



CANADA'S PERIODICAL ON REFUGEES

# REFUGEE

Volume 15

Number 1

## SPECIAL ISSUE ON REFORMULATION OF INTERNATIONAL REFUGEE LAW

### Toward the Reformulation of International Refugee Law

James C. Hathaway

As powerful states have increasingly come to question the consonance of the Convention-based refugee law system with their more general migratory control objectives, a political space has evolved in which fundamental issues of the nature of international refugee protection are tenable for the first time since the immediate post-War era. While it is true that recent reform initiatives have generally been regionalized in scope and often restrictionist in tendency, the Reformulation Project is examining the possibility of re-invigorating a universal protection regime characterized by an enhanced conceptual scope aligned with the norms of international human rights law, yet tailored to take real account of the legitimate interests of receiving countries. Our goal is to promote the reconceptualization of international refugee law based on the three principles of international human rights law, respect for distinct national values, and effective international burden sharing.

The Reformulation Project seeks to promote critical thinking on a "blueprint" for a new refugee protec-

tion system which would dispense with the present, arbitrarily assigned, non-collectivized duty of states to provide long-term asylum. Our objec-

tive is to investigate the possibility of a more universally accessible and human rights-defined system of refugee law premised not on long-term

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**REFUGE**

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## *Cditor.s Xofe*

Beginning with this new volume (15), *Refuge* is adopting a revised publication format. To inaugurate this volume, Professor James Hathaway, Director of the Refugee Law Research Unit of the Centre for Refugee Studies at York University, and colleagues, offer a precis of state-of-the-art position papers on the comprehensive project, "Reformulation of International Refugee Law." This most ambitious project bears wide-ranging implications which, if realised in anything resembling the recommended formulation, will irreversibly alter the current practices on refugee protection, creating a more regularized, universal and equitable system of determining asylum for claimants requiring protection. In offering new rigour to the meaning of burden sharing, this series of articles invites us to rethink the often *ad hoc*, insufficient and unsatisfactory current set of practices and to envisage, along with the authors, a new regime.

As the reader scans this issue, it is obvious that Professor Hathaway and colleagues are mid-passage-a perfect position to invite comments and constructive criticism. We hope that these articles will stimulate a debate which the magnitude and scope of this project deserves.

From this volume forward, each issue of *Refuge* will be devoted to a dominant theme, to be presented in a series of articles or sections of a major topic. Six of these thematic issues will appear each year. Additional articles, brief reports and statistical tables will also be included in each issue, on a space-available basis, after the thematic articles.

*Refuge* continues to welcome contributions on relevant topics, of approximately 4,000 words, including references. Please refer to a recent issue for examples of style.

C. Michael Lanphier, *Editor*

asylum, but rather on temporary protection leading to the restoration of the refugee's right to membership in his or her community of origin. The system would be characterized by an internationally administered process of refugee determination and interim protection in which refugee protection responsibility would be shared out under an interstate system, and in which there would be an equitable sharing of both the financial and human aspects of protection beyond the first asylum stage.

To explore this possibility, we convened a Legal Working Group of twelve recognized experts from around the world in 1993 to help us define the "building blocks" of such a regime. We then commissioned ten of the leading social science experts on refugee protection to work in five North-South teams to elaborate thinking on these building blocks, taking into account the most up-to-date empirical knowledge available. Most recently, we convened a consultation in 1995 of forty experts from academe, governments of the North and South, and the nongovernmental and intergovernmental communities. Their task was to debate the five "Studies in Action" prepared by the North-South social science research teams. Core funding for the project has been provided by the Ford Foundation, now supplemented by a grant from the MacArthur Foundation.

We invited the authors of the Studies in Action to consider a number of difficult issues, set out below.

### International Administration

Our commitment to a more meaningful international supervisory agency which might mean a revamped UNHCR or a new agency derives from a number of concerns. First, we want protection to be more principled and consistent than is presently possible with individual states exclusively in control. Huge disparities in recognition rates (for example, the United States recognizing Salvadoreans at a two percent rate in the late 1980s while Canada recognized about

85 percent of Salvadoreans using the same definition) bring the system into disrepute, and dilute its protective capability.

Second, since the proposed system would involve commitments by states to receive recognized refugees under a responsibility sharing formula, and to fund the operations of the system un-

status determination procedures and offering related processing and admissions services, we have proposed that UNHCR (or a successor international supervisory agency) take charge of the first asylum and status determination functions. It is assumed that the use of group determination, a common database of country of origin information,

## Temporary Protection

A first, critical issue is whether temporary protection does in fact make refugee protection a more palatable prospect for states. Is the "numbers issue", which is so routinely raised, truly the concern, or would a system that distinguishes between protecting refugees and permanent admission to a community make the "asylum crisis" less profound? Will temporariness counteract the "pull" dimension of current movements of asylum-seekers? What is the empirical evidence regarding the percentage of refugee-producing events which could reasonably be expected to be resolved before the expiration of a "temporary protection phase?" Is there "enough value" to ensure that repatriation in safety could become the norm of the regime?

Second, is temporary protection a humane concept that is truly reconcilable with respect for the dignity of refugees? Which human rights of refugees need to be respected as matters of priority? For example, what level of family reunification makes sense? How can one ensure that temporarily protected refugees do not just "disappear into the woodwork," particularly in states with heterogeneous populations and democratic values which

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der a burden sharing formula, there must obviously be real commonality in both the standards and modalities of decision-making. States must be able to place reasonable level of confidence in the accuracy and efficiency of refugee determination carried out by other states if the system is to work.

Third, we believe that there are tremendous cost savings to be realized by moving away from every state running its own determination system. If a generic international administration system could radically reduce the more than U.S. \$10 billion that developed states spend each year to run their highly legalistic status determination systems (by e.g. using positive group determination processes and a common country information database), then significant monies could be freed up to help fund other parts of the proposed system (e.g. repatriation and development assistance).

## Burden Sharing

As a preliminary matter, we have distinguished two issues: fiscal burden sharing and human responsibility sharing (addressing the allocation of responsibility for receiving refugees). There are three basic costs that would need to be shared under the proposal.

First, a critical piece of our reformulated system would be to induce states to honour the basic duty of *non-refoulement* (non-return) of asylum-seekers by minimizing the costs of compliance. Given the enormous costs to OECD states of running their individuated

etc., would be much less expensive than the present process.

Second, there would be expenses associated with repatriating rejected asylum-seekers and moving recognized refugees to the site of temporary asylum; supervising the compliance by temporary asylum states with relevant human rights norms; and providing "concrete inducements" by way of development assistance to less developed states which receive refugees for the purpose of temporary protection.

Third, there would be collectivized costs associated with the ultimate "return in safety and dignity" of refugees to their homes, including a program of repatriation and development assist-

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ance to bring about meaningful re-integration. Related to this would be the costs of moving those refugees unable to return home safely after expiration of the temporary protection period (probably 5 years) to a country of permanent resettlement.

The critical question, then, is the basis upon which to organize this fiscal burden sharing regime. How could states be induced to participate in such a system? How would obligations be structured and administered?

promote internal freedom of movement? Is there an effective means of supervising compliance with refugee rights by the states which afford temporary protection? What kinds of international fiscal support ought to be provided to less developed states which host disproportionate numbers of refugees in order to make a high quality of protection viable? How does one ensure a "flow-through" of that support to refugees, while simultaneously benefitting the local populations, it generates a popular support

for refugee protection? Is there a way to protect individual refugee rights (including specific concern for the vulnerable among the refugee population), and the collective rights of the refugee population, such that repatriation as a functioning communal entity is really viable?

Third, just how long can temporary protection last? Is the answer the same for all refugees, or do age, sex, family status, and other factors change the answer? How could an internationally administered regime take such matters into account? How could a temporary protection system be made as simple and subject to as few "exceptions" as possible, in order to attract state support, but not at the expense of sensitivity to the real predicaments of refugees?

### Responsibility Sharing

On what basis could the international community be convinced to commit itself to a system of responsibility sharing in refugee protection? In other words, what are the compelling political, moral, or other concerns which should cause us to rethink the current system's reliance on accidents of geography or transportation links as the defining factors in determining who seeks protection where?

Second, while it is illogical, viewed from both a fiscal perspective and in terms of ultimately facilitating repatriation (for both cultural and logistical reasons) to move huge numbers of (mostly rural) refugees in the South to Northern states for temporary protection, how does the Project avoid appearing to legitimate a "new apartheid" for refugees? This raises the very important concept of the "social limits" to the idea (derived from international environmental protection efforts) of "common but differentiated responsibility," which would seem key to a meaningful responsibility sharing system in the refugee context.

A third issue is how to define baseline responsibilities for human responsibility sharing. "Raw numbers" are unlikely to be the right measure of an equitable responsibility sharing sys-

tem; instead, account should be taken of the nature of the refugees to be received. Thus, for example, the Scandinavian example of receiving "difficult to settle" refugees, albeit in smaller numbers than other industrialized countries, is seen by some as a possible model for a broader system of responsibility sharing. A related concern is whether pre-existing responsibilities (i.e. refugees already residing in the state) should be factored in to original allocations, or whether the new system should "start from scratch." Further, there is the matter of taking account of the need for residual, permanent resettlement spots for those refugees unable to go home in safety after the expiration of the temporary protection phase. Should countries that are willing to take a larger share of this (more long-

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term) responsibility see their temporary protection quotas reduced accordingly?

Fourth, how should the international supervisory agency (UNHCR or its successor) make concrete decisions regarding who is protected and where during the temporary protection phase? In other words, how ought it to be decided which refugees are part of which country's responsibility sharing quota? Because of logistical, fiscal, and cultural concerns—and keeping in mind that the hoped for solution in most cases will be repatriation to the country of origin—a regionalized temporary protection approach seems to make the most sense. Can this objective be fairly achieved without inadvertently creating a "new apartheid"? What weight ought to be attached to individual refugee preferences, and how could this be reconciled to both the need for systemic efficiency and recognition of the value of protecting refugees as a group in order to allow the continuance of their communal traditions pending return? What of victimized minorities within the refugee

community who wish to be protected from the refugee community itself? If some refugees are to be protected outside the region, who should they be?

### Repatriation and Development Assistance

A system of repatriation and development assistance should ensure that account is taken of the relative inability of those states which currently receive most of the world's refugees (and which would likely continue to receive a high percentage of refugees under our largely regionalized temporary protection plan) to provide for their needs. Beyond simply "cost recovery," though, the system should aspire to greater balance through the provision of funding which would actually benefit the host community (e.g. support

for common infrastructure, education, etc.). If temporary protection logically dictates a general commitment to regionalized responsibility sharing (for logistical, fiscal, cultural, and viability of repatriation reasons), then shouldn't those states which carry less of the "human responsibility" be seen to owe a duty of compensation to those states which assume a disproportionate share of the universal duty of refugee protection?

The other half of the repatriation and development assistance program would relate to the facilitation of return. Some of the issues raised in this regard include the need to prevent states from "generating refugees" in order to benefit from international development assistance to facilitate their return; the possible need to fine-tune the system to distinguish between the logistics of assistance to "defunct states" (Somalia?) and (reformed) "predator states" (Guatemala?) in terms of the channels for delivering development assistance; how to link the receipt of assistance to a continuing commitment to fair treatment and ef-

# Some Thoughts on the Ethical Dimensions of the Project to Reformulate International Refugee Law

John Haley

fective integration of the returning refugees; the relationships between refugee-specific development assistance and general development assistance, specifically, how to avoid developed states simply reallocating existing funds to refugee-generating states, effectively penalizing those governments which do not produce refugees; and a reasonably clear definition of those kinds of development assistance which should most logically be funded in order to achieve the baseline objective of assisting the reintegration of refugees.

In the balance of this edition of *Refuge*, we extract portions of the analysis offered by each of the Studies in Action, the key questions raised by those invited to discuss this research, and the conclusions arrived at both in the Workshops devoted to each of the five "building blocks" and in plenary session. The Studies in Action have been substantially abbreviated for this edition and therefore do not capture the full scope of the authors' work. Anyone interested in exploring the ideas more fully or in using these papers as reference materials should consult the originals. Full versions of the papers will be available in published form in mid-1996. The papers in their entirety offer a comprehensive exploration of the critical elements involved in reform and provoke meaningful debate about some of the fundamental concepts involved in protecting refugees. Anyone interested in reading the full versions is encouraged to consult the information at the end of this edition.

What is presented here is a work-in-progress. Some of the questions and concerns remain to be answered. The research is ongoing, and we welcome the participation of readers in our work. As we now move to the next phase of the project, we are seeking broad consultation. Please consider becoming involved. Again, details are provided at the end of this edition. We are extremely grateful to all those who have worked with us to-date, and look forward to benefitting from the advice of new participants in this Project. ■

James C. Hathaway *Guest Editor*

The Reformulation Project was initiated from the conviction that the present system for the protection of refugees is seriously flawed. These flaws can affect those seeking protection. They can also affect those providing protection. All of these perceived flaws have a moral/ethical dimension.

Access to the system by those in need has always been a matter of moral concern. This concern has grown as various nation-states have placed more and more barriers to access, either unilaterally or conjointly with other states. This includes the need to cross an international border, into an-

is morally and ethically wrong, especially when the results may well have life and death implications.

Still another example of a flaw in the present system is that countries of the North spend an enormous amount of money on their own particular determination processes. This provides protection to only a small minority of the world's refugee population. Over 80 percent of the world's refugees remain in the South. Their protection needs are primarily met by the UNHCR, operating on a budget which is one-quarter that spent on refugee determination in the North.

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other state, in order to be eligible for refugee status. Recently, states have made increasing use of deliberate strategies to interdict the flow of refugees, thus seriously inhibiting the ability of those in flight to seek protection from the international community.

A second flaw in the current system is that success rates of claimants are widely divergent. Those coming from similar situations should experience largely similar results. After all, the various countries which are parties to the Convention are using the same definition. But this is not the case. The definition is not applied in a uniform manner. The differences can be extreme. To subject refugee claimants to an uneven application of the definition

Several other limitations in the current system have an impact upon those seeking protection. There has been a growing recognition that the current definition fails to protect claimants who are genuinely fearful of serious harm, but who cannot establish that they are at differential risk because of their civil or political status—the core of the present definition. Regional agreements in Africa and the Americas have recognized this and extended protection on a broader basis. The conceptual narrowness of the definition needs to be addressed if protection is going to be effectively and equitably available to all those in need.

There is a conundrum in the present system. The claim for protection may be favourably determined on a group basis when it can be established that the claimant is a member of a group that is at risk. However, thereafter, that group-linkage is largely ignored. The

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*John Haley is a former member of the Immigration and Refugee Board, Ottawa, presently engaged in counselling and spiritual direction.*

communitarian aspect of refugee life is generally dismissed and often actively discouraged during protection and resettlement. The refugee's right and need to freely associate with members of his or her community is violated and overlooked.

Some of the flaws in the present system are experienced by countries of asylum. Perhaps most notably, there is no operationalized system of responsibility and burden sharing. Each country is responsible for its own determination system and providing

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protection to those refugees who enter their territory. For countries too impoverished to meet even the most basic needs of a refugee population, the UNHCR has undertaken to meet these needs. But the financing of the UNHCR is uncertain at best, meaning that the conditions in which refugee populations are required to live are often woefully inadequate. There is no consistent and coherent means of sharing the operational burdens that are part and parcel of refugee protection.

Against this backdrop, it is clear that a project which seeks to reformulate the international system for refugee protection is a noble endeavour. It will succeed only when the politicians see that somehow this new system is in their own interests. It will also be important to satisfy the dreamers, the visionaries, and the passionate advocates for justice and human rights. It is important to make it clear that the moral and ethical dimensions of the protection of refugees have been considered at every step. ■

*Excerpts from the Five Studies in Action:*

## **I. International Administration**

**Kathleen Newland and Galina Vitkovskaia**

*The authors were asked to consider the best means for international administration of the proposed reformed system of international refugee protection. They suggest that the UNHCR, in its present form, would not be able to administer the proposed system. They explore the possible shape of a successor organization, perhaps a revamped UNHCR, with secured levels of funding, a greater vesting of authority in regional bodies and an enhanced role for non-state actors, which would actively engage in refugee determination and allocation of responsibility for temporary protection among states. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

Neither states, nor refugees, nor the institutions that mediate between them can be wholly satisfied with the current system of international protection. It is arbitrary, expensive and uncertain in outcome. Its recent history has been one of *ad hoc* responses, some effective and some not, to a rapidly growing and changing set of demands. After forty-five years of experimentation, it is time to reassess the adequacy of the legal and institutional framework of international protection.

That a new system of refugee law should be internationally administered is one of the key operational concepts of the Reformulation Project, which proposes a central International

Supervisory Authority to oversee the identification and protection of refugees. The three principal characteristics of the Authority are: 1) it would facilitate the operation and implementation of a new regime centered on human rights principles and operationally based on temporary protection rather than permanent asylum, 2) the diverse interests of the various major stakeholders in refugee issues would be represented (including states, refugee communities and non-governmental organizations active in refugee affairs), and 3) a degree of equality in participation would allow each of the major actors to safeguard its interests in the system. The Authority would operate within a more general framework of respect for national and community values, consistency with the norms of international human rights law, and effective international burden sharing.

The Reformulation Project's goal of a universally accessible legal regime that offers a consistent degree of protection to refugees everywhere argues for a central (although not necessarily centralized) international refugee agency. An international refugee agency does, of course, exist, in the form of UNHCR. Should this be the agency to take on the administration of a reformulated system of refugee law? UNHCR in its present form has significant weaknesses that impede its functioning, many of which spring from the fiction that it is a temporary body. This is reflected in its financing (voluntary contributions), structure (not fully articulated below the level of High Commissioner and Executive Committee, and dependent on renewal of its mandate every five years), and culture (emergency and short-term oriented). Here we propose moving towards a

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more mature organization, renamed perhaps the United Nations Refugee Organization (UNRO). UNRO should not be thought of as a new organization, but as one that may evolve from the process of strengthening UNHCR.

UNRO would perform a number of functions not carried out by UNHCR. The most important of these are 1) centralized refugee status determination and 2) allocation among states of responsibility for temporary protection and the relocation of refugees to the designated sites. Centralized refugee status determination should be closely tied to the other proposed UNRO function of allocating responsibilities for

and UNRO's role in effecting long-term solutions. Perhaps the major source of receiving countries' reluctance to offer temporary protection is skepticism about its temporariness. UNRO should articulate a norm of temporariness, of perhaps a maximum of five years, and have a mechanism for forwarding to bodies of the UN system or regional organizations a request for options for effecting solutions as the end of that period approaches.

UNRO would be composed of a General Council, Regional Commissions, issue-specific Advisory Committees, and a Secretariat. The General

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UNRO should be committed to vesting greater authority in regional bodies. Regional Commissions would oversee the quality of protection provided to refugees within their region. Issue-specific Advisory Committees might also be established. We would suggest a First Asylum Committee, to monitor admission to safety and *non-refoulement*; an Emergency Response Committee to develop recommendations on early warning, preparedness and rapid response; a Temporary Protection Committee to monitor refugee rights and conditions in temporary asylum, as well as responsibility sharing; a Repatriation Committee concerned with the identification of opportunities for repatriation and dangers associated with it, which would also encourage the early establishment of Tripartite Committees for each refugee situation; and an Adjustment of Status Committee, to develop alternatives for refugees whose temporary protection goes on too long or who clearly cannot be expected to repatriate.

A positive strategy to strengthen the international administration of refugee protection should, in our view, be built on the following characteristics: gradual restructuring; service orientation; a combination of assessed, voluntary and subscription income; far-reaching consultative structures; consensus decision-making; more emphasis on regional fora; and stronger information gathering and analysis. There is little doubt that the international system of refugee protection is undergoing a process of profound change. This transition can take place deliberately, in a manner that protects the human rights of refugees as well as the interests of states. Or, it can proceed chaotically, converging toward a least common denominator of protection and obligation. The human costs of the latter would be terribly high; it would also take a toll on the structure of international cooperation built over the past fifty years. ■

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protection. Without such bundling, some states may choose to hand over their costly determination procedures without accepting a share of responsibility for providing protection.

For even such a modest beginning of centralized allocation to find acceptance by states, a number of problems must be addressed. In the first place, handing people with valid refugee claims over to an international authority for removal without appeal may be incompatible with the laws of some states. Secondly, the *quid pro quo* for devolving some authority over protection admissions to UNRO would probably be for the agency to also take responsibility for, or at least cooperate actively in, the return of non-refugees. Third, while responsibility sharing will mean that refugees will not necessarily receive ongoing temporary protection in their country of first asylum, efforts should be made to avoid unnecessary transfers. This may mean, for example, exploring the viability of states accepting refugees beyond their allocated responsibility sharing quota in return for developmental or other assistance. Fourthly, is the question of the duration of temporary protection

Council would be the highest authority in UNRO. It would have authority to oversee the refugee protection process, but it would be primarily a policy-making body. The General Council would be composed of government representatives. Nongovernmental organizations should be granted consultative status. More formal representation for them, with voting power, is precluded by the difficulties of arriving at any truly representative arrangements for their participation. It would be easier to say which groups should be included in formal arrangements than which should not. An informal committee structure would give nongovernmental groups a voice in UNRO policy discussions. Most NGOs will continue to make their influence felt by acting on and through governments and intergovernmental bureaucracies, bringing to bear their advocacy, financial resources, information, ideas, labour and in some cases their electoral influence.

The General Council would be expected to delegate many of its powers to an Executive Committee, which would make decisions when the plenary body is not in session, and super-

## II. Fiscal Burden Sharing

Amitav Acharya and David B. Dewitt

*The authors argue that a reformulated system of refugee protection must proceed using a distributive-developmental framework for fiscal burden sharing. Such a framework would have to appeal to the national security interests of donors, rather than to humanitarian or altruistic motives. The funds provided should be tied to concrete, time-specified goals which will contribute to the wellbeing of refugees. They argue that this approach should be pursued parallel to the existing system of multilateral institutions. The framework envisions resources being channelled to regional institutions rather than national governments. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

Migration, and what that means for the carrying capacities of the local environments, the management of resource extraction and consumption, the reallocation of scarce commodities, the regulation of labour, land, and capital, the relations between host and transient populations, and the stability of the governing regime are basic questions which impact on the security interests of individuals, of communities, of institutions, of countries, and of regions. Refugees are evidence of insecurity, objectify insecurity, and create further insecurity. They are the victims, but they can also contribute to further victimization. Refugees may be innocents, but they can be employed to further the interests of others. What is common for all refugees is that they

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cross boundaries, and these boundaries are both physical and symbolic. Refugees exit one "system" of living and enter another. In small numbers, the impact may be negligible; in large numbers, it may be corrosive, threatening, and devastating.

From our perspective, there is no question of the validity of responsibility sharing, burden sharing, and equity sharing in providing protection to refugees: these are norms and values which must be engaged in an effective, timely, and humane way. But the security dilemma (or insecurity dilemma as many prefer the term when addressing problems in the developing world) is central if the formula is to be practical: neither host nor home countries will undertake preventive or remedial actions so long as perceived security threats and risks are not addressed.

involving cooperation among a group of states against a commonly perceived external threat. Looking at current developments in the international refugee regime, one finds some clear trends towards the development of an alliance framework. This is especially evident in the "harmonization" policies in the West, worked out over hundreds of meetings among Western refugee recipient nations. Although these "international consultations" have not led to any supranational authority to deal with the refugee issue, they clearly have underscored their perceived need and preference for an alliance approach to migration, refugees, and asylum issues.

A third framework of burden sharing, the distributive approach, generally views the economic problems of the developing countries, including

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***The concept of burden sharing may be located within three broad institutional frameworks—multilateral, alliance, and distributive-developmental.***

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The concept of burden sharing may be located within three broad institutional frameworks—multilateral, alliance, and distributive-developmental.

The dictionary meaning of multilateralism is cooperation involving two or more actors. Multilateralism has been a marked feature of post-World War II international relations, through such institutions as the UNHCR, the World Bank and the IMF. However, multilateral approaches to security have not always been effective because of ideological and political polarizations within the inter-state system, as well as the difficulty of reconciling competing national security objectives.

The limitations of the multilateral approach have contributed to the appeal of alliance burden sharing. Alliances are collective organizations

conditions that create conflict and lead to refugee exodus, as the function of a structural inequality within the international system. Burden sharing in this context focuses on the need for a redistribution of resources from the North to the South in order to enable the latter to overcome its own problems and vulnerabilities. From a distributive perspective, the developing countries bear the primary burden of refugees as countries of first asylum. Since developing countries lack the financial resources and infrastructure to bear the burden, assistance from the North is wanted. Such cooperation can be mutually beneficial to both the North and the South and is especially important to the management of international order at a time when refugee issues are a marked dimension of the North-South divide in the post-Cold War era.



Reform of the existing international refugee regime should focus on strengthening multilateral and distributive frameworks of burden sharing, as opposed to alliance frameworks. The suggested response of the international community should pay greater attention to empowering global and regional institutions that facilitate a multilateral, preventive, and distributive approach to refugee burden sharing. It might be particularly useful to assign a greater role to regional organizations to deal with refugee problems. Regional organisations can be suitable instruments of preventive diplomacy.

### Basic Principles

The following are some of the basic principles to guide a distributive-developmental framework for refugee protection:

1. Aid secured as part of the framework should be channelled to development projects that have a direct and immediate bearing on the conditions of refugees rather than other on segments of the population of the countries of first asylum.
2. The donors' commitments to the transfer of resources should not be viewed as unlimited, but time-bound and geared to the realization of specific developmental goals that will contribute to the wellbeing of the refugees.
3. Resources channelled for this purpose should be in addition to normal development assistance; and, moreover, should be taken from protection budgets.
4. The distributive-developmental framework should be based on the reallocation of existing resources. In particular, it should seek to redirect money saved from "policing" functions (which amount to some US\$8 to US\$11 billion for the main resettlement countries) toward development projects.
5. Funds made available by donors for this purpose should not in any way cut into the allocations for existing multilateral institutions

such as the UNHCR, since for the distributive-development model to work it must be complemented by a set of vigorous multilateral institutions at both the global and regional levels which facilitate and coordinate the management of reallocation and distribution.

6. Resources channelled to distributive-developmental projects should be allocated to regional institutions rather than national governments, just as the global multilateral institutions should be there to serve and to assist the functioning of these regional organizations.
7. To be credible and effective, a distributive-developmental framework should incorporate a range of functions, including development projects in first asylum countries as well as Third World countries of resettlement, status determination processing, and *in situ* protection and emergency relief. Distinctive multilateral regional agencies under the overarching umbrella of the distributive-developmental framework could then have specific responsibilities but in coordination with others and under the aegis of the responsible regional organization supported by the global institutional framework.
8. The principle of burden sharing should apply as much to South-South relationships within the distributive-developmental framework as to North-South relationships.

The developing states of the region should discuss equitable burden sharing among themselves as recipients of aid from the developed countries and in sharing responsibility for refugee protection, resettlement, and availability of land and other local resources for development purposes. This is essential if one is to address the fundamental security dilemma created by the process of intrusive migration which both draws on local resources and often expropriates land. ■

## Legitimate and Illegitimate Discrimination: New Issues in Migration

*Edited by Howard Adelman*

ISBN 1-55014-238-0. 1995.

287 pp., indexed. \$22.95

**Freedom of movement:** If the members of a state are forced to flee, the legitimacy of that government is questionable. On the other hand, if members cannot or must leave, again the government is not democratically legitimate.

**Immigration control:** While limiting access and determining who may or may not become members of a sovereign state remains a legitimate prerogative of the state, the criteria, rules and processes for doing so must be compatible with its character as a democratic state.

*Legitimate and Illegitimate Discrimination: New Issues in Migration*, edited by Professor Howard Adelman, deals with the question of legitimacy with cases studies from the Developing World, Europe, Australia, the United States, and Canada.

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### III. Temporary Protection

Manuel Angel Castillo and James C. Hathaway

*The authors argue for a humane and dignified conceptualization of temporary protection, in which "refugee containment" is emphatically rejected. Mechanisms to respond to refugee vulnerabilities, safeguard the family, preserve forms of social organization, and meaningfully involve refugees in constructive interaction with their host communities are outlined. A maximum duration of five years is proposed, subject both to early adjustment to meet special needs and a firm commitment to ensure a permanent solution at the expiration of that timeframe. The necessity of mandated repatriation in safety and dignity is acknowledged, though proposals are advanced to maximize voluntary repatriation as a preferred response. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

In asking whether there is good reason to consider the adoption of temporary protection as either a complementary remedy to, or replacement for, traditional modes of protection, commentators assume permanent integration of refugees to be the *status quo* position. To the contrary, at least in law, temporary protection is already the universal norm. International instruments do not establish a right of refugees to permanent admission to an asylum state. Whereas humanitarian or human rights concerns would arguably dictate granting to refugees some form of durable protection where safe repatriation is impossible, international refugee law presently obligates the state of reception only to avoid the return (*refoulement*) of a refugee to a

country where she or he may face persecution.<sup>1</sup> There is no binding requirement to grant permanent residency in the asylum state.<sup>2</sup>

This legal framework notwithstanding, many Northern countries have in fact traditionally linked refugee status to permanent residency. In the less developed states of the South, however, permanent admission of refugees has not been the routine policy response.<sup>3</sup>

Recently, Northern states have also begun to establish temporary protection regimes. Does this trend to emphasize temporary protection in the industrialized world provide evidence of a failure of the refugee protection system? On balance, such a proposition appears more rhetorical than substantial. An important potential *advantage* of temporary protection is the facilitation of a more generous conceptual approach to refugee protection. States are more inclined to pursue definitional expansion against the background of a practice of temporary, rather than permanent, admission. Care must be taken, however, not to overstate the ability of a shift to temporary protection to counter exclusionary trends. The objective of the international refugee regime should be to establish the minimum acceptable basis for granting protection to as many refugees as possible.

#### How to Render Temporary Protection Humane

For temporary protection to be humane, it must enable refugees to live their lives in dignity. This is not simply a matter of meeting the minimum standards set by international human rights instruments, but rather requires full respect for the needs and reasonable aspirations of refugees. It is particularly important that a humane system of temporary protection avoid the assaults on human dignity that are typical of refugee "containment."

The obvious starting point of a humane regime of temporary protection must be scrupulous adherence to the duty not to interfere with access by asylum-seekers to the protection system. It is imperative that governments respect the principle of *non-refoulement* by allowing potential refugees admission to their territory, pending assessment of their claims by an international supervisory agency.

Beyond protection against *refoulement*, the "core rights" to be ensured during temporary protection should build on applicable general standards found, for example, in Conclusion No. 22 of the UNHCR Executive Committee.<sup>4</sup> More fundamentally, account should be taken of the fact that refugees are involuntary migrants who have been forced to flee their homes; that the conditions of refuge they face are often very stressful; and that uncertainty about their future options will be a source of anxiety for them. The rights guaranteed to refugees should constitute a meaningful response to these concerns.

It is important that the temporary protection regime be conceived to restore the refugee's sense of security. As a general principle, assistance should be structured to create a climate of increasing social representation and participation of refugees in deciding every issue regarding their stay and future. The overriding focus should be to assist refugees to become self-supporting under altered social and economic conditions. The needs of refugee children and women refugees must be the focus of specific concern.

Losing the support of family is particularly disruptive of a refugee's sense of self. The separation of families, especially where some members remain at risk in the country of origin, can exacerbate the psychological stress already encountered by most refugees. The shaping of a humane system of temporary protection therefore

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requires respect for the significance of family. The right of individuals and groups within a refugee community to determine the structure of their own communal life is both intrinsically and instrumentally important. Temporary protection should be conceived to encourage refugees to devise collective and shared solutions to the dilemmas of their life in refuge.

Because refugees do not have the choice to return home in order to support themselves, they should be guaranteed attenuation of general restrictions on the right of non-citizens to, for example, access the labour market, enjoy internal freedom of movement, or own land and other means of production. Development programs conceived as joint ventures with the local population may prove particularly helpful in overcoming resistance to refugee participation in the labour force. Culturally appropriate educational programs for children should be a clear priority and labour-oriented training for adults is also important. Language training and health education are also important priorities.

### **How Temporary Protection Should be Structured**

There is little logic to a regime that imposes all responsibility for ongoing protection of refugees on whatever state they happen to arrive in. The apparent arbitrariness of this present rule, coupled with the sheer size of contemporary refugee flows, no doubt contributes to the increasing reluctance of states to admit refugees to their communities, even for the purpose of providing temporary protection. The international supervisory authority should therefore initiate a process of consultation with the refugees, host government, and members of the broader international community to determine whether the country of first asylum is also the most appropriate site in which to provide temporary protection. We believe, however, that particular attention should be given to issues of physical security, functional compatibility, cultural harmony, and geographical proximity.

Determining how long temporary protection should last is a difficult and complex matter. The restoration of safety in the country of origin and the possibility of a dignified return and reintegration of refugees are logical standards for termination of the temporary protection regime. Yet because it is impossible to guarantee that conflicts will be solved within a reasonable period of time, a cutoff point has to be established at which temporary protection yields to a permanent solution.

We view five years as an acceptable outside limit for temporary protection. The timeframe must be long enough that there is a reasonable prospect of temporary protection functioning as a practical mechanism regularly to renew asylum capacity. While clearly not all refugee-producing crises are resolved in five years, there is solid empirical evidence that a significant proportion may be solved within five years after their commencement. As well, viewed from the refugee's perspective there is some evidence that five years in asylum is not usually long enough to cause a loss of one's original cultural identity. The international community must commit itself to the provision of a *permanent solution* to persons who have received temporary protection for five years.

### **How Temporary Protection Should be Brought to an End**

We believe that every effort should be made to avoid the necessity for mandated repatriation of refugees. Voluntary repatriation, where it is possible, is both more respectful of individual autonomy and less socially problematic than is mandated return. In keeping with this philosophy, we believe that it is important that the temporary protection regime be constructed in a way that enables refugees freely to assess the desirability and appropriateness of a decision to return to their home. The international supervisory agency should have a budget to facilitate the voluntary return of refugees. To avoid abuse of such funds, it may be necessary to restrict eligibility to per-

sons who have received temporary protection for perhaps one year or more. There should also be a guarantee of non-penalization of refugees whose attempts to re-establish themselves prove unworkable.

The fact remains, however, that not all refugees will choose voluntarily to repatriate to their state of origin even when a safe and dignified return is possible. To ensure, however, that mandated return is minimally violative of the former refugee's dignity, and simultaneously to minimize the social disturbances that inevitably accompany involuntary repatriation, we recommend adoption of the Norwegian notion of the establishment of a generous deadline for departure, of perhaps six months duration.

While mandated return will never be avoidable in all cases, the reformulated refugee regime should be attentive to all possibilities to ensure that it is an option of last resort. In any event, mandated return should be carried out in a way that bears strict scrutiny from the optic of human dignity. Human rights monitoring by the international community, preferably in the context of negotiated security guarantees with democratic and accountable authority structures in the state of origin, should be an integral part of the repatriation process. ■

### **Notes**

1. "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion": *Convention relating to the Status of Refugees* (Refugee Convention), at Art. 33(1).
2. The responsibility of states is phrased in permissive terms as simply an undertaking "... as far as possible [to] facilitate the assimilation and naturalization of refugees": Refugee Convention, *supra* note 1, at Art. 34.
3. During 1992 alone, UNHCR assisted some 2.4 million refugees to return home, especially Afghans, Guatemalans, and Cambodians. The average rate of 46,000 persons returning home each week was unprecedented: UNHCR, *The State of the World's Refugees: The Challenge of Protection* 103 (1993).
4. "Protection of Asylum Seekers in Situations of Large-Scale Influx," UNHCR Executive Committee Conclusion No. 22 (XXXII). □

## IV. Responsibility Sharing

Astri Suhrke and Asha Hans

*The authors propose a bifurcated responsibility sharing system, in which protection would normally be provided within the refugee's region of origin, with selective extra-regional protection to meet special needs cases. The major contribution of states outside the region would be a commitment to fiscal burden sharing. This system is argued to reflect a situation-specific morality, taking into account the realpolitik concerns that make a more elaborate and universalized system of humane responsibility sharing unworkable. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

Most of the world's refugee movements are not subject to arranged distribution among receiving states. Spontaneity and anarchy, rather than organized distribution of asylum seekers and refugees, constitute the norm. Yet, the present system has severe shortcomings that are well known: it entails systematic biases in cost distribution among receiving states (most refugees originate in, and are accommodated, in the world's poorer countries); it encourages destructive beggar-thy-neighbour policies (as states try unilaterally to shift refugees onto the "next state" in the manner of protectionist states in a trading system); and the random characteristics of the system accentuate the hardship inflicted on refugees (who may/may not happen to arrive in an area that provides protection).

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In both the UN and regional interstate fora, the discussion of principled burden sharing with respect to refugees has focused on financial aid rather than redistribution of refugees. Developing countries, while hosting most refugees, have not demanded generalized sharing schemes whereby the North would help to off-load the South. Demands for sharing have only been made in particular and exceptional cases. Apart from these, states seem to tacitly agree to accept present imbalances in the global distribution of refugees. Precisely for that reason, however, financial aid to states that host large refugee populations has long been regarded as essential and self-evidently necessary, although practice typically has lagged behind principle.

The obstacles to a generalized scheme for significant redistribution of refugees do not merely lie in the unwillingness of the North to open its doors, as many critics charge. Many refugees prefer to stay near their home in order eventually to return. Political and military reasons may have the same effect as displaced persons take up arms to regain their territory (e.g. the Palestinians) or to overthrow a regime (e.g. the Afghan mujahedeen). Some celebrated cases of transfer out of the region have had miserable results and been discontinued.

Many governments willingly host a considerable refugee burden even though their own countries suffer from poverty and instability. The reasons range from a sense of responsibility to national security concerns. If participating in a generalized scheme of sharing, on the other hand, states might have reduced autonomy in selecting both the number and nationality of refugees for admission.

Occasionally states have joined in redistributive schemes, but only as ad hoc responses to massive outflows. In

these cases, states used a combination of humanitarian, immigration and political criteria for admission, and set their own quotas for intake. Taken as a whole these criteria constitute implicit rules for sharing and suggest what the present state system can accommodate. Similar schemes may well be established in response to particular future emergencies (as some European states tried but failed to do for refugees from former Yugoslavia). If so, the criteria for sharing in past emergencies may well be applied. Since previous schemes contained many elements of durable solutions, this seems reasonable.

Proposals for improved responsibility schemes which are anchored in the past and the present—rather than an idealized future—could reasonably start by focusing on means to provide improved protection within the area of first asylum. Financial transfers to compensate for costs incurred by first asylum states would be essential. If asylum is likely to be long-term or return impossible, settlement and redistribution within the region would seem the least problematic option, as the case studies suggest. A strong case can be made for resettling special individual cases wherever their needs would be best met. To proceed further towards formalized and enduring schemes for redistribution would require changes in the underlying conditions which affect states' attitudes towards sharing.

### **Burden Sharing Versus Burden Shifting**

States tend to accept refugees on the basis of three kinds of considerations: (i) legal and humanitarian concerns, (ii) fear of greater international disorder which may occur if refugees are not helped, and (iii) national interests arising from whatever specific economic or political considerations are relevant

in the particular case (e.g. ethnic kin, demand for labour, foreign policy).

Any burden sharing scheme must be based on the *realpolitik* assumption that legal obligations and humanitarian considerations alone rarely suffice to persuade states to admit refugees (unless the numbers are quite small). Accepting this premise, we can ask under what conditions states would be willing to accept a principled commitment to participate in a burden sharing scheme.

A global sharing scheme is morally attractive. A regionalized reformulation of refugee law, on the other hand, presents certain advantages:

- a) refugees are likely to come anyway. Hence, the notion of avoiding greater disorder carries more weight than in a global context, assuming that regional states have at least a second-priority interest in regional order;
- b) most states are likely to be more concerned with (or involved in) conflicts within their region than outside. Hence, there is likely to be a greater sense of responsibility or political involvement with the refugees;
- c) existing patterns of regional cooperation may facilitate extension to refugee matters; and
- d) the sense of commonality which prevails within a region will incline states to view incorporation more easily than if the refugees came from outside the regions.

Yet, two important questions remain. How is a region defined and, what form will regional cooperation on refugee matters take? A minimalist scheme for responsibility sharing might amount to exclusion and tokenism (as is the current West European tendency), or a sharing which amounts to shifting (which the ASEAN countries did with respect to the Vietnamese refugees).

States participating in a systematized and long-term burden sharing scheme for refugees will probably insist on greater control over both membership and likely caseload. The latter would involve some control over the

causes of outflows as well as initial status determination. At present these critical conditions are lacking, as the "spot contract" nature of the international refugee regime indicates. More importantly, states can unilaterally and with some ease insulate themselves from distant refugee flows; even refugees within the region can be kept out—if not entirely—by means of interdiction, restrictions and border controls of various kinds. If this leads to lack of protection, or concentrated impact in one area, both local and international disorder may follow. Yet, these are "ifs", as is the impact of eventual disorders on other states; recent conflicts—from the war in former Yugoslavia to the genocide in Rwanda—demonstrate how readily most states can in fact insulate themselves from the consequences of violence elsewhere. Under these circumstances, states will be tempted to shift rather than share refugees.

It should be made clear that a regionally-oriented regime does not mean *exclusive* regional responsibility for "people-sharing". Under this system, a proportion of the world's total refugee population would be transferred out of the region when this is warranted for reasons of protection, special vulnerability, or family reunification. Other refugees can be expected to move out of the region on their own (spontaneous asylum seekers). Hence, there is no absolute separation.

Yet, it is clear that the overwhelming number of refugees would remain within their region of origin. Whether or not this is morally repugnant is less clear. Redistribution can have an adverse impact on the refugees, may create a backlash in the receiving societies, and, on the level of morality of states, may affect the security and power of sending as well as receiving nations. From this perspective, situation-specific morality rather than general principles seems to prevail. ■

## RECENT REPORTS

### • **Somali Refugees in Toronto: A Profile**

By Edward Opoku-Dapaah

ISBN 1-55014-278-x, 130 pp., \$12.95.

This is the first comprehensive study of Somali refugees in Toronto. It examines the social, residential, and linguistic characteristics of Somalis, their participation in the local economy, and the activity of Somali community organizations. The report also contains valuable suggestions and recommendations concerning suitable and more efficient service delivery to this community.

### • **Cambodian Refugees in Ontario: An Evaluation of Resettlement and Adaptation**

By Janet McLellan,

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This major study of Cambodian refugees in Ontario examines the effects of various forms of sponsorship on Cambodian resettlement. It also focuses on the linguistic, economic, educational, training and social dimensions of the whole process of adaptation. The delivery of services by governmental and NGO agencies as well as the effects of the past traumatic experiences of genocide and mass starvation on Cambodian refugees are fully discussed.

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Compiled by

Dr. John Morris and Lydia Sawicki.

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This directory is designed for service providers who work with refugee families and children in Metro Toronto. Its aim is to improve service provision through networking and the sharing of training opportunities.

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## V. Repatriation and Development Assistance

Robert F. Gorman and Gaim Kibreab

*The authors argue that refugees should be seen as agents of a process of development to begin during temporary protection and extend well into the process of return and reintegration. The process of development advocated is intended to engage local resources and energies in the refugee, host and stayee communities, in a "bottom-up" fashion. It involves a unified international role in allocating resources, enlivening and promoting development at the local level, and ensuring accountability. The mechanisms proposed require "judicious, not lavish" external resources, and establish a continuum between emergency relief operations and long-term development assistance. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

There is an important connection between flight and return and development. Flight has developmental implications both for the country of origin and the country of receipt, in that refugees and returnees can as easily be agents for development as burdens on development.

We wish also to underscore that development, wherever it exists, is principally the result of a local population's energies and activities. Genuine development is self-reliant development. The point is that no development takes place unless it is the genuine by-product of the efforts, imaginations, and aspirations of a local population. The principles we propose for the establishment of a regime for Temporary Asylum and for Repatriation Aid and

Development, flow from these underlying realities. We have also concluded that such a new regime of refugee protection will work best when the international community actively engages in addressing the root causes of refugee flight, and in bringing diplomatic pressure to bear on local governments and opposition groups to resolve their disputes. The system that we propose in the following analysis, then, is best coupled with the political, diplomatic, and perhaps even military engagement of the international community in the interests of restoring peace and security.

Developmental implications of emergency assistance should be taken into account at the outset, and the local population and the refugees or returnees should, in principle, be incorporated into the planning and implementation of projects. There must be a linkage of infrastructural projects (bricks and mortar type projects) with self-reliance and income generation components (the human improvement aspect of development). Dispensers of refugee aid should be conscious of its developmental effects, and development aid should account for the impact that refugees and returnees have on the economic and social infrastructure and on the population of refugee and returnee-affected regions.

The system of Refugee Aid and Development that we propose in countries of asylum incorporates self-consciously many of the widely acknowledged principles mentioned above, while calling for an international supervisory authority to take institutional control at the international level for allocation of resources, and at the same time enlivening and promoting a system of development planning at the local level. The system of temporary asylum adopted here also embraces the principle that countries hosting large numbers of refugees who

have fled from neighbouring states should be provided assistance to compensate for both the humanitarian and developmental costs of asylum. This is, we believe, an important element of preserving protection.

But what are the appropriate modalities of assistance? The bulk of emergency, care and maintenance assistance should continue to be provided by the international community. Additionally, where refugee populations place burdens on the local infrastructures (education, health, water supply, security systems, food storage, roads, environment, social services, range and land management, wood and energy supply, etc.) the host government and population should be provided assistance to compensate for these burdens and to strengthen the infrastructural capacity of refugee-receiving areas. The effects of large refugee populations on local agriculture and employment should also be taken into account. But this compensation should be based on documented needs, and it should be adequate to meeting just those tasks found most wanting. Money alone is not the key to development. The key is in stimulating, rewarding, and supporting initiative.

Large refugee flows are often conceptualized as development depressing events, insofar as they impose development burdens. This conception of refugee events ignores the fact that refugee and local populations, though often facing great exigency and stress, are quite resourceful. We believe that any new regime for temporary asylum and facilitation of repatriation must take this fact into account. Thus, from the very outset of a refugee event, we recommend that the international community shift the emphasis away from the international to the local. We propose that, prior to any funds being allocated for local

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infrastructural assistance, two local bodies be created: a Refugee Development Council (RDC) and a Local Development Council (LDC). The RDC should be composed of representatives of the newly arrived refugee population, including, where appropriate, community elders. Where appropriate, the RDC should be elected, but this will vary with the circumstances of the case. Similarly the LDCs should represent the economic, tribal and geographical interests of the host country population. Though stressing traditional elder roles, RDCs and LDCs should be viewed as a means of identifying and unleashing skills that exist among the local and refugee populations, including doctors and traditional healers, engineers and teachers, economists and entrepreneurs. They should also be so composed as to reflect the special needs and interests of women. We recognize, in this connec-

tion, that some of the traditional leadership structures are undoubtedly unrepresentative and oppressive, but change, including gender-related change, ultimately must come from within. Outside intervention can only be facilitative.

An effective system for returnee aid and development must be linked with ongoing strategies for repatriation in the country of temporary asylum. It must take into account the fast-changing reality of global politics, the indivisibility of the processes of repatriation, reconstruction, development and peacemaking, the capability of displaced people to reconstruct their own communities, given a chance, and the right of people to remain, or if displaced, to return to their country or place of origin in conditions of safety and dignity.

Under the principles inhering in the regime we propose, conditions in the

country of temporary asylum will focus on the development needs of the host country and the ultimate reintegration of the refugee population into an improved development context in the country of origin. Far from increasing the arbitrary nature of voluntary repatriation as it has often been experienced in the past decade, such a system should at once reduce pressures for repatriation from the government of temporary asylum and increase incentives for return. But all this hinges on the willingness of governments to accept a new system of principles and procedures that are solution oriented, that aggressively promote peaceful resolution of disputes in countries of origin, that promote the expansion of local development capacity and that are backed by adequate financial support. ■

## Asylum—A Moral Dilemma

By W. Gunther Plaut

Toronto: York Lanes Press; ISBN 1-55014-239-9; 192 pages, indexed; \$19.90.

Every year the refugee landscape changes, but only in that more problems are added, fewer are solved, and all become constantly more urgent. Fuelled by the explosion of the world's population, the quest for asylum is one of the most pressing problems of our age. Refugee-receiving nations—located frequently, but by no means exclusively, in the Western world—have to respond to masses of humanity searching for new livable homes. Human compassion for these refugees can be found everywhere, but so can xenophobia and the desire to preserve one's nation, economic wellbeing, and cultural integrity. The clash between these impulses represents one of the great dilemmas of our time and is the subject of Plaut's study. In exploring it, he provides a far-ranging inquiry into the human condition.

The book presents political, ethnic, philosophical, religious, and sociological arguments, and deals with some of the most troublesome and heartbreaking conflicts in the news.

**Contents:** *The Issues*; Questions Without Answers; Definitions; Religion, Natural Law, and Hospitality; A Look at History; Some Ethical Questions; Through the Lens of Sociobiology; Community

and Individual; Contended Rights: To Leave, Return, Remain; *The Practice*; Refugees in Africa; Four Asian Lands; Glimpses of Europe and Central America; The North American Experience; The Sanctuary Movement; A Final Look; Appendix A: Egyptian and Hittite Treaties; Appendix B: Human Rights-Major Documents; Appendix C: Refugee Documents; Protocol Relating to the Status of Refugees of 31 January 1967; Bibliography; Index.

**W. Gunther Plaut** is a senior scholar at the Holy Blossom Temple in Toronto. Born in Germany, where he received his doctor of laws, he fled Hitler's Reich for the United States where he became a rabbi, serving in Chicago, St. Paul, and since 1961 in Toronto. Plaut is the author of 19 books, including *Torah: A Modern Commentary* (with B. Bamberger). His recommendations on the refugee determination process, submitted in 1985 at the invitation of the Canadian government, had an impact far beyond Canada's shores.

*Asylum—A Moral Dilemma* is simultaneously published in the United States by Praeger Publishers.

Available from York Lanes Press

# Toward the Reformulation of International Refugee Law Symposium Report

Bill Frelick

*On May 18–21, 1995, forty international lawyers, social scientists, government officials, and representatives of intergovernmental and nongovernmental organizations gathered in Toronto to participate in a collaborative exercise, termed the Reformulation Project, to analyze and critique a proposed reformulation of the international refugee regime. General Rapporteur, Bill Frelick, presents this synthesis of the Meeting's workshop and plenary discussions.*

## The Reformulation Project Idea

The post-Cold War refugee reality is increasingly characterized by the notion of *non-entrée*, the containment of refugee flows either in the country of origin or in the region of origin. Keeping refugees out of potential receiving countries, through various visa and border controls, prevents refugees from availing themselves of the protection of international and domestic refugee law that entry would bring.

Since World War II, most Northern states have built a link between refugee protection and immigration. Persons recognized as refugees, usually, have been allowed to remain in host states on a permanent basis. However, even those societies most open to immigration, for example, the United States and Canada, have signalled their unwillingness to continue high levels of immigration generally, and their specific unwillingness, to be open to the arrival of asylum-seekers. Because the link between refugee protection and immigrant benefits has been axiomatic, the effect has been for gov-

ernments to erect barriers to prevent asylum-seekers from entering for fear that the governments would then be obliged to adjudicate the asylum-seekers' refugee claims and provide permanent immigration benefits to those qualifying as refugees.

Related to the increased incidence of *non-entrée* are two factors under the current refugee regime that create inequities in the treatment of refugees. First, protection is being proffered to a smaller and smaller percentage of the world's refugees who have the good fortune, means, or talent to surmount the obstacles to entry, gain a foothold in a receiving state, and avail themselves of that state's protection. Who benefits from protection is less related

to raphy, find refugees crossing their borders, and are left to carry a burden not of their own making with inadequate support from the rest of the international community.

The problem confronted by the Reformulation Project, therefore, is to provide a twofold basis for enhanced international coordination to protect refugees: first, by guaranteeing them unhindered access, the right to flee their countries and to seek asylum in other countries based on a broader refugee definition; and second, to share burdens and responsibilities among states more equitably.

The central feature underlying the Reformulation Project is the notion that, as a rule, refugee protection ought

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to a comparative index of risk of persecution than to the ability of the claimant to enter and to negotiate complex asylum adjudication systems. The tendency of governments has been not only to restrict access to asylum-seekers physically and legally, but also to interpret the refugee definition ever more narrowly so that the number of asylum-seekers who succeed in entering and who are recognized as refugees appears to be a shrinking proportion of the total number of refugees and would-be refugees in need of protection worldwide. This narrowing of the refugee definition, as it is interpreted by states, ironically comes at a time in history when a broader definition is called for. The second consequence of the current regime is that a disproportionate burden is visited on countries or regions of first asylum, who, due to the happenstance of geog-

to be temporary, and that permanent protection ought to be considered as the exception, the solution for residual cases for whom, after a period of time, repatriation in safety and dignity is not possible. The Project also insists that a more equitable and binding system of international burden sharing, both human and fiscal, is necessary to enable states of first asylum to keep their doors open. Finally, the Project calls for greater emphasis on laying the groundwork for eventual repatriation through training and development.

## Temporary Protection

The centerpiece of the Reformulation Project enterprise is the idea that refugee protection ought to be conceived of as a temporary palliative to provide a broad level of protection to refugees for a limited period of time. A balancing act is called for between, on the one

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hand, ensuring that temporary protection is humane, and, on the other, not encouraging the development of roots that will compromise the goal of eventual repatriation to the country of origin.

The workshop discussion, as well as the Study in Action, seemed focused more on the criteria for the humanness of temporary protection than on the implications this might have on encouraging voluntary repatriation at a later point in time. The willingness of states to embrace the Reformulation Project, however, is predicated on the idea that temporary protection will be the norm. Since, heretofore, permanent protection has been the norm (even for groups who supposedly were being offered only temporary asylum), governments will need to be convinced (against the body of available empirical evidence) that protection can be viable on a temporary basis, and that temporary protection will not simply mean delayed immigration; a "slow way of saying 'yes' to permanent admission," as one observer put it.

The two critical issues in this regard seem to be (1) the duration of temporary protection and (2) freedom of movement for persons enjoying temporary protection—the time/space continuum, so to speak.

Both the workshop and the Study in Action were committed to guaranteeing refugees in temporary protection the full panoply of rights enshrined in international human rights instruments. The commitment to upholding basic human rights standards was viewed as unconditional, regardless of the possible effect on the willingness of refugees to repatriate. Nevertheless, it was recognized that some governments, particularly in the South, would be reluctant to move away from restricting the movement of refugees, as this relates to security concerns, the protection of local markets, deterring local integration and paving the way for repatriation as the preferred durable solution. In the North, as well, it was pointed out that integration produces non-return; Salvadoreans in the United States were cited as an example

of a group provided temporary protected status who would not voluntarily return after peace was restored in the home country. The tension between states' interests in restricting refugee movement and the consequences of such restrictions in terms of human rights and psychosocial needs was not fully explored or resolved.

The Study in Action proposed a maximum temporary protection duration of not more than five years. For those persons who are not able to return after five years, permanent residence would be offered in the country of temporary protection or in a third state. This also involves a balancing between the time generally required for conflict resolution and the desire to limit the extent to which refugees are

deemed to be permanent residents after five years, and if international refugee assistance funding stops at that time, then the African states that host long-term refugee populations stand to lose significant revenues through the suggested reformulated system.

Although the workshop discussed some studies analysing durations of refugee stays in the 1970s, it did not have enough empirical evidence about the numbers and types of refugees who might not be able to return after five years to draw conclusions about who and how many might require durable solutions other than repatriation.

Termination of temporary protection was not discussed in great detail in either the workshop or plenary session. The Study in Action did address measures that could be taken to avoid the necessity of mandated repatriation, which would be considered the option of last resort. Little attention was paid, however, to the standards for the termination of refugee status for former refugees or for rejected asylum-seekers, and for the methods and standards governing removal for those unwilling to repatriate voluntarily.

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***Who benefits from protection is less related to a comparative index of risk of persecution than to the ability of the claimant to enter and to negotiate complex asylum adjudication systems.***

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in legal limbo. Allowing for exceptions for vulnerable groups who could be offered permanent residence sooner, five years was considered the appropriate balance that would be long enough to allow situations in the home country to be resolved and short enough to account for the psychosocial needs of the refugees.

Several questions remained. What is the utility in setting one, universal standard of five years as the maximum duration for temporary protection? Is more flexibility needed on a case-by-case basis, so that, for example, when refugees and host populations are culturally similar and a high level of political solidarity exists, (such as when Iran and Pakistan hosted Afghan refugees in the 1980s) ten years would be a duration that would not do any harm to the psychosocial needs of the refugees? However, would the obverse hold? If a host country was hostile and politically and/or culturally incompatible with the refugee population would that mean that a period of less than 5 years could be set as the maximum duration? Would this give states an incentive to be less hospitable to refugees (assuming that the perma-

A major concern expressed in the workshop, with implications for the viability of the Reformulation Project itself, is whether there could, in fact, be a *quid pro quo*, whereby the willingness of states to adopt temporary protection (and other features of the Reformulation Project) would, in fact, be linked to the dismantling of *non-entrée* barriers. The workshop reached a consensus that the adoption of temporary protection as a norm would not, in itself, induce states to lower *non-entrée* barriers. The response of European states to refugees from former Yugoslavia shows that the creation of a temporary protection regime does not, in itself, result in open borders. In fact, subsequent to the creation of a temporary protection mechanism, visa restrictions were imposed on Bosnians by

tus determination, closed refugee camps, and *non-entrée* barriers?

#### **Repatriation and Development Assistance**

If the norm of protection is to be temporary, then strong emphasis needs to be placed on repatriation, and how it might be promoted and facilitated. The Study in Action provided a useful, though limited, model for establishing a system of development that would foster repatriation. Its "bottom-up" model placed emphasis on the creation of grassroots refugee development councils and local development councils to coordinate sustainable development plans for returnees and "stayees"—the local populations that did not become refugees. This model, though promising in itself, seemed

cal host populations and refugees and within the refugee communities themselves.

Concerns were raised in the workshop that the Study in Action, in keeping within the parameters of the Reformulation Project, did not address the issue of root causes. Ironically, however, the emphasis on development does implicitly suggest an economic "root cause." The suggestion that development is an indispensable component for solving the refugee dilemma implies that the grounding for the displacement is economic. This assumption might need further examination. It would seem to be more consistent with the current—or reformulated—refugee definition to link repatriation with improvements in human rights conditions and to place greater emphasis on conflict resolution, perhaps utilizing similar refugee and local development council models.

The Study in Action briefly touched on the criteria for safe and dignified return. In one instance, it articulated a standard of a "clear and imminent danger to the safety of returnees" as the basis for determining the advisability of repatriation, and suggested identifying "repatriation enclaves" to which refugees who desired to return could go when "pervasive conflict" continues in the country of origin. These ideas, controversial in themselves, were not addressed by the workshop because they were considered to be outside the scope of the workshop's mandate.

#### **Responsibility Sharing**

In order to dismantle *non-entrée* barriers and to convince states to allow refugees access to temporary asylum on their territories, the Reformulation Project needs to develop a system that will assure states that opening their borders to refugees will not result in overwhelming refugee flows with which they alone will have to cope.

The workshop proposed that states would identify "risk-regions" on a fluid and *ad hoc* basis as a means of sharing responsibility for hosting refugee populations. The risk-region

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most European states. However, it was also pointed out, that the temporary protection scheme adopted in Europe in response to the Bosnian crisis did not include a responsibility sharing agreement, creating an incentive to impose access barriers for fear that open countries would receive a disproportionate share of the burden, even if on a temporary basis. This view suggests that the Reformulation Project, if fully implemented, could have the hoped for result in allowing unrestricted access for refugees. However, the unwillingness of European states to enter into a responsibility sharing agreement for Bosnians in temporary protection suggests the difficulty of fully implementing the proposal.

This raises the following question for the proponents of the Reformulation Project: What would be accomplished if states choose certain features of the Project that they find attractive—such as temporary rather than permanent protection—and yet maintain a strict refugee definition, sovereign sta-

weighted in the direction of rural refugees from the South fleeing from civil-war related conflicts. Lacking were models for promoting repatriation among other important components of the refugee reality, such as urban refugees.

The construction of a South-South development/repatriation model, while useful in itself, is not a sufficient building block on which to erect the Reformulation Project edifice. Attention needs to be paid to models for stimulating voluntary repatriation from North to South (which is likely to be the more difficult enterprise), if Northern governments are to be convinced to buy into the reformulated refugee regime. The workshop, while characterizing the Study in Action model as "good," suggested that it might be overly optimistic and—as is often the case with models—somewhat too neat a formulation that might fail to take politics and other human foibles into account. It was pointed out the likelihood of tensions between lo-

would be supported by a universal system of fiscal burden sharing. The Study in Action argued that a more universalized system for sharing responsibility for hosting refugees was not tenable, citing the *ad hoc* nature of refugee movements and host state responses, and the interests of states in maintaining regional security. Also cited in support of this thesis was the example of Africa, where the concern of African states seems to be less with sharing responsibility for hosting refugee populations than with receiving adequate financial support to accommodate those populations and to ease the burden on the local host population.

According to the risk-region model, those states that perceive the threat of unmanaged refugee migration would join together in regional groupings to attenuate the impact of such migration by sharing responsibility for hosting refugees among themselves. Partners in a risk-region would be more likely than those outside the region to be motivated to address the resolution of refugee-producing conflicts, as well as longer-term development as a means to encourage repatriation.

There were unresolved questions about how responsibilities for hosting refugees would be allocated among states and concern about refugees being treated as commodities as governments and international agencies negotiated moving them from sites of arrival to sites of temporary protection. How, for example, would countries of first asylum respond if refugees refused to be moved from the site of arrival to other countries of temporary asylum? Assuming strict adherence to the principle of *non-refoulement*, could refugees be involuntarily transferred among asylum states according to responsibility sharing agreements they might enter into?

A related question is how the allocation of responsibility sharing among states would relate to the dismantling of *non-entrée* barriers. If the Reformulation Project's system of refugee responsibility sharing is intended to be minimally coercive, and if refugees are

free to move, then it could be anticipated that far greater numbers of refugees (largely from the South) would likely move to more attractive states of asylum (largely in the North), particularly in the absence of barriers to their onward movement. Would refugee responsibility sharing agreements involve the return/relocation of such refugees to the region of first asylum? If so, does this mean, in effect, that *non-entrée* barriers would only be objectionable where direct *refoulement* was imminent, i.e., in countries of first asylum?

The workshop felt that rules for refugee responsibility sharing would have to be *ad hoc*, and that it would be unrealistic to think that responsibility levels could be set and stipulated through a treaty-based obligation. Nevertheless, the workshop did discuss the factors that would be used as principled criteria for determining responsibility sharing obligations, based largely on determinations of each state's absorptive capacity.

There was some concern that the regional approach, in effect, amounted to a "buying out" of refugee responsibility sharing on the part of Northern states; contributing money instead of making their territories available to refugees themselves. While there seemed to be general uneasiness with this prospect, and while it seemed contrary to the original intent of the Reformulation Project, there also appeared to be a grudging consensus that it would be unlikely to expect states to share universally in hosting of refugee populations, and that a "buy out" might be the best concession that could be won from states unwilling to host refugees within their territories.

In response to this concern, one model that might be explored further would be to employ a regional approach for hosting the bulk of refugees during their first five years of temporary protection. However, for the residual population for whom a durable solution is needed after five years, a permanent resettlement off-take to third countries outside the region could be elaborated. This is the ap-

proach that has been followed (more or less) for Southeast Asian refugees, and serves as an example of responsibility sharing among state actors within and outside a risk-region.

Elaborating such a model in greater detail would address an issue that the Reformulation Project has tended to downplay: What will be the significance of the "residual" refugee populations who can't go home? How should permanent exile be factored in as a realistic outcome for significant numbers of the world's refugees? Even a system that is based principally on the goal of temporary protection needs to devise a credible solution for those needing permanent protection in exile.

### Fiscal Burden Sharing

This Study in Action and workshop covered much of the same ground as those considering responsibility sharing, in terms of trying to develop a model for fair and equitable distribution of the fiscal burden of caring for refugees so that no state or region would be disproportionately saddled with this obligation. Although the Study in Action and the workshop took a somewhat more abstract approach toward the development of such a model, they appeared to arrive at a similar place as those dealing with responsibility sharing (or, at least the General Rapporteur will seek to identify and synthesize the complementary aspects of the two models).

The distributive model proposed in the Study in Action and modified by the workshop to include the concept of states as stakeholders, puts a greater emphasis on regional responses and responsibility than a purely multilateral/universalist one, but, like the risk-region model, includes a broader concept of region than would be conceived of according to a pure alliance construct.

The Study in Action takes the Reformulation Project in a direction that was not part of the original conception of the project—promoting the idea of preventive humanitarian action. Although the post-Cold War political landscape is littered with examples of

the failure of preventive humanitarian action, and the misuse of this concept to bolster and rationalize the current international *non-entrée* regime, the idea of preventive humanitarian action seems nevertheless to be an element that ought to be factored into a system of risk-region management and fiscal burden sharing. A cost-benefit analysis can't help but find preventive humanitarian action to be an appealing idea, given the immense costs of full-blown humanitarian disasters. As conceived by the Study in Action, preventive humanitarian action would also require greater coordination between relief and development, an idea that was also promoted in the Study in Action on Repatriation and Development Assistance.

The Study in Action's emphasis on countries of origin, although rejected in the original Reformulation Project design, seems to be a logical extension of the Responsibility Sharing workshop's idea of a risk-region by including within the region of risk the refugees' country of origin. This model also seems to relate quite favourably to the ideas advanced in the Study in Action and workshop dealing with repatriation and development, on the need to pave the way for repatriation through the creation of sustainable development projects in the country of origin. If international financial burden sharing is going to include the cost of development in the country of origin as part of repatriation schemes, it seems only logical that the allocation of such costs would also factor in preventive measures in countries of origin.

A number of issues remained unresolved relating to fiscal burden sharing. A major selling point of the Reformulation Project has been the anticipated cost savings if states are no longer required to expend enormous funds on elaborate refugee determination procedures and *non-entrée* mechanisms. Although some states seemed to have successfully transferred savings from these budgets into refugee assistance and development programs, it was clear that for many states

a direct trade-off of savings from one departmental "account" to another would not be possible.

How then would funds be raised to make the Reformulation Project system work? The workshop and the plenary session suggested some interesting possibilities. But the focus might have been too narrow. Although the workshop's mandate was fiscal burden sharing, this should be conceived broadly to include non-cash resources, such as labour, goods, and land, that would need to be included in any allocation/assessment of state burden sharing contributions.

Also left unresolved was whether contributions ought to be assessed as part of membership requirement in the UN or whether, as is currently the case with UNHCR, the contributions should be voluntary. Although the original concept of the Reformulation Project was that a binding system of assessed contributions was required, several participants questioned whether a binding system would succeed in raising any more funds than the current voluntary pledge/donation system. It seemed that more study was needed on this question to determine which method was likely to result in greater and more consistent support for UNHCR (or some newly conceived international refugee agency).

### International Administration

This workshop decided early on that the form of any international supervisory agency (ISA) should follow its function, and that, since the workshop did not have the benefit of the construction of the other building blocks, they could not yet agree upon an appropriate administrative structure for the enterprise as a whole. Nevertheless, the workshop was able to reach consensus on several key points from which the beginnings of an administrative structure could be discerned. The workshop participants had serious reservations that a universal institution could or should be responsible for the whole status determination process, the allocation of refugees

among states for temporary protection, or the return of refugees no longer in need of protection or rejected asylum-seekers.

The workshop identified the centrality of states in any refugee regime, and concluded that any ISA would be state-driven, since states would not concede what they see as core sovereign state functions, including decisions on status determination and immigration and border controls.

The Reformulation Project assumes a simpler, more inclusive refugee definition that would make for easier and cheaper status determination, especially through group recognition. But what about negative determinations? The workshop concluded that negative determinations would have to be individualized and include due process guarantees that would meet basic fairness criteria. The ISA could monitor and coordinate status determination, but the actual adjudicatory function, the workshop indicated, would remain a state responsibility. Similarly, the workshop felt that the ISA would have to steer clear of any operational role in returning persons not in need of protection, as assuming a police function would undercut its protection mandate.

These conclusions were reached based on considerations both of sovereignty and cost-effectiveness. Although the ISA would not have an operational role in status determination or removals, the workshop suggested that the ISA should have a strong advisory role. It suggested that the ISA's role could include issuing statements on positive group determinations, issuing procedural guidelines, and giving advice on particular cases. The importance of regionalism in restructuring the refugee regime into a workable system was a theme that ran through most workshop discussions, including this one. The workshop participants argued that states would have more ownership over a system administered on a regional basis, resulting in greater efficiency and more generous standards (as in the case of the OAU definition).

The workshop cautioned, however, that the model of regionally based refugee responsibility sharing proposed in the Responsibility Sharing Study in Action could result in regional confinement by coercively maintaining refugees in one region. The workshop maintained that the regionalization of the system had to be linked to the principle of free access. Given other proposals currently under discussion (the "Reception in the Region of Origin" project of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, for example), this concern ought to be looked at more closely.

The issue of sovereignty went to the heart of the Reformulation Project. Some argued that states would never accept an ISA that could tell them who and how many refugees to accept. The Project rests on the idea that states would be willing to make such a compromise if the protection offered were temporary and the costs shared. With such a limited track record to draw on to show the success of temporary protection schemes, however, the onus is on the Project to convince governments through the force of argument—logic, morality, and political benefit—of its validity and viability.

In any event, consensus seemed to gel around the concept of the ISA—in all likelihood, a reformed UNHCR—as a coordinating institution whose role would be defined, largely, as maintaining consistent and universal standards of refugee protection and responsibility through a regionalized system of consensual participation among states. Greater cooperation among states toward a regime of enhanced protection could be won if states were convinced that their obligations would be temporary and equitably shared.

### Conclusion

The workshops were not intended to formulate resolutions, nor was the final plenary expected to vote or otherwise arrive at a concluding document or statement. The observations

expressed in the final plenary reflected the personal views of those articulating them, making it difficult to draw a sense of consensus from the participants.

Much of the discussion focused on the political context in which the dialogue regarding reformulation of international refugee law is taking place. If anything approaching a dissenting consensus to a major thrust of the Reformulation Project could be said to have emerged among participants in the symposium, it was a sense of the danger of opening the Pandora's Box of the Refugee Convention (and Protocol) for fear that in the present political climate a broader refugee definition would fail and that a more restrictive definition could be fashioned. Some suggested that the Convention has more flexibility, as written, than the Reformulation Project would suggest, and that it can be interpreted more lib-

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erally or more restrictively, depending on the political will of those interpreting it. Creating a new instrument, it was suggested, would not in itself establish such political will. It was also argued that the Convention still has relevance and utility as a critical instrument for confronting restrictive actions by States.

Others observed, however, that governments are moving forward in various ways to devise a more restrictive refugee regime that marginalizes most of the world's refugees and widens the gap between North and South in shouldering the refugee burden. According to this view, the Reformulation Project is unlikely to cause damage to refugee rights, and might have the benefit of presenting States with a more coherent response that satisfies their basic concerns.

Regardless of their views about the merits of the Reformulation Project, the participants, generally, seemed to be keeping an eye on the probable re-

sponse of governments to the Project. Would states be convinced by the logic of the Project? Fundamentally, would they be willing to sacrifice some of their sovereign prerogatives—primarily in the area of status determination and loosening of immigration controls for asylum-seekers—in return for the benefits of a new regime based on temporary protection and burden sharing? How receptive would they be to the International Supervisory Agency if it was able to fulfill the roles conceived on its behalf by the Reformulation Project?

The root of at least some of the ambivalence towards the Reformulation Project seemed to be a political equation suggesting that the more attractive the concept could be made to States (more specifically, the Northern states), the less palatable it might become to refugee rights advocates. Some saw a danger that the Reformu-

lation Project would be taken in bits and pieces, rather than as a whole, and that it ran the risk of providing scholarly legitimacy to governments looking for a rationale for not providing permanent asylum, but having no interest in dropping barriers to access, nor in broadening the refugee definition or sharing responsibility for refugees more equitably. There was concern that if temporary protection became the norm, the model for maintaining refugees in temporary protection would gravitate towards one of isolation and restriction, even detention, rather than empowerment and integration. This would be based on empirical evidence that integration produces non-return. On its face, it seems self-evident that an empowered and integrated refugee is less likely to return voluntarily (except in cases where he or she is motivated to do so for ideological or personal reasons) than a refugee who has been segregated from the host society. Could

states be convinced to "buy" a binding concept setting standards for treatment of refugees in temporary protection that would meet the requirements of refugee rights advocates? Or would that price be too high, in that they might lose out in their ultimate goal of seeing that refugees do not remain permanently? Ultimately, the deciding factor for states in considering whether to embrace the Reformulation Project may well be the extent to which it binds or does not bind them to certain principles and actions.

Ironically, the deciding factor for refugee rights advocates in determining whether or not they will be able to endorse this Project may well also hinge on the question of free choice. However, in their case, this refers not to the choice exercised by a state in the name of sovereignty and national interests, but rather to the free will and integrity of the individual refugee. To what extent can the Reformulation Project be structured to achieve its objectives of temporary protection and repatriation on a voluntary basis? To what extent would the Project have to rely on coercion to achieve its objectives? The prospect of moving refugees to locations that are not their preferred destinations, as part of responsibility sharing agreements, coupled with enforced removals upon the expiration of temporary protection status, could make it less attractive to refugee rights advocates as an alternative to the present, flawed system. The perceived risk would be that this approach strengthens the hands of states to treat refugees and asylum-seekers as they wish, without taking their interests and choices into account.

There are a number of elements of the Reformulation Project that call for more extensive consideration as the Project develops. Among them would be a discussion of the standards and procedures that have yet to be developed for safe and dignified return. What constitutes a dignified return? Does this require an examination of the relative importance of voluntariness on the part of refugees? The Project's proposed new standard for a refugee

definition, replacing the well-founded fear of persecution standard with a more easily decided "serious harm" standard based on the "ability of the state to protect", was not discussed in depth in the May symposium. Although there was considerable discussion regarding repatriation for refugees after it is safe to return, as well as discussion regarding *prima facie* positive group determination, little attention was paid to persons determined not to be refugees. The due process rights of such persons, and the costs associated with appeals and removals of those "screened out", need to be explored in greater detail.

The symposium was organized for the purpose of subjecting the Reformulation Project to careful and critical examination. As a result, comments in the final plenary often focused on participants' reservations and objections. Few, however, questioned its critique of the limitations of the present regime. In moving from critique of the old to construction of a new regime, however, the Reformulation Project is now in the difficult stage of ascertaining whether the proposal will be able to stand as an alternative system, tested against whatever realities it might encounter. As a result of this scrutiny, some elements will be revised. For example, the Reformulation Project is likely to accord more weight to regional structures of burden sharing as being more consistent with practical realities, as opposed to the more abstract and universal idea originally proposed.

As it now shifts to respond to real-world needs, it becomes increasingly evident that the Reformulation Project is not conceived as an ideal regime or a legal laboratory creation. It comes about and is being developed, rather, as a result of and in response to the very real challenges thrust upon international refugee law in the 1990s due to the failure of the present regime to provide adequate protection. It ought not, therefore, to be held to a standard that requires it to demonstrate a direct benefit to all the world's refugees and asylum-seekers. Rather, its value ought to

be judged according to the extent that it suitably addresses the situations and needs of the majority of the world's refugees, who, it is argued, do flee situations that are likely to be resolved within a five-year period, and who, reasonably, could be expected to return if refugee status did not carry a presumption of permanent exile. The Reformulation Project has the flexibility to allow for exceptions for refugees needing permanent solutions other than repatriation. However, in general, through *prima facie* group determinations and temporary protection, the Reformulation Project is seen as providing a broader (if shallower) level of protection for most of the world's refugees, at the same time as it would limit some of the benefits for that small percentage of the world's refugees who have successfully navigated *non-entrée* barriers, undergone individualized asylum procedures, and been granted permanent immigration status: "Reducing the Cadillacs for the few, increasing the bicycles for the many."

Even if the Reformulation Project could be adopted precisely as conceived, there will be those who will never stop advocating for a refugee rights regime that would represent anything less than a Cadillac for all asylum-seekers and refugees, and who will fault the Reformulation Project for its willingness to advocate for less than that ideal. So, we return to our starting point—the political dimension. Refugee law is not conceived (or reconceived) in a political vacuum. If, in reality, first asylum is being denied because a substantial proportion of refugees and would-be refugees are being denied access even to temporary protection, and if the purpose of the Reformulation Project is to devise a system that allows persons faced with serious harm in their home countries to universally seek and enjoy protection from such harm, then it deserves the careful and thoughtful consideration of nongovernmental and state actors alike, who, together, will fashion the new refugee regime reality. ■

# The Next Stage of the Reformulation Project

James C. Hathaway

Contributors to the Reformulation Project have expressed support and outlined concerns, both of which we are now seeking to develop and address. Four main areas of concern have arisen regarding our initiative to place a proposal for the fundamental restructuring of refugee law on the table at the present time:

1. There is not a consensus that the magnitude of the present crisis in the refugee protection system warrants its wholesale replacement by a new regime. Many participants believe that there is a real chance that significant protection value might be "extracted" from the creative tailoring of extant mechanisms of protection;
2. There is concern that the lack of concrete experience in the implementation of several key components of the proposed protection regime would militate against governmental interest in a reform of the kind suggested. In particular, the viability of enhanced international management of the system, the ability to humanely ensure that "temporary" protection is, at least in most cases, genuinely of finite duration, and the willingness of host governments to subscribe to an empowering model of temporary protection, were all viewed as untested hypotheses. Most of the contributors believe that, while each of these mechanisms might well prove of value, their wholesale adoption by governments was highly unlikely without clear evidence of their practicality and political acceptability;
3. Related to the second concern, it was the view of a number of con-

tributors that there was a risk of selective, protection-reducing reform if the proposal as presently conceived were formally advanced in international lawmaking circles. States might, for example, embrace a universalized commitment to temporary protection without accepting the proposed *quid pro quo* of burden and responsibility sharing. While others insisted that the posited "packaging" of a balanced set of reforms would, if anything, stymie the momentum of the largely state-centered reforms to refugee protection presently being implemented, most contributors felt that states should not be encouraged to feel at liberty to abandon presently accepted protection mechanisms; and

4. Fourthly, scepticism was expressed that there is a sufficient sense of interconnection at the global level to propel the move toward a more unified international protection system of the kind proposed. There was, however, near-unanimous support for greater solidarity in refugee protection at the (more interconnected) regional level. These efforts could be orchestrated and supported at the global level.

These reservations notwithstanding, it was equally clear that the majority of contributors acknowledged the force of the Project's essential goals. Most agreed that *non-entrée* practices are presently undermining the implicit premise of the Refugee Convention that states are prepared to grant access to asylum. It was also agreed that the "accident of geography" approach to the allocation of burdens and responsibilities is untenable, and that the quality of protection afforded refugees is often neither fully respectful of basic norms of human dignity nor consonant with the theoretical commitment to promote the repatriation and reinte-

gration of refugees in their home countries when circumstances allow. The challenge, then, was how best to draw on the Reformulation Project's insights and concrete ideas for change without running afoul of the four obstacles to a program of holistic reform noted above.

In the final analysis, we have elected to construct our follow-through at two levels. First, we will do whatever is possible to reform the refugee protection system *from within*. Taking account both of the reservations expressed to the present logic of comprehensive reform and of the components of the Project's work that attracted serious interest among contributors, we will promote consideration of *supplementary protection mechanisms* that require neither the amendment of the Refugee Convention nor the institutional restructuring of the UNHCR or national protection systems.

Second and simultaneously, we will lay the empirical and political groundwork for a more holistic reformulation of the protection regime. To avoid finding ourselves in a defensive, rearguard situation, I remain convinced that those of us concerned with the wellbeing of refugees need desperately to engage in critical thinking and to formulate concrete ideas to guide fundamental reform when and if the supplementary protection mechanisms fail adequately to reconcile the needs of refugees and states. It is important, in other words, to both act within the present context and to prepare for future eventualities.

In thinking of ways to equip the present refugee protection regime to attenuate the challenge of *non-entrée*, to promote enhanced solidarity among states in the provision of asylum, and to respond pragmatically to the diluted and debilitating nature of many present protection arrangements, we

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have identified two general themes we believe are worth developing for early consideration by persons and organizations concerned with refugee protection, international human rights, and global governance.

### **Common But Differentiated Responsibility Toward Refugees**

Much of the present refugee regime's disfunction can be traced to the atomistic notion of responsibility toward refugees that has evolved since the beginning of the Cold War. States engage in *non-entrée* and containment practices in large measure to avoid the particularized responsibility that ensues when a refugee arrives in their territory, and frequently offer only in-

Taking into account the importance of a solid empirical foundation to the success of any proposal for even supplementary change, we propose to test the theoretical logic of responsibility and burden sharing as it is conceived, against a small number of contemporary case studies. Tentatively, the empirical component will center on (a) refugees from Bosnia seeking entry into Europe (North-to-North); (b) refugees from Rwanda and Burundi seeking entry into Zaire and Tanzania (South-to-South); and (c) refugees from Haiti seeking entry into the United States (South-to-North). The goal will be both to learn from the successes and failures of efforts to share burdens and responsibilities in each of

consensus that it would be worthwhile to design a model of refugee rights that is specifically tailored to the psychosocial needs of persons in receipt of temporary protection, and which reinforces and contextualizes the obligations assumed by states under the Refugee Convention and general international human rights law.

Beyond designing temporary protection as a dignified and rights-regarding process, it was felt that it was equally important to promote a solution-oriented vision of temporary protection. While repatriation is, at least in principle, acknowledged to be the preferred solution to refugeehood, the mechanisms of temporary protection too often tend to work against this goal. In particular, refugees may be debilitated during temporary protection by social and physical isolation, and by the denial of access to meaningful socioeconomic activity. The "Study in Action of Repatriation and Development Assistance," in contrast, conceives of refugees as agents of a process of development to begin during temporary protection and extending well into the stage of return and reintegration. The process of development advocated in the Study is intended to engage local resources and energies in refugee, host, and stayee communities. It involves a limited international role in allocating resources, enlivening and promoting development at the local level, and ensuring accountability. The mechanisms proposed require "judicious, not lavish" external resources, and establish a continuum between emergency relief operations and long-term development assistance.

The supplementary study of "A Dignified and Solution-Oriented Approach to Refugee Protection" will therefore take present legal and institutional structures as its framework, but seek to provide guidance on how best to dovetail this framework to the reality of enhanced resort by states to temporary protection. It will serve as a principled yet practical supplement to the present understanding of the minimum acceptable standards for humane protection, and move the

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humane "protection" as a deterrent to other would-be arrivals. Yet there is nothing in the Refugee Convention that requires states to act independently of each other in meeting the needs of refugees. To the contrary, the Preamble to the Refugee Convention points toward a degree of collaboration among states that has yet to be realized in practice.

We are now undertaking a follow-through study that investigates the value of the "risk-region" concept to define primary responsibility to receive refugees, coupled with a broadened understanding of "collective security" that would sustain inter-regional fiscal burden sharing and the provision of exceptional and residual asylum and resettlement. We will seek to advance thinking on the ways in which regional and global governance structures can be effectively coordinated to facilitate an "insurance model" of refugee protection, in which the incentive to take harsh and preemptive measures against refugees is attenuated as a function of diminished risk to any particular state of destination.

these situations, and to analyze the viability of intra-regional responsibility sharing and inter-regional burden sharing in the actual circumstances of each of these important refugee flows.

### **A Dignified and Solution-Oriented Approach to Refugee Protection**

While it was the consensus of the contributors to the meeting that it was neither necessary nor strategically desirable to *encourage* states to view temporary protection as the normal response to refugeehood, it was generally understood that in fact international law requires no more than dignified protection of refugees pending their safe return to the state of origin. It was also acknowledged that temporary protection has always been standard policy in most parts of the less developed world, and is increasingly resorted to by developed countries as well.

The concern was expressed that the granting of "temporary" protection is not infrequently treated by states as a pretext to deal with refugees without due respect for their refugee-specific and general human rights. There was



protection regime toward greater harmony with the internationally preferred solution of repatriation in safety and dignity.

### Consultative Research Strategy

A major objective of the Reformulation Project has always been to reach out to the broader human rights and global governance communities, and to encourage them to join with the present circle of contributors to the Project in promoting the cause of a reinvigorated system of refugee protection. Rather than offering a relatively finalized blueprint for change in the hope of receiving advice on implementation strategy, we intend to draw a broadly defined group of interested parties into the process of testing our hypotheses for supplemental change to the refugee protection system against their understanding of both what is needed and what is viable.

To this end, we have established a site on the World Wide Web, and we will operate an electronic mail discussion list, as well as an electronic archive of our background materials and participant responses. We see the Internet as an effective means of involving persons who have contributed to the project to-date, as well as the broader refugee protection, human rights, and global governance communities. Not only is this consultation process, as conceived, open to many more people than would be possible by strict reliance on face-to-face meetings, but the interactive written communication format should allow for a more sustained process of thoughtful reflection.

The email discussion will run from late March through the end of June, 1996. We then intend to revise the two draft papers, taking into account ideas and suggestions which arise during the discussion. The revised papers will be presented for final discussions at two regional fora, perhaps in the Autumn of 1996, before making them widely available to governments, NGOs and the academic community. ■

*End of Focus Section*

## Toward the Reformulation of International Refugee Law

### Would You Like to Contribute?

#### Email Forum

As part of its ongoing research project, "Toward the Reformulation of International Refugee Law," the Centre for Refugee Studies at Toronto's York University, under the direction of Professor James Hathaway, is organizing an email discussion of two papers, entitled "Common but Differentiated Responsibility Toward Refugees" and "A Dignified and Solution-Oriented Approach to Refugee Protection."

The discussion will run from late March through the end of June, 1996. Interested individuals can consult our home page on the Internet in late March to obtain copies of the papers. The URL will be [http://www.yorku.ca/research/crs/law/RP\\_HP.htm](http://www.yorku.ca/research/crs/law/RP_HP.htm).

You can also reach us now by email, at [REFORM@YORKU.CA](mailto:REFORM@YORKU.CA), or contact Alex Neve, Legal Programmes Coordinator, by phone or fax. If you would like to participate but do not have access to the Internet, please let us know.

### Would you like to obtain copies of the papers and conference proceedings?

We expect that a volume containing the full text of the Five Studies in Action and other documents from the May 1995 Symposium—*Toward the Reformulation of International Refugee Law*—will be published in mid-1996.

If you would like to be kept informed as to when and where that publication will be available, please contact:

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# Struggling for Legal Status: Mainland Chinese Mobilization in Canada<sup>1</sup>

Tian Guang and Lu Jin

## Abstract

Between the end of 1993 and the spring of 1994, about 5000 Mainland Chinese rejected refugee (MCR) claimants mobilized themselves in Canada to lobby the Canadian government to make a special policy for them so that they could be considered for landed immigration status. The mobilization, launched by the Mainland Chinese Refugee Organization (MCRO), won wide sympathy and support from the Chinese community and mainstream society in Canada. The MCRs stated their goals and demands through Chinese ethnic media and mainstream media, started a dialogue with the Canadian government and even staged a protest in front of the Parliament Buildings in

Ottawa. On July 7, 1994, the Minister of Citizenship and Immigration Canada issued a policy, known as the Deferred Removal Orders Class (DROC) program, designed for claimants in similar situations.

In this paper, we examine the process of the movement, analyze its features, and discuss its effects on the Chinese diaspora community in Canada. The movement emerged out of the "fear" of a group of Chinese claimants, caused by the threat of being deported from Canada. The success of the movement was based on the mobilization of ethnic and social resources by the MCRO.

## Introduction

We live in a rapidly changing and globalized world within which the transnational mass movements of population have become more popular than ever before. As a specific phenomenon that developed with the growth of state hegemony in the 15th century, refugee experience is hardly new (Donnelly and Hopkins 1993, 2). In the contemporary world complex population movement, refugees are a growing element associated with the new world order that followed the end of Cold War (Richmond 1994, xi). It has been an international problem that is increasingly challenging concerned scholars all over the world since World War II.

Mainland Chinese Refugee (MCR) claimants are by no means a new phenomenon in the refugee world; the numbers of MCR claimants entering North America, particularly Canada, substantially increased after the Tiananmen Tragedy of June 4, 1989, but this is just the latest of a number of refugee groups who have entered North America historically (Tian et al.,

1994). Due to Canada's prosperity in comparison with China and the perceived opportunity for a better life, more and more MCRs chose Metro Toronto as their destination. According to the statistics released by the Immigration and Refugee Board of Canada (IRB), from January, 1984 to June, 1993, 8,992 Mainland Chinese had made refugee claims in Canada. Based on the reports in local Chinese newspapers, it is estimated that about 2,500 MCRs live in Metro Toronto.

Larger numbers of MCRs coming to Canada did not occur until recent years, as will be described. The reforms and the "open door" policy in China in the last two decades has made the Chinese more exposed to the West than ever before. The desire to emigrate far exceeds the available resources, resulting in large numbers of illegal emigrants and refugees. Once they have left China, these illegal emigrants and refugees become members of the diaspora Chinese community or overseas Chinese community, which has now reached a total world population of 50 million (Fu 1994). In Canada, although some of them subsequently qualify as *bona fide* refugees according to Canadian refugee policies and are permitted to stay permanently, most of them fail to meet the Geneva convention criteria. Some were subse-

quently allowed to stay in Canada temporarily under the special order by the Minister of Employment and Immigration Canada in the Summer of 1989 (Gilad 1990, 314). Up to 1994, there were about 4,500 such rejected MCR claimants cross Canada (*Winnipeg Free Press*, April 19, 1994, A4). Due to the uncertainty of their legal status in Canada, they were facing the danger to be deported back to China. This fact made them realize that they must mobilize themselves and struggle for their legal status collectively.

Collective Behaviour theory defines "fear," "crisis," or "panic" as one of the important determinants of collective behaviour. According to Strauss:

The conditions of panic can be roughly classified into three categories: physiological, psychological, and sociological ... A student seeking a genuinely effective statement of panic causation would attempt to find what is essential to these diverse conditions and tie these essential conditions into a dynamic statement of the development and outbreak of the panic occurrence. (Strauss 1944, 324)

In the case of the MCR movement, the notion of "fear" is a psychological one and it has had significant impact on the emergence of the movement. It is "fear" that brought all the Chinese re-

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jected refugees together. The movement started when this group of people shared the same fear or felt threatened by the "inevitable expectancy of danger." As a Chinese saying goes: "*tong bing xiang lian* (fellow sufferers commiserate with each other)." The threat made these people gather together and start certain actions in order to fight for their common interests or safety (not to be deported). Here, their shared identity of being "in the same boat" was reflected in their collective goals:

We assume that people can and do care about collective goals and act on them as if they were personal benefits. We take the goals as subjectively determined and often linked to important elements of people's self-identities. This assumption is in line with virtually all available empirical evidence about collective action participants. (Morris and Mueller 1992, 252)

Having the same "fear" and "collective goals" in mind, Chinese rejected refugee claimants started their actions. They mobilized support from society and organized mass meetings to make their situations understood and their voices heard, resulting in a protest movement led by these rejected MCR claimants.

Mobilization is an important process in any movement. It has a direct impact on the outcome of a movement. How did they assess the situation, what strategies did they make accordingly, what disadvantages did they have and how did they manage to overcome them? These are issues facing the MCRO's leadership of the movement:

... Social networks providing group coherence and strong horizontal links are key facilitators of collective action. These links promote the development of group identity and group solidarity. They also foster communication and encourage the development of organizational skills and leadership experience. (Carroll 1992, 40)

The establishment of the Mainland Chinese Refugees Organization

(MCRO) played a crucial role in this movement. It not only provided to the Chinese rejected refugees a sense of belonging in a foreign society but also made the Canadian government and society understand this group.

Resource Mobilization Theory also stresses the importance of leadership in the social movement. "Leaders identify and define grievances, develop a sense of groupness, devise strategies, and aid mobilization by reducing its costs and taking advantages of opportunities for collective action" (Carroll 1992, 40). According to Oliver, there are two kinds of technologies; production technologies and mobilization technologies (Oliver 1992, 255). Production technologies are sets of knowledge about ways of achieving goals, such as lobbying, demonstrations, strikes, or attending a public hearing. Mobilization technologies are sets of

Mobilizing money can take any forms, as long as it is raised. Mobilizing time involves more strategies, depending on who does the mobilization and who is mobilized. It requires being willing to ask people to do things and knowing something about the people one is trying to mobilize. The personal link is very important. It also requires asking people who are known to be interested and can make a contribution to the movement.

### Background

The June 4th Tiananmen Incident in China caused strong responses from around the world. Canada was one of the countries which fiercely protested against the incident. The Canadian government under Mulroney immediately issued an administrative moratorium on removals of the rejected MCRs claimants in Canada.

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knowledge about ways of accumulating the resources (such as time and money) necessary for production technologies. Organization leaders' understanding and analysis of the situation directly affect their mobilization strategies, thus influencing the outcome of the movement. They balanced the two technologies in a society foreign to them. They focused their "production technologies" exclusively on the Canadian government so that more energies could be spent on "mobilization technologies."

Time and money as resources are the two major components in the "mobilization technologies." As Oliver states:

Money is perfectly fungible; it doesn't matter from whom it comes or in what amounts ... Time is very different ... It always matters who is participating, and a time contribution can never be physically removed from the giver. (Oliver 1992, 257)

Two implications followed: first, these Chinese would be granted landed immigrant status in Canada, as long as they held a valid visa; second, Chinese, who did not hold a valid visa in Canada or had illegally entered Canada, would not be deported back to China. Instead, they would be allowed to apply for Convention refugee status. This policy had a great impact on the Chinese in Canada at that time. For those who held valid visas, no matter whether they were student visas, visitor's visas or even a transit visas, were all eligible to apply for landed immigrant status and often it was granted (cf. Liu 1995). All the others who did not hold valid visas, applied for conventional refugee status (cf. Tian et al. 1994).

By the end of 1992, there were about 8000 Chinese conventional refugee claimants in Canada, mainly in large cities such as Toronto, Montreal, and Vancouver. The panel of the Immigra-

tion and Refugee Board (IRB) made its decision on the basis of its knowledge of China and its views on the claimants' claims, in accordance with the Convention on the Status of Refugees. Among all the claimants, about 30 percent of applications were approved; while the majority were refused. In total, about 5000 Chinese claimants were rejected. Rejected claimants subsequently either appealed to the federal court, or applied to stay on humanitarian and compassionate grounds.

While the application for refugee status was being assessed by IRB, the claimant would get a wide range of government assistance such as legal aid, living allowance, temporary medical assistance, employment service, free ESL education, occupational training, interest-free transportation loans and other social assistance. It was estimated that the Federal government would spend up to \$50 000 per refugee claimant in order to complete the full process.

The Canadian refugee policy was seen as the most generous in the world. The perceived "pull" factor might be overwhelming. An accepted MCR claimant told one of the authors:

When I managed to escape from China after June 4, I went to Austria to apply for refugee status. You know what, I was put into prison for months to wait for a hearing. I basically lived with prisoners and was badly treated. I couldn't get good food and was beaten twice by the policemen. My personal belongings were stolen ... Finally, I got help and came to Canada. There is no comparison in terms of how the two governments treat me as a refugee. I am glad that I can live here. I am a Christian now. (interview, Dec. 28, 1994)

A rejected MCR said:

When our group got to Bolivia, we really intended to settle there and find chances to do some business. After a while, we found out that the economy was bad in the country and there was no money. In the meantime, we were told that it would be very easy to get status in Canada. We then thought there might be good

chances there, since Canada is a developed country. Therefore, we came here and applied for refugee status. (interview, Jan. 15, 1995)

As the economy in Canada was experiencing a severe recession in the early 1990s, Canadians had mixed feelings about the numbers of refugee claimants who were "flocking" to the country. While many people were proud and happy to be able to welcome people fleeing persecution from other parts of the world, there were also strong voices against existing Canadian refugee policy. Complaints were that current refugee policy was taken advantage of by people who were not genuine refugees; government had spent too much of taxpayers' money on refugees, and claimants created instability in society owing to the increase of the crimes related to refugee claimants; there was a clearly negative sentiment toward refugee claimants in Canada.

It was in this social climate that a group of Chinese refugee claimants decided to setup their own organization, which was aimed at uniting all Chinese refugee claimants in Canada to better express their interests. Their intention was to help Chinese refugees better adapt to the society, use the organization as a means to take care of Chinese refugees, solve their common problems and, most important of all, to create a good image in the society. The initial idea of this organization was also to create a sense of belonging among Chinese refugees. In January 1992, the Mainland Chinese Refugee Organization (MCRO) was established, as a non-profit, and nongovernmental association.

The MCRO strongly advocated four principles: self-respect, self-love, self-strengthen (translated from Chinese, meaning: to build up confidence) and self-establish (translated from Chinese, it means self-reliance). They educated refugee claimants that they did have the right to get government welfare. However, they also taught that welfare was a burden on the government and Canadians did not like it. Therefore, refugees were advised that

they should get off welfare as soon as they could and try to make contributions to the society as taxpayers. The organization also strongly discouraged any involvement in crime. It was made clear to MCRs that the MCRO agreed that deportation was necessary for those who committed crimes or created any instability in Canada (Organization Charter 1992).

The MCRO organization was widely welcomed by Chinese refugee claimants. Letters came from many quarters of the country to support the organization. For example, a letter from Montreal reads:

In the situation of being discriminated against and attacked by the local media and "noted persons," it is absolutely necessary and significant for Chinese refugee claimants to have an organization of their own. Please receive my sincere respect to the organizers and leaders of the organization. We hope the organization will help us gain understanding from Canadian people. (letter, Dec., 1992, translated from Chinese)

## The Movement

Toward the end of 1993 and early 1994, the issue of Chinese rejected refugee claimants became critical. Most of the Chinese refugee applications were turned down and the new government (Liberal) started to reconsider the administrative moratorium on removals of rejected Chinese claimants. Both Chinese and English media were reporting the relevant information and implied that deportation of Mainland Chinese rejected refugee claimants was possible.

*The Toronto Star* reported that:

Immigration Minister Sergio Marchi says that he has ruled out the idea of an amnesty for 4500 rejected Chinese refugee claimants who have been allowed to stay in Canada since the 1989 Tiananmen massacre. The ban on deportation to China is now being reviewed by the immigration department. (*The Toronto Star*, March 25, 1994)

*The Toronto Sun* read:

Marchi refused to say what the government intends to do, but noted that

other countries have returned Chinese who claimed refugee status after Tiananmen Square. "People have been sending the Chinese failed refugee applications from around the world back to China," he told reporters. (*The Toronto Sun*, March 23, 1994)

*The Shin Tao Daily* read:

Critics say that (Canadian) government has sacrificed the interests of this group of Chinese (rejected refugee claimants) for the benefit of politics. Prime minister Jean Chrétien has planned to visit China in the coming fall.

A special group from the Immigration ministry is contacting the Chinese embassy in Ottawa, discussing the issue of sending Chinese rejected refugee claimants back to China ... Marchi said that (human rights) situation in China has improved. "My colleague, (director of Asia and Pacific department, Foreign Affairs) Chen Zhuoyu, a major promoter for democracy in China, admitted that the situation in China had improved." (*Shin Tao Daily*, March 23, 1994, translated from Chinese)

*Ming Pao Daily* read:

Mr. Roger White, the spokesperson of immigration minister, Marchi, said that according to the immigration and refugee board, the 4500 Chinese are not refugees. "There is not enough evidence that they will be persecuted." (*Ming Pao Daily*, March 14, 1994, translated from Chinese)

Reports from the media had tremendous impact on Mainland Chinese rejected refugee claimants. The fear of being deported back to China soon spread widely among them, particularly by April of 1994, when they received the "removal order" from Ministry of Immigration and Employment.

This fear served as the basic motivation for the later protest movement. As noted above, the commonly shared "fear" drew them closer to the MCRO organization, thus making the mobilization possible.

The MCRO committees carefully examined the situation of these rejected MCR claimants. On the one hand, it was found that most of them

had already stayed in Canada for 3-4 years. Some got married, remarried or had babies born here. However, they were in "limbo," hoping one day their immigration status would be granted. On the other hand, they did fear being deported. They knew that the government of the People's Republic of China (PRC) would not react favourably to the Chinese who have been recognized by foreign countries as refugees or who have applied to be recognized as such. The claim of refugee status by any citizen of the PRC outside the country might be treated as traitorous behaviour. Once a person is so labelled, he or she might be subjected to a series of visible or invisible persecution, and it would be difficult for him or her to return to conventional life. Moreover, his or her relatives might be negatively affected (Tian 1995). The MCRO leaders analyzed the situation from the following aspects:

*The Economic Conditions:* Canada has been experiencing economic recession for four years continuously. The unemployment rate had reached a historical height. The Liberal Party in power could hardly change the situation in a short time, owing to the impact of the recession in the whole western world.

*The Social Climate:* Because of the economic recession, there was a strong anti-immigrant voice in the society. Many thought that new immigrants had taken Canadian people's jobs. Refugees created social instability. They committed crimes, robberies, shooting police officers, etc. The sentiment against immigrants in the society was obvious, let alone against rejected refugee claimants

*The Political Climate:* The Reform Party was strongly criticizing the existing refugee policy. It complained that the government had been too generous to refugee claimants. Too much of taxpayer's money had been wasted on refugees, in terms of welfare, medical care, free language/job training, etc.

*The Situation in China:* The economy in China was booming. The western world was strongly attracted by the huge market in China in the hope that

through the Chinese market, recession could be brought to an end. Moreover, as China became more open, the Chinese government started to release some of the political prisoners in order to better its image. It also loosened the regulations to let people get out of China.

These factors might have led to some misconceptions among Canadians that there would be no dangers for the rejected refugee claimants to return to China. Besides, it is possible that the Canadian government would try to please the Chinese government by sacrificing the interest of this group of rejected refugee claimants in order to gain a strong foothold in the expanding Chinese market (interviewed on Feb. 10, 1995).

Hence, the MCRO decided to make the following responses:

First, they wrote a long report to the government, comprehensively analysing the actual situation of the 4,500 Chinese rejected refugee claimants. By giving the government a full picture of these people, they wanted the government as well as the society to understand that the Chinese rejected refugee claimants were not a burden to Canadian society. MCRO found that most of them had been off welfare a long time and had made contributions to the society. It recommended that the government consider a special policy to grant the group of Chinese landed immigrant status on humanitarian and compassionate grounds.

Secondly, they mobilized support to win sympathy from all parts of the society: Chinese community, mainstream society, media, churches, and politicians. The MCRO also strongly advocated to its members to abide by Canadian constitutions and laws, to respect different cultures and to establish themselves. It reasserted the four principles so as to create and project a positive/desirable image of themselves in the society.

Taking into consideration the nuances as presented, the MCRO decided to choose the Canadian government as the sole object for their "production technologies," and based their mobili-

zation on presenting their case. In the meantime, they spent more energies on "mobilization technologies," covering communities, media, influential persons.

As the MCRO implemented its plan, a financial shortage appeared. Although the organization charged a five dollar membership fee (most of them voluntarily paid much more), it was unlikely that MCRO could carry out a research report on the characteristics of the MCRs with its limited funds. They applied to various funding agencies such as the United Way, Metro Toronto government, Provincial government and even the Federal government. None of their applications were successful. The committee decided to raise funds among its own members. The MCRO charged \$500 per person (compared to an average fee of \$1,200 that was being charged by inexpensive lawyers) from two hundred of its members and promised in turn to sort out their documentation, prepare them in prescribed form and then present them to the immigration department. They hoped that the 200 typical cases would be treated collectively, and landed immigration status could be granted to them first. The committee hired lawyers, immigration consultants and translators to prepare the 200 cases.

In the meantime, it started the research and circulated questionnaires for rejected refugee claimants to answer. However, MCRO confronted one of the most difficult problems relating to the prevailing "biases" against MCRs from within the Chinese Community. As one of the MCRO's leaders said:

Strong discrimination first came from within the Chinese community. According to Mainland Chinese immigrants, the very fact that Chinese refugee claimants applying for refugee status had made Chinese people lose face in foreign countries. They thought that these people took advantage of the Canadian refugee policy and got too much benefit from it. They also worried that the refugee problem could make the Canadian government tighten its rules to let

immigrants' relatives come to Canada, especially at the time when there was a strong social sentiment against immigrants and there was the stereotype that refugee claimants had cost too much of taxpayers' money and they committed lots of crimes.

Some Chinese who came from Hong Kong and Taiwan were opposed to assisting refugee claimants. They were proud of themselves for coming from capitalist or semi-capitalist systems. They thought any one coming from Mainland China had been brainwashed. In their eyes, Mainland Chinese were potential radicals and, therefore, they were not suitable to the capitalist system. As to the Chinese rejected refugee claimants, they were horrible. Their various illegal ways of entering Canada reminded them of "Red Guards", of Cultural Revolution in China. Certainly, the stereotype in media also reinforced their impression.

Canadian people usually didn't distinguish Chinese refugee claimants from other refugee claimants. They looked upon them as a whole. Therefore, any of their complaints about refugee claimants would have a negative impact on this Chinese group. (interview, Feb. 20, 1995)

In the Chinese community, MCRO was discriminated against in many ways. They were not allowed to participate in any activities with other organizations, even if they offered funds. MCRO members could only attain the most menial work in Chinatown. Employers gave them cash-payment, which was usually lower than the legal minimum pay. Chinese refugee claimants were in a "take it or leave it" situation. They knew they could not find jobs in mainstream society because of their limited command of English; on the other hand, if they complained about the employers in China Town, they would not get jobs. Therefore, they had to endure all the hardships.

In order to change people's impression toward Chinese refugee claimants, the MCRO adopted the following strategies:

1. They went to churches and talked to the pastors where church people offered them sympathy, food and even places where the MCRO could hold meetings. The committee often arranged lectures and workshops for its members. Lawyers and legal advisors were invited to introduce immigration and refugee affairs and legal issues. The "four principles" were emphasized repeatedly in order to improve the public image of Mainland Chinese refugee claimants. News reporters and journalists were also invited to attend meetings and lectures.
2. They contacted influential overseas Chinese leaders to solicit help. Among them, Mr. Hong Shi-zhong, vice chair of Metro-Toronto's National Day Committee and chair of Refugee Information Centre, commented as follows:

Chinese refugee claimants accounted for only 5% of the whole refugee population in Canada. It is very wrong to think that Chinese refugees have disgraced Chinese people. When my grandfather went to Philippine, his situation was much worse than the refugees today. However, the local Chinese there welcomed people like him. Two generations later, we are all very successful. My father was successful too. We are all Chinese and we should help each other. In my eyes, refugees are just like immigrants, only of different kind. They should be respected and receiving help. I have noticed that people scold and discriminate against Chinese refugees. This is not acceptable. It is against the policy and the interest of Canada. Our country always welcomes refugees coming here to start their new lives. We have this reputation in the world ... Chinese people are most hard-working and understanding. Every one can see that most of the Chinese refugee claimants have got off welfare and established themselves. Lots of refugees are doing the most menial work, overtime and getting low pay ... The leaders of MCRO are all very respectable ... I am very impressed by the four-self principles (sic) the MCRO advocates. I think this is a big contribution the MCRO

has made to the Canadian society. I noticed that since the four-self principles (sic) were advocated, the number of refugee claimants on welfare has decreased by 5–6 percent. (interview, Feb. 15, 1995)

In addition to mobilizing support in the Chinese community, the MCRO also organized its members to do voluntary work for the members of parliament. They made phone calls for the Members of parliament to Chinese-speaking people and helped the MP's in elections in the Chinese community. As to the government, the MCRO sent letters to express their concerns and met with Immigration Department officials. After one year's effort, the MCRO's mobilization work altered the once negative public impression of Chinese rejected refugee claimants, and the major research project regarding MCRs was completed. In January,

bate over this issue. The Parliamentary Secretary promised that the Ministry of Citizenship and Immigration would comprehensively consider the whole issue in its deliberations. The protest was also widely supported and won sympathy and letters of support both from the Chinese community and from prominent figures in mainstream society.

### Achievement

The Canadian Immigration Minister issued a new policy that affected this group of rejected refugee (Chinese) claimants, as well as those from other countries who were in similar situation, on July 7, 1994. According to the new policy known as the Deferred Removal Orders Class (DROC) the rejected refugee claimants would get a second chance to apply as long as they had stayed in Canada for three years,

### Conclusion

MCRs' mobilization of social acceptance and legal status in Canada is a very successful ethnopolitical mobilization. Ethnic political mobilization constructed by Adam (1984), Nagata (1981), Olzak (1983), and Zenner (1988), explains clearly how MCRO could take common interests as the keynote around which to organize MCRs, and took ethnicity as the base through which to persuade the Chinese communities to support them in pursuit of collective benefits. Ethnicity played a role as "a potential for action and mobility" (Nagata 1981, 89). However, it must be pointed out that in this case, because of sub-ethnic conflicts (Tian 1995, 1993), mobilization engineered by MCRO had to extend resources beyond ethnicity to acquire political strength.

According to Gladney (1991), a group's identity and loyalty only become valued "in dialogical interaction with sociopolitical context. Just as the Self is often defined in terms of the other, so ethnic groups coalesce in the context of relation and opposition" (ibid. 76–77). He stresses that social relations of power is the focus of attention in a dialogical approach to ethnicity (ibid.). Following Gladney, the MCR dialogue with Chinese communities and with government played a crucial role in their mobilization. Dialogue appeared an effective strategy in their adaptation to the Canadian society at the collective level (Tian 1995).

A wide variety of factors influences the success of an ethnic political mobilization. Two major factors should be stressed; the fear among MCRs and the role of the MCRO. The former was important as a determinant to initiate the movement; the latter brought the movement to a success. Leaders of MCRO showed their ability to organize and mobilize. They made a strategic decision to closely contact the government and keep it informed of MCRs' situations. As well, they were successful in mobilizing supports from social groups and important social persons (Oliver's theory of "mobilizing

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*Some Chinese who came from Hong Kong and Taiwan were opposed to assisting refugee claimants. They were proud of themselves for coming from capitalist or semi-capitalist systems. .... In their eyes, Mainland Chinese were potential radicals and, therefore, they were not suitable to the capitalist system.*

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1994, the MCRO leaders visited Ottawa and sent copies of their report with over one hundred supporting letters from organizations to the Immigration Minister and the Prime Minister.

### The Protest

By April 1994, no response had been received. In the meantime, fear of being deported back to China among MCRs became stronger. The MCRO organized a protest at the Ottawa Parliament Buildings on April 18, 1994, the day Chinese Vice-Premier Zhou Jiahua visited Ottawa. During the protest, many representatives from different organizations participated and aired their support in addition to Mainland Chinese refugee claimants from Toronto, Vancouver, and Montreal. After the protest, seven representatives of the protesters were invited to Parliament to hear the de-

had been paying tax for over half a year and had not committed any crimes in Canada.

Despite some other specific problems, the policy was widely welcomed by the 4,500 rejected Chinese claimants as well as the Chinese community. The MCRO decided that the policy basically met their original goal and expressed satisfaction over the government's response to their work.

The policy served to end the limbo status of rejected refugee claimants on humanitarian and compassionate grounds. Community leaders applauded MCRO's efforts. The Immigration Ministry recognized MCRO's work, especially the research report. With this new policy, the fear of being deported for many of these rejected MCR claimants no longer existed. The mainland Chinese rejected refugee claimants' movement gradually came to an end.

time"). As to "mobilizing money," MCRO leaders realized the difficulties for them in a foreign society. Fortunately, they were able to solve the problem within the organization. The MCRO successfully made the voice of rejected Chinese refugee claimants heard in the larger society and successfully influenced the Canadian government to make a policy favourable to them.

Finally, it is important to point out that the success of the mainland Chinese rejected refugee claimants in persuading the Canadian Government to allow them to apply for landing is related to the MCRO's mobilization strategy, which was politically sensitive. In the context of Canada's attempts to secure "economic interest" in China, MCRO did not raise the issue of "human rights" in China. It suggested to the Canadian government that accepting these rejected refugee claimants would merely a humanitarian act rather than a statement on China's human rights. It argued that China's "face" with respect to her human rights was not challenged by accepting these rejected refugee claimants, nor it would have any impact on Canada's pursuit of its "economic interest in China" (see Tian 1995 for a detailed discussion). This rationalization fitted well with China's claim that "human rights" issues and "economic interests" should not be linked between trading nations ■

#### Notes

1. Initial work on this paper was presented by the authors at the Fourth Canadian Symposium on China at University of Toronto, Sept. 22-25, 1995. Authors gratefully acknowledge the critical review of this paper by Professor Lawrence Lam, Department of Sociology, York University.

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## PATHS TO EQUITY

### Cultural, Linguistic, and Racial Diversity in Canadian Early Childhood Education

by Judith K. Bernhard, Marie Louise Lefebvre, Gyda Chud and Rika Lange

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*Paths to Equity* is based on an extensive nationwide study of 77 childcare centres in Montreal, Toronto, and Vancouver on the cultural, linguistic, and racial diversity in Canadian Early Childhood Education (ECE). The report presents the results this study on how the ECE system is responding to the increasing diversity of contemporary Canadian society.

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## A Summary of Claims Processed by Immigration and Refugee Board

Processing Period: Third Quarter (Q3), July–September 1995, and Year-to-Date (YTD) January–September 1995

### By Processing Regions

| Region                | Claims Referred |               | Heard to Completion |               | Other Claims Finalized |              | Decisions Positive |              | Decisions Negative |              | Decisions Pending | Claims Pending |
|-----------------------|-----------------|---------------|---------------------|---------------|------------------------|--------------|--------------------|--------------|--------------------|--------------|-------------------|----------------|
|                       | Q3              | YTD           | Q3                  | YTD           | Q3                     | YTD          | Q3                 | YTD          | Q3                 | YTD          | Cum.*             | Cum.†          |
| Ottawa/Atlantic       | 221             | 623           | 156                 | 565           | 27                     | 73           | 142                | 485          | 19                 | 81           | 58                | 727            |
| Quebec                | 3,400           | 8,824         | 1,019               | 3,921         | 284                    | 994          | 600                | 2,685        | 331                | 1,059        | 438               | 10,898         |
| Ontario I             | 1,415           | 4,109         | 745                 | 2,779         | 141                    | 570          | 534                | 1,811        | 304                | 720          | 602               | 5,454          |
| Ontario II            | 1,283           | 3,808         | 780                 | 2,613         | 198                    | 601          | 541                | 1,643        | 325                | 909          | 470               | 3,988          |
| Prairies              | 63              | 308           | 70                  | 289           | 10                     | 41           | 46                 | 225          | 15                 | 45           | 20                | 312            |
| Vancouver             | 367             | 1,040         | 298                 | 688           | 105                    | 320          | 195                | 500          | 46                 | 140          | 159               | 1,903          |
| <b>National Total</b> | <b>6,749</b>    | <b>18,712</b> | <b>3,068</b>        | <b>10,855</b> | <b>765</b>             | <b>2,599</b> | <b>2,058</b>       | <b>7,349</b> | <b>1,040</b>       | <b>2,954</b> | <b>1,747</b>      | <b>23,282</b>  |

### By Major Source Countries

| Nationality             | Claims Referred |               | Heard to Completion |               | Other Claims Finalized |              | Decisions Positive |              | Decisions Negative |              | Decisions % Accept. Rate |             | Decisions Pending | Claims Pending |
|-------------------------|-----------------|---------------|---------------------|---------------|------------------------|--------------|--------------------|--------------|--------------------|--------------|--------------------------|-------------|-------------------|----------------|
|                         | Q3              | YTD           | Q3                  | YTD           | Q3                     | YTD          | Q3                 | YTD          | Q3                 | YTD          | Q3                       | YTD         | Cum.*             | Cum.†          |
| 1. Sri Lanka            | 583             | 1,706         | 419                 | 1,311         | 24                     | 79           | 378                | 1,102        | 93                 | 184          | 80.3                     | 85.7        | 124               | 1,543          |
| 2. Iran                 | 543             | 1,374         | 265                 | 833           | 21                     | 111          | 208                | 653          | 67                 | 137          | 75.6                     | 82.7        | 126               | 1,719          |
| 3. Somalia              | 471             | 1,281         | 279                 | 1,088         | 22                     | 86           | 267                | 1,007        | 4                  | 14           | 98.5                     | 98.6        | 74                | 1,453          |
| 4. India                | 306             | 967           | 181                 | 598           | 87                     | 236          | 111                | 379          | 52                 | 195          | 68.1                     | 66.0        | 114               | 1,442          |
| 5. Venezuela            | 292             | 864           | 68                  | 189           | 17                     | 74           | 35                 | 103          | 9                  | 35           | 79.5                     | 74.6        | 53                | 1,095          |
| 6. Israel               | 366             | 844           | 128                 | 363           | 34                     | 84           | 30                 | 97           | 84                 | 202          | 26.3                     | 32.4        | 134               | 1,542          |
| 7. Pakistan             | 273             | 702           | 101                 | 343           | 44                     | 125          | 79                 | 250          | 21                 | 89           | 79.0                     | 73.7        | 32                | 816            |
| 8. Bangladesh           | 222             | 686           | 125                 | 395           | 14                     | 68           | 97                 | 307          | 21                 | 57           | 82.2                     | 84.3        | 45                | 969            |
| 9. Chile                | 427             | 667           | 7                   | 34            | 10                     | 26           | 3                  | 17           | 3                  | 13           | 50.0                     | 56.7        | 8                 | 698            |
| 10. Kazakhstan          | 308             | 559           | 11                  | 60            | 3                      | 7            | 4                  | 51           | 2                  | 6            | 66.7                     | 89.5        | 3                 | 606            |
| 11. China               | 228             | 549           | 70                  | 240           | 66                     | 178          | 28                 | 108          | 36                 | 122          | 43.8                     | 47.0        | 75                | 641            |
| 12. Algeria             | 190             | 544           | 77                  | 491           | 10                     | 49           | 39                 | 390          | 23                 | 66           | 62.9                     | 85.5        | 42                | 569            |
| 13. Guatemala           | 134             | 420           | 62                  | 242           | 17                     | 59           | 29                 | 135          | 25                 | 96           | 53.7                     | 58.4        | 39                | 517            |
| 14. Zaire               | 153             | 411           | 42                  | 198           | 3                      | 21           | 34                 | 154          | 6                  | 36           | 85.0                     | 81.1        | 18                | 417            |
| 15. Romania             | 93              | 370           | 84                  | 295           | 19                     | 85           | 19                 | 87           | 65                 | 188          | 22.6                     | 31.6        | 69                | 519            |
| 16. Mexico              | 175             | 345           | 20                  | 60            | 13                     | 65           | 8                  | 20           | 18                 | 52           | 30.8                     | 27.8        | 11                | 435            |
| 17. Afghanistan         | 93              | 343           | 104                 | 345           | 6                      | 24           | 97                 | 290          | 24                 | 34           | 80.2                     | 89.5        | 25                | 358            |
| 18. Lebanon             | 87              | 332           | 58                  | 175           | 16                     | 54           | 30                 | 87           | 26                 | 78           | 53.6                     | 52.7        | 43                | 519            |
| 19. El Salvador         | 87              | 329           | 57                  | 213           | 32                     | 88           | 21                 | 81           | 45                 | 124          | 31.8                     | 39.5        | 64                | 505            |
| 20. Russia              | 110             | 327           | 44                  | 184           | 24                     | 63           | 31                 | 140          | 13                 | 40           | 70.5                     | 77.8        | 29                | 435            |
| 21. Sudan               | 99              | 325           | 82                  | 216           | 17                     | 28           | 76                 | 196          | 11                 | 14           | 87.4                     | 93.3        | 13                | 267            |
| 22. Peru                | 86              | 271           | 64                  | 212           | 5                      | 28           | 35                 | 133          | 23                 | 69           | 60.3                     | 65.8        | 35                | 399            |
| 23. Nigeria             | 74              | 246           | 41                  | 143           | 8                      | 31           | 20                 | 81           | 17                 | 53           | 54.1                     | 60.4        | 34                | 292            |
| 24. Iraq                | 78              | 224           | 33                  | 159           | 9                      | 26           | 36                 | 149          | 0                  | 3            | 100.0                    | 98.0        | 8                 | 222            |
| 25. Ukraine             | 78              | 217           | 42                  | 146           | 7                      | 41           | 20                 | 104          | 16                 | 47           | 55.6                     | 68.9        | 27                | 323            |
| <b>Top-25 Countries</b> | <b>5,556</b>    | <b>14,903</b> | <b>2,464</b>        | <b>8,533</b>  | <b>528</b>             | <b>1,736</b> | <b>1,735</b>       | <b>6,121</b> | <b>704</b>         | <b>1,954</b> | <b>71.1</b>              | <b>75.6</b> | <b>1,245</b>      | <b>18,321</b>  |
| " %-share               | 82.3            | 79.6          | 80.3                | 78.6          | 69.0                   | 66.8         | 84.3               | 83.3         | 67.7               | 66.1         | --                       | --          | 71.3              | 78.7           |
| Other countries         | 1,193           | 3,809         | 604                 | 2,322         | 237                    | 863          | 323                | 1,228        | 336                | 1,000        | 49.0                     | 55.1        | 502               | 4,961          |
| <b>Grand Totals</b>     | <b>6,749</b>    | <b>18,712</b> | <b>3,068</b>        | <b>10,855</b> | <b>765</b>             | <b>2,599</b> | <b>2,058</b>       | <b>7,349</b> | <b>1,040</b>       | <b>2,954</b> | <b>66.4</b>              | <b>71.3</b> | <b>1,747</b>      | <b>23,282</b>  |

\*Decisions Pending (cumulative) - include all claim heard to completion by the Convention Refugee Determination Division (CRDD) since January 1, 1989 for which no decision had been rendered by the end of the reporting period.

†Total Claims Pending - include all claim referred to the CRDD, that have not yet been finalized as of the end of the reporting period.

Source: Immigration and Refugee Board, Ottawa, December 6, 1995.

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