

International Refugee Law: Misconceiving Reconceptions

Jim Rice

Abstract

This paper addresses the implications and adequacy of the "Hathaway model" for grounding refugee immigration policy. The Hathaway model envisions and may be suitable for cases of mass migration such as the recent tragedy in the Great Lakes region of Central Africa or the response to the "ethnic cleansing," which took place in the former Yugoslavia, large-scale crisis situations calling for immediate solutions. The author argues that for other more individualized types of refugee situations, there is a need to distinguish between the categories of "asylum seeker" and "refugee" when implementing policy in order to make a better effort to screen and adequately protect those individuals who make asylum claims.

Précis

Cet article traite des implications et de la pertinence du «modèle Hathaway» pour asseoir une politique d'immigration de réfugiés. Le modèle Hathaway appréhende (et se révèle possiblement pertinent pour) des cas d'immigration de masse du type de celle ayant eu lieu lors de la récente tragédie des Grands Lacs du Centre de l'Afrique, ou dans le cas de la réponse apportée aux «purifications ethniques» qui ont eu lieu en ex-Yougoslavie. On parle donc de crises à grande échelle nécessitant des solutions immédiates. L'auteur développe une argumentation selon laquelle dans les cas où on a affaire à des types plus individualisées de situations impliquant des réfugiés, la nécessité se fait jour d'établir une distinction entre «rechercheur d'asile» et «réfugié», au moment de la mise en place des politi-

ques, de façon à déployer un effort plus efficace pour sélectionner et protéger plus adéquatement ces individus demandant asile.

Introduction: The Notion of Temporary Asylum

In the recent article, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,"¹ written jointly by James C. Hathaway and R. Alexander Neve, and the book edited by James Hathaway, *Reconceiving International Refugee Law*² (1997), the contributors set out a possible model for the future development of refugee law and policy. As the title suggests, the proponents of the "Hathaway model" (as it will be called in this paper) argue that because of a variety of factors, including an increasing unwillingness by states to accept new arrivals of people from other countries (due in part to what is referred to as the demise of "interest convergence"), as well as the failure of the policy promoted by some Western governments of encouraging people at risk to stay in their countries of origin (described as the "right to remain"), current practices related to refugees should be fundamentally reexamined. Part of this reevaluation indicates, according to Hathaway, that refugees should be offered temporary protection until such time as they are able to safely return to their own countries.

The model as proposed by Hathaway and others is an attempt to offer humanitarian protection to refugees during the time that they are in actual danger in their countries of origin and to encourage (and if necessary) compel them to return home as soon as it is safe for them to do so. The idea does have a superficial appeal. With the perceived increase in mass migration from poor nations in the less developed world to more wealthy ones and the backlash against immigration that has come with this, social and

political pressure has been brought to bear on previously accepted policies of accepting refugees in developed nations. The idea of offering temporary protection as a way of "de-linking" the refugee issue from that of immigration can at once be seen as a potentially attractive immigration policy for receiving states. After all, repressive regimes which have caused the flight of thousands of refugees may be overthrown, civil wars may come to an end, "ethnic cleansing" may cease and the situations which have made it clear that people fleeing from their countries were in fact refugees, may dramatically change.

Although this idea appears to be an attractive one, given the dramatic rise in the number of refugees and displaced peoples over the past 25 years, such a proposal fails to offer a credible alternative to existing refugee law primarily because it does not offer adequate protection to them, nor does it properly distinguish between the different kinds of refugee scenarios, or different types of people seeking refuge.

The Recent Experience of Refugees in Hong Kong

This article seeks in part to view this idea of temporary protection from the experience of asylum seekers in Hong Kong during recent years. The reality in Hong Kong is somewhat different from the Hathaway notion of temporary asylum in that the asylum seeker is only allowed to remain in the Hong Kong Special Administrative Region (SAR) pending ultimate resettlement in a third country. Hong Kong does generally not allow for permanent resettlement by refugees.

The mass exodus from Vietnam, Laos and Cambodia in the years after the fall of Saigon in 1975 has had a major impact on Hong Kong as well as other places of "first country asylum" in Southeast Asia. Subsequent influxes of refugees arrived after the Vietnamese

Jim Rice, B.A., LL.M, is Assistant Professor in School of General Education, Lingnan College, Hong Kong. He has been involved in providing (pro bono) legal assistance to asylum seekers as well as migrant workers in Hong Kong, with the law firm of Pam Baker Company.

invasion of Cambodia in 1979 and the brief border conflict between Vietnam and China in 1978–79. Between 1975 and 1997 some 200,000 asylum seekers from Vietnam alone arrived in Hong Kong. Although the authorities allowed a small number of these individuals to stay in Hong Kong, the vast majority of those people who were found to be refugees were given temporary asylum in Hong Kong and then eventually resettled in third countries including the United States, Canada, Australia, Japan, United Kingdom, or other European countries.

By the late 1980s, the total number of people who had left their countries of origin in Indo-China was estimated by the UNHCR at over two million. The mass migration of displaced people from Vietnam, Laos and Cambodia and their landfall in small boats on the shores of Malaysia, Indonesia, Philippines and Thailand ultimately led to shrill opposition from some Southeast Asian leaders and a call by the Association of Southeast Asian Nations (ASEAN) for the United Nations General Assembly to address the issue with a view to bring the exodus to a conclusion.

In December 1988, the United Nations General Assembly voted to set up a conference on the refugee problem in Southeast Asia. In March 1989, countries of origin, states involved in offering first asylum to refugees, resettlement countries and the UNHCR met in Kuala Lumpur and agreed on a Draft Declaration and a Comprehensive Plan of Action (CPA) which was intended to find a "comprehensive and durable solution" to the Indo-Chinese refugee problem.

One of the decisions made in the CPA was that any new arrivals of asylum seekers would be held in "temporary asylum centres" (detention camps) and screened in order to determine whether they were refugees and thereby eligible for permanent resettlement in a third country or "economic migrants" and subject to repatriation.

The experience of screening the Vietnamese refugees in the closed camps of Hong Kong was not on the whole, an

edifying one. Although there is insufficient space here to do justice fully to the story of the Indo-Chinese refugees, there seemed to be a fundamental and systemic problem with the way in which the screening process was done. The system of screening asylum seekers as conceived may have seemed to be acceptable. The actual implementation of it, however, was not.

With regard to individual applicants, there was normally a two-stage screening process conducted first by an officer from the Hong Kong Immigration Department. In the case where an asylum seeker was determined not to be a refugee (or "screened out") she had the opportunity of making an appeal to the Refugee Status Review Board (RSRB), a body who had been appointed by the Governor of Hong Kong and made up of a retired individual from the judiciary, the executive branch, the UNHCR and other "prominent members of the community." Following a rejection from the RSRB, the asylum seeker was given the option of applying to the UNHCR for the exercise of its mandate or applying for voluntary repatriation ("vol rep"). If she refused to apply for voluntary repatriation, she would be slated ultimately for mandatory repatriation to Vietnam. This process for tens of thousands of people took six years or more years.

The implementation of the process of screening was basically flawed. It was instituted because over time, third country resettlement became more difficult, and the Hong Kong Government favoured rejection of refugee submission claims. In addition, the process was unduly slow and cumbersome. Thousands of Vietnamese asylum seekers spent up to ten years in detention camps. Children grew up in the camps with no knowledge of life outside. The human loss in terms of wasted years in detention is truly appalling and stands as a disgrace to the Hong Kong government as well as the international community. From the early 1990s as the Hong Kong Government and the UNHCR sought to empty the camps and bring the refugee "problem" to a close. In an effort to encourage voluntary repatriation, humanitarian services were

systematically withdrawn from the camps. Schools were closed and children were denied education. Medical services were reduced or terminated. Sanitation was left to deteriorate and even food rations for camp inmates were cut back.

In an unprecedented independent report on Hong Kong prisons made in 1997, the conditions inside the Vietnamese refugee camps were described as being "unacceptable" and "strikingly different" from other penal/detention centres in Hong Kong, in the sense that its living and sanitary facilities were "much worse", and the food provided was inferior to that of Hong Kong's prisons.³ The same report referring to the High Island Camp also included the following observations:

The detainees made a number of complaints about conditions in the camp and about their treatment. They stated that the huts had become unbearably hot in the summer, and that the huts leak when it rains; that not enough food is provided; that the male guards watch the female detainees shower from the guard towers; that the CSD (Correctional Services Department) is extremely slow to repair things, such as fans. Lights, faucets, etc.; and that there is no hot water in the winter.

The Human Rights Watch/Hong Kong Human Rights Monitor delegation noted significant deficiencies in camp conditions. Most notably, the sanitary facilities were barely functioning and were filthy, smelly, dark and bug infested. Worse, because many detainees quite reasonably avoided using these facilities, the showers had become a de facto second toilet. In the showers, which were in small shipping containers some distance away from the huts, most of the spigots were broken, so that some 900 people in one section were forced to share seven spigots ...⁴

By 1998, the Hong Kong government formally ended the policy of first asylum in Hong Kong, meaning that persons would no longer be eligible to seek asylum in the Special Administrative Region. The broad lesson that this whole episode teaches is that while all of the

Vietnamese asylum seekers may not have been refugees under the meaning of the Convention, there was a policy which militated against recognizing them as such. And as time went on, and these individuals spent year after year in detention, Vietnam began to move from the policies which had persecuted many of these people in the 1970s and 1980s to ones which relied less on seeking revenge on those who were perceived to have opposed the state.

The Hathaway model as it is presented, plays into the hands of the policies founded on cynicism and expedience such as the ones which were applied to the Vietnamese detained in Hong Kong during the 1990's. However, Hathaway would clearly want to assert that the case of the Vietnamese in Southeast Asia only serves to support his own model of temporary asylum. He might claim that although many of the Vietnamese may have had a reasonable fear of persecution when they fled, by the time that the policies of *doi moi* (economic reform) were established in Vietnam in 1990, and in the years after that, such fears were in fact unfounded, and a regime that he proposes such as the International Supervisory Agency (ISA) would have been better able to avoid (or at least minimize) the human tragedy of years lost in Hong Kong detention camps on the part of thousands of men, women and children.

However, to have treated all of the Vietnamese asylum seekers as "temporary refugees" subject to return upon a determination by an ISA would have made the situation in Hong Kong even worse because it would have failed to properly differentiate between those who may have had a reasonable fear when they fled, and those who faced persecution upon return regardless of any reform policies back in Vietnam. The correct answer, depends upon how a refugee is to be perceived by a screening agency or the receiving state.

In the years that followed the Communist victory in Vietnam, there were in fact, large scale human rights violations in that country. Families were "relocated" from their homes and farms to "new economic zones" which were

usually located in isolated areas of the country with no irrigation, or other facilities which make farming viable. Individuals were detained, tortured and even executed for having supported the previous regime or for having a family member who had done so.

It was primarily these serious human rights abuses that prompted hundreds of thousands of people to flee Vietnam. It is also true that in the 1990s things did begin to change in Vietnam. The forced migrations as well as the arbitrary detentions no longer drew public condemnation in the light of the economic reforms. However, despite these changes, there is yet to be any democratic reform or the establishment of the rule of law in Vietnam. An asylum seeker, languishing in the camps in Hong Kong during those years was most likely traumatized by the kinds of events described above. And even though the UNHCR and the Hong Kong government was providing information about changes in Vietnam, there was no guarantee for such a person that there would be no return to the human rights abuses experienced during the 1970s and 1980s. If a formerly repressive government were to revert back to its former policies, there would be nothing that either the UNHCR or the proposed ISA could do to protect any returnees who might be at risk.

One issue here is whether, in order to be a refugee under the 1951 Convention, one needs only to have a reasonable fear of persecution, or, one needs to have a reasonable fear and in addition, a real objective threat of ongoing persecution should one return to one's country of origin. If it should be the latter, and in order to be a refugee and someone entitled to protection, one needs to show not only a reasonable fear of persecution but also the objective fact of being threatened in one's own country for now and into the foreseeable future, then Hathaway may be better understood in his interpretation of the Convention. However, if it should be the former, and all that is needed in order to be recognized as a refugee is a reasonable fear of persecution, then clearly Hathaway is mistaken in his argument in favour of

temporary asylum. At the very least, he should be calling for an amendment of the Convention on the part of the signatory states to change the way the UNHCR and states view refugees.

The *Handbook on Procedures and Criteria for Determining Refugee Status* (The Handbook) used by the UNHCR in the determination of refugee matters sets out both subjective and objective criteria for determining refugee status. The Handbook indicates that the person applying for refuge will be deemed to have a well founded fear of persecution if

[h]e can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.⁵

The Handbook goes on to state that the applicant need not show that (his) fears are based on his own personal experience, and that the experiences of those in his social group may also be relevant in determining refugee status.⁶ This indicates that although there is a test based in part on an objective threat, any subjective fear is not to be discounted out of hand.

The saga of the Vietnamese asylum seekers dominated the news relating to refugee issues in Hong Kong since 1975. However, increasingly, there have also been individuals from other parts of the world such as the Middle East, Africa and South Asia who have sought asylum in Hong Kong during this period of time. Because the 1951 Convention was not extended to Hong Kong, individuals who have a claim to asylum must apply to the UNHCR, which bases its own decision on whether that person has a well founded fear of persecution in her own country.

The Handbook, as mentioned above, provides the guidelines for the determination of refugee status and indicates that the UNHCR is competent to recognize an asylum seeker as a refugees "regardless of whether or not he is in a country that is a party to the 1951 Convention of the 1967 Protocol or whether or not he has been recognized by his

host country as a refugee under either of these instruments."⁷ Individuals are recognized as being refugees by the UNHCR, under the mandate granted to the High Commissioner by the Convention.

Hong Kong Today as a Place of First Asylum

In cases where the asylum seeker who is not Vietnamese is recognized in Hong Kong as a refugee by the UNHCR, she is normally allowed to stay at liberty in the Hong Kong SAR pending permanent resettlement in a third country. During this time, the refugee is given temporary permission by the Hong Kong government to remain in Hong Kong. However, she is not permitted to work or even to study in the territory. Furthermore, no social services such as public housing, public assistance or access to public education are extended to the asylum seeker or her children during this (very often considerable) period of time. In these cases in which a decision to extend recognition has been granted by the Hong Kong office of the UNHCR, a monthly stipend of about U.S.\$720 per month is made available to the asylum seeker with additional money available to dependent children. Very often, the refugee has arrived in Hong Kong bearing false travel documents which were obtained during her flight to freedom. In these cases, the asylum seeker/ refugee is detained for several months or even over a year until she is recognized as being a refugee. Following release from detention on recognizance, she will be required to report regularly to the police during her stay in the territory.

One problem with the notion of temporary protection in a place like Hong Kong is that the refugee who has been recognized in the SAR has already had an enormous burden placed upon her regarding the period of time spent between her initial flight to freedom and ultimately being resettled in a third country.

Very often, in these cases, the period of time from the flight to freedom from a refugee's own country to initial refuge in Hong Kong may take up to a year. Then there is normally a period of from

three to six months for the asylum seeker to be screened by the UNHCR in Hong Kong. Following the decision to recognize an individual as a refugee, the time for the UNHCR to find a "durable solution" may take up to another two years. During this time, the refugee generally experiences the trauma of the past as well as a great state of uncertainty about the future. Should the notion of temporary asylum be implemented by states which traditionally accept refugees, such individuals may have their lives in a complete state of uncertainty for up to a decade. This is clearly not what the signatories from member states had in mind when they agreed to the 1951 Geneva Convention on Refugees.

The Conceptual Difficulties with Reconceiving Refugee Law

In the preface to *Reconceiving International Refugee Law*, Professor Hathaway explains the rationale for the notion of a "new paradigm of refugee protection":

While not itself a source of solutions, refugee protection needs to be reoriented in a way that takes full advantage of opportunities for solutions. Because governments today are unlikely to support refugee protection if they see it as a subversion of their immigration policies, it makes sense to facilitate repatriation when and if conditions in the country of origin are genuinely secure. If governments perceive repatriation to be unworkable, yet the interest-convergence that supported the grant of more than temporary protection in the past has disappeared, the obvious answer for governments is to intensify their efforts to prevent the arrival of refugees in the first place. Failure to promote dignified and rights-regarding repatriation undercuts the logic of refugee status as a situation-specific trump on immigration control. If the fundamental right of refugees is to be guaranteed access to meaningful protection until and unless it is safe to go home, it cannot legitimately be asserted that they should routinely be entitled to stay in the host state once the harm in their own country has been brought to an end.⁸

One of the problems for the view expressed above, is that it fails to take account of Article 34 of the Convention which mandates the naturalization of refugees. This is a major failure of this model as Hathaway does not seem to argue for an amendment to the Convention. Instead, the model put forward by Hathaway is an attempt to pray in aid of a misreading of Article 34 based on the obligation of receiving states not to send a refugee back to an ongoing risk of persecution (*refoulement*) found in Article 33.

Article 34 of the 1951 Convention Relating to the Status of Refugees states:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular, make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Hathaway states in the *Harvard Human Rights Journal* article:

The challenge is to re-assert both the essence of refugee protection as a human rights remedy, and the logic of a shattered commitment by governments to provide and fund that remedy.⁹

Indeed, the issue of human rights is in fact the biggest problem with the Hathaway model. It is doubtful that any institution/s can provide a workable system which tends to uphold human rights, when perhaps the most fundamental right that one can enjoy, the right to reside quietly in a place is denied or severely limited. Indeed, that a refugee ought to enjoy a kind of "trump card" over immigration control, is vital for the 1951 Convention to be viable as a human rights document.

In the *Harvard Human Rights Journal* article, Hathaway and Neve argue that the Convention requires that states provide only temporary protection for refugees. However, a statement issued by the UNHCR to this effect does not provide sufficient evidence for this far reaching proposition.¹⁰ Clearly, the United Nations High Commission for Refugees is not entitled to rewrite or reinterpret an international convention.

Practical Difficulties With Temporary Asylum

Hathaway tries to get around the problem of uncertainty on the part of the refugee by stating that there would be a time limit of five years, beyond which the asylum seeker would be qualified for permanent residence in her country of temporary asylum.¹¹

However, this five year cut off point only serves to further call attention to the flaw in the Hathaway model, that an asylum seeker would effectively be denied her fundamental rights as a refugee under such a scheme. First of all, such a provision would clearly offer a strong incentive for immigration officials to repatriate a refugee before the five year period of stay allowed her the right of permanent residence in the resettlement country. If, as Hathaway says, temporary asylum is an attempt to "de-link" refugee issues from immigration ones, then as the time for granting permanent residence grew near, there would be that same association in the minds of immigration officials.

The real difficulty is that the Hathaway model has made the initial assumption that the refugee is basically an undesirable; someone who is to be tolerated in her country of asylum only as long as it is unsafe for her to return. After that point, the individual is promptly declassified as a refugee and presumably put under the category of illegal migrant and repatriated as soon as possible. Second, the Hathaway model offers no satisfactory method for accurately verifying whether it would really be safe for the refugee to be repatriated. What are the criteria for the immigration official of the country of asylum for determining whether it would be safe to return?

In *Reconceiving International Refugee Law*, chapter one, "Temporary Protection," Manuel Angel Castillo and James Hathaway address the issue of how a regime of temporary protection should be structured. As part of this, they envision the establishment of an International Supervisory Agency (ISA) as a means of determining the fate of the refugee. According to this view, the ISA

would act in consultation with the country of first asylum and any resettlement state over refugee issues.

The difficulty with this proposal is partly that refugees/asylum seekers and immigration officials who in many cases determine their fate, stand in an adversarial position to each other. Although immigration officials in receiving states may have some knowledge of the 1951 Convention and 1967 Protocol, their job is more closely related to implementing the policies of their own governments on immigration and naturalization. The job of immigration officials is to follow the policy of their own governments.

Under the existing regime, the United Nations High Commission for Refugees exists to some extent as a broker, set between the refugee and the immigration department of the country of asylum. In practice, however, the protection officer, whose job it is to determine whether the asylum seeker is indeed a refugee, (on whom the Convention affords protection) is under intense pressure from officials in the country offering protection to interpret the Convention conservatively. The Hathaway model would have the effect of shifting this role of broker away from the UNHCR and place more power on the immigration official from the country of asylum. Hathaway and Castillo propose a body to monitor and administer refugee matters, referred to by them as an International Supervisory Agency (ISA).¹² The problem with this proposal is that it is unclear just how this future agency is to be set up, whether it would be a part of the UNHCR or a separate body, what its duties and powers would be, and of course, how it would be funded. Neither does the Hathaway book discuss whether there be overlapping functions or jurisdiction between the proposed ISA and the UNHCR.

One of the problems which already exists with the UNHCR and its present role of screening asylum seekers/refugees and determining their fate is that there are not adequate checks and balances found in many jurisdictions where similar administrative decisions are made. If for example, an administra-

tive decision is made in the United States, Canada or the United Kingdom which is adverse to the interests of the asylum seeker, she may appeal against this decision to a Board of Immigration Appeals, and if the original decision is upheld, a further appeal is subject to judicial review. This process of appeals is designed as a check on abuses of administrative power and an opportunity to provide the right of due process to the asylum seeker.

As it is, however, the UNHCR has no similar system of checks and balances. The United Nations High Commission for Refugees enjoys diplomatic immunity in the countries which it operates in. This means that its final determinations may not be challenged by the asylum seeker. With regard to similar adverse decisions made by the High Commissioner, a refugee/asylum seeker may lodge an appeal to the same office in which the original decision was lodged. The UNHCR is not required to provide reasons for either the initial decision or the decision on appeal. In fact, many refugees have been turned away with a one word decision; "rejected." The prospect of a future ISA seems to present itself with yet another layer of unchecked bureaucracy and with it, more costs, more delay and still more uncertainty for the refugee.

One other practical difficulty with providing temporary protection for refugees is that if as Hathaway suggests, a refugee is given such a limited status in a country of asylum, she will clearly be aware of its limited nature, in terms of the rights and remedies that she is being offered in the country of temporary resettlement. She will also be aware of the outside period for a refugee enjoying temporary protection to be repatriated.

In a case where a person has been granted temporary protection in a given resettlement country, there would be strong pressure for that person to go underground and remain illegally, or to marry out of convenience in order to obtain permanent residence or resort to some other illegal means of staying in the country. Clearly, this is the kind of problem that Hathaway is attempting to

avoid. The fact remains though, that an individual or a family who resides in a country of asylum for up to five years is not easily to be uprooted and sent back to where they came from. Furthermore, the Hathaway model seems unwilling to address the basic issues of rights to work and receive public education on the part of refugees. Without the rights to employment and education, a refugee will more likely be thrust into the world of exploitation and poverty which is commonly faced by illegal immigrants.

Castillo and Hathaway are at pains to stress that every effort should be made to avoid the prospect of "mandated" (forced) repatriation. However such a power would still be an invaluable tool of immigration authorities in an accepting state under a regime of temporary protection.¹³ The authors claim that wherever possible, voluntary repatriation is to be preferred. Such a claim is meaningless. Clearly, a person residing overseas whether she is a refugee or not, is normally free to return any time to her country of origin anyway. If that person has a well founded fear of persecution, such a trip would not be advised but the freedom to do so is there anyway.

Many refugees have, elected to return to their countries of origin after social or political changes have made such a return possible. For many, it seems the natural thing to do, as one is again able to enjoy the language and culture of one's birth. So despite their reluctance to mention it, forced repatriation would inevitably be used as the definitive tool to enforce the concept of temporary protection. In fact, the option of states to enforce mandated repatriation is the only significant thing about the concept of temporary asylum. Because of the strong incentive on the part of the refugee under a regime of temporary asylum to go underground as her period of asylum draws to an end, it would inevitably become policy under such a regime for receiving states to establish a "closed camp" system as was the case in Hong Kong following the CPA. Clearly, the Hong Kong experience of the Vietnamese refugees is not one that anyone should wish to repeat.

Misrepresenting the "Problem" of Refugees

The other serious problem with the Hathaway model, at least as expressed in the article, the "Temporary Protection of Refugees," is that it is founded on a premise containing certain racial implications. Simply because, as Hathaway claims, the Cold War is over and the economies of the northern industrial states have slowed and there is no longer a demand for unskilled migrant labour, does not mean that it is in keeping with either principle, or a "rights-based approach" to accommodate anti-foreign sentiment and buy in to the sentiment of politicians who would seek to exclude "non-white foreigners."¹⁴

In Hong Kong, as in other places in the world, there has been an increasing demand for cheap migrant labour from the period of the 1970s through the 1990s. These migrant workers have come from places such as mainland China, the Philippines, Thailand, Indonesia and elsewhere. The reason for this influx of migrant workers has been a rapidly growing economy, large scale infra-structure projects, and chronic shortage of workers as well as a demand for cheap child care services and construction workers, domestic helpers and other low paid jobs. At the same time, large numbers of workers were entering Hong Kong illegally from neighbouring mainland China. In his book, *The New Untouchables*, Nigel Harris makes the following observation about Hong Kong:

The Hong Kong story illustrates the curious conjecture of painful labour shortages with the expulsion of workers. In the case of those seeking asylum, or entering illegally, deportation was justified by the government in terms of reducing the burden of support by the public exchequer. Yet this is only a burden if the people concerned are interned; if they are allowed to work—and the Hong Kong market clearly needed workers—there is no burden. **Thus did the state invent the very pretext that it requires to justify exclusion** (my own emphasis). The economics and

the politics of immigration control appear to part company.¹⁵

The implication here is that the Hong Kong government as well as other governments have been deeply disingenuous in their commitment to maintaining "economic stability" by excluding foreign migrant workers or refugees from their shores.

The events which occurred in Malaysia in March and April of 1998 serve to reinforce this same point. Along with nearly ten years of robust economic growth which produced chronic shortages of workers, the Malaysian government in the 1980s and 1990s embarked on a large scale importation of foreign labourers, mainly from neighbouring Indonesia but also from the Philippines and South Asia. Following the economic downturn in 1997 and 1998, the Malaysian government treated these same workers as scapegoats, claiming that they were the ones who were taking jobs from locals. Contracts were terminated, and any illegal workers found were detained and expelled *en masse*. Political refugees who had fled to Malaysia from persecution in Ache province in Indonesia were also caught up in the Malaysian government's claim that migrants and refugees alike were now a threat to the economic and social stability of the nation and must be expelled. The UNHCR Chief of Mission was denied access to the detention centres where the asylum seekers were being held by Malaysian authorities.¹⁶ Those in Malaysia that harboured them were detained under the draconian Internal Security Act which allows detention without trial for up to two years.¹⁷ In this way was the myth of the refugee as both economic and security threat perpetuated by the Malaysian authorities.

Clearly there are those with racist views in countries all over the world who in recent years loudly expressed their opposition to people from less developed countries who have come to these places for a whole variety of reasons. The re-emergence of politics which appeals to racism and xenophobia is clearly a worrying development and is to be deplored anywhere in the

world that it is found. However, the momentary rise in racist sentiments does not provide a good reason to truncate international conventions and the law which up until now has offered protection to refugees.

Two issues need to be addressed. First, there may be political or other reasons for countries to control immigration and the pressure from those who don't like to see foreign faces in their societies may even be one of them. States are normally not under a blanket obligation to admit non-nationals, and immigration laws and policies are a matter for individual states themselves to decide. This political pressure to control immigration, however, must be kept separate from international refugee law. Although it is a stated goal of the Hathaway model to de-link these issues, it in fact confuses them by accepting the notion that they must be linked together in the first place.

Hathaway is at pains to point out and condemn what he refers to as the "politics of *non-entree*." By this he means the trend on the part of states in developed nations to require valid visas for entry as well as imposing "carrier sanctions" for those individuals who attempt to reach ports of entry without such visas and even the interdiction of displaced people on the high seas. Hathaway sees such policies as an attempt on the part of developed nations to limit the number of displaced peoples finding their way to their shores and into their ports of entry.

Despite the disapproval which Hathaway displays for *non-entree* policies, they have been formulated by states in order to curtail illegal immigration which has become both a serious problem and a sensitive political issue over the past 25 years in many countries around the world. Clearly, as Hathaway would admit, it is for individual states to regulate their own immigration policies and to allow or limit immigration to suit their own social and economic needs. Hathaway claims that it is partly due to the fact that refugee issues have become inter-linked with immigration issues, that states are reluctant to accept refugees. However, it is not at all clear

that the idea of temporary asylum would address this problem.

The Wide Diversity of Asylum Seekers and Refugees

One of the things that is striking to anyone who has worked as an advocate for refugees is that no two cases are the same. This seemingly obvious observation seems to be lost on Professor Hathaway who seems to be looking at the worldwide problem of refugees as a whole rather than from the point of view of individual cases. No doubt, the world's headlines have been dominated in recent years by the cataclysmic problems associated with forced migration on a wide scale in places like Afghanistan, Cambodia, the Great Lakes region of Central Africa, Southern Africa, as well as the former Yugoslavia. Those individuals clearly place a heavy burden on the receiving states that they arrive in as well as on international agencies such as the UNHCR. In these scenarios of mass migration, there may be some merit in Professor Hathaway's model of offering temporary asylum. It would seem likely that in these situations, most of those affected would want to return to their homes eventually with or without temporary asylum. To fail to distinguish these cases of mass migration, however, from individuals who flee from their countries because of a genuine fear of persecution, is to retreat from the very principles that established humanitarian law in the first place.

The Hathaway model wrongly assumes that refugees, are to be classified along with unwanted migrants from overseas who are for the most part a drain on society. In fact, it has long been argued that refugees have made significant contributions to the countries that offered them refuge. Persecuted waves of Jewish migrants fleeing from Russia and Eastern Europe who found refuge in Great Britain have made significant contributions to British culture, among them Carl Popper, Isaiah Berlin, and Hersh Lauterpacht, to name a few. The United States, a country which has been made up of immigrants, has constantly been reinvigorated by the diversity

those individuals and groups who have settled there from other countries. Many of these were refugees, including among many others, Madaline Albright, Henry Kissinger, Fritz Lang, Billy Wilder, Albert Einstein, Mikeil Barishnikov, Harry Wu and Marline Dietrich.

In 1948, the Universal Declaration of Human Rights was adopted by the same states who had earlier been signatories of the United Nations Charter. Article 14(1) of the Universal Declaration states, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

The 1951 Convention and the 1967 Protocol were part of an effort by the community of nations to implement these noble objectives and to provide for workable remedies in order for individuals to be able to find asylum. These multilateral conventions were not merely entered into as a matter of "converging interests" as has been suggested, nor were they adopted only as a means to score points during the cold war. The adoption of international humanitarian instruments such as the 1951 Convention and the 1967 Protocol were done as a matter of moral claim on the part of the signatory states and remain today as a vital part of human rights law. Just as it was a moral imperative to provide asylum for refugees in the years after the holocaust, it remains a matter of morality today. As the Universal Declaration reaches its fiftieth anniversary the international community is faced with a multitude of challenges, just as in 1948. However, this is no a reason to embark on diluting the instruments of humanitarian law which were conceived along the way. Instead, it ought to be the task of both academics and statesmen and those who defend human rights to expand and develop them further. ■

Notes

1. James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," *Harvard Human Rights Journal* 10, (1997): 115.

2. James C. Hathaway, *Reconceiving International Refugee Law* (The Hague; Boston: Martinus Nijhoff Publishers, 1997).
3. Joanne Mariner, *Hong Kong Prison Conditions in 1997* (Human Rights Watch Asia/Hong Kong Human Rights Monitor, 1997), 20.
4. *Ibid.*, 21.
5. *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: Office of the United Nations High Commission for Refugees, 1979), para. 42.
6. *Ibid.*, para. 43.
7. *Ibid.*, para. 16.
8. Hathaway, *Reconceiving International Refugee Law*, xxii–xxiii.
9. Hathaway and Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," 117.
10. Hathaway and Neve, "Making International Refugee Law Relevant Again," 157. The article refers to the following UNHCR statement:
The purpose of international protection is not ... that a refugee remain a refugee forever, but to insure the individual's renewed membership of a community and the restoration of national protection, either in the homeland or through integration elsewhere ... [T]he Convention makes clear that refugee status is a transitory condition which will cease once a refugee resumes or establishes meaningful national protection. (UNHCR, *Voluntary Repatriation: International Protection* vol. 8, 1996).
11. Hathaway, *Reconceiving International Refugee Law*, 17.
12. *Ibid.*, 7.
13. *Ibid.*, 19.
14. James C. Hathaway, "The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach," (Discussion paper, Refugee Law Research Unit, York University, Toronto, 1996), 9.
15. Nigel Harris, *The New Untouchables: Immigration and the New World Worker* (London: Penguin, 1995), 73.
16. Sheila McNulty, "Asia's New Boat People Adrift in the Storms," *Financial Times*, 28 March 1998.
17. "ISA, Whipping to Stop Illegals," *Business News Review* (Cambodia), 9 March 1998; "Malaysian Cops Net Three People for Sheltering Indonesian Illegals," *Agence France-Presse*, 10 March 1998. □

Refugee Rights: Report on a Comparative Survey

By James C. Hathaway and John A. Dent

Toronto: York Lanes Press, 1995; ISBN 1-55014-266-6; 82 pages; \$11.95

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