. The next generation, SIS II, is being developed to add new features such as biometric identification data and new categories of persons of interest. In addition, it will allow the United Kingdom, Ireland, and the ten accession states to participate in the system. Another database known as the Visa Information System (VIS) is also being developed to store personal information from visa applications to EU member states.

In response to the creation of an area of free movement within Europe, the resulting issue of "asylum shopping" was dealt with by the *Convention Determining the State Responsible For Examining Applications For Asylum Lodged In One of the Member States of the European Communities*,[6] signed on June 15, 1990, that came into force on September 1, 1997 [the *Dublin Convention*]. All EU Member States became parties to this Convention that determines state responsibility for determining asylum claims. To avoid the situation in which a failed asylum seeker files another claim in a second jurisdiction, the Convention provides for a regime in which only one determination is made under the responsibility of a State identified by established criteria. Given that the *Dublin Convention* is an instrument of public international law, a Council regulation was required to replace it with Community law in accordance with Article 63(1)(a) of the amended *Treaty of the European Community*. The document, entitled *Council Regulation establishing the criteria and mechanisms for determining the Members State responsible for examining an asylum application lodged in one of the Members States by a third country national*,[7] is sometimes referred to as "Dublin II." In order to keep track of claimants for purposes of Dublin II, "Eurodac" was created by Council Regulation (EC) No. 2725/2000 of December 11, 2000,[8] to permit exchange of fingerprints of asylum seekers among Member States. In addition to this responsibility-sharing regime, a European Refugee Fund was established by Council Decision on September 28, 2000[9] pursuant to Article 63(2)(b) of the *Treaty of the European Community*, as amended by the *Treaty of Amsterdam*.

Temporary Protection

In accordance with Articles 63(2)(a) and (b) of the TEC, the Council enacted the *Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displace persons and on measures promoting a balance of efforts between Members States in receiving such persons and bearing the consequences thereof*[10] [the *Temporary Protection Directive*]. In addition to those who meet the definition of a Convention refugee in accordance with Article 1A of the 1951 *Geneva Convention*, this directive also applies to those who have been displaced by armed conflict, endemic violence, or "persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights." Temporary protection is without prejudice to the person applying to be recognized as a Convention refugee. In response to a proposal by the European Commission, a Council decision is adopted by qualified majority to make a designation for purposes of temporary protection. Unless otherwise terminated, temporary protection lasts for one year and may be extended by the Council by qualified majority to extend it up to one year. The effect of the Council decision is to grant temporary protection throughout the European Union to displaced persons who are members of the specified group. Obligations incumbent on Member States include the issuance of residence permits, necessary visas, access to suitable accommodation, social welfare, medical care, employment authorization, educational opportunities, and vocational training (subject to priority given to EU citizens or other designated persons). Article 17 provides that those who enjoy temporary protection have the right to apply for asylum at any time.

Minimum Reception Standards

In accordance with subparagraph 1(b) of Article 63 of the TEC, *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*[11] [the *Reception Directive*] was enacted by the Council, establishing minimum standards for the reception of asylum seekers based on a proposal from the European Commission after consultation with the European Parliament, the Economic and Social Committee, and the Committee of the Regions. The preamble identifies one goal of the *Reception Directive* as being to ensure that asylum seekers have a dignified standard of living and comparable living conditions throughout the EU. In addition, it is hoped that harmonization of reception conditions would reduce secondary movement. The Directive only applies to those who make asylum claims under the 1951 *Geneva Convention*, not those

who seek other forms of subsidiary protection, including temporary protection under the *Temporary Protection Directive*.

The *Reception Directive* provides for the provision of information concerning benefits and communication of obligations respecting reception conditions. Information must be given about organizations that provide assistance, be it legal, medical, or other, that is relevant to reception conditions. A status document as an asylum seeker must be issued within three days of receipt of the application. A travel document must be issued if serious humanitarian reasons require the person's presence in another State. Although freedom of movement is protected, States are permitted to restrict movement to a prescribed area provided that this does not interfere with private life or access to benefits under the *Reception Directive*. Detention is authorized for reasons of public order. Member States must make best efforts to respect the principle of family unity. Medical screening is permitted on public health grounds. Minors must have access to the education system on the same basis as nationals within three months of the asylum claim having been made (or up to one year for training designed to facilitate access to the educational system). Member States have discretion to determine a waiting period before an asylum seeker can access the labour market. However, if after one year the application has not been decided through no fault of the person concerned, the State shall determine conditions for access to the labour market. Priority can be given to EU nationals and other designated persons. Employment authorization may not be revoked if an appeal of a negative decision has a suspensive effect. The *Reception Directive* then outlines material reception conditions. Provisions are also made for those with special needs.

Minimum Procedural Standards

A draft *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* [the *Procedural Directive*] was adopted by the European Commission on September 20, 2000.[12] After consultation with the Council, the European Parliament, and the Economic and Social Committee, it was amended through document /COMM/2002/0326 final-CNS 2000/0238,[13] but has not yet been enacted. The draft *Procedural Directive* applies to applications for asylum, defined in Article 2 as referring to requests for international protection under the *Geneva Convention,* not to other forms of subsidiary protection. Accelerated procedures are permitted in a number of cases, including applications that have been found to be inadmissible, manifestly unfounded, repeat claims, port of entry applications, or cases in which there is evidence of misrepresentation or abuse (including destroying identity documents in cases where identity is uncertain or making an asylum application with unreasonable delay in circumstances in which it appears that the claim has been made to delay removal). Reasonable time limits are established for processing, but claims cannot be rejected simply because they were not made at the first opportunity. Border officials must be properly trained. Applicants must be informed about procedure and right to counsel, and must be provided with the services of an interpreter. Decisions must be made individually by qualified personnel. With certain exceptions, applicants have the right to a personal interview from which a transcript is prepared. The benefit of the doubt is to be given to the claimant provided that a genuine effort has been made to substantiate the claim, all available evidence has been obtained and verified, and the examiner is satisfied that the statements are "coherent and plausible and do run counter to generally known facts relevant to his/her case" (Art. 16). States are required to provide an effective remedy before a court of competent jurisdiction against a negative decision that must be provided in writing and include reasons. Provisions are also made for procedures relating to unaccompanied minors and to the detention of asylum seekers.

This proposed *Procedural Directive* reflects a common practice in Europe of dividing responsibilities between the Interior Ministry that determines admissibility of the application and an administrative tribunal that assesses its substance. In many countries, the preliminary examination by the Interior Ministry can reject the application on the basis that it is manifestly unfounded without referring it to the tribunal responsible for refugee status determination. Article 29 limits such cases to situations in which the officer determines that there is no nexus between the stated risk and Article 1(A) of the Geneva Refugee Convention, the applicant is from a safe country of origin as defined in the *Procedural Directive*, or a *prima facie* case can be made for exclusion under the *Geneva Convention*.

Article 25 of the draft *Procedural Directive* permits Member States to reject an application for asylum in five cases: (a) a Member State, Norway, or Iceland has acknowledged responsibility for examining the application; (b) the applicant arrived in the EU from a "first country of asylum" in accordance with Article 26 (the person has been granted asylum in a third country and can still avail him or herself of its protection); (c) the applicant arrived from a "safe third country" as defined in Article 27 and in accordance with the principles set out in Article 28 and Annex I; (d) extradition by a Member State or a "Safe Third Country," and (e) indictment by an International Criminal Court.

On October 2, 2003, the Council considered the issue of safe countries of origin and safe third countries, and on November 6, 2003, it looked at several issues relating to the

designation of safe third countries. A revised draft of the Directive was issued on December 4, 2003, as ASILE 66 (15198/03) with proposals from Member States found in ASILE 66 ADD 1. Under the Irish Presidency, an informal meeting of the Justice and Home Affairs Ministers was held in Dublin on January 22 and 23, 2004.[14] Two issues of particular importance were identified at the meeting. The first concerns the degree to which the application of the safe-third-country provision should be dependent on a past connection to the country and the possibility of seeking and obtaining asylum in that country. The second concerns a proposal in amended Article 28A that provides for "neighbouring safe third countries." If the applicant comes from a country that, by national legislation, offers the protection of both the 1951 *Geneva Convention* and the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* [the *European Convention on Human Rights* or the ECHR], the Member State may refuse access to its asylum determination system. After EU enlargement on May 1, 2004, this would apply to the nineteen non-EU members of the Council of Europe that have ratified the ECHR. The Dublin meeting raised the questions of whether Article 28A should maintain ratification of the ECHR as a requirement and whether the Directive should include a common EU list of safe third countries as a requirement for the application of Article 28A. An example of NGO rejection of the notion of what it refers to as "super safe third neighbouring counties" can be found in the submissions to the Dublin meeting made by the European Council on Refugees and Exiles which advocates individual examination of every claim.[15]

The Proposed Qualification Directive

In accordance with Article 63 of the TEC, paragraph 38((b) (i and ii) of the *Vienna Action Plan*, Conclusion 14 of the Tampere European Council and with reference to the "scoreboard" presented to the Council and the European Parliament in March of 2000, the European Commission published a *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*,[16] [the *Qualification Directive*]. The Directive took the March 4, 1996, Joint Position of the Council concerning the harmonized application of the definition of a Convention refugee as a starting point, but significantly amends it, then goes on to consider subsidiary protection outside the purview of the *Geneva Convention*.

Consultation was mandatory for the European Parliament, but optional for the Committee of the Regions and the Economic and Social Committee. The Committee of the Regions reported back on May 16, 2002.[17] It acknowledges that those who qualify for refugee status under the *Geneva Convention* are entitled to the same access to services and opportunities as nationals. However, those granted subsidiary protection may have different entitlements, for example, with respect to access to the labour market.

The Economic and Social Committee reported on May 29, 2002,[18] pointing out that the priority rule according to which an application must first be assessed under the *Geneva Convention* before subsidiary protection is considered must be respected in order not to weaken this Convention. With respect to status, the Committee criticizes the distinction made between refugee status that results in a five-year residency permit and subsidiary protection that only entitles one to a one-year permit, stating that there is no reason why one should be shorter than the other. In addition, the Committee is of the opinion that those who have been granted subsidiary protection should have the right to work as soon as their need for protection has been recognized.

Some problematic aspects to the proposed *Qualification Directive* include the following.

1. Article 8 provides that *sur place* claims may be based on activities done after leaving one's country of origin "save where it is established that such activities were engaged in for the sole purpose of creating the necessary conditions for making an application for international protection." This exception has elicited the criticism that this is inconsistent with the terms of the *Geneva Convention* that do not exclude persons in this category from its protection.

2. The proposed Directive refers to applications for international protection. The UNHCR is of the view that this term is properly used to describe protection provided by international agencies such as the UNHCR, not domestic protection that is more properly referred to as asylum.[19]

3. Article 5 defines subsidiary protection as being based on a "well-founded fear of suffering serious and unjustified harm as described in Article 15." Article 15 outlines three categories of subsidiary protection: (a) torture or inhuman or degrading treatment or punishment, (b) violation of a human right, sufficiently severe to engage the Member State's international obligations, or (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights. It has been pointed out that some human rights standards are non-derogable expressions of *jus cogens*. For example, it is inappropriate to ask whether torture can be justified. Professor Guy Goodwin-Gill has pointed out that the use of the term "unjustified" risks being interpreted as a separate test to be applied within a legal analysis.[20]

4. Article 5 provides that "international protection" may be granted to a third-country national. That is to say, the proposed *Qualification Directive* only applies to applications made by those who are not European Union citizens. This is consistent with the Protocol to the *Treaty of Amsterdam* that also establishes this principle. The criticism has been made that the right to make an asylum claim under the *Geneva Convention* in another contracting State is undermined by this provision. There may well be some legitimate protection needs within the meaning of the Convention notwithstanding the fact that the State in question is a member of the EU.

5. Article 21 provides that those recognized to be Convention refugees and accompanying family members are entitled to a residence permit valid for a minimum of five years, renewable automatically. Those granted subsidiary protection and their accompanying family members are only entitled to a residence permit that is valid for one year, automatically renewed for a period of at least one year until authorities establish that protection is not longer needed. This has been widely criticized by NGOs as having no rational basis, given that there is no appreciable difference between refugee and subsidiary protection with respect to how long it will be required and the settlement needs of the protected person. This was also recognized by the Economic and Social Committee, as previously noted.

6. Article 24(1) requires that those who have been granted refugee status be permitted to work immediately upon recognition. Article 24(3) permits States to delay entry into the labour market for up to six months in cases of those granted subsidiary protection. However, Articles 25, 26, and 27 of the proposed Directive do not distinguish between refugee and subsidiary status with respect to access to education, social welfare, or health and psychological care.

7. There has been some debate about whether the proposed *Qualification Directive* excludes Palestinians from its applicability when they make asylum claims in Europe. The reason for this is that Article 1D of the *Geneva Convention* is an exclusion provision that concerns those who are in receipt of protection from United Nations agencies other than the UNHCR. Because Palestinians receive assistance from the United Nations Relief and Works Agency (UNRWA), the *Geneva Convention* is not applicable to their situation. However, Article 1D goes on to say that the *Geneva Convention* applies when such protection or assistance ceases for any reason. The proposed *Qualification Directive*, at Article 14(1)(a), excludes from refugee status any applicant "who is at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees." This could be interpreted to mean that Palestinians who arrive in Europe to make an asylum claim are excluded from the protection of the *Geneva Convention* and must return to seek protection from UNRWA. However, Professor Goodwin-Gill has pointed out that, under the *Geneva Convention*, UNRWA protection ceases when a person leaves its jurisdiction. As a result, the second paragraph of Article 1D applies and protection may be granted under the *Geneva Convention* in Europe. To remove the ambiguity of the text on this point, Professor Goodwin-Gill suggests that Article 2(c) of the *Qualification Directive* be amended to include in the definition of a refugee those to whom the second paragraph of Article 1(D) of the *Geneva Convention* applies.[21]

On the other hand, the *Qualification Directive* has proposed to resolve the debate concerning agents of persecution and membership in a particular social group. Article 11(2)(a) states that it is "immaterial whether the persecution stems from the State, parties or organisations controlling the State, or non-State actors where the State is unable or unwilling to provide effective protection." This raises the bar for countries that require that a non-State agent of persecution act with the consent or acquiescence of the State to be considered persecution under the *Geneva Convention*. Article 11(2) goes on to specify in (b) that it does not matter whether a political opinion is actually held, only that the agent of persecution attributes the belief to the applicant. Article 11(2)(c) states that "it is immaterial whether the applicant comes from a country in which many or all persons face the risk of generalised oppression." Article 12(d) specifies that the concept of a social group includes:

> certain fundamental characteristics, such as sexual orientation, age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as "inferior" in the eyes of the law.

These provisions are a welcome development that harmonize conflicting European approaches and follow interpretations adopted by many national asylum-determination systems that use the *ejusdem generis* principle to extrapolate human rights and anti-discrimination categories from the other grounds enumerated in the *Geneva Convention*.[22]

Council Directive on the Right to Family Reunification

The major difference between the *Council Directive on the Right to Family Reunification*[23] [the *Family Reunification*

Directive] as implemented in 2003 and the original proposal made by the European Commission on January 11, 2000,[24] is that the draft version applied to both refugee and subsidiary protection. The Directive as implemented is restricted to those who have been determined to be Convention refugees. This is a significant step backwards with respect to the status that attaches to subsidiary protection. Neither version extended its scope to those admitted on the basis of temporary protection. The *Family Reunification Directive* authorizes entry to a spouse and to unmarried minor children of a Convention refugee, with the exception that those twelve years of age and older who arrive independently may be subject to statutory integration criteria. Entry may be authorized for the parents of the refugee or his or her spouse in cases in which they are dependent on the refugee and do not enjoy proper family support in the country of origin. Unmarried adult children may also be authorized to enter if they cannot provide for their own needs for health reasons. Provision is also made for common-law spouses. Article 10(2) is proper to refugees and permits family reunification of other family members not referred to in Article 4 if they are dependents of the refugee. Special provisions are made for unaccompanied minors to bring parents into the country in Article 10(3). If the application is made within three months of obtaining refugee status, the settlement criteria of Article 7 do not apply. Family members are entitled to have access to education, employment, and training. However, Member States may set conditions or delay in authorizing employment for up to twelve months.

Agenda for Protection and Convention Plus Initiatives

The global consultations that began in December 2000 to mark the fiftieth anniversary of the 1951 *Geneva Convention* led to the approval of an "Agenda for Protection" by the 2002 Executive Committee of the UNHCR. Among the six goals established are strengthening the implementation of the Convention, the protection of refugees within broader migratory movements, sharing burdens and responsibilities more equitably, building capacities to receive refugees, redoubling the search for durable solutions, and addressing security concerns. The UNHCR challenged the international community to respond to this initiative by developing programs and policies that implement a comprehensive response to asylum-related migration flows known as "Convention Plus."

The European Commission drafted a report on implementation of the Agenda for Protection, published at Brussels on March 26, 2003, as COM(2003) 152 final entitled *Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for Protection*. This document incorporates work done in the area of the Common European Asylum System with broader issues of racism, combating the trafficking in human beings, domestic security issues, external border controls, managing illegal migratory flows, and stronger dialogue and partnership with third countries. An important issue studied was the question of external processing of refugee claims through protected entry procedures and resettlement programs. At present, five of fifteen EU countries have formal procedures for processing refugee claims outside the country and granting admission. Six others have informal procedures on a case-by-case basis. The Commission recommends that the EU consider a common European approach to protected entry procedure and resettlement that works in conjunction with partnership with third countries in developing protection capacity in the countries of first asylum and supporting other durable solutions in the form of local integration or voluntary return. As part of this process, the EU made the negotiation of readmission agreements part of broader negotiations on such issues as better market access, preferential trade tariffs, visa policies, quotas for migrant workers, development aid, and the like.[25] As part of the Agenda for Protection, the Commission considered elements of the Common European Asylum System to advocate for a system that is fairer, faster, and more efficient, particularly with respect to the removal of failed asylum seekers. A second important report on this issue was published by the Commission on June 3, 2003, as COM (2003) 315 final-*Communication from the Commission to the Council and the European Parliament: Towards more accessible, equitable and managed asylum systems*. The Communication proposes a model that includes use of closed reception facilities for up to one month in conjunction with rapid determination of claims and removal. Mention is made of a "growing malaise in public opinion" in response to abuse of asylum procedures, mixed migratory flows, smuggling practices, and use of asylum procedures to improve living conditions unrelated to protection needs. Asylum policy is set squarely within the parameters of "orderly and managed arrival," responsibility sharing, both within the EU and with regions of origin, and efficient and enforceable asylum decision making and return procedures. At page 13, the Communication cites the discouraging of abuse of the asylum system as another important objective. In 2002, the Council adopted three action plans designed to combat illegal immigration and trafficking in human beings, to strengthen external border controls, and to facilitate removal of third-country nationals.

The focus of the Commission has been on creating a seamless web of asylum, immigration, and foreign policy that begins with the root causes of forced migration, follows

on to solidarity and capacity building with countries of first asylum, considers questions related to durable solutions (including protected entry procedures and resettlement programs), and then proceeds to address issues of appropriate reception standards, fast and fair asylum determination procedures, the expeditious removal of failed claimants in conjunction with the negotiation of readmission agreements, and, finally, voluntary return programs when changes in country conditions warrant it.

Commentary

The nascent Common European Asylum System is emerging within the context of a debate between two fundamentally different approaches to protection. A good example of this can be seen with respect to subsidiary protection. From the point of view of consistency in application of international human rights principles, there should be no difference with respect to procedures, substantive status, duration of protection, and family reunification. This perspective has not only been advocated by many voices in civil society,[26] but also by the Economic and Social Committee. It is rooted in international human rights values that are reflected in what is often referred to as the International Bill of Rights – the 1948 *Universal Declaration of Human Rights*,[27] the *International Covenant on Civil and Political Rights*,[28] and the *International Covenant on Economic, Social and Cultural Rights*,[29] as supplemented by the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*[30] and other international human rights instruments.

Within the European Union these principles have been incorporated into the *Charter of Fundamental Rights of the European Union*,[31] the Tampere European Council Presidency Conclusions,[32] and the draft *Treaty Establishing a Constitution for Europe*.[33] Outside the framework of Community law, foundational principles were incorporated into the "Helsinki Process" that began with the Helsinki Summit *Final Act* of the Conference on Security and Co-operation in Europe (now the Organization for Security and Co-operation in Europe) of August 1, 1975. In its declaration of principles, the participating States "recognize the universal significance of human rights and fundamental freedoms." The 1990 *Charter of Paris for a New Europe* affirms that "Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law."[34] Within the forty-five-member Council of Europe system, the *European Human Rights Convention*[35] is enforced by the European Court of Human Rights in Strasbourg. In addition, the *European Social Charter*[36] contains a statement of important principles concerning access to employment and social programs.

European values with respect to human rights were forged in the conflict between traditional notions of state sovereignty and the need to deal with serious human rights abuses committed during the Second World War. Although Humanitarian Law as reflected in the Hague and Geneva Conventions codified international rules with respect to the conduct of war, the lack of an effective enforcement mechanism led to a sense of impunity among military and political leadership. In the spirit of legal positivism, many accused of war crimes cited domestic legal authority as justification for their crimes. With the demise of such morally based legal theories as natural law, a new foundation needed to be found which could place limits on state sovereignty. The first step towards the development of the concept of universal jurisdiction was made by the October 30, 1943, *Moscow Declaration* and the *Charter of the International Military Tribunal* of October 6, 1945,[37] that gave the tribunal jurisdiction over crimes against peace, war crimes, and crimes against humanity. In subsequent years, principles of universal jurisdiction have been developed and now include enforcement by the International Criminal Court. In the early post-war period, the Council of Europe began work on a *European Human Rights Convention* to address issues raised by this legacy.

In light of the European experience, human rights responsibilities are taken very seriously within the various European systems. The development of the Common European Asylum System is no exception. However, it is being driven by an agenda that distinguishes between the *Geneva Convention* and subsidiary protection in significant ways. Those who approach the issue from the point of view of consistency within the body of international human rights law see no justification for such a distinction. The European Commission, however, does. What accounts for this difference of approach?

There are several possible answers to this question. One is that it responds to enforcement priorities by some governments of Member States. The Commission's approach seeks to balance protected human rights with an attempt to deal with a perceived abuse of the asylum determination system by those considered to be economic migrants. In order to achieve this goal, the system should contain as few "pull factors" as possible under established legal obligations. This focus on program integrity, enforcement, and the importance of following immigration rules and procedures (*i.e.*, coming in through the front door, not the back door) reflect political values that are popular in a number of EU countries. An example of this can be found in the Committee of the Regions report on the *Qualification Directive* that supports the distinction between Convention refugees and those with subsidiary protection with respect

to access to labour markets. Given that this 222-member body is made up of regional representatives, it reflects grassroots sensitivity to the impact of irregular entry into the EU on local employment, provision of social services, and integration issues. The conflicting approaches taken between the Committee of the Regions and the Economic and Social Committee demonstrate a contrast between a principled human rights approach taken by the latter with a politically sensitive one adopted by the former. The Committee of the Regions reflects the approach taken by the European Commission and supports the view that a common asylum system is best achieved through minimum standards that are not in conflict with binding international human rights obligations. If local economic and political conditions are such that a Member State wishes to be more generous, it is free to do so and to incur any risks that this added "pull factor" may produce.

A second explanation can be found in the nature of the European Commission itself and its roots in the functionalism that has accompanied the rise of contemporary bureaucracy. The classic expression of the dominant role assigned to central state authority can be found in the tradition of legal positivism. Law is understood from the point of view of the command of the sovereign that, by operation of principles of recognition, is accepted as binding and, to ensure effectiveness, is backed by threat of coercive measures. This approach is sometimes referred to as "normativism" because state "command" makes law normative. From John Austin in the nineteenth century to such contemporary writers as H.L.A. Hart, legal positivism has had a significant influence in Western jurisprudence. Normativism is based on the notion of law as promulgated by statute and as interpreted by courts. Although the nature of international law is different, the term can also be used to describe State obligations that are binding under international human rights law through Conventions, customary law, and *jus cogens*.

Normativism worked well when the role of central government was limited in scope to foreign relations and public policy issues that were amenable to debate in Parliament or the National Assembly. However, the rapid growth of industrialization in the late nineteenth century drew many from rural areas into overcrowded, unsanitary, and substandard urban housing. Long working hours, child labour, and unsafe working conditions were the order of the day. Social reformers gave voice to those who lobbied for the introduction of regulatory schemes to further social policy objectives related to quality of life. The dominance of capital over labour that had prevailed under the *laissez-faire* principles of Adam Smith and nineteenth-century liberalism needed to be tempered by the introduction of administrative principles that could address issues of distributive justice and quality of life issues, as can be seen in the Roosevelt's "New Deal" of the 1930s. From this perspective, the role of the state is not to command in the name of dominant social classes, but rather to create, coordinate, and facilitate programs that allow the latent humanity of society to take institutional form. This marks a shift from the normativism that views political institutions as being the custodian of social values to one that looks to society itself as identifier of normative values through collective interaction.

With the rapid development of technology and communications, the need for specialized support in the area of regulation became evident. Administrative institutions that began as part of an agenda to promote quality of life developed into ones that designed and implemented complex regulatory schemes in virtually all areas of life. To a certain extent, one could say that the growth of administrative agencies in the twentieth century has created a fourth branch of government – the civil service. Rather than being limited to implementing instructions received from the legislature, civil servants have become social regulators in their own right, but nevertheless subject to political direction. Functionalism developed out of a history of attempts to develop the law in terms of social policy objectives, collective engagement, rationality, and fundamental human values. Rather than limiting the law to the broad strokes of statute, it developed a complex system of interdependent regulations that viewed the role of law in society from a holistic and mechanistic point of view. The civil service, administrative agencies, and tribunals are required to make it operational. Functionalism requires the co-operation of experts within the bureaucracy and specialized agencies with the political decision makers who set policy direction.

This is precisely what is evident in the work of the European Commission. It does not approach the question of a Common European Asylum System from the point of view of the normativism that is inherent in the total body of international human rights law and binding obligations, both on a U.N. and a European level, after asking what the fundamental underlying principles are, how they interconnect, and how best to incorporate and institutionalize them. Civil society goes beyond the letter of treaty law and asks questions about its spirit. The Commission has adopted a functional approach that attempts to coordinate asylum policy with larger issues of interdiction, border control, migration policy, integration, and foreign policy. For this reason, the impact of asylum policies on labour markets is a relevant factor for the Commission, but not to those who view this as irrelevant when considered from the perspec-

tive of international human rights law. To put it another way, the Commission's proposals reflect bureaucratic values that attempt to create a coherent and principled policy for Europe that integrates all aspects of migration and asylum into Community law. Civil society and the Economic and Social Committee of the European Parliament view the matter from the point of view of normative human rights standards that must be respected quite independently of migration issues.

Given that the functionalism of the European Commission suits the political agenda of governments in Member States that promotes restrictive immigration and asylum programs, the Commission proposals are not likely to be made more generous at the level of the Council of the European Union as it sits in its Justice and Home Affairs configuration. As a decision-making body that represents the political instructions of home governments through ministerial-level delegates, it will likely support the use of minimum standards for a Common European Asylum System, although perhaps for political rather than technocratic reasons. The voices of advocates of international human rights normativism that have been falling on deaf ears will not likely affect the outcome of the Tampere I phase. But, what of Tampere II?

The goal of creating an area of freedom, security, and justice in Europe is being met through balancing of competing agendas. On the one hand, human rights obligations are fully accounted for in the directives and regulations. An important advance has been made with respect to a consistent interpretation of "particular social group" and agents of persecution under the *Geneva Convention*. On the other, citizens from Member States are excluded from the common system (although individual Member States can opt to include them). Subsidiary protection remains a second-class status that many asylum seekers find themselves in, notwithstanding the "priority rule." Although the Strasbourg European Court of Human Rights has interpreted Article 3 of the European Human Rights Convention as expressive of the principle of *non-refoulement*, it could not impose positive status that would allow those who could not be removed to enjoy the treatment of a national. Each Member State has developed its own approach to this issue. Although the Common European Asylum System has helped by developing common minimum standards, they fall far short of those enjoyed by Convention refugees.

The approach taken by the European Commission and Council is essentially technocratic, functional, and systemic. Human rights obligations are seen as necessary building blocks that that must be arranged in conjunction with those relating to forced migration, international protection and development, foreign relations, immigration, domestic security, and social policy. In order to make the system work with maximum efficiency, human rights must be restricted to obligations that are binding through international law, domestic courts, or the European Court of Human Rights. The interest is in the letter of the law, not extrapolating its spirit to be applied to changing circumstances by reference to international human rights law principles. For this reason, the European Common Asylum System has adopted as its lowest common denominator obligations that must be accounted for and respected, given that there is no choice in the matter because of binding legal obligations. In response to criticism about this, the Commission points out that Member States are free to develop domestic asylum policy that goes beyond mandatory principles. But, given that the purpose of the system is to discourage asylum shopping, this answer would not likely be satisfactory to a country that wishes to set a higher standard for treatment of asylum seekers, but has concerns about the availability of resources to respond to an increase in numbers of claimants.

One of the challenges for the Common European Asylum System at the Tampere II stage lies in moving from minimum standards incorporated into domestic asylum determination proceedings to a common determination system and status that replaces subsidiary protection with a complementary form based on the protection needs of the person rather than on a functional analysis of economic and forced migration issues with a view to developing integrated and coherent European policies. Perhaps the recent Canadian experience in creating such a system could be helpful for the European Commission to consider. However, Canada has limited this form of protection to the *Geneva Convention* and to the equivalent of Article 3 of the *European Human Rights Convention*. The *Qualification Directive* includes broader categories of forced migration.

A significant issue that the EU must face relates to restrictions placed on access to protection of the *Geneva Convention*. First, citizens of the European Union have no right to claim asylum in another EU country. On May 1, 2004, ten countries representing seventy-five million people will join the EU. Given the mobility rights available to EU citizens, one could argue that asylum is no longer necessary. This fact does not abrogate international obligations undertaken by States Parties to the *Geneva Convention*. In response to concerns about state resources being overburdened through internal EU migration after May 1, the United Kingdom has announced a residency period of two years in order to be entitled to apply for social assistance. Although work permits are not needed for EU citizens, the United Kingdom will require worker registration for those from the new states. The result of this regime is

that someone who may have a well-founded fear of persecution in one EU country cannot go to another Member State and claim asylum. Due to issues of training, language, or other personal circumstances, employment may not be possible. A prolonged ban on the receipt of public benefits would put the person in a situation of not having access to either *Geneva Convention* entitlements or the support necessary to live on. This is problematic from the point of view of respect for obligations undertaken by ratifying or acceding to the Convention. Second, the use of safe-country-of-origin provisions for purposes of admissibility to claim asylum is also very problematic. No country can be presumed to never be capable of creating the circumstances that may lead a person to flee for reasons described in the *Geneva Convention*. Although each claim must be heard individually, use such a list may be warranted to direct applications into an expedited stream. This is also true of the proposed concept of safe neighbouring countries who are States Parties to the ECHR.

Another challenge facing the implementation of the Common European Asylum System is that not all the building blocks are in place. Significant issues remain to be settled before the May 1, 2004, deadline mandated in the *Treaty of Amsterdam*. Bruno Waterfield has identified three concerns about this.[38] First, failure to meet the deadline would have diplomatic consequences by sending the message that the EU cannot be counted on to deliver when required. Second, EU enlargement from fifteen to twenty-five countries could make finding agreement on such politically charged issues as asylum much more difficult. Third, legal questions would arise concerning the ability of the Council to act after an explicit treaty deadline has passed. Suffice it to say, the situation will change considerably after May 1, 2004.

Notwithstanding this, the debate between human rights normativism, European Commission functionalism, and political preoccupation with program integrity will no doubt continue into the Tampere II phase of the Common European Asylum System. Individual rights protected by State obligations will be respected. However, collective values relating to security, fairness to those who seek to enter by the front door, and equitable distribution of limited resources will form the basis of debate in order to set the boundaries for the tent – the European area of freedom, security, and justice. Whether there should be two tents offering different levels of hospitality depending on the legal classification of the risk encountered by those seeking shelter remains to be determined. However, the current state of the Tampere process suggests that the EU will not move from a system of subsidiary protection to one of complementary protection in the near future and will continue to promote programs of interdiction and safe-third-country or safe-country-of-origin regimes to restrict access to first-tier *Geneva Convention* status in Europe. Efforts will be made to streamline the system to promote rapid determination of claims and speedy removal of unsuccessful asylum seekers. External processing will be studied in the context of protected entry procedures and resettlement. This is a welcome development provided that it complements the European asylum system and does not create external processing centres for European asylum claims as proposed by the United Kingdom.

Perhaps this debate would be best conducted in conjunction with the international community by addressing the question of whether the status accorded to Convention refugees should also be available to those at risk of torture or cruel, inhuman, or degrading treatment or punishment under other international Conventions. The next question is whether this should also be true for those displaced by armed conflict or human rights abuses who do not meet the preceding definition. Given the historical context in which the *Geneva Convention* was drafted and the subsequent developments of international human rights law through custom, *jus cogens*, and by Convention, this may be an appropriate time for the international community to revisit the question of whether protection from a human rights point of view should be limited to *non-refoulement* outside of the application of the *Geneva Convention* or whether all international protection should now include the economic and social rights available to Convention refugees. In light of the UNHCR's Agenda for Protection and Convention Plus initiative, it may be an appropriate time to revisit the question of whether it is time to harmonize the status of all in need of protection under international human rights instruments. The second significant issue in Europe relates to responsibility sharing, safe-third-country lists, and safe countries of origin. In an era of globalization, should protection under the *Geneva Convention* shift from a question of individual State responsibility to one of regional protection? Should the European debate become an international discussion?

Notes

1. Official Journal C 325 of 24 December 2002 (as amended by the *Treaty of Amsterdam*).
2. *Consolidated Version of the Treaty Establishing the European Community*, Official Journal C 325 of 24 December 2002.
3. Official Journal C340 of 10 November 1997.
4. Official Journal C 325 of 24 December 2002 (as amended by the *Treaty of Amsterdam*).
5. Official Journal L 239, 22/09/2000 p. 0019–0062.
6. Official Journal C 274 of 19 September 1996.

7. (EC) No. 343/203 of 18 February 2003.
8. Official Journal L 316 of 15 December 2000 p. 1.
9. Official Journal L 252 of 6 October 2000, p. 12.
10. 2001/55/EC.
11. Official Journal L 31/18 of 6 February 2003.
12. COM (2000) 578 final, Official Journal C62 E of 27 February 2001, p. 231.
13. Official Journal C 29 of 26 November 2002, p. 0143–0171.
14. Irish Presidency of the European Union, Informal meeting of the Justice and Home Affairs Ministers, Dublin, Ireland – 22/23 January 2004, *Orientation discussion on the amended proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status* at <http://www.statewatch.org/news/2004/jan/European-Returns-policy.pdf>.
15. European Council on Refugees and Exiles, *ECRE's Recommendations to the Justice and Home Affairs Council on the "Safe Third Country" concept at its meeting on 22–23 January 2004,* AD1/01/2004/.EXT/MTGB, 15 January 2004.
16. COM/2001/0510 final – CNS 2001/0207, Official Journal C 051 E of 26 February 2002, p. 0325–0334.
17. COR/2002/93.
18. ESC/2002/683.
19. See the memorandum by the United Nations High Commissioner for Refugees to the European Union Committee (Sub-Committee E) of the House of Lords, Session 2001–02, 28th Report of 16 July 2002 (minutes of evidence dated 24 April 2002), particularly the commentary on Article 2(a).
20. See the Memorandum by Professor Guy S. Goodwin-Gill to the European Union Committee (Sub-Committee E) of the House of Lords, Session 2001–02, 28th Report of 16 July 2002 at paragraph 4–8 (minutes of evidence dated 10 April 2002).
21. For details, see his supplementary memorandum to Sub-Committee E of the European Union Committee of the House of Lords, Session 2001–02, 28th Report, 16 Jul 2002.
22. See, for example, *Matter of Acosta,* 19 I&N Dec. 211, 222 (BIA 1985) of the U.S. Board of Immigration Appeals; *Attorney-General of Canada v. Ward* (1993) 103 D.L.R. (4th) 1, and *Chan v. Minister of Employment and Immigration* 128 D.L.R. (4th) 213, 247, both in the Supreme Court of Canada, and in the British House of Lords, see *Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals), [1999] 2 AC 629 of 25 March 1999.
23. Council Directive 2003/86/EC of 22 September 2003.
24. 2000/C 116 E/15) COM (1999) 638 final – 1999/0258(CNS).
25. See *Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union's relations with third countries*, COM (2002) 703 final of 3 December 2002.
26. See, for example, Jane McAdam, *The European Union proposal on subsidiary protection: an analysis and assessment*, Working Paper No. 74, New Issues in Refugee Research, UNHCR (December 2002), online: <www.unhcr.ch>. See also European Council on Refugees and Exiles, *Comments on the proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* (March 2002), online: <http://www.ecre.org/statements/statuscomms.shtml>. Professor Goodwin-Gill also makes this point in his memorandum to the House of Lords European Union Committee, previously cited in note 20.
27. U.N.G.A. Res. 217A (III), December 10, 1948.
28. U.N.G.A. Res. 2200A (XXI), December 16, 1966 (entered into force on March 23, 1976).
29. U.N.G.A. Res. 2200A (XXI), December 16, 1966 (entered into force on January 3, 1976).
30. U.N.G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.
31. 2000/C 364/01. The *Charter of Fundamental Rights of the European Union* was declared at the Nice European Council on 7 December 2000.
32. Available at <http://www.europarl.eu.int/summits/tam_en.htm#union>.
33. CONV 850/03 of 18 Jul 2003.
34. Both the *Helsinki Final Act* and the *Charter of Paris for a New Europe* are available on the OSCE web site at: <http://www.osce.org/docs/english/summite.htm>.
35. (ETS NO. 5), 213 U.N.T.S. 222, entered into force 3 Sept 1953.
36. ETS No. 035 (Turin, October 18, 1961), as revised in ETS No. 163 (Strasbourg, May 3, 1996). A complaint mechanism was established through a protocol – ETS 158 (Strasbourg, September 9, 1995).
37. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (London Agreement), August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.
38. Bruno Waterfield, *Asylum Policy Faces "Huge Challenge,"* 17 February 2004. See full text online: <http://www.eupolitix.com/EN/News/200402/cd271116-cfee-4a22-80aa-f2d2b833ff3f.htm>.

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A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation

Michael Bossin and Laila Demirdache

Abstract

Canadian decision makers refer so regularly to the bipartite nature of the test for persecution in refugee claims that one rarely gives the matter a second thought. After all, the Supreme Court of Canada in Ward clearly affirmed that a refugee claimant must subjectively fear persecution, and this fear must be well-founded in an objective sense.

In this article, the authors focus on the meaning and validity of the subjective aspect of the bipartite test. It is especially appropriate to do so at this time, given the introduction of the term "person in need of protection" in section 97 of the Immigration and Refugee Protection Act, and recent Federal Court decisions holding that the subjective fear is not a requirement in section 97 cases.

Looking at the issue of subjective fear from historical, psychological, and legal perspectives, the authors argue: (a) that the drafters of the UN Convention never intended claimants to be "subjectively afraid" in order to qualify for protection; (b) determining an asylum seeker's state of mind presents a minefield of potential problems for decision makers; and (c) given the new IRPA provisions dealing with persons in need of protection, the question is not whether there is a bipartite test for determining well-founded fear, but whether, indeed, there ought to be such a test.

Résumé

Les décisionnaires Canadiens font si souvent allusion au caractère bipartite du test de la persécution dans les cas de revendications du statut de réfugié que l'on ne s'arrête presque jamais pour reconsidérer la chose. Après tout, n'est-il pas vrai que la Cour suprême du Canada a affirmé très clairement, dans le cas de Ward, qu'un revendicateur doit avoir une crainte subjective de la persécution, et que cette crainte doit être bien-fondée de façon objective?

Dans cet article, les auteurs se penchent sur le sens à donner à l'aspect subjectif du test bipartite et à sa validité. Il est tout spécialement pertinent de poser ces questions dans les circonstances présentes, étant donné que le terme « personne à protéger » a été inclus à l'article 97 de la Loi sur l'immigration et la protection des réfugiés, et au vu des décisions récentes de la Cour fédérale déclarant que la peur subjective n'est pas une condition requise dans les cas visés par l'article 97.

Examinant la question de la peur subjective du point de vue historique, psychologique et légal, les auteurs soutiennent que : (a) les auteurs de la Convention des Nations Unies n'avaient jamais voulu dire que les revendicateurs devaient « avoir une crainte subjective » pour être qualifiés pour la protection ; (b) essayer de déterminer l'état d'esprit d'un demandeur du droit d'asile est un exercice truffé d'embûches pour les décisionnaires ; et (c) vu les dispositions récentes de la LIPR concernant les personnes ayant un besoin de protection, la vraie question n'est pas de savoir s'il existe un test bipartite pour déterminer la peur bien-fondée, mais plutôt si un tel test doit exister.

Introduction

In a recent decision, the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) accepted that a young, female claimant from Estonia had been the victim of trafficking.[1] She had been tricked into going to Italy where she thought she would find work as a domestic. Instead, her testimony was that upon arrival in Italy, she was taken and held against her will by a group of men involved in organized criminal activity. The RPD accepted the claimant's allegation that she was forced into prostitution in Italy.[2] It accepted "that the claimant was greatly traumatized by this prostitution ring".[3] It also accepted that she had "clearly run afoul of a group of criminals in Estonia," after she escaped from her captors in Italy and returned home.[4]

In a report filed at the claimant's hearing, a clinical psychologist stated that the claimant "reported a constellation of psychological and somatic symptoms that are entirely consistent with individuals who have experienced severe psychological stressors, such as forced confinement, repeated rapes, and forced prostitution."[5] According to the psychological report, "[d]iagnostically, [this claimant] meets *all* the criteria for *Post-Traumatic Stress Disorder* of chronic duration (i.e., more than three months) with depressed mood as outlined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV revised)" (emphasis in the original).[6] Among the symptoms exhibited by this claimant were: recurrent nightmares; intrusive thoughts; significant emotional distress when exposed to stimuli that remind her of the traumatic events; sleep difficulties; hyper-vigilance; irritability; interpersonal distrust; and social isolation/withdrawal.[7]

As her lawyers, we had come to know this woman well over a period of more than two years. In preparation for her hearing, a great deal of time had been spent with her. From our perspective, if one word (more than any other) could be used to characterize this woman's demeanour, it would be "frightened." This view was corroborated by the psychologist who had examined our client. According to her, this claimant was one of the most traumatized people she had ever encountered in years of practice.

It was therefore surprising to read in the RPD's decision that the panel found this claimant to be lacking in subjective fear. This was because her failure to claim asylum in the United States, when she had the opportunity to do so, was found to be behaviour inconsistent with someone who is truly afraid.

It is not uncommon, of course, for RPD panels to determine that a claimant is lacking in subjective fear. In *Canada v. Ward*, the Supreme Court of Canada affirmed that there is a bipartite test for persecution: a claimant must subjectively fear persecution, and this fear must be well-founded in an objective sense.[8] La Forest J., writing for the Court, cited the oft-quoted passage of Heald J.A. in the Federal Court of Appeal decision in *Rajudeen*:

> The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.[9]

The subjective component of the bipartite test has engendered both controversy and questions. Is it appropriate for board members to delve into whether fear actually exists in the minds of refugee claimants? If so, should the subjective and objective components be weighted equally? Could the lack of subjective fear negate a refugee claim, even if there are objective reasons for the claimant to fear persecution? If so, should it?

It is timely to consider the status of "subjective fear" in refugee determinations in view of the addition of "consolidated grounds" for protection found in the *Immigration and Refugee Protection Act* (IRPA).[10] Section 97 of IRPA introduces the term "persons in need of protection," and the court has already addressed whether such persons must demonstrate a subjective fear of persecution in order to qualify for "protected person" status.

Looking at the issue of subjective fear from historical, psychological, and legal perspectives, we argue that: (a) the drafters of the UN Convention never intended claimants to be "subjectively afraid" in order to qualify for protection; (b) determining an asylum seeker's state of mind presents a minefield of potential problems for decision makers; and (c) given the new IRPA provisions dealing with persons in need of protection, the question is not whether there is a bipartite test for determining well-founded fear, but whether, indeed, there *ought* to be.

History

One may begin by asking, "where does the notion arise that refugee status is determined, in part, by a person's frame of mind?" Where does it say that a person must actually be afraid in order to qualify as a Convention refugee? The Convention itself stipulates that a person's unwillingness to avail himself of the protection of his country must be "owing to a well-founded fear of being persecuted."[11] It does not specify, however, whether "fear" is meant to be "[t]he emotion of pain or uneasiness caused by the sense of impending danger or by the prospect of some possible evil," or "a particular apprehension of some future evil," or "an apprehension or dread of something that will or may happen in the future" – all definitions found in the *Oxford English Dictionary*.[12]

Support for the first definition of "fear" is found in the *Handbook on Procedures and Criteria for Determining Refugee Status*, published in 1988 by the United Nations High Commissioner for Refugees. It states, at paragraph 38:

> To the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[13]

In his book *The Law of Refugee Status*, James Hathaway argues that this two-pronged, bipartite approach to the definition of "well-founded fear" is "neither historically defensible nor practically meaningful."[14] According to Professor Hathaway, "[w]ell founded fear has nothing to do with the state of mind of the applicant for refugee status, except insofar as the claimant's testimony may provide some evidence of the state of affairs in her home country."[15]

One reason why decision makers and commentators have found it necessary to examine the psychological reaction of claimants to conditions in their state of origin, states Hathaway, is the linguistic ambiguity of the word "fear." He writes:

> While the word "fear" may imply a form of emotional response, it may also be used to signal an anticipatory appraisal of risk. That is, a person may fear a particular event in the sense that she apprehends that it may occur, yet she may or may not (depending on her personality and emotional make-up) stand in trepidation of it actually taking place. It is clear from an examination of the drafting history of the Convention that the term "fear" was employed to mandate a forward-looking assessment of risk, not to require an examination of the emotional reaction of the claimant.[16]

The predecessor to the UN Convention definition of "refugee" can be found in the Constitution of the International Refugee Organization (IRO). The IRO was the first to incorporate the word "fear" into its definition of a refugee. As explained by Guy Goodwin-Gill in his text *The Refugee in International Law*, the word was used not to express an emotion, but rather a desire not to be returned to a country where persecution was a reasonable possibility. He writes:

> [T]he IRO Constitution included as refugees those unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence. It was expressly recognized that individuals might have 'valid objections' to returning to their country of origin, including 'persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions,' and objections 'of a political nature judged by the IRO to be valid'.[17]

Hathaway argues that the inclusion of the word "fear" in the IRO Constitution was meant to extend protection beyond those who had been persecuted in the past. It allowed for protection to be granted to those who, even though not persecuted in the past, might still be in jeopardy in their state of origin because of who they were or what they believed. "The establishment of the alternative formulation of refugee status was thus intended to recognize the importance not only of sheltering those who had already been persecuted, but equally of extending protection to those who could be spared from prospective harm."[18] Concludes the author: "The use of the term 'fear' was intended to emphasize the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind."[19]

According to Hathaway, a claimant's state of mind was meant to be relevant only in exceptional cases, of persons who had suffered past persecution, or whose "horrifying memories made it impossible for them to consider returning."[20] The example given was of a person who had fled Nazi Germany and for psychological reasons could not return after the war, even though, objectively, there was no longer a risk of persecution. This exception is found in the current legislation at subsection 108 (4).[21] Where the reasons for which persons sought refugee protection have ceased to exist, they may still be Convention refugees or persons in need of protection if able to establish that there are "compelling reasons" arising out of previous persecution for refusing to avail themselves of the protection of their country.[22] In all other cases, argues Hathaway, whether fear actually exists in a claimant's mind is irrelevant.

Atle Grahl-Madsen, in *The Status of Refugees in International Law*, takes a similar view of the propriety of peering into the minds of refugee claimants. "The adjective 'well-founded'," he states, "suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick."[23] According to Grahl-Madsen:

> [T]he frame of mind of the individual hardly matters at all. Every person claiming – or being claimed (in the case of minors) – to be a refugee has "fear" ("well-founded" or otherwise) of being persecuted in the sense of the present provision, irrespective of whether he jitters at the very thought of his return to his

> home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers.[24]

Clearly a fearful state of mind on the part of the refugee claimant, on its own, is not enough to satisfy the Convention refugee definition. There must be an objective basis to that fear. By the same token, the mere fact that human rights violations are prevalent in an asylum-seeker's country is insufficient evidence to justify a positive determination. The individual's particular circumstances must be placed in the context of those violations to show that he or she would be at risk if returned there.

To Grahl-Madsen, the "subjective" aspect of the refugee definition referred to those individual circumstances, or characteristics, of the claimant. The problem with trying to determine whether fear actually exists in a person's psyche, he states, is that

> [w]e cannot find a meaningful, common denominator in the minds of refugees. We must [therefore] seek it in the conditions prevailing in the country whence they have fled. "Well-founded fear of being persecuted" may therefore be said to exist, if it is likely that the [individual] person concerned will become the victim of persecution if he returns to his country of origin.[25]

Implied in the last sentence is the phrase "regardless of his or her state of mind."

Psychology

To determine whether a refugee claimant subjectively fears persecution, the Supreme Court of Canada in *Ward* explained that a decision maker must establish whether such a fear exists "in the mind of the refugee."[26] Yet, as Goodwin-Gill points out: "Fear, and the degree to which it is felt by a particular individual, are incapable of precise quantification."[27]

Since IRB members are not capable of actually reading a person's mind, the existence of subjective fear, or the lack thereof, is determined through an examination of a claimant's actions and statements.

Typically, the Board finds that a refugee claimant lacks subjective fear when that person's actions do not conform to what is perceived to be the expected behaviour of someone who is afraid. Board members assume, for example, that persons who truly fear persecution will leave their country at the earliest opportunity. They will seek asylum in the first country where such a claim is possible, they will not return voluntarily once having left the country where they fear persecution, and they will ask for refugee status at the Canadian port of entry or as soon as possible after entering Canada. Unless they are able to provide a reasonable explanation for their behaviour, those who act differently are routinely found by the Board to be lacking a subjective fear of persecution.[28]

Such decisions are based on the member's understanding of human behaviour. They are premised on the notion that, normally, people who are afraid will act in certain predictable ways. This approach, however, is fraught with potential problems – especially in a refugee context.

The first concern arises from the fact that not all individuals react to fear or danger in the same way. Although it is true, as Eve Carlson notes in her text *Trauma Assessments: A Clinician's Guide*, that "[w]hen humans are exposed to extreme danger, they have a natural response of fear and anxiety,"[29] how the trauma that arises from fear will manifest itself varies from person to person.

The clearest psychological indicators that someone has been exposed to extreme danger are the symptoms attributed to Post-Traumatic Stress Disorder (PTSD). PTSD is associated with victims of the types of persecution regularly found in refugee claims: assault; detention; kidnapping; torture (both physical and psychological); and rape and other kinds of sexual assault. However, as Carlson points out,

> ...although all of the core, secondary and associated trauma symptoms *can* occur as part of a post-traumatic disorder, all of these will not necessarily occur. Different symptoms may predominate in a client's symptom picture as a result of the influence of various individual and situational factors and the length of time that has passed since the trauma.[30]

In short, people react to fear in individualized ways. As such, predicting how a person will respond to danger or fear is at best an extremely challenging task, particularly for those not trained in the psychology of trauma.

Added to the complexity of assessing fear is the notion that culture may be a factor in how a person responds to danger. As Carlson observes:

> It is possible that "particular symptoms may predominate in a traumatized individual as a result of cultural influences. As with all psychological disorders, we should expect culture to greatly influence how symptoms are expressed. Although the bulk of research and clinical reports relating to trauma responses has focused on white, middle and upper-middle class Americans, the research on trauma responses of persons from other cultures (and U.S. subcultures) that is available indicates that there may be considerable variation in the symptoms observed following trauma in different cultures."[31]

This is not to say that people from different cultures have a different internal response to trauma, only that the manifestation of those symptoms may differ according to one's

culture. In other words, persons from different cultures may appear, to a western observer, to respond to trauma in an "atypical" way. This cross-cultural phenomenon ought to be a warning sign to RPD members who are drawing conclusions about subjective fear based on the behaviour of people coming from a myriad of cultures.

One factor that may also affect the assessment of subjective fear is the claimant's gender. Elizabeth Adjin-Tettey has argued that the subjective fear component of the bipartite test has a particularly negative impact on female claimants. She notes that

> [w]omen fleeing gender-related harms have often not been successful in communicating their subjective fear of persecution even in the face of strong objective indicators because they have difficulty relating their claims. In particular, female refugee claimants are often reluctant to disclose experiences of sexual violence to asylum decision-makers who are predominantly men, because of the stigma attached to sexual violence, or due to trauma.[32]

The fact that much testimony will be relayed to the Board via interpreters, she suggests, may result in testimony that is either distorted, censored, or both.

One assumes that a person acting rationally would leave a situation of risk as soon as possible. Similarly, it would be rational for a person at risk to seek protection at the earliest opportunity. However, even a cursory survey of psychological texts on the subject of trauma makes it clear that people who have been traumatized do not always act rationally, let alone in their own best interests. People who are afraid, especially those who have been traumatized by events, often act in ways that seem irrational and counter-intuitive. This does not mean they have not been traumatized or that they are not truly afraid. In fact, the very opposite may be true.

Instead of escaping, seeking protection, or other behaviour that one would normally associate with a profound fear, the traumatized person may instead become dissociated from her reality. According to numerous studies, "dissociation is an integral aspect of PTSD."[33] In her authoritative text, *Trauma and Recovery*, Dr. Judith Herman explains:

> [a person suffering from PTSD] may feel as though the event is not happening to her, as though she is observing from outside her body, or as though the whole experience is a bad dream from which she will shortly awaken. These perceptual changes combine with a feeling of indifference, emotional detachment, and profound passivity in which the person relinquishes all initiative and struggle.[34]

People caught in situations that seem inescapable may respond, not by taking steps to escape, but by removing themselves from danger in a psychological sense only. Writes Dr. Herman:

> When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defence shuts down entirely. The helpless person escapes from her situation *not by action in the real world* but rather by altering her state of consciousness." (emphasis added)[35]

A state of profound passivity, in which one relinquishes all initiative and struggle, is not one that leads to the type of actions the IRB typically associates with a genuine subjective fear. Yet these are the actions – or in-actions – of people who are afraid. As Dr. Herman explains: "The constrictive symptoms of the traumatic neurosis apply not only to thought, memory, and states of consciousness but also to the entire field of purposeful action and initiative."[36]

Sometimes, trauma prevents individuals from expressing or proclaiming their fear, the very act that Board members seem to believe is consistent with a "subjective fear." In fact, writes Bessel A. van der Kolk, "trauma may lead to a 'speechless terror', which in some individuals interferes with the ability to put feelings into words, leaving emotions to be mutely expressed by dysfunction of the body."[37]

Other psychological phenomena associated with trauma suggest additional reasons why traumatized individuals may not react in anticipated ways to situations of risk. Everstine and Everstine, in their text *The Trauma Response*, note that:

> [s]ome victims [of trauma], particularly those who were seriously injured, have no memory of the event. This may be due to physical trauma (i.e. head injury), emotional trauma or both. Some may eventually remember what happened to them, while others may never experience the memory.[38]

It is true that in assessing subjective fear, Board members may be aware of the complexities of trauma, or psychological reports filed as evidence may alert them to the claimant's state of mind. But, as the case described in the Introduction illustrates, a diagnosis of PTSD does not prevent conclusions about subjective fear from being made based on the assumed behaviour of persons who are afraid. Moreover, with single-member panels, the high cost of psychological/psychiatric reports, the scarcity of legal aid funding for refugee claimants, and the significant incidence of claimants appearing without counsel,[39] there is a strong likelihood that "mis-diagnoses" will be made in determining the existence of subjective fear.

Finally on this point, it should be noted that other motivations, apart from or in addition to fear, may also influence a claimant's behaviour. The Federal Court has held that negative inferences about subjective fear should not be drawn if a refugee claimant offers a reasonable explanation for failure to seek asylum in a transit country.[40] The presence of family members in the country of destination, for example, has been held to be a justifiable reason for failure to make a claim while en route to Canada.[41] Similarly, people may decide not to flee a situation of danger out of concern for dependents, or because the risk of flight may seem greater than the risk of staying put, because the cost of fleeing is too dear, or for a variety of other reasons. Although matters such as delay in departure, return to the country of origin, or failure to claim at the first opportunity may be applied appropriately to the question of objective risk, none of them necessarily negates a subjective fear of persecution.

People who may fear the consequences of their actions nonetheless speak out, write articles, and take political action in the face of brutal repression as a matter of principle or conscience. The prisons and torture chambers around the world are filled with such people. The point is that people react to danger, and to fear, in a myriad of ways, and for a wide variety of reasons. Their actions are not necessarily driven predominantly by fear, even though they may have great reason to be fearful. Conclusions on what is in the mind of such people, therefore, should not be made lightly.

The Law

A. Ward and Rajudeen

The Supreme Court of Canada's decision in *Ward* is often cited as the leading authority for the proposition that refugee claimants are required to establish a subjective fear of persecution. *Ward*, however, contains very little, if any, analysis of why this is so. As La Forest J. acknowledges, "[I]n the present case, the only real issue is the objective test."[42] The issues before the Court in *Ward* were: persecution and state complicity; the meaning of "membership in a particular social group;" the meaning of "political opinion;" the effect of section 15 of the Charter on the definition of Convention refugee; and the burden of proof for persons holding dual nationality.[43]

In *Ward,* the Court made brief mention of the fact that subjective fear is a necessary component of the Convention refugee definition. The Court simply adopted the test articulated and applied by Heald J.A. in *Rajudeen.*[44]

Curiously, although *Rajudeen* has become the standard authority for the bipartite test, the case is not really *about* the bipartite nature of "well-founded fear," let alone the subjective component of the test. *Rajudeen* concerned a Sri Lankan Tamil who was threatened and beaten by the Sinhalese "thugs" on a number of occasions. The Sri Lankan police, meanwhile, turned a blind eye to the communal violence directed at Tamils.

In *Rajudeen*, the Immigration Appeal Board determined the claimant not to be a Convention refugee for the following reasons:

> Whether events in Sri Lanka can be classed as "civil war" or not, there is certainly civil unrest but the nature of that unrest and the resulting harassment of Mr. Rajudeen is not such that he can be classed as a Convention refugee.[45]

The primary focus of Heald J.A., in his reasons, was the meaning of "persecution." Citing definitions for "persecute" and "persecution" found in *The Living Webster Encyclopedic Dictionary* and *The Shorter Oxford English Dictionary* respectively, Justice Heald concluded that "[b]ased on the evidence of this case, it is clear to me that this applicant was persecuted over a lengthy period of time in Sri Lanka because of his religious beliefs as well as his race."[46]

The other issue before the Court in *Rajudeen* was whether, in the circumstances, the claimant was required to avail himself of the protection of the Sri Lankan authorities. On the evidence, the Court held that Mr. Rajudeen had "ample justification" for being unwilling to do so.[47]

Heald J.A. concluded his reasons by stating: "I accordingly conclude, that on the basis of all the evidence adduced, it was possible for the Board to come to only one conclusion, namely, that this applicant had satisfied the definition of Convention refugee as contained in the *Immigration Act, 1976*." The other members of the panel concurred with this disposition.[48]

What is curious about the decision in *Rajudeen* is that the claimant displayed many of the qualities of an individual typically found by the IRB to be lacking in subjective fear. Although being beaten in January, March, April, and August 1978, Mr. Rajudeen did not leave Sri Lanka until January 1979.[49] He went to India and then Pakistan, but did not claim asylum. He took a job as a seaman, travelling to various places in Europe, South America, and Asia over a period of more than two years. He failed to make a refugee claim in any country to which he travelled during this period.[50] In November 1981, while his ship was docked in Karachi, Pakistan, Mr. Rajudeen made the decision to return voluntarily to Sri Lanka, believing that "neither India nor Pakistan accepted refugees."[51] There, he again experienced harassment by the Sinhalese. Nevertheless, he remained in the country until March 1982. He flew to Japan

where he joined the crew of a Greek ship. He did not claim asylum in Japan, but when the ship docked in Vancouver, Mr. Rajudeen finally made a claim to refugee status.[52]

Mr. Rajudeen had lingered in his country long after claiming to experience harassment, beatings, and threats, had failed to make claims in numerous countries when he had the opportunity to do so, and had returned to Sri Lanka voluntarily. All of these are factors routinely cited by Boards in support of findings that claimants are lacking a subjective fear. Nevertheless, the Federal Court of Appeal had no hesitation in finding that this claimant had met the definition of Convention refugee. It is interesting, then, that this is the leading judicial authority for the proposition that subjective fear is a necessary component of the refugee definition.

B. *Yusuf v. Kamana/Tabet-Zatla*

Although consistently accepting that there is a bipartite test for refugee determination, Canadian courts have not all been of the view that the two components of the test should be given equal weight. In *Yusuf v. Canada (M.E.I.)*[53] Mr. Justice Hugessen, then of the Federal Court of Appeal, questioned the propriety of rejecting a claim for which there was an objective basis for the claimant's fear, on account of a lack of subjective fear. Wrote Hugessen J.:

> It is true, of course, that the definition of a Convention refugee has always been interpreted as including a subjective and an objective aspect. The value of this dichotomy lies in the fact that a person may often subjectively fear persecution while that fear is not supported by fact, that is, it is objectively groundless. However, the reverse is much more doubtful. I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent.[54]

The reasoning of Hugessen J. in *Yusuf* has not been universally accepted by the Federal Court. It was followed in a 2003 decision, *Balendra v. Canada (M.C.I.)*.[55] It was also followed in a 1999 decision, *Uthayukumar v. Canada (M.C.I)*, where Justice Blais cited the IRB's Guidelines on Procedural and Evidentiary Issues for Child Refugee Claimants, which states that "a child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant."[56]

Other decisions have distinguished *Yusuf* on the basis that it was decided before the Supreme Court of Canada decision in *Ward*. This was the case in *Maqdassy v. Canada (M.C.I.)*,[57] where the applicant, citing *Yusuf*, submitted that it may not be necessary to establish a subjective fear of persecution where it has been clearly shown that an objective basis for the fear exists. In rejecting this argument, Madame Justice Tremblay-Lamer referred to her earlier decision in *Tabet-Zatla v. Canada (M.C.I.)*[58] where, citing her even earlier decision in *Kamana,* she held that the lack of evidence going to the subjective element of the claim is in itself sufficient for the applicant's claim to fail. In *Kamana v. Canada (M.C.I.)*, Tremblay-Lamer J. wrote:

> The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition – subjective and objective – must be met.[59]

A number of other Trial Division decisions have followed *Kamana* and *Tabet-Zatla*, including *Fernando v. Canada (M.C.I.)*[60] and *Anandasivam v. Canada (M.C.I.)*,[61] two judgments from 2001.

Strictly speaking, the *Kamana/Tabet-Zatla* interpretation of what the Supreme Court said in *Ward* cannot be challenged. By definition, under a bipartite test, *both* parts of the equation must be established. The potential consequence of this line of reasoning are *Yusuf*-like decisions, where a refugee claim is rejected due to a lack of subjective fear in spite of evidence that establishes an objective ground for the claimant to be afraid of returning home.

Hathaway has criticized this approach to refugee determination. He writes:

> [I]t would be anomalous to define international legal obligations in such a way that persons facing the same harm would receive differential protection. Why should states be expected to distinguish among persons similarly at risk on the basis of variations of individual temperament or tolerance? Why should an individual of stoic disposition be viewed as less worthy of protection than one who is easily scared, or who proclaims her concerns with great fervour? Yet surely this is the implication of giving "substantial, if not primary weight to a claimant's own assessment of his or her own situation."
>
> Logic dictates that since the central issue is whether or not an individual can safely return to her state, the claimant's anxiety level is simply not a relevant consideration.[62]

Another potential consequence of the reasoning in *Kamana/Tabet-Zatla* is that the Board, after finding that the subjective fear component of the test has not been met, could simply decide not to examine whether the fear is

objectively well-founded. Indeed, as Justice Lemieux stated in *Anandasivam*, "lack of subjective fear constitutes a critical barrier to a refugee claim which, on its own, justifies non recognition."[63] If one aspect of the test is not met, what is the point of examining the other aspect?

One can legitimately question how this interpretation of the refugee definition can be reconciled with La Forest J's statement in *Ward* that, clearly, "the lynch-pin of the analysis [of the test for determining fear of persecution] is the state's inability to protect."[64] Following the reasoning in *Kamana/Tabet-Zatla*, persons found lacking in subjective fear may still be at risk due to their country's inability, or unwillingness, to protect. They may still face persecution. Indeed, how is such an interpretation consistent with one of the stated objectives of the *Immigration and Refugee Protection Act*, "to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted"?[65]

C. *Section 97 of the IRPA*

Thrown into this mix is section 97 of the IRPA. Section 95 of the Act states that: "Refugee protection is conferred on a person when … (b) the Board determines the person to be a Convention refugee or a person in need of protection." "Person in need of protection" is defined in section 97 as:

> a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
> (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
> (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment.

In a number of recent decisions, the Federal Court has held that there is no subjective component to the test for determining a person in need of protection. In Shah v. Canada (M.C.I.) Justice Blanchard noted that the Board had appeared "to dismiss the claimant's s. 97 application based on a finding that the applicant's behaviour is not consistent with a well-founded fear of persecution."[66] He had delayed his departure from Pakistan until one and half years after incidents of harassment had begun.[67] Blanchard J. decided that:

> [e]ven if [he] were to accept this finding as reasonable… the test under s. 97 of the Act does not require a determination of subjective fear of persecution, but rather a determination that removal would subject an applicant to a danger of torture, or to a risk to life or to a risk of cruel and unusual treatment or punishment under certain conditions.[68]

Justice Blanchard's analysis of the test for s. 97 in *Shah* has been followed, most recently in the case of *Ghasemian v. Canada (M.C.I.)*.[69] In *Bouaouni v. Canada (M.C.I.)*,[70] a decision that post-dated *Shah,* the RPD did not believe the claimant's testimony that he had been beaten and tortured by the Tunisian police. On judicial review, Justice Blanchard discusses the different approaches to claims made under sections 96 (regarding Convention refugees) and 97 of the Act. Discussing how the Board should address claims under s. 97 of the IRPA, he states:

> There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97 (1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a Convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act.[71]

The IRPA is a relatively new piece of legislation, and many more decisions on the evaluation of section 97 claims are to be expected. Still, in light of this jurisprudence, one can arguably say that a double standard exists for applicants before the Board. Those who face a risk to life, torture, or cruel and unusual treatment or punishment need not establish that they subjectively fear such treatment. Those who face other forms of persecution (for example, arbitrary detention, denial of the right to work and other forms of systematic discrimination, harassment, or physical treatment that does not amount to torture or cannot be considered "cruel and unusual") will have to establish subjective fear.

To illustrate the point, here is an example. Imagine that both claimants A and B have objectively well-founded reasons for not returning to their respective countries of origin. Claimant A will likely be sent to prison for years because of his political writings. Claimant B, who is charged with theft, will likely be deprived of food and sleep, and held

incommunicado for several months, because that is how persons charged with criminal offences are routinely treated in his country. Both claimants came to Canada via the Netherlands, but neither claimed asylum there. Both waited two weeks before initiating their claims in Canada. Claimant A, having to deal with the bipartite test under section 96 of the IRPA, may have his claim turned down due to a lack of subjective fear. In claimant B's case, under section 97, subjective fear will not even be an issue.

It is hard to discern any justification for requiring some claimants to meet a bipartite test of well-founded fear, but not others. All are seeking the same thing, protection from persecution. The only factors that distinguish claims made under section 96 and 97 are the necessity for the former to be based on one or more of the grounds enumerated in the Convention, and the limited form of persecution contemplated by section 97. As Blanchard J. suggests in *Bouaouni*, in many cases, the evidentiary base for both claims will be the same. Why then, with respect to the question of subjective fear, should some claims be treated differently than others?

Conclusion

It is perhaps an ideal time for Canadian decision makers to reconsider the appropriateness of the bipartite test for determining well-founded fear of persecution. The historical basis for the bipartite test has, for some years, been seriously questioned by academics. The equal division of weight between the subjective and objective components of the test continues to be challenged by some members of the judiciary. Moreover, given the current state of psychological research into Post-Traumatic Stress Disorder, one can confidently say now that many potential pitfalls exist for board members in determining whether subjective fear actually exists in the minds of claimants. Finally, due to the introduction of the category of "person in need of protection," there are now two standards of review for claimants, with no clear, logical reason for this to be so. Adopting a test that requires more attention to the objective nature of risk facing refugee claimants, and less on what may be going on in their minds, would place emphasis, quite properly in our view, on the need for protection.

APPENDIX "A"

Failure to claim elsewhere:

Saez v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 631 (FCTD)*

Ilie v. Canada (Minister of Citizenship and Immigration),[1994] F.C.J. No. 1758 (FCTD)

Bogus v. Canada (Minister of Employment & Immigration), [1994] F.C.J. No. 1455 (FCTD)

Lameen v. Canada (Secretary of State), [1994] F.C.J. No. 886 (FCTD)

Thandi v. Canada (Secretary of State), [1994] F.C.J. No. 819 (FCTD)

Hristov v. Canada (Minister of Employment and Immigration), [1995] F.C.J. No. 32 (FCTD)

Wey v. Canada (Secretary of State), [1995] F.C.J. No. 286 (FCTD)

Memarpour v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 1679 (FCTD)

Hankali v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 339 (FCTD)

Delay in leaving country where persecution feared:

Huerta v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 271 (FCA)

Radulescu v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 589 (FCTD)

Castillejos v. Canada (Minister of Citizenship and Immigration), [1994] F.C.J. No. 1956 (FCTD)

De Beltran v. Canada (Secretary of State), [1994] F.C.J. No. 1282 (FCTD)

Hristov v. Canada (Minister of Employment and Immigration), [1995] F.C.J. No. 32 (FCTD)

Al-Kahtani v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 335 (FCTD)

Hankali v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 339 (FCTD)

Delay in claiming in Canada:

Huerta v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 271 (FCA)

Hanna v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 133 (FCTD)

Ezi-Ashi v. Canada (Secretary of State), [1994] F.C.J. No. 401, (FCTD)

Marquez v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 850 (FCTD)

Lameen v. Canada (Secretary of State), [1994] F.C.J. No. 886, (FCTD)

Thandi v. Canada (Secretary of State), [1994] F.C.J. No. 819, (FCTD)

Carranza-Gonzalez v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 1628 (FCTD)

Panta v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 1789 (FCTD)
Hankali v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 339 (FCTD)

Reavailement:

Caballero v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 483 (FCTD)
Larue v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 484 (FCTD)
Tejani v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 528 (FCTD)
Zergani v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 493 (FCTD)
Galdamez v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 1983 (FCTD)
Bogus v. Canada (Minister of Employment & Immigration), [1994] F.C.J. No. 1455 (FCTD)
Gabeyehu v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 1493 (FCTD)
Ali v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 558 (FCTD)
Al-Kahtani v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 335 (FCTD)

* All cases are identified by their QuickLaw citations.

Notes

1. RPD File no. AA1-01365, decision dated November 18, 2003.
2. *Ibid.* at 1.
3. *Ibid.* at 1.
4. *Ibid.* at 1.
5. Confidential report of Dr. Marta Young, dated March 21, 2003, at 6. Dr. Young is a registered psychologist in Ontario. She has a Ph.D. in clinical psychology with a specialization in refugee adaptation. She is a full-time professor in the School of Psychology at the University of Ottawa. Her research, teaching, and clinical supervision foci are all in the area of cross-cultural psychology, particularly as it relates to immigrant and refugee issues.
6. *Ibid.* at 6.
7. *Ibid.* at 6.
8. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at para. 47.
9. *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, at page 134, [1984] F.C.J. No. 601 (QL), at 6.
10. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
11. *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, at 137, Article 1 (A).
12. *The Compact Edition of the Oxford English Dictionary* (1971), at 114.
13. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, January 1988) at 11-12.
14. James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 65.
15. *Ibid.* at 65, citing K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 724.
16. *Ibid.* at 66.
17. Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983) at 4.
18. *Supra* note 14 at 67.
19. *Ibid.* at 69.
20. *Ibid.* at 68, citing the Statement of Mr. Robinson of Israel, U.N. Doc. E/AC.32/SR.18, at 4, February 8, 1950.
21. Note that the "compelling reasons" exception, although codified in Canadian law, is limited in international law to Article 1 (A) (1) of the Convention – that is, pre-Second World War refugees. The UNHCR has argued that the exception extends to modern refugees. In 2002, however, the UK Court of Appeal rejected that interpretation in *Hoxha v. Secretary of State for the Home Department*, [2002] All ER 182, [2002] E.W.J. No. 4398 (QL).
22. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 108 (4).
23. Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1. (Leyden: A.W. Sijthoff, 1966) at 173.
24. *Ibid.* at 174.
25. *Ibid.* at 175.
26. *Supra* note 8 at para. 47.
27. *Supra* note 17 at 25.
28. A list of Federal Court decisions dealing with IRB decisions where the Board made such findings regarding the lack of subjective fear can be found at Appendix A to this paper. The list is not meant to be exhaustive, merely illustrative of the type of reasoning often applied by the Board to this issue.
29. Eve B. Carlson, *Trauma Assessments: A Clinician's Guide* (New York: Guilford Press, 1997) at 39.
30. *Ibid.* at 39.
31. *Ibid.*, citing the study of Marsalla, Friedman, Gerrity, & Scurfield, 1996, at 44.
32. Elizabeth Adjin-Tettey, "Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law" (1997) 25 Manitoba Law Journal 127 at para. 14.
33. Bessel A. van der Kolk, "The Complexity of Adaptation to Trauma: Self-Regulation Stimulus Discrimination, and Characterological Development" in van der Kolk, McFarlane, and Weisaeth. *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (New York: Guilford Press, 1996) at 192.
34. Judith Herman, M.D., *Trauma and Recovery* (New York: Basic Books, 1992, 1997) at 42.
35. *Ibid.* at 43.
36. *Ibid.* at 46.
37. *Supra* note 33 at 193.
38. Diana Sullivan Everstine and Louis Everstine, *The Trauma Response: Treatment for Emotional Injury* (New York. London: W.W. Norton, 1993) at 17.

39. Currently, this figure is roughly 10 per cent to 12 per cent of claimants appearing before the RPD. It varies from province to province. In some provinces, the incidence of unrepresented claimants is almost 100 per cent. This information was taken from communications with Paul Aterman, acting general counsel for the Immigration and Refugee Board.
40. *Hue v. Canada (Minister of Citizenship and Immigration)* [1998] F.C. J. No. 283 (FCA) (QL).
41. *El-Naem v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 185 (FCTD) (QL), at para. 20.
42. *Supra* note 8 at para. 47.
43. *Ibid*. at para. 17.
44. The bipartite test set out in *Rajudeen* was confirmed again by the Supreme Court of Canada in *Chan v. Canada (Minister of Employment and Immigration),* [1995] 3 S.C.R. 593 (SCC), at para. 119.
45. *Supra* note 9 at 6 (QL).
46. *Ibid*. at 6 (QL).
47. *Ibid*. at 7 (QL).
48. In concurring reasons, Stone J. addressed the issue of state complicity in the attacks on Mr. Rajudeen.
49. *Supra* note 9 at 2, 3, 4 (QL).
50. *Ibid.* at 4 (QL).
51. *Ibid*. at 4 (QL).
52. *Ibid*. at 4, 5 (QL).
53. *Yusuf v. Canada (Minister of Employment and Immigration)* [1992] 1 F.C. 629, [1991] F.C.J. No. 1049 (FCA) (QL).
54. *Ibid*. at para. 5.
55. *Balendra v. Canada (Minister of Citizenship and Immigration)* 2003 F.C. 1078, [2003] F.C.J. No. 1352 (FCTD) (QL), at para. 11.
56. *Uthayakumar v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1013 (FCTD) (QL), at para. 23.
57. *Maqdassy v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 238 (FCTD) (QL).
58. *Tabet-Zatla v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1778 (FCTD) (QL).
59. *Kamana v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1695 (FCTD) (QL), at para. 10.
60. *Fernando v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1129 (FCTD) (QL), at para. 2.
61. *Anandasivam v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1519 (FCTD) (QL), at para. 23.
62. *Supra* note 14 at 69-70.
63. *Supra* note 61 at para. 23.
64. *Supra* note 8 at para. 45.
65. *Immigration and Refugee Protection Act*, s. 3 (2) (a).
66. *Shah v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1418 (FCTD) (QL), at para. 16.
67. *Ibid*. at para. 7.
68. *Ibid.* at para. 16.
69. *Ghasemian v. Canada (Minister of Citizenship and Immigration)* F.C.J. No. 1591 (FCTD) (QL), at paras. 18-19.
70. *Bouaouni v. Canada (Minister of Citizenship and Immigration)* F.C.J. No. 1540 (FCTD) (QL).
71. *Ibid.* at para. 41.

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Asylum Seekers Living in the Australian Community: A Casework and Reception Approach, Asylum Seeker Project, Hotham Mission, Melbourne

Grant Mitchell and Sara Kirsner

Abstract

In Australia, asylum seekers either are detained in immigration detention centres or, depending upon their mode of entry into Australia and the status of their application for protection, live in the community, often in a state of abject poverty. Hotham Mission's Asylum Seeker Project (ASP), a Melbourne-based non-governmental organization (NGO), is unique in Australia in its comprehensive work in housing and supporting asylum seekers in the community, particularly those released from detention. The work of the Asylum Seeker Project illustrates that it is possible, through the application of a comprehensive reception casework system, to adequately support asylum seekers in the community with their welfare needs and to prepare asylum seekers for all immigration outcomes. The Project thus provides a compassionate model of reception support and a viable alternative to immigration detention.

Résumé

En Australie, les demandeurs d'asile sont soit détenus dans des centres de détention de l'immigration, ou, dépendant leur mode d'arrivée en Australie et la situation de leur demande de protection, habitent dans la communauté – souvent dans des conditions de dénuement extrême. Le « Asylum Seeker Project » ('Projet des demandeurs du droit d'asile') du Hotham Mission, une organisation non gouvernementale (ONG) basée à Melbourne, est unique en son genre en Australie, du fait de ses services complets visant à loger et à soutenir les demandeurs d'asile dans la communauté, tout spécialement ceux qui sont relâchés des centres de détention. Le travail accompli par le « Asylum Seekers Project » démontre qu'il est possible – en utilisant un système complet d'accueil individualisé – d'assister de façon effective les demandeurs d'asile vivant dans la communauté avec leurs besoins sociaux et de préparer les demandeurs d'asile à faire face à toutes les éventualités possibles à leurs demandes d'immigration. Ce faisant, le Projet fournit un modèle de ce qui peut être accompli en matière de soutien à l'accueil et une alternative viable à la détention.

Australian Policy Regarding Asylum Seekers

Australia's policy response to asylum seekers and refugees varies depending upon the way in which refugees and asylum seekers enter or are chosen to enter the country. Australia maintains a focus on immigration control, reflected in specific categories and quotas determined for immigrants and refugees in addition to a focus on border protection. Australian policy ensures that there are different visa classes and consequently different welfare entitlements for refugees and humanitarian entrants who are selected for settlement by the government, for people who enter on a legal Australian visa and subsequently apply for asylum, and for those who enter Australian territory seeking asylum without legal documentation.

Approximately 12,000 refugees are accepted each year. Those who are selected "offshore" for settlement are generally eligible for full welfare, housing, and education entitlements. Under Australia's Migration Act (1992), those who arrive without a valid visa are immediately placed in

detention, where they remain for the entire duration of their visa application. Due to delays in processing and the often-lengthy process of appeal, many who seek asylum without valid Australian visas are detained for months or years on end. Also, if their application is rejected and the government is unable to remove them to their home country, the applicants generally remain in detention until removal can occur.

Those who arrive on a valid visa and later apply for asylum in Australia live in the community on limited, if any, income support. There currently do not exist any government funded community-based reception centres or housing for asylum seekers in Australia.

Asylum Seekers in the Community

There are approximately 8,000 asylum seekers living in the community on bridging visas.1 In general, this group has never been in detention but arrived in Australia with valid visas, were immigration cleared, and lodged protection visa applications. This group of onshore asylum seekers makes up the majority of all asylum seekers in Australia and includes groups of people from East Timor and Sri Lanka.

The rights and entitlements for asylum seekers depend on which bridging visa they hold and the particular stage of their case. Since July 1997, all asylum seekers who have not applied for a Protection Visa within forty-five days of arrival in Australia are refused the right to work and receive medical assistance. If asylum seekers lodged their application within forty-five days and have not appealed a negative decision on the application, beyond the initial stage of appeal to the Refugee Review Tribunal, they are entitled to work and receive subsidized medical assistance.

If asylum seekers have not received a first decision on their visa or a visa rejection within six months from the Refugee Review Tribunal, they may receive a federally funded Asylum Seeker Assistance Scheme payment through the Australian Red Cross. However, many asylum seekers have no right to work, Medicare, or any welfare payment. This includes all asylum seekers awaiting a humanitarian decision from the Immigration Minister and all asylum seekers released from detention on a Bridging Visa E, including those released on psychological or medical grounds.

The Asylum Seeker Project: A Community-Based Response

Hotham Mission's Asylum Seeker Project (ASP) is a Melbourne-based non-governmental organization, working with asylum seekers who have no right to work, no welfare payments or any form of income, and no entitlement to health assistance. The Asylum Seeker Project began with the support of the Australian Uniting Church in early 1997. The project moved formally to Hotham Mission in 2000. The project has for more than six years provided housing and support to homeless asylum seekers, and now works with over 200 asylum seekers in thirty-four properties across Melbourne.

The ASP provides free housing, casework, and volunteer support, pays for emergencies, and provides monthly cash relief. Most clients have no family or other supports in Australia and some have been released from detention into the project's care for psychological or medical reasons. Almost all clients are on a Bridging Visa E, which denies access to government support or mainstream services. Neither the asylum seekers nor the ASP receive financial assistance from the government.

On 10 December 2002, the Asylum Seeker Project was awarded Australia's National Human Rights Award for the Community by the Human Rights and Equal Opportunity Commission. The project was praised by the judges for the way in which it has not only directly assisted needy asylum seekers by providing support to them when they have nowhere else to go, but also by demonstrating to the government that it is possible to systematically house asylum seekers released from detention. In September 2003, the Asylum Seeker Project was nominated for the French Republic's Human Rights Prize for its work with detainees.

The project has recently undertaken research into the welfare needs and immigration outcomes of asylum seekers living in the community in order to provide qualitative and quantitative evidence of the issues and also to contribute to dialogue on new approaches for case managing asylum seekers, both in detention and in the community.

Client Group

The ASP works with asylum seekers who live in the community on Bridging Visa E. There are two groups of asylum seekers living on this visa: asylum seekers who applied for refuge while living in the community, and asylum seekers who have been released from detention on a discretionary basis (generally due to special humanitarian needs, being a minor who can be provided with adequate community care, or because they have an Australian spouse).

Bridging Visa E

A bridging visa gives applicants the legal right to stay in Australia while they are being considered for another visa. Applicants are eligible for a bridging visa if there has been:

- an application for a visa that can be granted in Australia,
- an application for a visa has not yet been formally determined,
- an application lodged in a court about their visa, or
- an appeal made to the Minister for Immigration regarding the grant of a visa.

Population Characteristics

The ASP's research[2] revealed that while the majority of clients are single men, much of the client group also consists of families or single parents with young children, an issue of particular concern given their lack of income and ability to access medical assistance. The table below portrays the characteristics of the client group with whom the ASP worked between February 2001and February 2003. This includes information regarding gender, age, family status (in Australia), country of origin, means of arrival, visa status, and time spent in Australia. A total of 111 cases (including families, couples, and singles) are represented, totalling 203 asylum seekers. Of these, 37 cases have had a final immigration outcome, while the project is still working with 74 cases.

Gender	***Total***	***% of Total***
Male	124	61.1
Female	79	38.9
Total	203	100.0
Age	***Total***	***% of Total***
0–15	44	21.7
16–25	39	19.2
25–65	119	58.6
65+	1	0.5
Total	203	100.0
Family Status	***Total***	***% of Total***
Single	60	54.05
Two-parent families	20	18.02
Single-mother family	16	14.41
Single-father family	1	0.90
Couples	10	9.01
Unaccompanied child	3	2.70
Siblings	1	0.90
Total	111	100.0

Means of Arrival	***Total***	***% of Total***
Plane	100	90.09
Boat	8	7.21
Boat-stowaway	2	1.80
Working on ship	1	0.90
Total	111	100.0
Plane Arrivals With Visa	***Total***	***%of Total***
Tourist	43	42.57
Visitor	22	21.78
Student	21	20.79
Business	5	4.95
Other	10	9.90
Total	101	100.0
Boat Arrivals Country of origin/ethnicity	***Total***	***% of Total***
Afghanistan	4	36.36
Iran	2	18.18
Kenya (stowaway)	2	18.18
Palestinian Territories	1	9.09
Iraq	1	9.09
Srilanka (work'g on ship)	1	9.09
Total	11	100.00
Boat Arrivals Country of Origin (first 20)	***Total***	***% of Total***
Srilanka	30	27.03
Russia	8	7.21
Iran	6	5.41
Albania	5	4.50
India	5	4.50
Pakistan	5	4.50
Afghanistan	4	3.60

Egypt	4	3,60
Ethiopia	4	3.60
Turkey	4	3,60
China	3	2.70
Palestinian Territories	3	2.70
Serbia/Croatia	3	2.70
Iraq	2	1.80
Eritrea	2	1.80
Ethiopia	2	1.80
Angola	2	1.80
Kenya	2	1.80
Somalia	2	1.80
Other	15	13.51
Total	111	100.0

Time Spent in Detention	***Total***	***% of Total***
Never	76	68.47
Less than three months	12	10.81
3–6 months	5	4.50
6–12 months	7	6.31
More than 12 months	11	9.91
Total	111	100.0
Total no. who have been in detention	35	31.53

Time Spent in Australia	***Total***	***% of Total***
Under 12 months	4	3.60
1–3 years	44	39.64
4–5 years	29	26.13
6 years plus	32	28.83
Not answered/do not know	2	1.80
Total	111	100.0

The ASP's research indicated that the majority of asylum seekers live in abject poverty and are forced to rely on minimal handouts from agencies and charities. Ninety-five per cent of asylum seekers had no work rights or access to medical services and 23 per cent had never had an income while in Australia. Such a situation means that families and individuals are forced into dependency, relying on family members, religious organizations, and community groups in order to meet their basic needs. Furthermore, 44 per cent of asylum seekers were in debt to friends or lawyers, or had outstanding bills or detention center costs (asylum seekers can be billed for time spent in detention). Twenty-four per cent claimed to have been refused medical treatment due to their lack of status, funds, or eligibility for medical assistance. Financial destitution has led asylum seekers to experience ongoing risk of homelessness, whereby at least 68 per cent were homeless or at risk of homelessness.

The impact of the above factors on those who were single mothers, vulnerable families, children at risk, and/or experiencing serious medical, mental health, and torture and trauma related issues was of particular concern to the Asylum Seeker Project. The ASP's research[3] indicated that asylum seekers released from detention were three times more likely to seek medical attention, particularly from mental health services, than those asylum seekers who have never been in detention. Two other issues observed for a number of detention releasees were a comparative high use of medical services and a high dependence on medication. While the research was inconclusive as to the reasons for higher medical use of services by detention releasees, much research has documented the way in which detention has had a negative impact on psychosocial health.[4] This may, therefore, also account for the levels of casework and support for detention releasees required from the ASP, which was more than three times higher for detention releasees than community-based asylum seekers.

Case Managing Asylum Seekers in the Community

The ASP has taken a reception/welfare-based approach in its work with asylum seekers. This approach is in place in order to ensure the utmost duty of care to asylum seekers, to support, prepare, and empower asylum seekers and facilitate the best possible immigration outcomes, whether they be settlement or return outcomes. Much of ASP's work with asylum seekers is about providing a supportive and safe "holding space" while they await a final decision. For workers and volunteers, providing that "holding space" may mean many things: providing housing, advice, legal assistance, social work, counselling, assisting practically, or being a support person. Ultimately it is about building trust and

being consistent in the work and relationship with the asylum seeker, who is often highly anxious over both past traumatic experiences and the uncertainty of their future. The core principle to ASP's work with asylum seekers is in respecting and valuing each person as an individual with dignity, with specific skills and needs.

The ASP therefore models its work on a reception response rather than a settlement response. Early intervention is the ideal approach, as it is preventative rather than reactive, particularly in terms of negotiating possible crisis issues. In the case of ASP, this work is provided in two ways: firstly, via initial assessment and case coordination, and secondly, via ongoing housing support and casework. This includes empowering and preparing clients for all immigration outcomes.

Providing consistent casework, preferably with an ongoing worker, has been found to be crucial when working with asylum seekers, particularly in addressing a client's lack of trust in authority, agencies, and strangers. Furthermore, ensuring that the asylum seekers completely understand the situation in which they have found themselves (determination process, welfare situation, etc.) assists them in coping with the situation and in making the few decisions they are able to make.

Other important issues dealt with include cultural sensitivity, trauma or medical issues, and asylum seekers' orientation to their new surroundings. The Project aims to support through empowering and resourcing clients, and by proving a supportive role that is both realistic and sustainable, but also compassionate and consistent, for the period of time that the asylum seeker is awaiting a final outcome.

Staff and volunteers are encouraged to be mindful of professional boundaries and possible vicarious traumatization and to make very clear their role to clients. As in any social, community, or welfare work context, professional boundaries are crucial. This, however, is particularly so in working with asylum seekers who may face an uncertain immigration outcome. In Australia, there is a focus on assisting refugees to resettle where workers' tasks are often focused on assisting a person to access resources, develop networks, and integrate into the community. However, the ASP's reception work pertains only to the duration of the determination process. As not all asylum seekers will be granted residency, workers need both to be prepared for all possible outcomes and, ideally, to have a mechanism to raise concerns that have come to their attention, such as mental health issues or new information about a case.

As case termination is a constant for workers, it is important to:

- set in place the appropriate means of communicating with those who are departing, farewells, etc.;
- allow time for discussion and working through closure, particularly in dealing with abrupt terminations, when asylum seekers must leave quickly; and
- allow adequate time for hand-over if a different authority or worker is to become involved.

Outcomes of the Case Management Model

Housing

The ASP has been successful in developing networks and relationships with a variety of housing providers and churches. By fully utilizing available housing stock, particularly church properties, ASP has been extremely successful in reducing the level of homelessness for asylum seekers despite receiving no government funding or government-funded properties. The project has extensive asylum-seeker housing experience, currently accommodating over 100 asylum seekers with no income, in thirty-eight properties throughout Melbourne.

Recent feedback from asylum seekers in ASP housing indicated a high level of satisfaction with both the appropriateness of housing and the level of support. The role of volunteers who make home visits has played a particularly important role in providing both ongoing support and a preventative response to vulnerable asylum seekers, particularly those experiencing depression, anxiety, or difficulties in coping with their predicament.

There are concerns, however, as to the sustainability of such a housing program, given increasing demands, heavy reliance on donated or subsidized properties and volunteers, and a general lack of funds, particularly from government sources.

Case Examples

Many asylum-seeker families spent time living in unacceptable conditions prior to presenting to the project. A family from South Asia, who had awaited a decision since 1997, had lived for many years with very little income. The family of four lived in a back shed in a friend's home with no running water in cramped and unsanitary conditions. When the family lost their right to work, the family was told they had to leave. Faced with homelessness, and not aware of their option to contact the Red Cross previously, the family later found them and were referred to ASP who is currently housing the family in a church property.

A number of single females have presented as very vulnerable and susceptible to abuse, having to depend on people they don't know very well or who don't always have their interests at heart. A young woman from the Horn of Africa who lodged her protection visa application in 2000 spent most of her time with no income and chronically homeless, moving between friends until the welcome was outstayed, then moving on. Her days were spent trying to access food banks and looking for housing. She said she was often treated like a servant and felt scared much of the time. She faced high levels of anxiety, depression, and health issues. At one point she was hospitalized for malnutrition before the project was contacted and found housing for her.

Many more single young males have presented to the ASP after having spent time living on lounge room floors, in cars, in a mosque, and a number on the street.

Income

The ASP assists asylum seekers through a Basic Living Assistance Program, providing monthly cash relief. The ASP initiated the Basic Living Assistance (BLA) Program in 2000, and it is the only ongoing non-governmental funded financial assistance program specifically for ineligible asylum seekers available in Melbourne. Though crucial for the support of this group, at a maximum of $35 per week, it rarely covers even basic items. The allowance does, however, allow asylum seekers to buy basic food items and limited transport and communication. This is particularly vital for single mothers and unwell asylum seekers, unable to access larger welfare agencies and food banks. Also provided is assistance for housing, medical and living emergencies, and assistance with referrals to health, education, recreation, and legal services. The project's total emergency relief and housing budget is currently $30,000 per month, assisting over 200 asylum seekers. Besides some funding and donation from a charitable trust, there are no regular funds coming into the Basic Living Assistance Program. All remaining funds come from community groups or individual donations.

Health

Asylum seekers reported experiencing high levels of anxiety and depression. Loss of work rights and income exacerbated such issues and contributed to increased isolation. In response, the ASP introduced support programs such as "LinkUp," linking volunteers to asylum seekers and to the men's, mothers', and youth groups. There is, however, a general lack of funding and thus of counseling and mental health services for ineligible asylum seekers. Long waiting lists and inflexible service criteria further affected asylum seekers' ability to access the few services for which they were eligible.

The seriousness of health issues for community-based asylum seekers and the difficulties of accessing services, documented as early as 1996,[5] have prompted the emergence of a number of initiatives in Melbourne. The ASP, together with Refugee and Asylum Seeker Health Network (RASHN), Bula Bula Asylum Seeker Health Centre, Asylum Seeker Specialist Clinic, and the Red Cross, have been successful in reducing the number of refused services due to individual advocacy and referral to free services. A network of free services, including hospital services, specialists, and general practitioners, has emerged and the hard work of the above groups should be commended. Undoubtedly there would have been a larger percentage of refused services if not for these initiatives, and indeed anecdotal evidence from other states around Australia indicates a less coordinated approach to community-based asylum-seeker health and far fewer services available.

Case examples

The ASP works with a number of single mothers who have no form of income. One mother from South Asia arrived in 2001 with her three children. Having no income in the first few months, she used her remaining funds before being cleared for payments from the Australian Red Cross. Since receiving a refusal of her first negative decision from the Refugee Review Tribunal more than one year ago, she lost her entitlement to receive the Red Cross funds. With no income, she could not afford to pay for food or rent, forcing her and her three children into homelessness and severe poverty. ASP has assisted since that time with Basic Living Assistance and housing, though the family has had to move three times to different crisis and church properties.

A number of single male asylum seekers have never had an income while in Australia. A male asylum seeker from the Middle East approached a migration agent within two weeks of arrival in Australia; however, the agent failed to lodge his application for protection within forty-five days, leaving the man without work rights or medical assistance for four years. As he was ineligible for Australian Red Cross payments, he faced constant homelessness and presented in very poor health and nutrition.

Case example

One mother from the Middle East living in the Project's care had been on more than ten different prescriptions for various health ailments, including sleeping tablets and anti-depressants, during her time in detention. Not being provided with sufficient medical records for this period, she stopped a number of these medications quickly after release, which had some adverse effects on her health, such as dizziness and heart palpitations. She was generally unaware of exactly what medications she had taken in detention, their purpose, or the correct dosage. In response, the mother sought out medical attention very frequently, as was the case during her time in detention.

Immigration Outcomes

Refugee and humanitarian issues are generally viewed, not in immigration terms, but in a context of international obligations under various conventions and covenants. However, for the research referred to in this paper, the final decisions pertaining to protection visa holders, *i.e.* refusal of visa and return to country of origin or third country, approval of Temporary or Permanent Protection Visa, were defined as an immigration outcome.

Outcomes	***Total***	***% of Total***
Detained	1	2.70
Detained and Returned	2	5.40
Voluntarily left Australia	18	48.64
TPV/THV	14	37.83
PV	2	5.40
Absconded	0	0.00
Total	37	100.0

Voluntary Departure by Country of Origin)	***Total***
Iran	3
Srilanka	3
Cyprus	2
India	2
Serbia	2
Albania	1
Congo	1
Ethiopia	1
Iraq	1
Pakistan	1
Russia	1
Total	18

Asylum seekers usually have only two possible outcomes, settlement or return. In Australia, asylum seekers who have been successfully granted refugee status may also receive a Temporary Protection Visa after which a refugee needs to reapply for protection. Of all final outcomes recorded by ASP in the last two years, 43 per cent of all asylum seekers were approved, receiving either a Temporary Protection Visa or a Permanent Visa, and 57 per cent were rejected and left the country. No asylum seeker absconded. Of the 21 cases finally refused, 18 cases (85 per cent) involved voluntary departure, divided between voluntary repatriation (57 per cent) and departure for a third country (29 per cent).

The high level of repatriation at 85 per cent is particularly evident given that 95 per cent of asylum seekers interviewed had no form of income and thus few possibilities to make their own travel arrangements. Exploration of third-country options was facilitated by the fact that almost 50 per cent of all surveyed asylum seekers were in possession of a valid passport, and was made possible through the provision of funds from the Project and other agencies and churches. It is, however, unsustainable for small community agencies to fund travel costs on anything more than an emergency basis.

Further improvements on the level of returns would no doubt occur if there were increased resources to better work with clients at the final stages and if the Australian Immigration Department allocated funds for reintegration and travel (including third countries) and allowed more flexibility in notice given to leave the country.

The lack of income does affect people's choices to depart Australia. Two asylum seekers released from detention on a Bridging Visa E wanted to return home voluntarily but did not have work rights to pay for the travel or the issuance of a new passport. As the Project cannot fund travel for all clients, the government advised them that they would have to return to detention where the fares could be paid. As they did not wish to return to detention and feared prolonged detention pending removal, they appealed further. The

Immigration Department has recently indicated it will further explore these travel and return issues facing community-based asylum seekers. Alternatively, allowing work rights or income support at the final stages would enable asylum seekers to better plan and prepare for either return or settlement.

Final Stages of Asylum-Seekers Return: ASP Response

The high figures for voluntary repatriation highlight the success of ASP's casework system in preparing, supporting, and empowering asylum seekers in the final stages. Working with asylum seekers at the final stages is a challenge, particularly when addressing clients' concerns about having to leave Australia, being rejected or returned. In many cases the issue of return is only raised with an asylum seeker once a final decision is imminent or has been made.

Assisting clients to think about, prepare, and ready themselves for all possible immigration outcomes as soon as possible is vital. However, discussing the possibility of having to leave Australia is a challenge due to high anxiety levels and the amount invested in the determination process.

There are three major options for refused asylum seekers: third-country options, voluntary repatriation, or forced return. Voluntary repatriation indicates a degree of confidence in the determination process and ideally involves a mechanism to monitor a percentage of returns to ensure safety, dignity, and security. It is important that asylum seekers are satisfied that they have been properly represented and that any new information has been fully considered prior to a final decision. It is equally important that caseworkers are able to provide the Immigration Department with information affecting a client's capacity to leave the country, such as medical, mental health, family, or humanitarian issues.

The ASP has found that bringing up the subject of a final decision on return needs to be approached with sensitivity to the client's unique situation and only if sufficient trust has been gained and the asylum seeker is ready. It is important that the exploration of return issues is raised in a way that does not diminish the level of trust the client may have developed with the worker and that does not deny their refugee claims. Instead, it should be explored as putting their interests first and looking at all their options. Furthermore, it is important that a clear distinction is made between the government Department of Immigration's responsibility in implementing immigration decisions and the caseworker's role in providing support and preparation during the process. The ASP has concluded that any discussion with the client should not instill false hope.

A number of approaches have been taken by caseworkers in preparing asylum seekers for return:

- ensuring asylum seekers are properly legally represented, are able to contribute to putting their case together, and understand decisions made in their case;
- discussing all potential outcomes as early as possible;
- providing updated, independent country information;
- providing statistics on the percentage of refugee approvals for the country of origin;
- briefing the client on changes in the country, politically, socially, etc.;
- exploring third-country options where applicable;[6]
- exploring the possibility of domestic relocation with the client;
- empowering asylum seekers to undertake their own research, particularly using the internet or library;
- being realistic and open about the information provided or discovered;
- empowering asylum seekers to make as many preparations as they can; calling family members, arranging on-arrival accommodation and people to meet them;
- for asylum seekers with particular needs, making referrals, care plans, or organizing on-arrival support;
- ideally, providing statistics and case studies of the outcomes of returned cases; and
- ideally, ensuring reintegration funds are available.

Absconding and the Availability for Return

A key concern for government, and a consistent argument in favour of detention, is ensuring the availability of asylum seekers for removal. This concern raises a number of issues:

- the actual risk of absconding;
- the role of caseworkers and the Government Immigration Department; and
- the ability to track asylum seekers in the community.

Although there is always some possibility of absconding, the experience of ASP and indeed international findings is that the actual risk is minimal. This may in part be due to the strong incentive for asylum seekers to comply during the determination process and should be considered in the context that authorities are aware of a final negative outcome prior to the asylum seeker, and are thus able to make an individual risk assessment at that point.[7]

Given, however, that there may be some risk of absconding, this can be minimized by:

- compliance requirements in the community, such as regular reporting;
- living assistance linked to maintained contact with authorities;
- risk assessments; and
- comprehensive case management.

An important distinction needs to be made at this point between the responsibility of the government to implement

immigration decisions and the role of caseworkers and NGOs in supporting and preparing asylum seekers throughout the process. The Department of Immigration's compliance section is ultimately responsible for ensuring asylum seekers comply with expulsion orders, which for community based asylum seekers in most cases involves twenty-eight days notice to make travel arrangements or risk being detained and removed.

The role of the caseworker is crucial, as it is at this point that they can provide the Immigration Department with any new information that may affect a person's ability to travel or safety upon return. At the point of imminent return the caseworker's role at the ASP has therefore involved:

- encouraging asylum seekers to comply with decisions;
- maintaining regular contact with the client;
- ensuring the client's contact details are accurate, and
- ensuring clients have the means to report to the Department of Immigration (travel, telephone cards, etc.)

The Department of Immigration, however, is ultimately responsible for ensuring the availability of asylum seekers for return, while caseworkers have a legal obligation to inform the department if a client has absconded or there is an apparent risk that they will.

It is, however, the experience of ASP that in the majority of cases forced removal or detention is neither desirable nor necessary. With caseworker support, asylum seekers are prepared, supported, and empowered throughout the process and are more likely to comply with decisions and more able to either cope with return or settle successfully. Such outcomes provide evidence for how a community-based reception response can provide a viable alternative to immigration detention.

Conclusions

Asylum seekers in Australia on Bridging Visa E were found to live in a state of extreme poverty. Lack of income, work rights, and access to health services increased people's experiences of homelessness, debts, and experiences of isolation and anxiety, resulting in a particularly negative impact on families, especially single mothers and those who were unwell and experiencing major torture and trauma related issues.

The reception/welfare casework response administered by the Hotham Mission's Asylum Seeker Project was successful in significantly increasing access to legal, medical, and other services. Furthermore, the housing options and support provided by ASP were found to greatly reduce the level of homelessness and degree of poverty, isolation, and destitution faced by many asylum seekers. Under ASP's comprehensive program, casework, housing, living assistance, and support programs complemented each other and provided a high standard of care for asylum seekers, a remarkable achievement in view of the lack of resources and funds for this group.

Further outcomes of welfare-based case management systems include: assisting decision makers to make informed decisions as to whether a person is required to remain in detention or whether they are able to be released into the community, and what needs or risks are present; tracking asylum seekers through the stages of detention and into the community; ensuring continuity of care and ongoing social and welfare support; and improving outcomes on return and settlement, as well as reducing crises or incidents. Such outcomes illustrate that a reception-based model is a viable and compassionate alternative to detention and does not involve the same psychosocial risk factors as does long-term immigration detention. Of overwhelming concern is that this work is unsustainable without government funds to ensure supports and resources are in place for this vulnerable group.

To further reduce the vulnerability and difficulties experienced by asylum seekers living in the community on Bridging Visa E, the ASP recommends that asylum-seeker children have access to a welfare payment from lodging to final outcome and including asylum seekers released from detention on bridging visas, that asylum seekers have access to health coverage from lodging of application to final outcome and including asylum seekers released from detention on bridging visas, and that at least one family member has access to work rights, including asylum seekers released from detention on bridging visas. Furthermore, the ASP proposes that the rule requiring people to seek asylum within forty-five days be abandoned and that financial assistance be provided for those seeking to return but with no funds available to assist with airfares or on-arrival support.

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Complementary Therapies for Treating Survivors of Torture

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Abstract

The long-term consequences of torture are complex, multidimensional, and pervasive. Torture leaves indelible scars in the mind, body, and cultural world of survivors, compromising their health and well-being. A clearer understanding of biological, psychological, and socio-cultural mechanisms underlying these difficulties is emerging. Research findings on pain are relevant for those suffering from post-traumatic stress disorder (PTSD) and its associated chronic pain. Rehabilitation programs require cross-disciplinary knowledge and expertise, including of complementary therapies. This article explores the use of complementary therapies in which psychotherapy, in concert with either physiotherapy or bodywork, is offered. Case studies illustrate its application and potential benefits. The clinical experience in controlled circumstances suggests the thesis that complementary therapies advance the psychological and physical healing process.

Résumé

Les conséquences à long terme de la torture sont complexes, multidimensionnelles et envahissantes. La torture laisse des cicatrices indélébiles sur la psyché, le corps physique et l'espace culturel des rescapés, compromettant leur santé et leur bien-être. Une meilleure compréhension des mécanismes biologiques, psychologiques et socioculturels sous-tendant ces difficultés commence à prendre forme. Les résultats de la recherche sur la douleur sont pertinents pour ceux qui souffrent du syndrome de stress post-traumatique (SSPT) et des douleurs chroniques associées. Les programmes de réhabilitation requièrent des connaissances spécialisées multidisciplinaires, y compris une connaissance des méthodes thérapeutiques complémentaires. Cet article examine l'usage de méthodes thérapeutiques complémentaires où la psychothérapie est offerte de pair avec soit la physiothérapie ou des approches corporelles ('bodywork'). Des études de cas démontrent ses domaines d'application et ses avantages potentiels. L'expérience clinique, menée dans des conditions contrôlées, suggère l'hypothèse que les approches complémentaires et parallèles en santé ont pour effet de promouvoir le processus de guérison psychologique et physique.

When refugees arrive in their host country, it is a relief from persecution, an end to flight, and the beginning of a new life, though the baggage of exile accompanies them. For those who endured imprisonment, violence, or torture, the psychological and physical sequelae are compounded by cultural bereavement, the disruption of cultural and familial connections and supports – the loss of identity, status, loved ones, structures of meaning, symbols, heritage, language, and traditions.[1] These new arrivals have many needs and may require help dealing with issues that could stand in the way of their emotional and physical well-being. Effective assistance for these challenges requires a careful consideration of a cross-disciplinary approach in which a variety of therapeutic interventions can work *together* to improve health.

Although traumatic episodes leave indelible scars in the mind, body, and spirit of a person, recognition of its effect as post-traumatic stress disorder (PTSD) dates back only two decades. Since then, research on PTSD has profoundly influenced how it is conceptualized and treated; much has been learned about its complex biological, psychological, and social processes.[2] A parallel exists between the historic difficulties in obtaining recognition for PTSD and gaining recognition of the effects of pain by clinicians and re-

searchers. Consequently, the short-term effects of unrelieved pain associated with trauma, injury, and illness are well known, but understanding of the long-term deleterious effects of pain is more recent. Research in the past two decades has radically altered knowledge and attitudes regarding the health risks associated with exposure to severe, persistent physical pain.

These issues are relevant because significant numbers of refugees are survivors of torture. Torture, according to the International Rehabilitation Council for Torture Victims (IRCT), is "the intentional infliction of severe pain or suffering for a specific purpose."[3] While the prevalence of torture is uncertain, some studies estimate that 5 to 35 per cent of refugees suffered torture in their homelands,[4] while similar surveys in other countries estimate from 5 to 30 per cent.[5] A growing medical literature documents the physical problems confronting survivors of torture – chronic pain with symptoms of diffuse and persistent musculoskeletal pain and other types of chronic pain.[6] These were considered psychosomatic in origin due to significant discrepancies between subjective reports of pain and positive physical findings.[7]

This article proposes consideration of an integrated approach to treating survivors of torture – psychotherapy concurrently with physiotherapy or bodywork – after ruling out any medical problem, as practiced at the Vancouver Association for Survivors of Torture (VAST). The underlying assumption is that, when treating survivors of torture who are suffering from chronic pain, there is a need to deal with psychological issues as much as physical pain. The psychotherapies represent various schools of psychology: psychoanalytic, behavioural, cognitive, and existentialist. The bodywork is also diverse in technique and cultural representation. The integrated approach intends to soothe pain or desensitize physiological, cognitive, and affective structures affecting chronic physical pain and PTSD symptoms. Case studies illustrate its potential benefits.

The discussion is organized in three parts. Part one provides an overview of the pain literature. Part two introduces various forms of bodywork. Part three explains implementation of the complementary approach. The last analyzes how complementary therapies work. The emerging thesis is that physical and psychological therapies, in concert, can attenuate the indelible scars of torture by sensitizing the body to healing touch, leading to a faster path of recovery.

Physiological Consequences of Torture

The assumption that physical pain, unexplained by medical or physical findings, is psychosomatic in origin has been long-standing and pervasive as was pain reported by survivors of torture attributed to psychological trauma. Of course, not all health workers made this assumption. In the early 1950s, Dr. Pappworth, whose work is described in *A Good Listener*,[8] acknowledged the increased propensity of torture survivors to suffer from pain. Investigations of PTSD have also elucidated how trauma affects neurobiology through complex psychobiological mechanisms.[9] Similarly, recent pain research explains how exposure to severe and prolonged pain triggers a cascade of neurobiological events that can result in long-term cellular changes and chronic pain states.[10]

The capacity to perceive and respond to pain is a fundamental survival skill. Pain serves an important protective function by alerting individuals to injury, illness, and disease states.[11] Paradoxically, while physiological pain is adaptive and contributes to general health and well-being, unrelieved and persistent pain is known to impair health, limit functional capabilities, and compromise quality of life.[12] Because survivors of torture have endured severe and prolonged pain, they are at a high risk for development of chronic pain and associated health and functional problems.

Pain is a complex, multi-dimensional topic, requiring the cross-disciplinary resources of scientists and clinicians. Although recent research has resulted in remarkable molecular level discoveries, pain is not merely a neurobiological event. Psychological and social factors profoundly influence the experience of pain, consequently, current conceptual models embrace a biobehavioural or biopsychosocial framework.[13] These integrated conceptual models acknowledge that pain perceptions evolve over time and are influenced by prior pain experience as well as psychological, social, and environmental factors.

A discussion of chronic pain requires a brief overview of pain definitions, concepts, and theories. The International Association for the Study of Pain (IASP) defines pain as "an unpleasant sensory and emotional experience associated with actual and potential tissue damage."[14] It has been described in terms of a "pain episode" composed of four components: nociception, pain, pain behaviour, and suffering.[15] "Nociception" is defined as a physiological signal that alerts the nervous system to a noxious or tissue damaging stimulus.[16] This is distinguished from "pain," defined as the sensory perception of the nociceptive stimulus.[17] The pain episode may be associated with suffering, the affective reaction to pain, and pain behaviours, or observable behavioural actions in response to pain.[18]

The experience of pain is also defined in *temporal* terms distinguishing chronic pain from acute pain. Acute pain is defined as limited in duration, recent in onset, with an identified cause such as trauma, surgery, or disease. In contrast, chronic pain persists and remains long after healing.[19] Clinically, the time associated with the development

of chronic pain may be less than one month or more than six months.[20]

According to the traditional specificity theory, pain was predicted to be proportional to the extent of tissue damage and resolved with healing.[21] In 1965, Wall and Melzack introduced the gate control theory of pain, which challenged conventional thinking and suggested that the nociceptive transmission could be amplified or inhibited at the level of the spinal cord by descending control from the brain.[22] This theory, however, did not fully explain the symptoms associated with chronic pain.[23] During the 1980s, research demonstrated neuronal plasticity or "an alteration in pain signal processing in the nervous system in response to a painful stimulus or experience."[24]

The concept of plasticity is central to current theories of pain, supported by evidence that neurons in the brain and spinal cord change in structure, function, or neurochemistry in response to severe and prolonged noxious events.[25] These changes are associated with the transition of acute pain to chronic pain.[26] Persistent pain over periods as short as hours or days can trigger enduring changes in the central nervous system, amplifying and prolonging pain after the event.[27] Investigations of the mechanisms responsible for these changes have revealed a great deal about chronic pain.

Chronic pain states are characterized by hyperalgesia, increased sensitivity to painful stimuli; allodynia, pain associated with a non-noxious stimulus; and hyperesthesia, increased sensitivity to sensory stimuli.[28] Central sensitization is believed to contribute to the development of hyperalgesia and allodynia.[29] The neural mechanisms underlying central sensitization are complex and illustrate both modulation and modification forms of neuronal plasticity. Central sensitization is characterized by an increase in spontaneous neuronal activity, decreased threshold for firing, an increase in magnitude and duration of firing, and expanded peripheral receptive fields for dorsal horn neurons.[30] Specific neuronal modifications include alterations in gene regulation and the altered expression of specific neurotransmitters, changes in the structure of proteins, and alterations in neuron cell membrane structure and function.[31] In other words, chronic pain is associated with neuronal changes through various mechanisms.

Pain perception can be *inhibited* and *magnified*. Current understanding of inhibitory mechanisms builds upon the gate control theory of pain, which predicted pain could be diminished or blocked at the level of the spinal cord through activation of cognitive and affective pathways in the brain.[32] These descending pathways provide the mechanisms for cognitive, attentional, and emotional strategies to alter pain perception at the spinal cord level.[33] The neural mechanisms involved include the actions of various inhibitory neurotransmitters[34] from higher centres in the brain[35] that attenuate nociceptive signals.[36] However, in chronic pain states, normal inhibitory control mechanisms are disrupted.

Current pain research and concepts are important to consider for survivors of torture. Clinicians must recognize the neurobiological consequences of unrelieved acute pain inflicted through inhumane torture practices.[37] Though neurobiological processes underlying chronic pain are complex, they need to be considered in order to gain a greater understanding of why management of chronic pain is so challenging. From an applied perspective, current pain theories and concepts provide a framework for physiological, cognitive, and behavioural approaches used in pain management to treat survivors of torture. Treatments have included psychological, medical, surgical, or pharmacological therapies.[38] Recently, other types of therapies have been introduced such as physiotherapy.[39] Less known approaches today include the use of complementary and alternative medicine (CAM).

Complementary Therapies

When a person is so injured emotionally and physically, a single clinical approach may not fully address his or her physiological and psychological challenges.[40] The process at VAST begins with an intake interview in which the needs of a survivor – psychological, emotional, physiological, medical, or related to resettlement – are assessed and prioritized. This approach first screens for possible physical injuries such as fractures, traumatic brain injury (TBI),[41] illnesses, diseases, or other pathologies needing medical care. During intake, however, a client rarely expresses physical pain. Pain issues are often identified later on, perhaps in psychotherapy, in medical treatment, or in settlement assistance.

The clinician must be alert to the person's sensitivities to touch when bodywork is offered, based on cultural, religious, gender, or personal preference. The clinician also considers the most appropriate bodywork for the survivor. A person sensitive to touch may state quite plainly: "I don't want to take my clothes off," "I don't want someone else to see my torture scars," "My religion does not permit physical touch." In other instances, the survivor may not be this direct, may say nothing or accept to undergo the treatment.

Conventional Physiotherapy

The World Confederation for Physical Therapy (WCPT) encourages high professional standards through education, clinical practice, and research.[42] In 1995, the 13th General Meeting of the WCPT adopted a Declaration of Principles on Torture, including statements underscoring the ethical imperative of physiotherapists to ease distress. As emphati-

cally, it prohibits physiotherapists from engaging in or condoning torture. The International Rehabilitation Council for Torture Victims (IRCT) in Denmark has demonstrated exemplary leadership in disseminating information about rehabilitation and physiotherapy for torture survivors.[43]

Conceptually, physical therapy assessment and intervention usually reflects a four-level disablement framework: pathology; changes in body structure or function; difficulties performing self-care activities; and societal level disadvantage.[44] The World Health Organization (WHO) International Classification of Functioning, Disability and Health (ICF) uses the terms "impairment," "activity," and "participation" to define problems in body structure or function, person level functioning, and societal or life situation issues, respectively.[45]

The focus of physiotherapy for survivors of torture was initially at the impairment level with the goal of restoring body structure and function.[46] The treatment of specific muscle, joint, and movement problems was intended to alleviate pain and functional problems, but often the pain was unchanged.[47] Current models of physiotherapy assume that survivors of torture have chronic pain, and treatment approaches mirror interventions for other groups who experience chronic pain. This acknowledges the complex and indelible changes in neurobiology associated with chronic pain and shifts the focus of physiotherapy away from impairment to activity and participation level interventions. "The [field of] physiotherapy has therefore changed and is now emphasizing active training, the main purpose being to stimulate the survivor of torture to live an active life despite pain and limitation of physical function."[48] Physiotherapy specifically includes education, a promotion of functional capabilities through an appropriate exercise program, use of assistive devices as required, and relaxation and body awareness training. Equally important is the promotion of effective self-management of pain.[49] This approach is consistent with current biopsychosocial models of chronic pain management for other groups, though physiotherapy is just one of many disciplines involved in caring for survivors of torture and their families.

Bodywork Therapies

Integrating psychotherapy with bodywork, or hand healing, presents a range of therapeutic alternatives. Bodywork, including physiotherapy, generally falls under three major approaches: (a) bodywork that involves manipulation of the body or direct touch, (b) bodywork that involves no touch or manipulation of the body, and (c) bodywork through soft touch of the body. VAST offers all three types.

The first category of bodywork encompasses various types in which there is direct manipulation of the body through deep muscle massage or heavy manipulation. Those practiced at VAST are: (1) neurological organizational technique (NOT); (2) Breema; (3) shiatsu; (4) massage therapy; (5) muscle response testing or applied kinesiology; (6) Hellerwork; (7) acupuncture; and (8) Tui Na Chinese medical massage. Breema, Kurdish in origin, and NOT are similar in that both involve heavy touch and pulling. Shiatsu combines the use of direct work and autosuggestive commands to the body. A more common practice in North America, massage therapy generally uses heavy massage of various areas of the body, though it may use a combination of heavy and soft touch. Muscle response testing or applied kineseology, established by Dr. George Goodheart, Jr., a chiropractor, is based on testing the strength or weakness of a particular muscle by touching pertinent points to make corrections, whether physical, mental, or emotional in origin. Hellerwork involves deep touch, but is limited to the fascia of the body. To facilitate motion restricted by collapsed layers of fascia or connective tissue, pressure on the muscles is exerted by using the fingers, knuckles, elbows, and arms. Because of the deep pressure, interaction between the practitioner and the patient is essential to signal potential painful or sore spots.

Anchored in ancient Chinese medicine, acupuncture requires inserting needles, for a few seconds or as long as half hour, to certain regions of the body to foster a balance of energy or the yin and yang. Though there is a risk of complications,[50] its effectiveness has been documented in the treatment of certain conditions, narcotic withdrawal, pain, anxiety, and spastic muscle in children with cerebral palsy.[51] Tui Na (push pull) Chinese medical massage, originating in Chinese traditional medicine dating back a couple of thousand years, uses the hands instead of needles to harmonize the *chi* or energy of the body; it is considered the grandparent of Shiatsu. "Tui Na operates from a system of four basic hand styles and is used to release spasms, increase circulation, and help prevent or reduce adhesion."[52]

The second category of bodywork departs significantly from the other two in that the body is not touched or manipulated in any way. Among the repertoire available, only reiki is practiced at VAST. Based on the concept of life energy, reiki seeks to capture what its practitioners refer to as the spiritual dimension of the soul and its universal intelligence. Originated in Japan by Dr. Usi in 1914, reiki only requires placing the hands above the injured or stressed area of a person to allow a transmission of energy.

The third type of bodywork resembles the first in that there is contact with the body of the patient, but differs in that the touch and manipulation are distinctly soft. Practitioners at VAST use: (1) the Rosen Method; (2) the Alexander Technique; (3) Bio-Energetics; and (4) craniosacral therapy.

Marion Rosen originated the Rosen Method, characterized by stretching exercises and gentle body movements. "Using hands that listen rather than manipulate, the practitioner focuses on chronic muscle tension" as the bodyworker uses words to alert the patient to "unconscious muscle tension."[53] Its uniqueness is based on a gentle but direct touch as the bodyworker is guided by changes in the breathing as barometers of internal relaxation or lack thereof.

The Alexander Technique, soft touch in nature, is grounded in the concept of unlearning habits that create muscular tension throughout the body.[54] Practitioners contend that a patient, while learning a new "sensation, a new feeling" by increasing self-awareness about posture, balance, breathing, and coordination of movements, can release strain caused by everyday activities. "It can be applied while lying down, standing, walking, lifting, and other daily activities"[55] by focusing on the head and spine relationship to foster balance. Bio-Energetics, on the other hand, uses a biotensor, an instrument that detects different vibrations indicative of imbalance. A school of therapy, Bio-Energetics was the result of the collaboration between Eva Pierrakos and Dr. John Pierrakos, a psychiatrist. They argue that the biotensor, playing a dual role, is used to "add healing vibrations and loosen up energetic blockages."[56]

Last, craniosacral therapy operates on the principle of promoting healthy functioning of the central nervous system by activating the fluid system that nurtures it.[57] Through gentle motions on a patient who lies comfortably and fully clothed on a table, the practitioner applies gentle pressure to activate the body's self-corrective ability.

Once therapy begins, the bodyworker particularly needs to be cautious abaut the possibility of flashbacks or hyperarousal in the session. Thus, it is important to have a psychotherapist prepared to intervene, if and when necessary.

The Practice of Complementary Therapies

A person's circumstances guide the decision as to which particular service he or she needs. Initially, the intake staff performs a basic screening to identify the most pressing mental and physical health needs. It is critical at this point to pay close attention to the survivor's emotions. When appropriate, the second step is to refer the person to a physician to assess the need for antidepressants to help with sleep disorders, to smooth out the affect, or medications to treat chronic pain, if present. Thereafter, the clinical coordinator assesses what could be a compatible match among the client, the bodyworker, and the psychotherapist. The cases below illustrate this sensitive interaction.

Case 1. The initial contact by a male survivor was based on the need for legal advocacy regarding asylum status. In the intake process, it was determined that this man needed psychotherapy immediately due to extensive and intensive symptoms of PTSD, specifically, sleep difficulties, nightmares, anxiety, depression, isolation, flashbacks, and fear. Later, bodywork was initiated when it became apparent that he had a great deal of physical pain and tension. Meantime, he was prescribed antidepressants.

Because he was particularly sensitive to touch, the Rosen Method, involving minimal touch, was indicated. The first bodywork session, however, precipitated flashbacks and intrusive thoughts too suddenly and made him feel exposed and vulnerable. This disturbed his psychotherapy and he stopped attending. At this point, the clinician approached him and redirected him to another style of bodywork as a compromise to resume therapy. Breema matched his needs as indicated by continuous weekly sessions for six months, until his symptoms subsided. Meanwhile, the psychotherapist focused on dealing with his flashback and retrieval of his memory in a contained and controlled fashion. According to van der Kolk, it is crucial to help the client retrieve memories in a contained manner. It is counterproductive to push the client to remember more and more, overwhelming the client.

In the case of this client, there were three reasons why Breema was considered more suitable. First, the practitioner was female while his violators had been male. Second, the context was brighter; *i.e.*, the room was well-lit. Third, he was non-threatened by this type of bodywork because the bodyworker was using more direct touch and manipulation of the body, more in concert with his concept of health and healing. In contrast, the Rosen method, a light touch bodywork, was administered in a quiet room with subdued lighting, which made him feel vulnerable and threatened. The combination of Breema and psychotherapy sped the healing process as indicated by the reduction and elimination of the physical symptoms and some of the other PTSD symptoms. His traumatic experience was remembered in a contained fashion that allowed him to make sense of his flashbacks, regain memory of the trauma, make sense of his experience, and learn some sense of mastery of his emotions. He started to sleep better and experienced less anxiety and depression. As his fears diminished, his social functioning improved. The flashbacks and nightmares disappeared, resulting in his renewed interest in a professional career.

Case 2. This case involved two young women relatives who had had similar experiences of torture and persecution. They came to VAST for support and started receiving psychotherapy, followed shortly thereafter by bodywork. Both women received reiki. Their most salient PTSD symptoms were headaches, sleep difficulties, suicide ideation,

fear, lack of trust, functional impairment, withdrawal, aggressiveness, isolation, and nightmares. Though they had had common experiences of torture and rape, their responses were totally different. One woman demonstrated internalized, passive behaviours while the other demonstrated externalized, aggressive behaviours.

The first woman encountered serious emotional difficulties in communicating with the psychotherapist. Her withdrawal symptoms were so severe that she was closed to any therapy. She was prescribed antidepressants. In contrast, the other young woman made steady progress in psychotherapy and was receptive to the idea of bodywork. As she became more extroverted and receptive to other therapies, whether psychological or bodywork, her results positively influenced her reticent relative.

Eventually, both women participated in bodywork and psychotherapy. Because they had been raped, female psychotherapists and bodyworkers were selected. This combined treatment addressed both the emotional and physical trauma. Reiki, characterized by no direct touch, helped the women accept non-violating, indirect physical contact.

As the internalizing symptoms diminished, the first woman became more responsive to treatment. She eventually became active and engaged in everyday life, demonstrating healthy social functioning. The second one's anger was transformed into positive energy as she became involved in meaningful adult activities – attending school, working, and socializing with others.

Case 3. In working with survivors of torture, the goal often is to alleviate and help the survivor cope with pain. However, in other cases, the goal of complementary therapies may require sensitizing the survivor to respond appropriately to noxious stimuli. A man was receiving therapy from three different professionals. During this process, he was employed in construction work and sustained work-related injuries. His pain signaling system was ineffective in alerting him to significant physical injuries. On one occasion he injured his fingers while hammering boards, but he did not experience any physical pain. It was in the psychotherapeutic context that he was able to recall the trauma of imprisonment and torture. While in prison, he had programmed himself to be numb to the experience of pain during torture. However, now in his country of asylum, this desensitization and underarousal were no longer adaptive, and, in fact, became harmful.

At this point, a reiki bodyworker was recommended. The goal of the bodywork was to sensitize him to feel pain again to promote health, wellness, and safety. The integrated therapy, reiki and psychotherapy, disrupted the desensitization, allowing him to perceive noxious stimuli and experience acute pain. During this period, he rejected recommendations for pain medication. The treatment to his pain, henceforth, was strictly psychotherapy, bodywork, and treatment of physical injuries. Based on the survivor's acute pain, the course of action was massage therapy, reiki, and breathing exercises, known as SIT (stress inoculation training).[58] The intent of these interventions was to help him learn to respond to pain-producing events. Through each of the therapies, he learned to engage with the painful part of his body, care for the injured part, and do what was necessary to make it feel better. The bodyworkers and the psychotherapist worked in concert to facilitate his efforts to attend to the painful part of his body as if it were a person. Neurological testing of peripheral nerve function would be required to rule out other potential nerve injuries caused by torture for this type of cases.

Discussion

Practicing complementary therapies necessitates close collaboration and partnership among the survivor of torture, the psychotherapist, and the bodywork practitioner[59] to respond with sensitivity and care to the survivor's pain, emotional and physical. It is vital to ask for permission from the survivor to see a bodywork practitioner, because the experience of pain is so deeply personal. It is in this context that the psychotherapist and the survivor discuss with the bodywork practitioner the most compatible approach to address individual needs. The psychotherapist, the survivor, and the bodywork practitioner, meanwhile, need to connect, constantly, in an *interactive triangle*. Feedback from the client and the bodyworker helps in evaluating the body therapy in real time as in the three cases cited.

An important focus of bodywork is how and whether the body therapy affects emotional states. Clinicians need to be alert to the complex nature of pain during body therapy and its effects on physical and psychological recovery. "Knowing what one feels and allowing oneself to experience uncomfortable sensations is essential in planning how to cope with these sensations and emotions."[60] Hence, it is essential to maintain that interactive triangle through open and constant communication among the psychotherapist, the client, and the bodyworker.

The practice of complementary therapies entails a teaching process in which the survivor needs to learn how to deal with the injured part of his body in a sensitive and caring manner. In Case 3, this was done by sensitizing him to feel pain, to acknowledge it, and to give it the necessary attention – whether it was rest, cold compresses, heat applications, or massaging to treat the pain. "Patients need to develop an internal locus of control by understanding and managing uncomfortable sensations and emotions and by learning effective plans of actions."[61] For this survivor of

torture, the learning process required attending to his injuries. In particular, it required providing *gentle attention* to his physiological and psychological needs, to the whole person, which, ultimately, promoted healing for him.

Although complementary therapies have had a positive effect on survivors of torture, there are some continuing challenges. Treatment tends to be terminated once survivors regain a manageable level of social functioning for two understandable reasons. First, refugees commonly struggle with resettlement and integration into the host country. Commonly, after gaining employment, they stop the therapy. Second, survivors of torture come from cultural or religious backgrounds anchored in an ethos of suffering and endurance of suffering. Once the therapies help them get hold of their symptoms, they feel any residual suffering must be endured. It is, however, impaired social functioning, whether family related or work related, that leads them to resume therapy.

Another challenge is accessibility to services as well as awareness by medical professionals of patient exposure to torture. The study by Eisenman *et al*[62] revealed that none of the 121 participants, survivors of torture, had been identified by primary care physicians. Thus, even if and where these services may be available, many survivors may go untreated. A less discussed issue is the understandable suspicion survivors may experience towards health professionals, when other professionals in their homeland may have participated in the torture. In addition to doctors, other health providers may be unfamiliar with health problems and proper treatment of survivors of torture. Trust and empathy by advocacy organizations, if available, may be the link to potential treatment.

Last, for survivors exiled in developing countries without a reliable medical system, complementary therapies may pose an attractive option in which a traditional healer can serve a dual role of psychotherapist and bodyworker. Though the cultural dimension plays an important role at VAST, that is the topic of another piece.

Conclusion

This essay is based on clinical experience in controlled circumstances. Thus, more research is needed with recognition of uniqueness of circumstances for each refugee. Nevertheless, this piece offers a set of options for serving survivors of torture coming from particular circumstances supporting the premise that complementary therapies can attenuate the psychological and physical scars inflicted by torture. This model appears to facilitate faster recovery and healing with significant consequences for survivors. Though more research is needed to explore optimum care and interventions for survivors of torture, including the approach presented in this essay, complementary therapies may allow the "speechless terror"[63] imprinted at the cellular level to emerge and give voice to the trauma in a safe and nurturing environment. Foa and Cahill explicate: "[T]he knowledge of how to treat chronic PTSD by far exceeds the knowledge about when treatment succeeds and when it fails....Very little is known about matching treatments to patients."[64] Alleviating the psychological and physiological impact of war, trauma, and torture, as well as the reconstruction of the cultural milieu, through complementary therapies are the guiding ethical principles for VAST and for the authors.

Notes

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Book Reviews

Feminists under Fire: Exchanges across War Zones

Wenona Giles, Malathi de Alwis, Edith Klein, Neluka Silva, editors
Toronto: Between the Lines, 2003

Times of war in areas of conflict are times of ruptures in traditional patriarchal structures, times when women, as secondary political players, are most vulnerable to the circumstances of war. And yet war situations sometimes enable women to surpass traditional feminine roles and thus to empower themselves, both personally and communally. War brings upon women destruction, dislocation, death of husbands and children, rape, poverty, hunger, and other tragic consequences. The majority of women in war zones are victims of policies they have not voted for. But women's resilience, survival skills, and capacity to organize networks of support all enhance and empower their communities to make changes in their own lives. Feminist responses to war situations vary from rejection of war (for example, the organization Women in Black), to support of war in the rear, to recruitment to fighting forces, to name just a few positions. But all feminists tackle wars as patriarchal constructs, and their engagements with armed conflicts (whether in support or in opposition) are filtered through gender divides that are only heightened in war situations.

Nationalist movements have tended to use women as metaphors for the nation: the mother of the nation, the one who instills the mother tongue and the love of the nation in her fighter son. But in times of war, women are also used as the symbolic victims of enemy violence. Rape by the enemy (which has finally been defined as a war crime by the Statute of the International Criminal Court) is used by men on all sides of a conflict as a measure to humiliate and weaken the position of women in war situations. Symbolically, women are raped by the "enemy" only if their men cannot protect them. Furthermore, the phenomenon of forced pregnancies through rape (which was a war tactic both in Rwanda and in the former Yugoslavia in the 1990s) situates the woman as the carrier of a mixed race/ethnicity/nationality bastard. Ethnic or national purity, in the patriarchal configuration, postulates the woman as a helpless prop that can be manipulated by the "enemy," as a sign of the emasculization of her original nation. While nationalist liberation movements from Algeria to India to Israel incorporated women as fighters or in other active roles, these momentary inclusions were generally conducted when they suited the (otherwise) patriarchal goals of the mostly male leadership. Furthermore, once independence was achieved, these movements rarely incorporated women as equals in the new nation-state institutions. As a result, most feminists treat the nationalist project with suspicion at best, although some feminist organizations do recruit themselves to nationalist projects in numerous ways.

How does one come to account for, and analyze from a feminist perspective, the variety of experiences and positions women take, and are positioned in, during wartime and in war zones? This edited collection emerges as the outcome of a multiyear project in which women from two war zones (Sri Lanka and the region of the former Yugoslavia) not only met and discussed the academic aspects of the various conditions and experiences of women in war zones, but also shared skills from operating activist organizations, as well as ways to empower and learn from this comparative project. As such, the book is diverse in its forms of writing and varied in the topics that it engages. Some articles investigate an issue, some report on strategies developed or on data collected, while others describe the emergence of various institutions and their contexts or conduct interviews with activists. The book is necessarily diverse and uneven in its form, but since this is a reflection of the hetero-cultural conditions of the lives of the authors, I would consider its conglomerate nature an asset rather than a shortcoming. The editors go to great lengths to remind the reader of the many differences in war experiences, class, ethnicity, access to media, agency, and more in the different societies in which these women authors live and work. At the same time, the book as a whole shows that some commonalities exist, and thus the comparative project is justified not so much theoretically as organically. What is common to all the writers is that as feminists they see a continuum from gender-based violence in their own societies to war against an external "enemy." As such, the majority of writers seem to be anti-nationalist, although that does not mean that

they are not national subjects, a position to which they own, especially in accounting for communication with women from the "other" side. The authors also recognize that the assumption that women are oriented towards peace is not always correct, as women soldiers so well exemplify.

The book is organized in four parts, the first of which includes the introduction by Wenona Giles, followed by two overview essays to set up the historical and political context. The first, by Malathi de Alwis, discusses gender and ethnicity in Sri Lanka, and the second, by Maja Korac, women's organization against ethnic war in the post-Yugoslav states. In different terms, both articles set up the questions or areas of operation — loci that the rest of the articles engage with more specifically: women's roles in their society, ethnic violence, gender violence, war, communism, religion, and, most importantly, the sense of how complex and specific are the results of these conjunctions on actual women's experiences.

Part 1 is entitled "Ethnic Nationalism and the Militarization of Women." It includes articles on Women in Black by Lepa Mladjenovic, feminist politics in Serbia by Zarana Papic, Sri Lankan women militants by Neloufer de Mel, and gender in the Croatian media war by Djurdja Knezevic. The last two essays in particular focus on ways in which women's actions expose the fissures in the patriarchal system, but are also penalized for challenging that very nationalist patriarchy. De Mel claims that the woman fighter in Sri Lanka is accepted, but contained in numerous ways, rarely reaching any position of real power in the political and militaristic system. More importantly, it is suggested that her inclusion is temporary, until the war is over, at which time she will return to her traditional role as mother. In Croatia, the media ignored and demonized an American tour (Mother Courage) of Croatian and Serbian women peace activists. The women were accused of being dangerous to the nationalist cause. The state organized a competing tour of nationalist women, which was widely covered by Croatian media. These articles show that women's agency and initiatives are often negatively sanctioned by state or community institutions, particularly if they do not fit a nationalist image that accepts them only as mothers and victims but instead promote a feminist agenda.

Part 2, entitled "Gendered Violence in Times of Conflict," deals with trauma (particularly rape) and how it is treated and manipulated in the communities discussed. Radhika Coomaraswamy theorizes the issue of honour from her own experiences as the special rapporteur on violence against women to the United Nations Human Rights Commission. Duska Andric-Ruzicic analyzes the political manipulation of war rape victims in Bosnia-Herzegovina. Ananda Galappatti shows how the concept of post-traumatic stress disorder (PTSD) is used to categorize and group together women in Sri Lanka, and Selvy Thiruchandran looks at the psychological and socio-economic challenges of post-war households in Sri Lanka. The articles in this section show the diverse ways in which women are grouped together to symbolize their victimhood, rather than provided with the help they need as individuals. Coomaraswamy, in particular, identifies a typology of roles that are imposed on women who experienced war violence, and her article poignantly calls for change in the emphasis on ethnic purity, amongst other restrictions on women's sexuality, so as to enable women to recover from rape in particular, and violence in general, and heal the society in general.

The last part of the anthology is dedicated to cultures of resistance. Neluka Silva discusses the (new) representation of intermarriage in Sri Lankan teledramas, showing that the topic is acknowledged but ultimately presented as less than desirable and carrying a high price for the couples involved. In a painfully introspective article by Lapa Mladjenovic, the issue of pacifism is interrogated at full force. The general tendency of many post-Yugoslav feminists towards anti-militarism was challenged when the issue of international military intervention was discussed, both in Bosnia-Herzegovina in 1995 and in Kosava in 1998-99. Mladjenovic's essay reminds us how principled ethics can clash with daily realities of friends and neighbours, demanding a stance that is irresolvable ideologically or emotionally. Kumudini Samuel shows how Sri Lankan women used their motherhood as an activist tactic in making political demands, but how that position, while yielding some *ad hoc* results, helped perpetuate their subversive position in social structures. Elissa Helms discusses gender essentialisms and women's activism in post-war Bosnia-Herzegovina, and Wenona Giles interviews long-time activist and academic Kumari Jayawardena. Finally, the editors provide some afterthoughts to the book and the project, which illuminate a list of areas of concern and future directions for research and attention. To name just a couple, it is important to note that women's peace activism rarely translates into peace negotiations and post-conflict institutions; and the complex relationship between class and nationalism, which has great implications for gender, is rarely discussed.

The greatest strength of the articles in this collection is that they articulate their theoretical concerns from a localized but well-informed perspective. Their claims then are grounded in specific historical circumstances. Thus, in line with third-wave feminism, these articles, while rarely written in the first person, never efface the positionality of their authors *vis-à-vis* the material they write about. But at the same time, when read together, these articles form a jigsaw puzzle where the constancy of some issues emerges above and beyond the diversity in regions and conditions of war.

The weakness in this anthology, as in the underlying project, is that, in its attempt to provide a comparative analysis, it is unclear why Sri Lanka and the former Yugoslavia were chosen as the regions of study. The (somewhat cumbersome) introduction attempts to justify the comparative project, despite the many differences, but never explains why regions like Palestine and Rwanda were not included. The project was hosted by York University in Toronto, and neither the introduction nor the essays discuss the geopolitical role and function of this location as facilitator. Finally, reading the anthology is both utterly painful and inspiring. Not only are the effects of war so devastating, but the general inability of feminists to penetrate political processes in significant ways is worrisome. At the same time the hope, perseverance, and initiatives discussed in the book are inspiring, and should pave the way to thinking and working towards deeper and necessary social changes.

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Problems of Protection: The UNHCR, Refugees and Human Rights

Niklaus Steiner, Mark Gibney and Gil Loescher, Editors
New York and London: Routledge, 2003

Fiftieth anniversaries are traditionally celebrated with gifts of gold. However, in the case of the UNHCR and the 1951 Convention, the gift of choice appears to be paper: pages and pages of paper filled with opinions on the past, present and future of refugee protection. One of the most recent gifts of this sort, *Problems of Protection: The UNHCR, Refugees and Human Rights*, edited by Niklaus Steiner, Mark Gibney, and Gil Loescher, attempts to offer a critical assessment of the past half-century of refugee protection under UNHCR.

The Problems of Protection is an outgrowth of a conference held at the University of North Carolina in the spring of 2000. The thirteen essays that make up the book are grouped, by subject matter, into five sections: definitional issues, ethical issues, legal and institutional issues, policy issues, and the post-September 11 context of refugee protection. The essays in the last section were obviously commissioned subsequent to the conference and show less evidence of being part of the "ongoing dialogue" that informed the other essays.

Arthur Helton and Gil Loescher provide the opening two essays, both related to the definitional issue of the meaning of "refugee protection" – and the related topic of UNHCR's diminishing interest in the subject. Loescher traces the erosion of the UNHCR's protective mandate to the politicization that was entailed by the expansion of its mandate since the dying years of the Cold War. While Helton does not dispute this premise, he nonetheless professes hope that the expanded mandate of the UNHCR can enhance its ability to "proactively" assist those in need of protection. Ultimately, both authors argue that only greater resources and political attention, by both the UNHCR and its funders, can refocus the UNHCR on its mandate to protect refugees.

In a sense, the subsequent "dialogue" of the book can be framed in terms of Helton's and Loescher's subtly diverging views on the central actor in refugee protection: the UNHCR or a statist international community. Loescher acknowledges the UNHCR as both a mechanism through which states act and as "a principal actor" in its own right. Notwithstanding this dualism, he addresses his concerns to the UNHCR *qua* principal actor:

> UNHCR is not a static organization but has constantly changed and evolved over the past fifty years. Dramatic and bold steps should now be taken to revitalize UNHCR's primary role as the protector of refugees and the guardian of asylum worldwide.[1]

While Helton shares Loescher's concern about UNHCR's declining attention to the protection of refugees, his prescription favours UNHCR's alternate persona: UNHCR *qua* a mechanism through which states act (or, in this case, fail to act). This approach is perhaps based in Helton's understanding of the statist nature of the 1951 Convention and his oft-quoted premise that "when we speak of 'protection' we mean *legal* protection."[2] In keeping with his approach, Helton's examples of "proactive" refugee policies (particularly his proposal for a meeting of state "stakeholders" to resolve the West African refugee crisis) all involve increased action by the "international community" (read: state actors and subcontracted NGOs).[3]

The agent-versus-actor dichotomy expressed by, respectively, Helton and Loescher repeats itself throughout the

The weakness in this anthology, as in the underlying project, is that, in its attempt to provide a comparative analysis, it is unclear why Sri Lanka and the former Yugoslavia were chosen as the regions of study. The (somewhat cumbersome) introduction attempts to justify the comparative project, despite the many differences, but never explains why regions like Palestine and Rwanda were not included. The project was hosted by York University in Toronto, and neither the introduction nor the essays discuss the geopolitical role and function of this location as facilitator. Finally, reading the anthology is both utterly painful and inspiring. Not only are the effects of war so devastating, but the general inability of feminists to penetrate political processes in significant ways is worrisome. At the same time the hope, perseverance, and initiatives discussed in the book are inspiring, and should pave the way to thinking and working towards deeper and necessary social changes.

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The agent-versus-actor dichotomy expressed by, respectively, Helton and Loescher repeats itself throughout the

collection of essays, with about half on each side of the divide. Viewed from the point of view of this dichotomy, Brian Gorlick's essay on refugee protection and human rights is perhaps the most interesting. Gorlick attempts to reconcile the burgeoning literature and jurisprudence on human rights with both international refugee law and the actions of the UNHCR. Although he spends much time describing various human rights developments and mechanisms, his essay is most interesting when it (perhaps too briefly) approaches the issue of the increasing overlap of human rights and refugee law from the point of view of the UNHCR as an agent. His resulting discussion of whether and how the organization has incorporated human rights into its policies and procedures is a topic that will hopefully be picked up in subsequent writing.

In a different way, Elizabeth Ferris's analysis of the role of NGOs in the protection of refugees also deals with the agent-versus-actor dichotomy insofar as it is embodied in the civil society "movement" that has engulfed NGOs, including those involved in refugee protection. Ferris's essays provide a good overview of the parasitic (in the original, if not always colloquial, use of the term) relationship between NGOs and the UNHCR. Ultimately, she suggests that whereas NGOs were initially seen as agents of the UNHCR, the expansion of both UNHCR and the NGOs has led to a much more active role for NGOs in the protection of refugees. In a foreboding passage, she also questions the increasing obstacles that face NGOs and others protecting refugees:

> In the past few years, the murders of UNHCR, ICRC and WFP staff in East Timor, Sierra Leone, Chechnya and Burundi has led to intensive soul-searching debates over staff security and the limits of acceptable risk. Many NGO staff have also been victims of the violence inherent in trying to provide relief in situations of armed conflict. It is increasingly difficult to protect refugees and displaced people in all regions of the world.[4]

Of course, it would be a gross simplification to characterize the essays as merely commentaries on the legal personality of the UNHCR. The usual mix of optimism and pessimism and arguments for expansion and contraction can be seen within and between the essays. It would also be a mistake to portray the book solely as a philosophical debate. The essays broach a number of practical issues that have perpetually plagued refugee protection, including the flexibility of the definition of "refugee" (Bonny Ibhawoh on cultural relativism and FGM and Emily Copeland on the growing recognition of gender-based persecution); the appropriateness of repatriation (Beth Whitaker on the Rwandan repatriation fiasco of December 1996); and the public debate about refugees in the developed world (Niklaus Steiner on the debate in Europe).

Although all of the essays are of a high quality, they often belie their origins as conference papers. In this sense, the book is directed at those readers "in the field" of refugee protection as understood in a concrete, rather than abstract, sense. At times, sources and arguments are not as formally referenced or supported as would be required in an academic publication (perhaps most obviously in Ibhawoh's essay on cultural relativism, admittedly a subject that it is impossible to do scholarly justice to in the span of fourteen pages). Even ten months after publication, the essays seem at times dated – an observation perhaps highlighted best by the below-noted events subsequent to its publication. Certainly, the post-September 11 "securitization" discussion has filled in and elaborated upon the sketch presented in van Selm's essay. Furthermore, the essays make at best cursory mention of the High Commissioner's "Agenda for Protection." While the critics of "Convention Plus" may retort that there is not much to mention, it would have been interesting to integrate an analysis of the UNHCR's own response to its fiftieth anniversary into the book.

In closing, less than four months after the publication of the book, two of the authors learned first-hand of Ferris's "increasing difficulty" of refugee protection. In August 2003, Arthur Helton was killed and Gil Loescher was seriously wounded in the bombing of the UN Headquarters in Baghdad. No one can question the commitment of either author to the protection of refugees. As we pay tribute to their dedication, the essays contained in *The Problem of Protection* lead us inevitably to ponder Helton's question: "How committed is the international community to refugees and displaced persons?"[5]

Notes

1. Niklaus Steiner, Mark Gibney and Gil Loescher, eds. *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge: New York and London, 2003) at 17.
2. *Ibid.* at 20 (emphasis in the original).
3. *Ibid.* at 31 to 33.
4. *Ibid.* at 128.
5. *Ibid.* at 33.

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