Refuge
CANADA'S JOURNAL ON REFUGEES
REVUE CANADIENNE SUR LES RÉFUGIÉS

SPECIAL ISSUE

Securing Protection in a Cold Climate

Vol 20 • No 4 • 2002

Contents

Introduction: Securing Refugee Protection in a Cold Climate
COLIN HARVEY 2

Refugees and Border Security Post–September 11
HOWARD ADELMAN 5

Mr. Suresh and the Evil Twin
AUDREY MACKLIN 15

Preventive Detention of Immigrants and Non-Citizens in the United States since September 11th
KATE MARTIN 23

Refugee Policy after September 11: Not Much New
REG WHITAKER 29

Human Security and Refugee Protection after September 11: A Reassessment
RAQUEL FREITAS. 34

Development and Conflict Prevention: Reflections on Rwanda; An Interview with Professor Peter Uvin
ERIC K. BAINES 45

Roundtable Report: Migration and Security: September 11 and Implications for Canada's Policies
SUMAN BATTACHARYYA. 49

Problématique du genre dans les situations de détresse : le cas des refugiés en Afrique
DANIÈLE LALIBERTÉ-BERINGAR 53

Protecting the Borderline and Minding the Bottom Line: Asylum Seekers and Politics in Contemporary Australia
SIMON PHILPOTT 63

Book Review

The Security of Freedom: Essays on Canada's Anti-Terrorism Bill
By Ronald J. Daniels, Patrick Macklem, and Kent Roach
CONOR GEARTY. 76

Introduction

Securing Refugee Protection in a Cold Climate

Colin Harvey

The terrible events of September 11, 2001, in the U.S. continue to have an impact on the treatment of refugees and asylum seekers in a range of states. This is despite the fact that little evidence has been produced to demonstrate any link between international terrorism and refugee movements in, for example, Canada or the U.S. The suspicion is that governments have used events to justify the accelerated implementation of policies which were already being considered, or have applied existing authorities inappropriately in this new context. Through such cynical manipulation of this tragedy governments too display a lack of respect for the victims of international terrorism.

Governments have a duty to protect their citizens. Citizens have the right to expect to be protected. Those who support a "social contract" model of democratic life affirm not only the duties of the citizen, but also the responsibilities of the state. That governments come under intense pressure to offer security to their citizens is not in doubt. No one disputes the role of the state in securing the conditions which make a decent human life possible.

Terrorism often brings with it vocal demands for tough responses. In the case of internal opposition movements the focus is on the perceived "enemy within." Responses can take the form of enhanced monitoring of political movements and/or national minorities. However, when the danger comes from international terrorism then attention often shifts to migration control, and with it more intense scrutiny of the regulation of entry and the monitoring of migrants who are already present. What is sometimes neglected is that this does not take place in a legal vacuum. States have obligations arising from national and international law which apply to citizens and non-citizens. In particular, human rights law is there to offer protection to persons. It may seem obvious, even banal, but it is the *human* element which makes human rights so important. One of the more dispiriting current political themes is the vilification of human rights advocates, and the downgrading of human rights considerations in the formulation of policy responses. This is a hard time to be a human rights lawyer and/or activist. What is remarkable is that states that parade their adherence to the rule of law in the international community treat human rights law (and human rights lawyers) with contempt when it is convenient to do so. It is almost as if the struggle to enshrine human rights in law had never happened. A similar trend is also evident with respect to those who call for the full and effective implementation of refugee law. The danger is that the gains in refugee and human rights law are threatened by states that view them as inconvenient constraints.

The contributors to this special issue of *Refuge* offer insights into the responses to the events of September 11 which have impacted on refugees and asylum seekers. If there is a unifying theme, it is the importance of defending basic humanitarian principles at a time when they are coming under intense strain. All the contributors acknowledge the need to address international terrorism. This is not in dispute. What is problematic is the way basic human rights principles have been lost in the process. Governments often talk of a balance. However, when one looks at the evidence, human rights are frequently at the bottom of the list when national security becomes an issue. In addition, it should be remembered that in law at least some rights really are absolute. In Europe, for example, Article 3 of the European Convention on Human Rights provides an absolute guarantee against return. Most human rights do not take this form. Limitations are permitted, for example, to the right to liberty and security of the person. Refugee law also contains permissible limitations and even allows

© Colin Harvey, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

exclusion from status in a range of cases relevant to this special issue. However, the point is that state policy is constrained by established norms of refugee and human rights law.

Howard Adelman examines the control mechanisms in place to restrict the entry and retention of terrorists through the refugee determination process in Canada. He asks whether refugees are a security issue or not and places the current debate in context. His answer to his own question is straightforward. He states that there is no evidence to link *global* terrorism with refugees. However, he argues that homeland insurgency movements have used the determination process to ensure that their supporters gain entry to Canada. The conclusion reached by Adelman is that the security threat has been used to achieve other objectives, such as reducing the number of refugee claimants coming to Canada.

Audrey Macklin explores the troubling level of judicial deference evident after September 11. Her focus is on *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[1] and *Ahani* v. *Canada (Minister of Citizenship and Immigration)*.[2] The argument is that when there is a perceived threat to democratic states the role of the judiciary becomes particularly important. Are judges prepared to uphold established norms in a difficult political context? In trying to answer this she focuses rather more on *Ahani* than on *Suresh*. This is deliberate. Macklin argues that *Ahani* has more to tell us about the position of refugees labelled as security threats. In this instance, Macklin's assessment is that the judges failed to accord sufficient weight to the human rights of the individual. In this the Canadian Supreme Court is not alone in the common law world.[3]

Kate Martin carries forward the theme of human rights sacrificed to security interests. She examines the response of the U.S. government to the events of September 11. This contribution makes for depressing reading. The policy response remains remarkable for its neglect of basic civil liberties. Martin highlights the use of preventive detention and the decision to keep the names of those detained a secret. She notes the unconstitutional and generally questionable way that pre-existing authorities were used to justify this policy. The U.S. repeated a common flaw in anti-terrorism policy by adopting what she terms a "dragnet approach" rather than a targeted investigation focusing on the actual terrorist threat. Martin argues that promoting democracy, justice, and human rights is as powerful a weapon as military strength. Her conclusion is that the U.S. government has assigned no weight to the protection of civil liberties in its current policy response. It is hard to disagree with this conclusion.

Reg Whitaker provides a welcome reminder that we should not exaggerate the current position. As he notes, journalistic wisdom is that the world has changed forever. He is suspicious of some of these overblown claims. In fact, he suggests that we are seeing an acceleration of trends already evident before September 11. Whitaker acknowledges the real pressures placed on governments by international terrorism. He also suggests that North American governments have learned some lessons from the mistakes of the past. As he notes, this will be of little comfort to those at the receiving end of a security strategy which is effectively based on ethnic profiling.

Raquel Freitas looks at the concept of "human security" and argues that it is difficult to combine with the understandings of internal security which have emerged since September 11. She stresses the complexity of the term and its use. Freitas is worried about a concept which is so open to abuse and argues that it can easily turn into an instrument of exclusion. In the current climate it is easy to see what she means. However, the "human security" model remains important, particularly when considering how the root causes of forced migration might be effectively addressed.

Suman Bhattacharyya provides a useful report of an important meeting organized by the Canadian Centre for Foreign Policy Development and the Centre for Refugee Studies on migration and security after September 11. A number of recommendations emerged from this meeting. Generally, the policy makers involved accepted the continuing importance of the "human security" model. In practice, and as outlined, this means focusing on the root causes of migration. In addition, Bhattacharyya outlines the acceptance of the need for more economic migration. It is clear from this contribution that human rights considerations formed a central part of the discussions. In particular, whatever other states may wish to do, Canada should not violate its international obligations.

Ultimately, political responses are the only effective way to address security threats. Military responses may satisfy short-term ambitions, but in the longer term it is to politics that we should turn for a solution. Conflict prevention is therefore one part of a rational policy response. Erin Baines offers an instructive interview with Peter Uvin on the lessons to be learned from the Rwandan experience. Uvin advances seven features that ought to be part of a good policy on development and conflict prevention. His reference to a human rights based approach is of particular interest. Uvin talks not of a legalistic model, but of creating social practices that might make rights real. This is an attractive way of thinking about human rights. Political imagination is sometimes eroded by a more narrow legal logic. In the process the social basis of human rights law is often lost. Uvin is right, in my view, to stress the creation of new social practices. However, what emerges is the sense

© Colin Harvey, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

that too much is still happening "after the event" and that too often conflict prevention is never seriously attempted. This seems to be because we are still not listening to the "voices" of people in local contexts.

The contributors to this issue of *Refuge* all have different things to say about current developments. They write from a range of perspectives. What is revealing is that common themes do emerge. In particular, there is a general concern that human rights and civil liberties have been sacrificed in an attempt to address security threats. Writing from a U.K. perspective, I can confirm that this trend has been repeated here and in the European Union as a whole. In order to facilitate the policy of detention of asylum seekers, the U.K. government decided to derogate from Article 5 of the European Convention on Human Rights. The U.K.'s Anti-terrorism, Crime and Security Act 2001 includes extensive provisions on the treatment of asylum seekers deemed to be international terrorists. Asylum seekers have steadily been constructed as a security threat, and are now routinely discussed as part of the focus on tackling forms of criminality. Despite the vocal claims to the contrary by states, the institution of asylum is now under serious threat in Europe.

The negative impact of recent legal developments on refugees and asylum seekers is unsurprising given the existing trends. Governments have used the events of September 11 to justify the rapid implementation of plans that were already being discussed. By using the plight of victims as a means to justify illiberal ends states display a level of disrespect for those who suffer from international terrorism.

At times like this we all must acknowledge the force of the *human* in human rights. We also should stand up for established protections. What are human rights or civil liberties worth if when placed "under stress" they are simply swept aside? No one doubts the importance of protecting people from international terrorism. As a number of contributors point out, democracy, justice, and human rights are also important tools to be used in this struggle. Whether it is Canada, the U.S., or the U.K., it is vital that fundamental freedoms and the core values of democratic life are not sacrificed for short-term political ends. Politicians, lawyers, judges, and NGOs (to name only a few) all have a responsibility to ensure that this does not happen. Refugees and asylum seekers should not become victims of the events of September 11.

Notes

1. 2002 SCC 1.
2. 2002 SCC 2.
3. See *Secretary of State for the Home Department* v. *Rehman* [2001] 3 WLR 877.

Colin Harvey is professor of constitutional and human rights law at the University of Leeds (U.K.). His research interests include refugee and asylum law, human rights, and constitutional law and politics.

© Colin Harvey, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Refugees and Border Security Post-September 11

Howard Adelman

Abstract

In the aftermath of the terror attack on the United States on 11 September 2001, widespread concerns were raised about security concerns related to access to Canada and the United States of refugee claimants. Many new changes were introduced after that event to improve the control mechanisms to reduce the threat of terrorism. In the overlap between refugee and security concerns, particularly with respect to the genuine fear of terrorism, this paper will examine the controls in place and introduced after 11 September 2001 to restrict the entry and retention of terrorists in association with the refugee determination process. This paper will attempt to assess whether the refugee determination process provides any significant opening for terrorists to enter Canada or the United States.

Résumé

Dans la période qui a suivi les attentats terroristes du 11 septembre 2001 aux États-Unis, beaucoup d'inquiétudes ont été exprimées autour de la question de sécurité liée à l'entrée au Canada et aux États-Unis de demandeurs d'asile. De nombreux changements ont été introduits à la suite de ces évènements pour améliorer les mécanismes de contrôle et réduire les risques de terrorisme. Dans le chevauchement entre réfugiés et problèmes de sécurité, particulièrement en ce qu'il s'agit de craintes fondées du terrorisme, cet article se propose d'examiner les mesures de contrôle qui ont été instaurées après le 11 septembre, de pair avec le processus de reconnaissance du statut de réfugié, afin de contrôler l'entrée de terroristes et leur détention. L'article essayera de déterminer si le processus de reconnaissance du statut de réfugié représente réellement une porte d'entrée de quelque importance permettant aux terroristes d'entrer au Canada ou aux États-Unis.

Security and Refugees

There are many areas in which immigration and, more particularly, refugee issues overlap with security concerns, especially since the Canadian system of selection and control presumes that the desirable can be distinguished from the undesirable. This overlap with security is particularly important in the case of refugees for, unlike immigrants, Convention refugees are self-selected and are generally permitted to become members of Canada if they can prove that they are entitled to refugee status according to the provisions of the International Refugee Convention. However, even if adjudication has replaced a system of selection, there are some controls in place to assess any security risk related to potential refugee claimants, refugee claimants, and persons given refugee status under the Convention. Those who pose security risks are inadmissible.[1]

These controls include: imposition of visa requirements on travelers from specific countries coming to Canada; pre-screening abroad to interdict[2] undocumented arrivals in partnership with transport companies,[3] even if genuine refugees are prevented from arriving in Canada to make a claim; limiting the number of refugee arrivals by implementing a "safe third country" mechanism,[4] a provision already in Canadian legislation that eliminates the refugee claims of persons who transited through a country – specifically the United States – where they could have made a refugee claim; the use of Advanced Passenger Information (API) lists with full reservation details to facilitate interdiction at airport ports of entry by disembarkation teams to detect and prevent entry of improperly documented, un-

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

documented, and unwanted arrivals; screening at ports of entry to attempt to identify security risks[5] in partnership with other countries[6] with which Canada shares information,[7] detention[8] of suspect refugee claimants, subject to review,[9] without resorting to the current Australian system of detaining all claimants;[10] pre-screening of refugee claimants by the Canadian Security and Intelligence Service (CSIS) to ensure that they are not security risks;[11] and, finally, removal[12] of those refused refugee status or those granted refugee status[13] if they are deemed to be a security risk. These efforts are enhanced by new high-tech systems to detect security risks, such as the Automated Fingerprint Identification System (AFIS) of Citizenship and Immigration Canada (CIC). To ease the burden on and workload of Immigration Control Officers (ICO), safe travellers can now be expedited through immigration control where the systems are in place by using the CANPASS, INSPASS, and the new Expedited Passenger Processing System (EPPS), all of which were designed to identify pre-approved low-risk travelers expeditiously.

One foundation of this control system is documentation – passports, visas. and refugee (and immigrant) identity documents. Quite aside from the controls on refugees, one of the major breaches in the control apparatus involves the fraudulent use of passports. These include Canadian passports: there were 2,200 reported misuses of Canadian passports through fraudulent alteration, theft, borrowing, and obtaining legitimate passports illegally[14] between 1988 and 2000, according to a 27 September 2001 report of CIC. In addition, corruption is used to buy visas.[15] Some also argue that the absence of a system of identity cards for immigrants and refugees, prevalent in continental Europe, has also been a problem (though such a system is now to be introduced into Canada).

In the application of these enforcement mechanisms, there are always constraints – financial, bureaucratic, legal – as well as continuing debates between the degree of discretion permitted and the desire to have all control rules spelled out clearly and unequivocally. While control systems apply to undesirables of many kinds – criminals, trafficked persons, war and other serious criminals, human rights violators – this article is limited to the examination of control mechanisms in place or recently introduced to restrict the entry and retention of terrorists in association with the refugee determination process, though in some situations there are linkages between the control of terrorism and other control issues. For example, in the case of the Tamil Tigers, there have been allegations of linkages between organized crime, money laundering, immigrant smuggling operations and terrorism.[16] In another example, Ahmed Ressam, the terrorist convicted of planning to bomb the Los Angeles airport, plotted bank robberies and organized the fraudulent use of credit cards. This paper will nevertheless focus on terrorism alone and by and large avoid other issues of control.

Whatever the inherent limitations in any control system, in the aftermath of September 11, widespread charges were made[17] both in the United States[18] and in Canada[19] that the Canadian control system was porous and inefficient. In a poll conducted by Léger Marketing in the aftermath of September 11, 80 per cent of Canadians demanded stricter controls over immigration.

However, in Chapter 2 of a report entitled *Hands across the Border* (henceforth *Hands)*,[20] the Standing Committee on Citizenship and Immigration, reporting on the effects of September 11 on border and immigration issues to the House of Commons, concluded: "Evidence to date indicates that the attacks of September 11th were largely orchestrated and carried out by a group of people who entered the United States legally," and had nothing to do with individuals attempting to enter Canada to win status as refugees.[21] However, the Canadian Alliance qualified its overall endorsement of the report as follows: "Capacity creates its own demand, for where there is a weakness it will be exploited. The 'refugee system' continues to be exploited by non-refugees and is a grave security concern." And on December 7, 2001, the *Toronto Star* headlined its coverage of *Hands*: "MPs Urge Crackdown on Refugees." Is the refugee control system porous and a security threat to Canadians, or is this all hyperbolic rhetoric with little relationship to reality, and, even worse, an excuse and cover to introduce stricter controls on the entry of genuine refugees to Canada? The latter is the attitude of most individuals in the refugee support community. Thus, while unequivocally condemning the terrorist attacks on the World Trade Towers on 11 September 2001 and recognizing the need to take defensive measures against future attacks, refugee and immigration support groups tend to view the terrorism scare after September 11 as having been used as an excuse to restrict and limit refugee entry into Canada even further and with very little justification.

Are refugees a significant security issue or not?

Actual Security Threats and Refugees

As everyone knows, the September 11 attack on the World Trade Towers was not the first terrorist attack targeting North American people and property. One very early terrorist attack aimed at civilians was the 1985 bombing of an Air India flight with 325 people, mostly Indo-Canadians, aboard. Another airline attack on an India-bound plane was just barely averted. Several Canadian Sikhs were recently indicted for the Air India disaster.

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Other groups involved in terrorism have been supporters of the Tamil Tigers in Sri Lanka. Many Sri Lankan Tamils arrived in Canada and were accepted as genuine refugees. CSIS several years ago identified the Liberation Tigers of Tamil Eelam (LTTE) as a terrorist organization guilty of assassinations, suicide bombings, ethnic cleansing, torture and rape. Further, the Security Intelligence Review Committee (SIRC) in its 1999-2001 Report (Ottawa 2000) recommended legislation to criminalize fundraising efforts for terrorist and terrorist front organizations prevalent in Canada. This was picked up in the *National Post* on 8 September 2001, just prior to September 11, in an article entitled "Defunding Terrorism." In October 2001, regulations were introduced, pending legislation, to block money transfers of terrorist organizations. On 7 November 2001, the Canadian government formally declared LTTE to be a terrorist organization.[22] Further, CSIS purportedly named the Tamil Eelam Society as a front for the LTTE. At the beginning of December 2001, CIC denied further funding to the Tamil Eelam Society of Canada, which provides services to Sri Lankan refugees and migrants on the grounds that the society "was not meeting our requirements," according to the CIC spokesperson, Simon MacAndrew. He did not specify what those requirements were.

Note that these organizations are not so much involved in global terrorism as in support of homeland insurgency movements (which may include the use of terrorism as a strategy), for which they provide monies, lobbying, public relations, sources of recruitment, and safe havens. However, in addition to the LTTE and various militant Sikh groups from India,[23] Canada has been used as a conduit for global terrorism as well. Terrorist organizations active in Canada include the al Qaeda network and the Algerian Armed Islamic Group (GIA)[24] as well as Hamas and Hezbollah, which share some common goals with al Qaeda.[25] In the 1993 World Trade Towers attack in which six people were killed, the chief organizer, Ramzi Yousef, used forged Canadian immigration papers to gain access to the United States. He went on to plan to sabotage twelve U.S. planes in the Philippines, but that terrorist attack was foiled.

However, the closest connection to Canada, refugees, and security was another foiled terrorist operation, the planned bombing of the Los Angeles airport. Thanks to alert U.S. Customs officials who discovered explosives in the trunk of Ahmed Ressam's car on 14 December 1999 when he tried to cross into Washington State on a ferry from Victoria, British Columbia, Ressam was captured. Ressam had entered Canada as a refugee claimant from Algeria, but had been unsuccessful in his refugee claim. He returned to Canada on a false passport. His alleged partner, the Algerian Samir Ait Mohamed, entered Canada in October of 1997 with a false Belgian passport and a fake name. He too claimed refugee status, and had a hearing in August 1998 in Montreal but his claim was also rejected. Though having no employment and living off welfare, he paid rent of $1400 per month. He was picked up in Vancouver in July 2000 on an immigration warrant as a result of information that came out of the trial of Ahmed Ressam. The United States was not the only target the two had in mind. They planned to place an explosive device in a gasoline truck at the busy Laurier/Park intersection in Outrement, Montreal, a classy francophone area, because Ressam saw ultra-orthodox Jews there due to the proximity of a large Hasidic community. They also planned to set off a bomb on a busy commercial block of Ste. Catherine Street in Montreal.[26] However, the major targets have been in the United States.

Other than our own safety, as well as our concern for American lives and our many shared values, we have other motives than terrorism itself for focusing on immigration and refugee issues as a security concern.

Economics as a Motive

Canada and the United States boasted the longest undefended border in the world. The U.S. admits about 530 million people across its border each year, almost 200 million from Canada; eighty million of these cross into the United States on land. Prior to September 11, there were only three hundred American agents patrolling the US/Canadian border and only seven hundred customs inspectors. As a result of the North American Free Trade Agreement (NAFTA), trade between the two countries grew from $116.3 billion in 1985 to $409.8 billion in 2000. That trade represented 85 per cent of Canadian exports in 2000, up from 60 per cent thirty-five years earlier. At the same time, to become more efficient, industry had instituted just-on-time delivery so that auto assembly plants on both sides of the border would have only from six hours to two days of supplies on hand. About 3.75 million trucks per annum cross the four bridges from Ontario to the U.S., about one half via the Ambassador Bridge, which carries five thousand trucks per day. Before September 11, Canadians and Americans had been moving to integrate their economies even more.

Other than the outpouring of sympathy for Americans post-September 11, effects were most acutely felt at the long delays at border points for both people and goods. Consider that each automobile assembly line produces $1 million worth of cars per hour. When backups at the U.S. border create delays of days, the economic impact is enormous.[27] Thus, efforts were expended in three very different directions. First, the smart-border declaration signed by Can-

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ada's Foreign Minister John Manley and Paul Ridge, the U.S. Director of Homeland Security, included provisions for the long-standing efforts of Canada to create joint customs pre-clearance for commercial cargoes and jointly operated customs facilities at remote border points; Canada Customs and Revenue Agency (CCRA) has introduced a self-assessment program (CSA) to facilitate the movement of low-risk commercial traffic as well as a joint commercial driver registration system. Second, efforts are being made to speed up introduction of the CANPASS system (an automatic pass to allow electronic identification for secure Canadian travellers to return into Canada without being checked by an ICO) and its successor, the Expedited Passenger Processing System (EPPS), the technological means that allow immigration and customs officers at airports to identify pre-approved low risk travelers to create what the Canadian Minister of National Revenue in 1996, David Anderson, dubbed "a hassle-free border for honest travelers and businesses." Third, in addition to making the free flow of goods and services as well as secure travelers across the border easier, reinforced security measures were stepped up along the border dividing Canada and the United States. American agent numbers along the border were tripled in the immediate aftermath of September 11, initially from three hundred to nine hundred and then with the addition of another six thousand Patrol Officers.[28]

Changes in Canadian Controls to Enhance Security

A number of changes on the Canadian side have been made to enhance security with respect to dealing with refugees that assume refugees create security problems. Even before September 11, in March 2000 the House of Commons Report, *Refugee Protection and Border Security: Striking a Balance*, tabled in the House of Commons, connected the security and refugee issues. Further, the Immigration and Refugee Protection Act (IRPA),[29] includes clauses connecting refugee and security issues. For example, clauses condensing the security certificate protection procedure were drafted before September 11 (though the Bill received Royal Assent on 1 November 2001 to come into force on June 28, 2002).

The Public Safety Act passed after September 11 includes provisions in Part 9 amendments to the current Immigration Act for stopping a refugee proceeding if a claimant is discovered to be a member of an inadmissible class or under a removal order. In such cases, refugee determination proceedings before the Immigration and Refugee Board (IRB) could be suspended or terminated if there are reasonable grounds to believe that the claimant is a terrorist, senior official of a government engaged in terrorism, or a war criminal. Another amendment allows immigration officers to arrest and detain foreign nationals within Canada who cannot satisfactorily identify themselves in the course of an immigration proceeding, thus enabling CIC to enforce security concerns whether they arise at the border or within Canada. However, CIC does not have to certify that someone detained was an individual who might facilitate acts of terrorism. Other provisions require airlines to provide information on passengers before arrival. The Act provides stiff increases in penalties for those who engage in human trafficking and smuggling; those convicted would face fines of up to $1 million and/or prison sentences for life. Finally, the provision for the new independent appeal to those refused refugee status – that had been provided for when Elinor Caplan, the then Minister of Citizenship and Immigration, introduced the new Immigration Act – was suspended by her successor, Denis Coderre.

There have been a number of initiatives to harmonize Canadian and American practices, though none can be said to go so far as harmonizing immigration policies according to George Bush's directive on 29 October 2001 when he ordered his officials to begin harmonizing customs and immigration policies with those of Canada as well as Mexico to ensure "maximum possible compatibility of immigration, customs and visa policies."[30] In addition to visa screening abroad and pre-clearance of flights abroad, two key areas of co-operation between Canada and the United States are in the process of being introduced with respect to refugees – the creation of a common list of countries exempt from visa requirements and the introduction of a safe third-country accord.

A day after Canada and the U.S. signed a joint border and immigration accord in December of 2001, Canada imposed visa requirements on the following eight countries: Dominica, Grenada, Kiribati, Nauru, Tuvalu, and Vanuatu (six small island states), as well as Zimbabwe and Hungary. The island states are used to buy passports or, in the case of Nauru, serve as a holding centre for Australian refugee claimants. Hungary was included because, although a small percentage of Roma have been accepted as refugees, Roma from Hungary continually arrive in Canada to become refugee claimants. However, the inclusion of Zimbabwe supports the fears of the refugee support community since 1,652 Zimbabweans made claims in 2000 and the majority (70 per cent) of claimants have been successful. In the news release of 4 December 2001, the then Minister of Citizenship and Immigration, Elinor Caplan, explained that, "The decision to impose a visa for Zimbabweans reflects our concern with improperly documented travellers to Canada." The Canadian High Commissioner to Zimbabwe was quoted in the *Zimbabwe Independent* that same day as saying the visa was imposed to ensure "that only those

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

people with genuine reasons are allowed entry to Canada." But most were genuine refugees! Would the Canadian High Commission issue a visa if the applicant in Zimbabwe said that his reason was a desire to make a refugee claim? Is it any surprise that the refugee support community believes that such provisions would, and were probably intended to, deter the arrival of genuine refugees even though there has been no evidence of a security threat from Zimbabweans?

The biggest worry for the refugee support community has been that the United States and Canada have finally agreed to implement the safe third country provision already in Canadian legislation. Since 75 per cent of refugee claimants in Canada arrive through the United States, refugee support groups either totally oppose its implementation or insist on conditions. For example, Amnesty International, in a press release on 23 May 2002, demands that individuals denied access to the Canadian system in accordance with a safe third country agreement not be subjected to the American expedited removal process and summarily removed for want of a valid or suitable documentation, that internment only be employed if necessary but always in accord with international standards and never applied to children, and that those fleeing gender-based violence not be denied access. The Canadian Council for Refugees (CCR) is much more vociferously opposed to introducing a safe third country provision and is running a campaign against its introduction with the misleading title of the "None Is Too Many" provision.[31]

The Chrétien/Clinton Canada-USA Accord on Our Shared Border, of February 1995, included a provision for implementing a safe third country provision. The September 11 attack gave the absence of any true effort in that area a new impetus. On 12 December 2001, Canada and the U.S. signed a Joint Statement of Cooperation on Border Security and Regional Migration Issues, otherwise known as the Smart Border Declaration,[32] that included a commitment to work towards a safe third country agreement that would significantly reduce or bar access to Canada for refugee claimants passing through the U.S. The agreement stated that,

> We plan to develop the capacity to share such information and to begin discussions on a safe third-country exception to the right to apply for asylum. Such an arrangement would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries.

This provision requires that if claimants passed through a country where they were entitled to make a refugee claim, then they would not be allowed to make a claim in the country of arrival but, instead, would be sent back to that country to make a claim.

While the Citizenship and Immigration Minister, Denis Coderre, was reported in the 2 May 2002 *Globe and Mail* to have promised that no agreement was possible unless the Agreement "guarantees the United States will treat the asylum seekers much like Canada does," on 6 May John Manley, who was charged by the Prime Minister with coordinating all matters related to security with the United States, indicated that a draft agreement was ready and would be signed in June at Kananaskis by George Bush and Jean Chrétien in accordance with the thirty-point action planned agreed upon between the two countries at the end of 2001, which included joint security clearances for refugee applicants, coordination of visa policies, sharing of information on passenger manifests, and pre-clearance of exports headed across the border. At the time of this writing, the details of any draft agreement are not available.

There were other changes affecting refugees that did not involve legislative changes or implementation of existing legislation. Paul Martin's 10 December 2001 budget allocated $395 million to speed up and enhance refugee and immigration screening. A sum of $500 million was set aside for detention[33] and speeding up the removal process. (Much larger amounts – $1.2 billion – went into high tech devices to speed up the movement of goods and people, such as the Primary Automated Lookout System (PALS) for land border passenger traffic, designed to take care of 70 million of the 80 million Canadians who cross the Canadian/American border by land each year, and the Canadian Air Transport Security Authority (CATSA), a new authority set up to oversee security at Canadian airports.) New immigrant and refugee claimants would henceforth be required to carry a fraud resistant "Maple Leaf" identity card to be paid for by a $50 fee charged to the refugee claimant.[34] The cards would be encoded with an identifier, such as a fingerprint, and those carrying the card would use it at ports of entry or to check in periodically at designated kiosks where they would swipe the card to see if it matched their biometric identifier. The cards would also be used for medical and welfare purposes to prevent fraud and double-dipping. The CCR submission to the Standing Committee on Citizenship and Immigration of the House of Commons complained about the "excessive and intrusive demands for information" from immigrants applying for a permanent resident card because the government had no business asking these individuals who their employers were or where they went to school for the last five years, presumably based on some ostensible security need. The CCR also complained about the lack of a mechanism to apply to the Minister for an exemption and to ensure exemption applications are dealt with in a fair manner with respect to the broad provisions concerning inadmissibility on the

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

grounds of security, human rights violations, or participation in organized crime.

The fears about the direction of these reports, legislative initiatives, and budgetary allocations were accentuated for some members of the refugee support community when the Supreme Court handed down its ruling on the Manickavasagam Suresh, a forty-five-year-old Tamil citizen of Sri Lanka. Suresh entered Canada on 5 October 1990 and was accepted as a Convention refugee on 11 April 1991. When Suresh applied for landed status in the summer of 1991, the Solicitor General of Canada and the Minister of Citizenship and Immigration declared him inadmissible on security grounds, on the grounds that Suresh had been a fundraiser for the LTTE and was, therefore, a member of an alleged terrorist organization. On 18 January 2000, the Federal Court of Appeal ruled that:

> It is permissible in defined circumstances to deport a suspected terrorist to a country even though, in the words of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, … there are substantial grounds for believing that *refoulement* would expose that person to a risk of torture."[35]

In effect, refugees could be sent back to potential torture under certain circumstances. After the attack on the World Trade Towers, the Supreme Court of Canada rendered a ruling that upheld the right of the government to deport Suresh as long as the government observed procedural proprieties. Amnesty International had all along criticized any policies or court rulings for excluding "serious criminals, terrorists, human rights violators, traffickers and security risks" if they would face serious human rights violations such as torture. AI, in a press release dated 7 April 2002, interpreted the *Convention Against Torture* to which Canada was a signatory as absolutely forbidding return to a state where the individual "would be in danger of being subjected to torture." The Supreme Court determined that it was wholly within the government's prerogative to determine whether there was any significant danger as long as proper procedures in making that determination were followed.

In order to assess whether such measures are necessary and appropriate, it is incumbent that the security threat be understood in order to assess its relationship to the refugee process.

Terrorism

The September 11 events were not the first terrorist attacks aimed at U.S. targets by al Qaeda or its predecessors. The 1983 truck bomb in Beirut, the 1988 crash of Pan American flight 103, the 1989 UTA crash in which 171 were killed, the previous attempt on the World Trade Towers in 1993 when six were killed, the 1995 bombing of the Military Cooperation Program building in Riyadh, Saudi Arabia, the 1998 bombings of American embassies in Nairobi and Dar es Salaam, the 2000 attack on the USS Cole in Yemen – all of these had been part of a growing pattern of global terrorism fostered by radical Islamist groups aimed at the U.S. The September 11 attack was simply the most audacious and sophisticated with the greatest loss of lives and property.

In the September 11 attacks when American airlines were hijacked and used as explosive missiles to destroy or attempt to destroy American buildings of great symbolic significance in New York and Washington, two targeting the two towers of the World Trade Centre and two targeting the Pentagon and possibly the White House, the four teams of terrorists – nineteen men in all[36] – demonstrated that they had been highly prepared and coordinated. For the success of the attack depended on well structured surveillance, clear and unequivocal decisions and planning, and an effective logistic support operation. The terrorists had to have knowledge of airport security and know that transcontinental flights carried a low passenger load on Tuesday mornings but also a high fuel load after takeoff. As we have learned from a number of Hollywood terrorist movies, a well-trained attack team capable of using swift initial violence to intimidate, and to take advantage of past habits during airline hijacking that recommended co-operation rather than resistance, is necessary. It was an operation that required close coordination in time. And it depended on some of the hijackers taking enough flying lessons over time to be able at least to steer these large aircraft towards their pre-selected targets.

All these terrorist attacks have been made up of low tech/high tech combinations. They are high tech when they use explosives that are more compact, more lethal, and easier to make, including turning civilian planes into missiles, but low tech when they employ box cutters to hijack the planes. These terrorists seem to have no moral qualms about killing innocents, including women and children. In some cases, women and children are even targeted. The attacks have increasingly become more brutal and indiscriminate with larger numbers of casualties following a multiple coordinated attack. What is most important, the attackers do not require close direction and supervision, but have become self-guided missiles capable of keeping their focus on their targets after long separations of time and distance from the centre of operation. They are better educated and backed by cadres that number in the thousands in a network with a global reach. Muslim extremists committed to messianic terrorism are behind 90 per cent of these attacks. Intelligence on them is difficult to acquire

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

since al Qaeda consists of highly organized teams relatively isolated into tightly closed cells, but whose operations depend on loosely structured networking versus strict hierarchical command and control. In this messianic terrorism, the terrorists believe they are opposing conspiracies of powerful, hostile forces out to destroy and eliminate what they value, while their cause is all-good, all-powerful, and guaranteed victory.

It is one thing to describe and characterize these terrorist attacks on which there is general agreement. It is another to explain them. Commentators generally fall into one of five groups in accounting for this terrorism: (1) those who see this terrorism as an expression of irrationality,[37] (2) those who view it as an expression of one side of a struggle, a sort of civil war within Islam between tradition and modernity into which the United States has been drawn;[38] (3) those who see America as the main target because of what America has done in the past;[39] (4) those who see it as a war of civilization aimed at America because of what America stands for;[40] and (5) those who see this terrorism not as an act of war, either civil, against a state, or against a civilization, but as a crime against humanity.[41] However, whatever the explanation or interpretation adopted, they all focus on strategies for attacking the problem in its home base rather than defending against the terrorists through homeland security.

Linking Terrorism and Refugees

It is clear that terrorism aimed at North America is a real threat and both aggressive and defensive measures must be taken to combat it. Though some of those defensive measures include enhanced immigration controls, there is virtually no evidence linking *global* terrorism with refugees. Global terrorists have not exploited the refugee determination system to gain access to Canada, though several tried. There is an obvious reason for this. Entering Canada via the refugee stream exposes a refugee claimant to authorities, to a security clearance, to divulging information in filling out a refugee claim form. Any sophisticated terrorist would reasonably be expected to avoid such an exposure. Further, there are far easier options for gaining entry into either Canada or the United States.

There is plenty of evidence, however, that indicates that homeland insurgency movements characterized by violence have used the refugee determination system as a way for their supporters to gain entry into Canada and as fronts for organizing support for those insurgent terrorist groups. Actions are underway to undercut that diaspora support for insurgency movements abroad that use terrorism as a key tool.

There is even more evidence that the security threat – which is real and palpable – has been used as a cover to cut down on the entry of refugee claimants coming to Canada whether through visa controls or through the proposed implementation of a safe third-country system. If there are justifications for this indirect cutback by greater restrictions on access to the system, one of them is not security; the security issue is a rationale rather than a reason.

Notes

1. Part 3, 14 of the regulations registered June 11 (cf. CIC web site, online: <http://www.cic.qc.ca>) states that a foreign national or permanent resident is inadmissible, "if the Board determines that the person has engaged in terrorism or b) a Canadian court determines that such persons have been involved in the commission of a terrorism offence in accordance with 34 (1) (c) of the Act." Also inadmissible are those determined by the Board, Canadian courts, or the international criminal court to be guilty of crimes against humanity. According to section 35 (1) (b) of the regulations, prescribed officials from states that persecute their own citizens may not be allowed to enter. These include heads of state, government ministers or members of the governing council, senior advisers, senior civil servants, senior military officers and senior members of the intelligence and security services, ambassadors and senior diplomatic officials, and members of the judiciary.
2. Prior to September 11, Canada had forty-four Immigration Control Officers (ICOs) posted abroad. The December 2001 budget allocated increased funds to deploy additional ICOs abroad, perhaps to be enhanced by posting CSIS and RCMP officers abroad as well.
3. Over the five years preceding September 11, Canada interdicted an average of 6,600 individuals each year and prevented them from travelling to Canada.
4. In the interim, direct-backs – that is, sending refugee asylum applicants back to the United States to await an initial hearing – have been used as an alternative to detention when initial checks could not be completed expeditiously, such as when proper documents or a senior Immigration Control Officer (ICO) was not available.
5. This involves profiling based on countries to which they traveled, source countries, employment and non-employment backgrounds, past studies, etc. Cf. the *Globe and Mail*, 19 September 2001, p. 1, for a story on a CIC document marked, "Protected: Canadian Eyes Only – for Official Eyes Only."
6. The Integrated Border Enforcement Teams (IBETs) have been created as multi-agency cross-border intelligence law enforcement teams to share information and coordinate actions against terrorists, illegal migration, and cross-border criminal activity reinforced by the use of a number of high tech devices.
7. In the one area of overseas intelligence in which Canada has a capacity, signals intelligence or SIGINT, Canadian signals intelligence evidently intercepted encrypted messages among

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

international terrorist groups indicating a renewed terrorist assault on the U.S., though CSIS erroneously received the credit. (Cf. Jerry Seper, "FBI Alert Based on Coded Message," *Washington Times*, 1 November 2001, and Scott Simmie, "Why Spy Agency Had Key Role in Terror Alert?" *Toronto Star*, 1 November 2001.) This sharing of information was consistent with the priorities of then Immigration Minister Elinor Caplan, who had said, "We need to be able to develop a network where we share information overseas so that we can better protect our continent" to stop "those who pose any kind of security threat from coming to Canada or the U.S. to begin with." (Cf. Allan Thompson of the Ottawa Bureau of the *Toronto Star*, who also reported on 31 October 2001 that Canada and the U.S. were edging towards establishing a common security perimeter by establishing joint screening procedures to stop security threats at the source.)

8. In the Canadian government May 2002 response to *Hands*, the claim was made that detention is only used "when absolutely necessary, i.e. when persons pose a threat to public safety, are considered to be a flight risk, or are undocumented and uncooperative in establishing their identity." (emphasis added, p. 4)
9. In Canada, a review of the circumstances of detainees occurs within forty-eight hours and then again within seven days and every thirty days thereafter.
10. The UNHCR Guidelines on Applicable Criteria and Standards related to the Detention of Asylum Seekers view detention as inherently undesirable and should not be used as a deterrence measure or to punish asylum seekers who have entered a country illegally. The Guidelines forbid the automatic use of detention, and provide that detention only be resorted to in cases of necessity as an exception, and should be imposed on reasonable grounds, and, even then, insist that it should not be unduly prolonged. However, since the "reasonable grounds" include opportunities to verify identity, to determine the elements on which the claim for refugee status is based, cases where asylum seekers have destroyed travel documents or used fraudulent documents, or in cases of security concerns, most cases could easily fall under one of these exceptions even if the procedural safeguards are in place, such as providing detention orders and reasons in the language the detainee can understand, providing access to legal counsel, providing for a review of any decision, and allowing the detainee to challenge the reasons before a review tribunal.
11. SIRC in its 2000–2001 Report (Ottawa, 2001) noted that it could take up to as long as two years to complete a background check on a refugee claimant. As the Report also notes, much of the time taken up by intelligence liaison concerns immigration, visa, and refugee clearances. However, in spite of the Global Case Management System of CIC (GCMS) and its Field Operational Support System (FOSS), the lack of coordination among CSIS, CIC, and the RCMP has impeded the proper identification of refugee claimants who are suspect, according to Adrian Humphries ("Caplan Made Promises She Could Not Keep," *National Post*, 3 November 2001). The designation of liaison officers from CIC, CSIS (SLOs) and the RCMP (LOs) was intended to expedite communication and co-operation. Further, the Canadian government in its May 2002 response to *Hands* committed itself to fair and equitable treatment, the development of national standards for pre-screening, and the training of officers in cross-cultural understanding.
12. CIC employs 350 inland enforcement officers (IEOs) to investigate, remove, and escort deportees.
13. Including humanitarian cases as well as Convention refugee status, Canada admits about 58 per cent of refugee claimants compared to 52 per cent for the U.S.
14. Bertoliny Eugene, an enterprising student at Concordia University, testified at the trial of Ahmed Ressam (where Ressam was convicted of terrorist activity for trying to bomb Los Angeles airport) that he had obtained five other passports "easily" in addition to the one he supplied Ressam, and only received $300 for each of them. Another supplier testified that passports were very easy to obtain, but he sold them for $800 each. The Algerian co-conspirator with Ahmed Ressam, Samir Ait Mohammed, using false Canadian passports, allegedly tried to arrange the entry into Canada from Germany of four terrorists who had trained with Ahmed Ressam in al Qaeda camps in Afghanistan.
15. Canada has a much smaller problem of control than the U.S. for we admit only six hundred thousand per year as students, tourists, and business people, while the U.S., with its more universal visa requirement, issues over thirty million visas.
16. In comparing foreign intelligence with domestic intelligence related to control, the only issue that does not overlap is perhaps nuclear proliferation, and in terms of domestic intelligence, even this is a problem when the focus is on non-state actors. All the other issues set forth as priorities by the federal Cabinet in 1991 have a domestic security counterpart relevant to domestic intelligence: international terrorism and ethnic and religious conflict in which the diaspora communities generally are significantly involved. These security priorities are: nuclear proliferation, illegal migration, transnational organized crime, economic espionage, and trade intelligence.
17. A backgrounder, "Canada's Asylum System: A Threat to American Security?" by James Bissett, makes the claim that the refugee determination system is a security threat. Since Bissett is a former Canadian ambassador and was the Executive Director of Canada's Immigration Service from 1985 to 1990, his charges carry some initial credibility. (Cf. online: <http://www.cis.org/articles/2002/back402.html>.) In the article posted on that site, Bissett says: "Canada has introduced some far-reaching security legislation since the attacks in the United States, but the weakest link — Canada's asylum system — has not been addressed . . . the security of both countries remains vulnerable to a Canadian asylum system that seems designed to openly welcome potential terrorists."

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

18. Cf. D.L. Brown, "Attacks Force Canadians to Face Their Own Threat," *Washington Post*, 23 September 2001; J. Bagole, et al., *Wall Street Journal*, 24 September 2001.
19. Cf. Stewart Bell, "A Conduit for Terrorists," *National Post*, 13 September 2001, Diane Francis, "Our Neighbour's Upset over Our Loose Refugee System," *Financial Post*, 22 September 2001.
20. Canada. *Hands Across the Border: Working Together at Our Shared Border and Abroad to Ensure Safety, Security and Efficiency*, House of Commons Standing Committee on Citizenship and Immigration Report (Ottawa, December 2001). The Canadian government response was published in May 2002 and is available on the internet, online: <http://www.cic.gc.ca/english/pub/hab/htlm>.
21. An American INS Bulletin in October reported that thirteen of the nineteen hijackers entered the U.S. on legal business or a visitor visa; there were no records for the others.
22. See also Ravindra Aryasinha, "Terrorism, the LTTE and the Conflict in Sri Lanka," *Journal of Conflict Security & Development* I:2, 2001, 25–50.
23. Other terrorist organizations that use Canada as a base for support, recruitment, funds, and a safe haven for homeland insurgency include the Real IRA and the Kurdistan Workers Party from Turkey (PKK).
24. The Algerian terrorists were linked with al Qaeda by John Solomon, "Authorities Identify Six Terror Centres in US," *Jerusalem Post*, 18 November 2001, and by Susan Sachs, "Merger Spread al-Qaeda Tentacles," *New York Times*, 21 November 2001. As we shall see, two of the terrorists associated with al Qaeda who have been caught came from the Algerian group. Further, Nizar Ben Muhammad Nassr Nawar, who killed himself along with nineteen others, twelve of whom were German tourists, on 11 April 2002 when he used an old refrigerated truck filled with propane to blow up an ancient synagogue in Djerba, Tunisia, was evidently part of the Algerian al Qaeda cell based in Montreal. However, Canadian officials could find no record that he had tried to immigrate to Canada or had applied for refugee status. (Cf. *Toronto Star*, 9 June 2002, A1 and A12.)
25. There were other potential cases involving Palestinians, only a few of which have come to light. For example, just prior to September 11, Ary Hussein came to Canada to file a refugee claim. He ditched his papers before arriving at Pearson airport and landed behind bars after confessing to having once participated in a kidnapping. (Cf. the report of Bill Schiller in the *Toronto Star* on 23 November 2001.)
26. This information became available in early December 2001 as a result of a freedom of information action launched by the *Globe and Mail*.
27. As Lunman reported in the *Globe and Mail* of 17 October 2001, "Waits at U.S. Border Hurting Economy, B.C. Premier Says – He Urges PM to Push for North American Security Perimeter." Kuitenbrouwer in the *National Post* of 29 October 2001 wrote, "Perimeter will save trade: CEOs – 74% say we need common security rules as worries mount over access to key market."
28. What was once the longest undefended border was becoming a security barrier. U.S. Border Patrol official Robert Finley, chief agent for a nearly five-hundred-mile stretch of the United States-Canadian border from the Continental Divide in Montana to North Dakota, was quoted in an article by Sam Howe Verhovek in the 4 October 2001 *New York Times* as saying, "There are all kinds of means to get across the prairie illegally. People use bicycles here; they drive in on snowmobiles. They come over by horseback." Compare this to the eight thousand American agents along the U.S.-Mexican border. Cf. Sam Howe Verhovek in the 4 October 2001 *New York Times*, where he began by contrasting the former focus on preventing people from wading across the Rio Grande or hiking across the scorching desert that borders the U.S. and Mexico, to a new focus on securing the longest unguarded border.
29. Cf. Canada. Bill C-11: An act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (Ottawa, 1 Nov. 2001). See also Canada. Bill C-36: An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, 37th Parliament, 1st session (Ottawa, 2001).
30. According to Bush's spokesperson, Campbell Clark, as quoted in "Bush Aims to Tighten Continent's Borders – U.S. Bid to Harmonize Immigration and Customs Puts Heat on Chretien" (*Globe and Mail*, 30 October 2001).
31. Catherine Balfour widely circulated an e-mail calling on all Canadian Council for Refugees (CCR) members and friends to organize a media blitz on U.N. World Refugee Day, June 20, over the prospective "safe third country" agreement with the U.S. NGOs misleadingly dubbed the provision the *None Is Too Many* agreement after the bookby the same name by Irving Abella and Harold Troper documenting the efforts of the Canadian Immigration Department during the 1930s and 1940s to keep Jews out of Canada. CCR argues that "the evidence shows the United States IS NOT A SAFE THIRD COUNTRY for refugees!" (Cf. online: <http://www.ccr~web.net>)
32. Previous meetings, such as Border Vision and the Cross-Border Crime Forum, were movements in this direction.
33. Before September 11, about eight thousand people were detained by immigration for an average of sixteen days; the U.S. average detention time was twice as long, and twenty times more people were detained, a reflection largely of the activity on the Mexican border. Grounds for detention in both countries are similar, including: the security risk posed; the fear that the individual will disappear underground; and the need to confirm the identity of the person detained, though Canada is less likely to detain refugees based on the latter need.
34. Provisions for a Permanent Resident Card were spelled out in the regulations registered June 11 although the official version was not available until June 17 on the CIC web site, <http://www.cic.gc.ca>. As stated in the regulations, "The implementation of the Act on June 28, 2002, will bring with it the introduction of the permanent resident (PR) card that will

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

provide new and existing permanent residents with clear, secure proof of their status. The PR card will automatically be issued to all permanent residents who are new to Canada as of June 28, 2002. Permanent residents already in Canada will be able to apply for the card this fall according to a schedule based on their year of landing. After December 31, 2003, all permanent residents will need the PR card to re-enter Canada after traveling abroad."

35. The Supreme Court did not overturn the second case of Mansour Ahani because the Supreme Court ruled that the government had followed proper procedures in considering him a security risk and weighing the risk of torture upon his return.
36. The theory is that twenty men were intended to hijack the planes, but a French-Moroccan flight student, Zacarias Moussouai, was detained by INS on 17 August 2001 because his flight instructor at an Eagan, Minnesota, flight school became suspicious because of his persistent efforts in training on flight maintenance operations on the flight simulator.
37. Cf. Bruce Cumings, Professor of History at the University of Chicago. His views are articulated in an e-essay solicited and distributed by the Social Science Research Council (SSRC) in the United States, entitled "Some Thoughts Subsequent to September 11th. See also James Der Derian, Professor of International Relations at Brown University and Professor of Political Science at the University of Massachusetts, whose views are represented in an e-essay, also distributed by SSRC, entitled "Before, After, and In Between," as well as in remarks made at a symposium sponsored by the Watson Institute for International Studies at Brown University in the aftermath of September 11 and reprinted in a special issue of *Briefings: Perspectives on 9.11.2001* published by the Watson Institute.
38. Cf. Timur Kuran, Professor of Economics and Law, and King Faisal Professor of Islamic Thought and Culture, at the University of Southern California, who offers an economic interpretation in his SSRC e-essay, "The Religious Undercurrents of Muslim Economic Grievances." See also Farish A. Noor of the Institute for Strategic and International Studies (ISIS) in Malaysia who articulates a more cultural interpretation of the civil war within Islam in another SSRC e-essay entitled "The Evolution of 'Jihad' in Islamist Political Discourse: How a Plastic Concept Became Harder."
39. Cf. Mahmood Mamdami, Professor of Anthropology at Columbia University, in his SSRC e-essay, "Good Muslim, Bad Muslim: An African Perspective;" and Tariq Modood, Professor of Sociology and Director of the University Centre for the Study of Ethnicity and Citizenship at the University of Bristol, in his SSRC e-essay, "Muslims in the West: A Positive Asset."
40. Cf. Luis Rubio, General Director of the Centre for Research for Development (CIDAC) in Mexico City, in his SSRC e-essay, "Terrorism and Freedom: An Outside View;" and David Held, Professor of Political Science at the London School of Economics, in his SSRC e-essay, "Violence and Justice in a Global Age."
41. Cf. Mary Robinson, the United Nations High Commissioner for Human Rights; her views are expressed in the USIP *Peace-Watch* of October/December 2001 (p. 7); see also Thomas J. Bierstecker, Director of the Watson Institute for International Studies and Henry R. Luce Professor of Transnational Organizations at Brown University, in "Perspectives on 9.11.2001; A Special Issue," *Briefings*, Summer/Fall 2001. Finally, look at Janet Abu-Lughod, Professor Emerita of the Department of Sociology at the New School in New York City, in her SSRC e-essay, "After the WTC Disaster: The Sacred, the Profane, and Social Solidarity."

Howard Adelman is a Professor of Philosophy at York University in Toronto. He is also a resident faculty member of the Centre for Refugee Studies. *This paper was first presented at a conference entitled "Peacekeeping or Gatekeeping: Canadian Security Policy after September 11," hosted by the York Centre for Security Studies at York University on February 7 and 8, 2002.*

© Howard Adelman, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Mr. Suresh and the Evil Twin

Audrey Macklin

Abstract

In Suresh v. Minister of Citizenship and Immigration and Ahani v. MCI*, the Supreme Court of Canada declared that removing a refugee accused of terrorism to a country where he or she would face a substantial risk of torture or similar abuse would virtually always violate the individual's rights under s. 7 of the Canadian Charter of Rights and Freedoms. While the Court deserves praise for vindicating fundamental human rights over competing claims of national security, coming so close on the heels of September 11, the victory is in certain respects more apparent than real. Given the strong endorsement of judicial deference to the exercise of Ministerial discretion in national security matters, the Court leaves the state wide scope to circumvent the spirit of the judgment while adhering to its letter.*

Résumé

Dans les cas Suresh *c. Ministre de la citoyenneté et de l'immigration, et Ahani c.* MCI*, la Cour suprême du Canada a statué que le transfert d'un réfugié accusé de terrorisme vers un pays où il ou elle court des risques substantiels d'être soumis à la torture ou à des mauvais traitements similaires, violerait presque à tout coup, les droits de l'individu prévus à la s. 7 de la* Charte canadienne des droits et libertés*. La Cour mérite d'être félicitée pour avoir donné préférence aux droits fondamentaux de la personne aux dépens des pressions concurrentes en faveur de la sécurité nationale. Cependant, succédant de si près les événements du 11 septembre, cette victoire est, par certains côtés, plus apparente que réelle. Vu l'aval donné à la prééminence du pouvoir discrétionnaire ministériel sur le judiciaire en ce qui concerne les questions de sécurité nationale, la Cour donne beaucoup de latitude à l'état pour contourner l'esprit du jugement tout en en respectant la lettre.*

Introduction

In May 2001, the Supreme Court of Canada heard the appeals of Manickavasagam Suresh and Mansour Ahani, two refugees deemed terrorists. At stake was the power of the state under s. 53 of the *Immigration Act* to *refoule* refugees back to their countries of nationality on grounds that they posed a threat to the security of Canada. The Court reserved judgment in both cases. The Supreme Court of Canada was still deliberating on the appropriate balance between national security and human rights when the first plane crashed into the World Trade Center on September 11. The Court released its unanimous decisions in *Suresh* v. *Canada*[1] and *Ahani* v. *Canada*[2] on January 11, 2002, exactly four months later.

The Canadian Supreme Court was not the only judiciary to issue decisions about refugees and security in the shadow of September 11. During this same period, the British House of Lords rendered a judgment affirming the deportation order against a Pakistani cleric alleged to constitute a national security threat.[3] Around the same time the United States began bombing Afghanistan, and the Australian High Court upheld Prime Minister John Howard's policy of deflecting boatloads of Afghan refugee claimants.[4]

At moments of real or perceived threat to the integrity of a democratic state, the responsibility of the judiciary to protect human rights comes under special scrutiny. Will the Court validate the political calculus of elected officials, or will it deploy its status as an independent, unaccountable, norm-generating body to check the majoritarian tendency to compromise the rights of the few in the name of protecting the many? Without actually acknowledging their own role as arbiters, the Court in Suresh launches its judgment by evoking the classic tension between liberty and security:

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge. On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society – liberty, the rule of law, and the principles of fundamental justice – values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.[5]

The judgments in *Suresh* and *Ahani* reveal how the Supreme Court of Canada chose to situate itself at a particular historical moment. The Court selected *Suresh* as the lead judgment, and it contains the detailed recitation of facts and extensive legal analysis that sustain the results in both cases. I will argue that while Mr. Suresh appears to occupy the starring role in the legal drama scripted by the Court, it is actually Mr. Ahani, the "sinister" character lurking downstage and in the shadows, whose fate prefigures that of future refugees caught up in Canada's security dragnet.

Background

Manickavasagam Suresh, a Sri Lankan Tamil, entered Canada in 1990. He made a refugee claim based on his fear of persecution by the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE). He was recognized as a Convention refugee in 1991, and applied for permanent resident status thereafter. His application was delayed, and in 1995 the Solicitor General and the Minister of Citizenship and Immigration issued a "security certificate" under s. 40.1 of the *Immigration Act* alleging that Suresh was inadmissible on security grounds. The specific provisions under which Suresh was ultimately determined to be inadmissible permit the exclusion of a person who there are reasonable grounds to believe is or was a member of an organization that there are reasonable grounds to believe is, was, or will be engaging in terrorism.[6]

The factual basis for the allegation was that Suresh acted as a fundraiser for the World Tamil Movement, an organization that is either part of, or supports, the LTTE. The government took the position that the LTTE is a terrorist organization, and that Suresh was a member of it by virtue of his involvement with the World Tamil Movement. At no time was Suresh accused of engaging in violent activities in Canada or abroad. Indeed, his act of fundraising was not unlawful, though this may no longer be the case under Canada's new *Anti-Terrorism Act*.[7]

The Federal Court upheld the security certificate on judicial review, and the Minister of Citizenship and Immigration then notified Suresh that she was considering issuing a "danger opinion" declaring Suresh to represent a danger to the security of Canada. The issuance of a danger opinion by the Minister grants her discretion to order the return (*refoulement*) of a refugee to a country where the person's life or freedom would be threatened, thereby creating an exception to the singular protection afforded to refugees by states party to the *U.N. Convention Relating to the Status of Refugees*. Counsel for Suresh contended that he would face a substantial risk of torture if returned to Sri Lanka.

A memo provided to the Minister (but not disclosed to Suresh) speculated that Suresh's high profile would render him less likely to be tortured upon return to Sri Lanka but that, even if the risk of torture was substantial, "there are insufficient humanitarian and compassionate considerations present to warrant an extraordinary consideration."[8] The Minister issued the danger opinion, thereby paving the way for Suresh's deportation to Sri Lanka. Suresh applied for judicial review of the danger opinion and of the inadmissibility provisions, on administrative and constitutional grounds. He was unsuccessful at the Federal Court trial and appeal levels, and ultimately appealed to the Supreme Court of Canada.

Suresh challenged various aspects of the *Immigration Act* and the Minister's conduct. He argued that deportation to a country where he would face a substantial risk of torture violated Canada's international human rights obligations as well as s. 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 guarantees that "[e]veryone has the right to life, liberty and security of the person, and the right not be deprived thereof except in accordance with the principles of fundamental justice."

Suresh also contended that the terms "terrorism," "danger to the security of Canada," and "member," as employed (but not defined) in the *Immigration Act*, were unconstitutionally vague. He further claimed that deportation on the basis of mere membership violated the Charter rights to freedom of expression (s. 2(b)) and association (s. 2(d)).

Apart from the defects in the legislative scheme, Suresh also argued that the Minister owed him a duty of fairness in the exercise of her discretion, and she had breached that duty by failing to give him a proper hearing, disclosure of the evidence against him, and reasons for her decision to *refoule* him to Sri Lanka.

Mansour Ahani, an Iranian national, entered Canada and acquired refugee status in 1991. The Canadian Security

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

and Intelligence Service (CSIS) formed the opinion that Ahani was a trained assassin for the Iranian Ministry of Intelligence Security (MOIS). Ahani met with CSIS agents upon return from a trip to Europe, and allegedly admitted to them that he had met with a former MOIS associate. In June 1993, the Minister of Citizenship and Immigration and the Solicitor General issued a certificate declaring Ahani to be inadmissible both as a member of a terrorist organization and as one who there are reasonable grounds to believe has engaged or will engage in acts of terrorism or violence that "would or might endanger the lives or safety of persons in Canada."[9] Pursuant to legislative authority, Ahani was arrested in 1993 and has remained in custody ever since.

As between the two men, Suresh was clearly the more sympathetic appellant: As a Tamil, he belongs to a minority that has experienced systematic and often brutal discrimination and oppression by the Sinhalese majority and government. As noted earlier, he was not directly associated with violence. Accompanied by many supporters from the Canadian Tamil community, Suresh attended his hearing before the Supreme Court of Canada. Moreover, eight interveners lent their support and credibility to his appeal, including the United Nations High Commissioner for Refugees, Amnesty International, and the Canadian Bar Association.

In contrast, Ahani was an alleged political assassin employed by a widely reviled regime. Unsurprisingly, he was not a popular man in the Iranian community, many of whom had fled the current government. Not a single intervener in *Suresh* participated in *Ahani*, even though the legal issues (and even legal counsel) were identical in both cases. Ahani remained in detention on the day of his hearing, an absent presence before the Court.

There are many layers to the decisions in *Suresh* and *Ahani*. One may begin with a description of the form in which the judgments were rendered. Both were delivered unanimously under the collective authorship of the Court. Decisions issued by "the Court," rather than under the name of the judge who authored it, are usually reserved for cases that not only raise contentious issues, but which also have the potential to become flashpoints for debate over the legitimacy of judicial review in a democracy.[10] Arguably, *Suresh* did not raise issues that were intrinsically more "political" than many other cases; nevertheless, the timing of the decision ensured that it would attract controversy. The image of a united Court potentially reduces the scope for politicizing the judgment by withholding alternative legal analyses from critics. It also precludes the tactic of telescoping criticism onto the personality of the author, thereby confining detractors to a broad institutional critique of the Court.

Deportation and Torture

The starkest question before the Court was whether returning a non-citizen to a country where he or she faced a substantial risk of torture violated fundamental human rights obligations binding upon Canada. But which human rights obligations? Canada is constrained from without by international law. It is constrained from within by Canada's own constitutional commitments as articulated in the *Canadian Charter of Rights and Freedoms*.

Both the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture* (CAT) prohibit deporting an individual to torture. Canada ratified the two instruments in 1976 and 1987 respectively. The Supreme Court of Canada adopted the CAT definition of torture and, subsequent to *Suresh*, the government incorporated the CAT definition into the new *Immigration and Refugee Protection Act*. It states as follows:

> *Article 1 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*
>
> 1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

In addition to the CAT and other international instruments, a considerable body of state practice and international authority support the contention that an absolute prohibition on torture is a peremptory norm of customary international law (*jus cogens*), which binds Canada independently of any treaty obligation.[11]

Meanwhile, s. 7 of the Charter guarantees to everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In the landmark case of *Singh* v. *Minister of Employment & Immigration*,[12] the Supreme Court of Canada ruled that sending refugee claimants back to their country of origin would jeopardize their s. 7 right to security of the person. In *Suresh*, the issue was

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

whether s. 7 if the Charter permitted return of a person to face torture if he was found to be a security risk in Canada.

In the course of the judgment, the Court diminishes the authoritative force of international law by implying that Canada's treaty obligations regarding torture had never been formally incorporated into Canadian law, and thus do not bind Canada.[13] The Court also shies away from according the prohibition on torture the status of *jus cogens*.[14] Further, the Court asserts that, in any event, it is the Charter, and not international law, which supplies the normative standard against which Canadian law will be measured:

> Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice [under s. 7]. We look to international law as evidence of these principles and not as controlling in itself.[15]

One might reasonably contend that it matters little whether the Court takes the route of international law or the Charter if the destination turns out to be the same. Nevertheless, the subordination of international law to the role of interpretive tool for domestic law reveals a certain symmetry between who decides the terms of entry into the country and who determines the terms of entry into the legal order. In both cases, the answer is national authorities, acting according to domestic law.

Policing the borders is seen as a matter of national sovereign control, and to the extent that the *UN Convention Relating to the Status of Refugees* shears this power, interpreting the available exceptions to the duty to admit refugees emerges as a site for reclamation of control. Domesticating international law through the Charter means that Canadian law remains answerable ultimately only to Canadian law, as interpreted by Canadian judges. Because the Supreme Court of Canada provides the final word on Canadian law, international treaty bodies (such as the UN Committee against Torture) that advise states party of the scope of the international norm, do not challenge the Supreme Court of Canada's interpretive monopoly. As if to reinforce their dominion, the Supreme Court of Canada declined to hear a subsequent appeal by Ahani that his deportation should be stayed pending the outcome of his application to the UN Human Rights Committee for consideration as to whether his human rights under the UN *Covenant on Civil and Political Rights* would be violated upon return to Iran. A majority of the Ontario Court of Appeal ruled that s. 7 of the Charter did not require the Canadian government to await the communication of the Human Rights Committee and take its views into account before proceeding with the deportation.[16]

In its s. 7 analysis, the Court rules that deporting a person to a country where he or she faces a substantial risk of torture will virtually always violate the life, liberty, and security of the person in a manner that does not comport with fundamental justice. The Court emphatically rejects the government's attempt to evade responsibility for what another country might do to a deportee. Instead, it affirms that:

> . . . where Canada's participation is a necessary precondition for the deprivation [of life, liberty, and security of the person], and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand."[17]

This constitutional accountability for complicity in the human rights violations of actors beyond the reach of the Charter warrants closer scrutiny, for the Court tacitly admits that the polycentric matrix dubbed "globalization" creates not only economic and security interconnections, but also networks of moral responsibility.[18]

The Court concludes that the Minister "should generally decline to deport refugees where on the evidence there is a substantial risk of torture."[19] Although it allowed for the theoretical possibility of departures from the rule, the Court declines to articulate any examples, saying only that "the ambit of an exceptional discretion to deport to torture, if any, must await future cases."[20]

A year prior to *Suresh*, the Supreme Court of Canada reversed earlier s. 7 jurisprudence by ruling that the Minister of Justice could not normally extradite a fugitive to face the possibility of capital punishment in the United States without requesting assurances that the death penalty would be neither sought nor imposed.[21] In light of this decision in *Burns and Rafay*, the finding that deportation to face torture would also violate s. 7 is perhaps unsurprising, though no less salutary for that reason.

The determination that Canada may not generally deport a person to face torture represents the climax of the legal narrative. To grasp its significance in the real life stories of refugees who come after Suresh, one must attend to some of the Court's less dramatic pronouncements, and the way in which they steer Ahani's appeal toward its resolution.

Interpretation and Discretion

The path to *refouling* a refugee is paved with a series of discretionary rulings by the Minister. It begins with the Minister issuing a certificate labelling the refugee inadmissible as a terrorist, either because of his or her own past, present, or future "terrorist" actions or due to membership in a "terrorist" organization. This finding must be upheld as

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

"reasonable" by a reviewing judge of the Federal Court. The next step involves an opinion by the Minister under s. 53 of the *Immigration Act* that the refugee poses a threat to the security of Canada on account of terrorism. From there, the Minister makes a finding about the consequences of *refoulement*, which in turn grounds the balancing exercise between Canada's security and the likely fate of the refugee upon return. Only in circumstances where the person concerned faces a substantial risk of "torture or similar abuse"[22] will the Charter generally prohibit *refoulement*.

One need never confront the prospect of *refouling* a refugee if the refugee is not a "terrorist," or does not pose "a danger to the security of Canada." More insidiously, one need not engage in the exercise of balancing Canadian security against the likely torture of a human being if the Minister concludes that what awaits the refugee constitutes some lesser harm. In the result, the legal content of the terms "danger to security of Canada," "terrorism," and "membership" become crucial filtering mechanisms, as does the process by which the Minister determines the nature of the risk facing the refugee.

Counsel for the appellants and several interveners argued strenuously that "terrorism" is an ineluctably political term and unconstitutionally vague in its ambit. The *Immigration Act* does not define it, and the Federal Court consistently refused to interpret the term, preferring instead the "I know it when I see it" approach. According to the appellants and some interveners, "terrorism" does not admit of a neutral conceptual definition. At best, it can only be defined functionally, by reference to specific prohibited acts, most of which are criminal in any event.

The Supreme Court of Canada acknowledges these critiques, but ultimately is "not persuaded … that the term 'terrorism' is so unsettled that it cannot set the proper boundaries for legal adjudication."[23] The Court adopts the definition employed in the recent *International Convention for the Suppression of the Financing of Terrorism*,[24] and defines terrorism for purposes of the *Immigration Act* as:

> Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[25]

While acknowledging room for disagreement at the margins, the Court feels confident that this definition captures "the essence of what the world understands by 'terrorism',"[26] though Parliament is not precluded from adopting an alternative definition.[27]

One may cavil over the Court's definition of terrorism, but at least the Court confines its scope to acts of serious violence. Unfortunately, the Court does little to clarify what it means to be a member of a terrorist organization, which is the provision used to label Suresh a terrorist. The Court indicates only that "member" encompasses "persons who are or have been associated with things directed at violence, if not violence itself," while excluding those who associate with (or contribute to) organizations in ignorance of the group's terrorist activities.[28] Replacing the noun "member" with the verb "associate" is distinctly unhelpful, especially since the Court declines to elaborate upon the indicia of association.

The opacity of the Court's discussion of membership is revealed by the fact that the judgment does not explain whether or how Suresh's fundraising activities for the World Tamil Movement (WTM) were sufficient to make him a member of the LTTE. Nor is it evident what conclusion the Court ought to draw in light of its definition, though one might infer by its silence that the Federal Court did not err in upholding the certificate which found Suresh inadmissible on the basis of membership. Nevertheless, if one cannot confidently apply a definition developed in the context of an appeal to the actual fact situation presented in the case, one might conclude that the definition is rather unsatisfactory. Of even greater concern is the fact that the potential breadth of an imprecise definition of membership eviscerates the virtue of a relatively narrow definition of terrorism. Few persons may engage in "terrorist" activities, as terrorism is defined, but a great many may be caught in the expansive sweep of "membership" in an organization that engages in terrorism.

The finding of inadmissibility based on membership in a terrorist organization forms the basis of a Ministerial opinion that the person poses a "danger to the security of Canada." The Court resists the claim that risks to Canadian security include only those activities that pose a threat to Canada and not another country,[29] stating simply that whatever the justification for this limitation in the past, "after the year 2001, that approach is no longer valid."[30] Rejecting the argument that "danger to the security of Canada" is unconstitutionally vague, the Court furnishes the following definition:

> While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to *refoule* a refugee …to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. . . .

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

> These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.[31]

In principle, the finding of inadmissibility on grounds of terrorism does not prove that the refugee poses a danger to the security Canada, since s. 53 requires that the person must be inadmissible *and* that "the Minister is of the opinion that the person constitutes a danger to the security of Canada." One might speculate that a person who is deemed inadmissible on the basis of an attenuated association with an organization that carries on diverse activities (ranging from provision of social services to violence) might not necessarily pose a danger to the security of Canada. The Court declines the opportunity supplied by the factual context in *Suresh* to provide guidance on this matter. Suresh was a fundraiser for the World Tamil Movement, not the LTTE, but the judgment does not explore the actual relationship between the WTM and the LTTE, or explain why it is sufficient to constitute membership in a terrorist organization.

Standard of Review and Procedural Fairness

The Court undertakes to give legal content to "danger to the security of Canada," "terrorism," and, to some extent, "membership" in order to thwart the claim that the terms are unconstitutionally vague, or violate the Charter guarantees of freedom of expression (s. 2(b)) and association (s. 2(d)). In so doing, the Court constrains the ability of the Minister and the Department of Citizenship and Immigration to arbitrarily attach those designations to individuals. Section 7's virtual prohibition on deporting a person to face torture similarly circumscribes Ministerial discretion.

What remains, however, is the Minister's discretion to formulate an opinion about whether the refugee is a danger to the security of Canada and whether the risk faced upon return equals torture or similar abuse. How closely should the courts scrutinize the Minister's exercise of discretion? The Supreme Court makes it clear in *Suresh* that both decisions warrant maximum deference. With respect to the first, the Court quotes approvingly from a recent House of Lords decision, *Secretary of State for the Home Department* v. *Rehman*,[32] in which Lord Hoffman declared that the events of September 11 "underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security."[33] The Court concludes that it should follow its British cohort and:

> . . . adopt a deferential approach to this question and set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.[34]

Regarding the standard of review of the Minister's decision regarding the consequences of deportation, the Court describes the assessment as "in large part a fact-driven inquiry."[35] The Minister may consider a range of factors, including the human rights record of the home state, the personal risk faced by the refugee, the ability of the home state to control its security forces, the availability of another state to accept the refugee, etc. According to the Court, this evaluation by the Minister attracts deference from reviewing courts, and can only be set aside if, once again, "the decision is not supported by the evidence or fails to consider the appropriate factors."[36]

Despite the high stakes of deportation, the Court is confident that "a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the Charter."[37] What are the proper procedural safeguards? According to the Court, the requirements of fairness fluctuate with the risk facing the refugee – the greater the potential harm, the more fairness due the individual.

In effect, the refugee must "establish a threshold showing that a risk of torture or similar abuse exists before the Minister is obliged to consider fully the possibility."[38] Where a refugee makes out this *prima facie* case, the Minister must provide the refugee with notice of the case against him or her, an opportunity to respond in writing, and substantive, written reasons for the decision. Suresh had made out such a *prima facie* case, and since the Minister had provided Suresh with no opportunity to respond to the case against him (as contained in the memo to the Minister), much less reasons for her decision, Suresh's appeal was allowed and the case was remitted back to the Minister for consideration in conformity with the requirements of procedural fairness.

And so the story of Mr. Suresh appears to have a happy ending, or at least a hopeful ending: Having [fortuitously]

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

established a *prima facie* risk of torture, the failure of the Minister to disclose her assistant's memo and provide Suresh right of reply, as well as her refusal to supply written reasons for her decision, breached a duty of fairness owed to Suresh. Thus, he is entitled to a new hearing before the Minister, and a reasonable inference from the Court's judgment is that Suresh's "terrorist" membership *qua* fundraiser would not justify an exception to the general prohibition against *refouling* a refugee to face torture.

But what of Mr. Ahani? The Court has little difficulty disposing of his appeal. Ahani had not established a *prima facie* case that he would be exposed to torture upon return to Iran; therefore, he was not entitled to know and respond to the contents of the memo to the Minister. Nor was he entitled to reasons for the decision to deport him. The Court concludes that the Minister had properly exercised her discretion in arriving at the opinion that Ahani posed a danger to the security of Canada and that the risk to Canada by his remaining outweighed whatever risk faced him in Iran. Her decision was not patently unreasonable and therefore warranted judicial deference.

Of course, Ahani would have had no way of knowing at the time he made his submission to the Minister that he was required to demonstrate a *prima facie* risk of torture in order to attract a duty of fairness. Section 53 is silent regarding procedural protections, and places no limits on the Minister's power to deport. The limitation regarding deportation to torture was "read in" to the legislation via s. 7 of the Charter. In dismissing his appeal, the Supreme Court of Canada effectively found that Ahani had failed to meet a standard that did not yet exist as a prerequisite to obtaining procedural protections that had never been provided in the past, which were to be implemented in exercising discretion for which no limiting factors had yet been articulated.

One cannot but wonder whether rejecting this Middle-Eastern man, alleged to be a hired assassin for a brutal Islamist regime, provided a useful counterweight to the relatively favourable outcome for Suresh, whose activities were non-violent and not even unlawful at the relevant time. Permitting an [indirect] fundraiser to remain in Canada is surely less controversial than the prospect of allowing a hired assassin to stay indefinitely because he might be tortured if returned to his country of nationality. What better way to convey an image of transcendent judicial neutrality and perfect balance between liberty and security than a tie score – refugee 1: government 1.

But of course, there will be other non-citizens who come after Mr. Suresh and Mr. Ahani. Some will be refugees who face persecution, torture, or death if returned. What do the decisions in *Suresh* and *Ahani* presage?

After *Suresh*, a decision to deliberately deport a person to face a substantial risk of torture will (or should) come at a high political cost. On the other hand, thanks to *Ahani*, if the Minister determines that the individual has not made out a *prima facie* case of torture, there is no requirement to inform the refugee of the case against him or her, to provide the refugee with an opportunity to respond to the evidence marshalled against him or her, or to provide reasons for the decision. Even if the Minister concedes that a *prima facie* case has been established, the Minister can still decide that after careful review, the evidence does not support a substantial risk of torture or similar abuse. *Suresh* confirms that each of these interim exercises of discretion will be subject to the most deferential standard of review, meaning that the exercise of discretion must be "patently unreasonable" to warrant judicial intervention. In practice, no one will be returned to face a substantial risk of torture if the Minister always forms the opinion that the evidence is insufficient to establish a substantial risk of torture, and if the courts systematically defer to the Minister's assessment of that risk.

After September 11, Canada passed a *new Immigration and Refugee Protection Act*, as well as the *Anti-Terrorism Act*. The latter was in direct response to September 11. The new immigration legislation does not materially alter the process to which Suresh and Ahani were subject, and I suspect that deportation under immigration law will be the instrument of choice (rather than criminal prosecution under the *Anti-Terrorism Act*) where the suspect is a non-citizen.

I expect that September 11 will result in more refugees being entangled in the security web in the future. When the Court declares in *Suresh* that "Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments," they omit to add that the judiciary's task is to ensure not only that those laws are constitutional on paper, but also to scrutinize the implementation of those laws so that human lives do not fall through the cracks of discretion into a dark space where the law does not reach.

Notes

1. 2002 SCC 1 [hereafter cited by paragraph number].
2. 2002 SCC 2.
3. *Secretary of State for the Home Department* v. *Rehman,* [2001] 3 WLR 877.
4. *Vadarlis* v. *MIMA and Ors,* M93/2001 (27 November 2001).
5. Para. 4.
6. *Immigration Act*, ss. 19(1)(*f*)(iii)(B) and 19(1)(*e*)(iv)(C).
7. *Anti-Terrorism Act*, S.C. 2001, c.41.
8. Para. 16.

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

9. Immigration Act, ss. 19(1)(*e*)(iii), 19(1)(*e*)(iv)(C), 19)(1)(*f*)(ii), 19(1)(*f*)(iii)(B) and 19(1)(*g*).
10. Examples include the Reference re Secession of Quebec, [1998] 2 SCR 217; *Daigle* v. *Tremblay*, [1989] 2 SCR 530.
12. [1985] 1 SCR 177.
13. Para. 60. One might counter that s. 12 of the Charter, which prohibits cruel or unusual treatment or punishment, and s. 269.1 of the *Criminal Code* effectively incorporate the treaty prohibition.
14. Paras. 62–65. If the prohibition on torture cannot satisfy the test for *jus cogens*, one may well question whether any human rights norm ever could.
15. Para. 60.
16. *Ahani* v. *Minister of Citizenship and Immigration*, [2002] OJ No. 81 (CA). Leave to appeal to the Supreme Court of Canada denied, 17 May 2002.
17. Para. 54.
18. The principle also creates the potential for holding the state accountable for the foreseeable human rights consequences of privatization, or the delegation of state power to non-state actors.
19. Para. 77.
20. Para. 78.
21. *United States* v. *Burns*, [2001] 1 SCR 283, overruling *Kindler* v. *Canada (Minister of Justice*), [1991] 2 SCR 486.
22. Para. 126.
23. Para. 96.
24. GA Res. 54/109. 9 December 1999, Annex, Art. 2.
25. Para. 98.
26. Para. 98.
27. Parliament had, in fact, already incorporated a much more extensive and potentially expansive definition in the *Anti-Terrorism Act*, passed 28 November 2001 (Bill C-36). On the other hand, the new *Immigration and Refugee Protection Act* does not define terrorism.
28. Paras. 108, 110.
29. Paras. 85–87. The Court was responding to arguments presented in J. Hathaway and C. Harvey, "Framing Refugee Protection in the New World Disorder," (2001) 34 *Cornell Int'l L.J.* 257, 289–90.
30. Para. 87. The Court elaborates by setting out the global nature of terrorist networks, and the need for international cooperation to respond to existing and future threats. Para. 88.
31. Paras. 89–90.
32. [2001] 3 WLR 877.
33. Quoted at Para. 33.
34. Para. 29.
35. Para. 39.
36. Para. 40.
37. Para. 32.
38. Para. 127.

Audrey Macklin is associate professor of law at the University of Toronto. Her research areas include immigration and refugee law, culture and law, and feminist jurisprudence. From 1994–96, she was a member of the Convention Refugee Determination Division of Canada's Immigration and Refugee Board. She was also counsel to one of the interveners (Canadian Arab Federation) in the Suresh case. This paper was first presented at a conference entitled "Peacekeeping or Gatekeeping: Canadian Security Policy after September 11," hosted by the York Centre for Security Studies at York University on February 7 and 8, 2002.

© Audrey Macklin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Preventive Detention of Immigrants and Non-Citizens in the United States since September 11th

Kate Martin

Abstract

The attacks of September 11, 2002, have dramatically altered the policy andscape in Washington, but it is important to reject the notion that there is a necessary trade-off between security and civil liberties. One of the most serious threats to civil liberties has been the adoption of a policy of preventive detention that has resulted in the secret jailing of hundreds of Arabs and Muslims when there is no evidence linking them to terrorist activity. This has been done, not by using the limited new authorities granted the government in the post-September 11 terrorism legislation, but by improperly using pre-existing criminal and immigration authorities. Secret arrests are antithetical to a democratic society. A targeted investigation that focuses on actual terrorist activity and respects the legitimate political and religious activity of citizens and non-citizens would be more effective than a dragnet approach that has resulted in the secret arrests of hundreds of individuals.

Résumé

Les attentats du 11 septembre ont changé de façon dramatique le paysage politique à Washington. Néanmoins, il importe de rejeter la notion que pour obtenir la sécurité, il faut nécessairement sacrifier les libertés civiles en échange. Ainsi, une des atteintes les plus sérieuses contre les libertés civiles a été l'adoption d'une politique de détention préventive, qui a permis la détention au secret de centaines de ressortissants Arabes et de musulmans malgré qu'il n'existe aucune preuve les liant aux activités terroristes. Ceci a été accompli non pas en appliquant les pouvoirs limités donnés au gouvernement par les lois anti-terroristes adoptées après le 11 septembre, mais en évoquant, à tort, des pouvoirs préexistants dans le domaine du criminel et de l'immigration. Les arrestations secrètes constituent l'antithèse même d'une société démocratique. Par contre, une enquête ciblée se concentrant sur des activités terroristes réelles et menée dans le respect des activités religieuses et politiques des citoyens et des non citoyens, serait bien plus efficace que l'approche d'une drague ratissant large et qui a abouti à l'arrestation secrète de centaines d'individus.

I begin this paper by noting that since September 11 there has been a fundamental change in perspective in Washington, D.C. It is now considered a real possibility that a small nuclear device will be set off in some American city and that possibility underlies the discussions about the difficult problems of what do we do now. If a small nuclear device were to be set off, the pressure to suspend the Bill of Rights would be overwhelming. We civil libertarians could argue that it would be not only an inappropriate, but an ineffective and irrelevant, response to that event; but I have little confidence that we could prevent it if there were a nuclear attack or explosion somewhere in the United States.

I begin also with the recognition that there is a crucial responsibility on the part of the United States government to prevent terrorist attacks. At the same time, I reject the notion that there is some necessary trade-off between civil liberties, human rights and constitutional procedures on the one hand, and security on the other.

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

While many in the United States have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I believe that is neither an accurate nor a helpful analysis. Before asking what trade-offs are constitutional, we must ask what gain in security is accomplished by restrictions on civil liberties. It is only by forcing the government to articulate how each particular restriction will contribute to security that we can have any assurance that the steps being taken will in fact be effective against terrorism. Unfortunately, this has not been the approach of the U.S. government to date.

Rather than outline all of the domestic measures taken by the United States government since September 11 that have raised questions about threats to civil liberties, I will concentrate on a subject that is of interest from a comparative perspective looking at Canada and the United States: the government's use of preventive detention in the fight against terrorism.

Since September 11 we have witnessed an extraordinary shift in rhetoric by the Attorney General. The Attorney General, although the chief law enforcement officer in the United States, no longer speaks of the activities of the Department of Justice in terms of law enforcement; that is, investigating planned or committed crimes with the objective of prosecuting individuals for criminal activity and the secondary objective of preventing crime. Attorney General Ashcroft now speaks almost exclusively about prevention and disruption of terrorism.[1]

Before September 11 there was an unquestioned and virtually universal understanding in the United States that individuals could be jailed prior to being convicted of a crime or prior to being found deportable in violation of the immigration laws only upon an individualized showing before some judicial officer that he or she posed either a risk of flight or a danger to the community if released on bond. That understanding was based in the constitutional guarantees in the Bill of Rights, including the Sixth Amendment's prohibition against excessive bail; the protections against imprisonment without probable cause of criminal activity, found in the Fourth Amendment's prohibition of unreasonable seizures; and the Fifth Amendment's prohibition of deprivations of liberty without due process of law. In the Patriot Act and since September 11 there has been a dramatic erosion of that basic principle.

The USA Patriot Act

Eight days after September 11, the Bush Administration sent a draft anti-terrorism bill to Congress that became the USA Patriot Act. Unlike what happened in Canada, the anti-terrorism bill was not drafted in response to the attacks, but instead contained many individual amendments to many different statutes giving the government new authorities it had long been seeking. Many of the provisions are in fact unrelated to terrorism; for example, the Act authorizes secret executions of search warrants in all criminal cases.[2]

In the week following September 11, the administration urged the Congress to pass the bill immediately and without making any changes. Many civil liberties groups, and some courageous members of Congress, urged the administration to separate out those authorities it needed immediately to fight terrorism and to consider the rest of the authorities in the usual legislative process. The administration refused to do so and repeated its earlier demands to pass the entire bill. When Congress had not passed the bill within two weeks, the Attorney General and the Republican leadership in the Congress publicly warned that further terrorist attacks were imminent and implied that, if these new powers were not authorized, those attacks would be the fault of the Democrats in Congress.[3] Congress could not withstand that political pressure and both houses of Congress passed the bill by October 12. It was signed into law on October 26, 2001.

In the Patriot Act, the administration specifically sought the authority for indefinite preventive detention of non-citizens on the sole say-so of the Attorney General. The initial administration bill provided that non-citizens could be detained simply on the certification of the Attorney General that he believed an individual *might* be a terrorist. It contained no limits on the how long an individual could be detained and specifically stated that the substantive basis for the Attorney General's certification that an individual was a terrorist would not be subject to judicial review. That proposal applied only to non-citizens and was the subject of the greatest public controversy during consideration of the bill. Negotiations with the administration did produce some safeguards in the final law.

The final law provided that the Attorney General's certification that a non-citizen is a threat to national security can only justify detention without charges initially for seven days.[4] At the end of those seven days, the non-citizen must either be charged under the criminal law or immigration proceedings must be initiated against that individual and his continued detention would presumably have to be on the basis of such charges. However, at the far end of the adjudicative process, the new law contains no protections. Even if one is found not deportable under the immigration laws and has the right to remain in the United States, the Attorney General at that point can certify the individual as a threat to national security and detain him in jail indefinitely subject to recertification every six months.[5] That provision arguably conflicts with the recent Supreme Court ruling that aliens who have been found deportable, but

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

whom no country is willing to accept, may *not* be jailed indefinitely.[6]

The President's Military Order Authorizing Detentions and Military Trials

On November 13, the President issued a military order authorizing the creation of military commissions to try suspected terrorists. The order also claimed unilateral authority to detain indefinitely non-citizens deemed terrorists by the President.[7] The order applied to any non-citizens found either within the United States or abroad. The President directed the Secretary of Defense to issue regulations implementing the order.

The authorization in the order for detaining aliens inside the United States believed by the President to be involved in terrorism was an end-run around the provisions of the USA Patriot Act concerning such detentions. The Act had limited the conditions under and period for which individuals may be detained, but then the President's order purported to authorize what the Congress had rejected in the first administration draft of the anti-terrorism bill. It was criticized as a deliberate end-run around the limits and restrictions agreed to by the administration in negotiating the detention provisions of the Patriot Act.

Indeed, all parts of the order were widely criticized by members of Congress, law professors, civil liberties groups, and others on the grounds that it set up an unconstitutional system of secret military trials and illegal detention. Since the public outcry, the authority has not been used. The government brought terrorism-related charges against two individuals in federal court rather than transferring them to military authorities. On December 11, 2001, the Justice Department indicted Zacarias Moussaoui for conspiracy in the September 11 attacks, describing him as the "twentieth hijacker." It similarly indicted the "shoe bomber," the individual arrested on a plane headed for Boston and charged with having explosives in his shoes.

On March 21, 2002, the Department of Defense finally issued regulations implementing the President's military order. While the regulations set up procedures for trials by military commissions, they make no reference to the authority to detain individuals under the order.[8] It is not clear whether the government's current view is that the detention authority claimed in the President's order applies only to authorize pretrial detention of individuals who are to be tried by military tribunals, or to anyone the government wants to detain as a suspected terrorist.

Secret Detentions

While the administration demanded and received new powers in the USA Patriot Act to detain non-citizens indefinitely on the grounds that such authority was urgently needed to counter an imminent terrorist threat, those new statutory powers have not been used since then.[9] Nevertheless, the government has embarked on a policy of massive preventive detention using pre-existing authorities in questionable and unconstitutional ways to jail hundreds of people for months.

In the first few days after the attacks some seventy-five individuals were detained. While the administration was seeking increased authority from the Congress to detain non-citizens, it picked up hundreds more individuals. On November 5, the Department of Justice announced that 1,182 people had been detained as part of its investigation into the September 11th attacks. In the face of increased public questioning, the Department has refused to give out any more information about the numbers since then.[10]

While trumpeting the number of arrests in an apparent effort to reassure the public, the Department of Justice refused to provide the most basic information about who had been arrested and on what basis. It refused to give the names of any individuals who were arrested or to provide the charges that were brought against them. The exact details of this policy of preventive detention are not yet clear, because even as of today, the names of those arrested are secret. In the face of congressional and public pressure, the Department of Justice has released the names of some one hundred people who were detained as part of its September 11 investigation and then charged with federal criminal offenses. Only one of them was charged with conspiracy related to the September 11 attacks.[11]

In addition, the government released a list of 718 non-citizens who had been detained by the government on immigration violations as of January 11, 2002. Their names are blacked out, as are the locations where they were arrested and are being held.[12] The government announced that as of April 30, 104 of those individuals are still in custody.[13]

This limited information was released in response to a lawsuit brought by the Center for National Security Studies and twenty other organizations challenging the secrecy of the detentions.[14] They are suing under the Freedom of Information Act, common law, and the First Amendment to obtain the names of the jailed individuals, where they are being held, and on what basis.[15]

There is no existing legal authority for keeping arrests secret. The government has defended its refusal to release the names on the grounds, first, that to do so would harm its terrorism investigation, even though by its own admission, almost half of the detained individuals "are not of current interest to the investigation." It has also claimed that it is withholding the names out of concern for the detainees' privacy.[16] The government's papers fail to ex-

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

plain how releasing the names of those it has jailed will harm its terrorism investigation, as it is clear that it has no evidence linking the vast majority of those individuals with terrorism in any way.

The plaintiff organizations have pointed to numerous press reports which, if accurate, raise serious questions as to whether the rights of the detainees are being violated. Public disclosure of the names of those arrested and the charges against them is essential to assure that individual rights are respected and to provide public oversight of the conduct and effectiveness of this crucial investigation. Public scrutiny of the criminal justice system is key to ensuring its lawful and effective operation. Democracies governed by the rule of law are distinguished from authoritarian societies because in a democracy the public knows who has been arrested. Here, there have been numerous credible reports of violation of the right to assistance of counsel, violation of the right to have the consulate of one's country notified when arrested, imprisonment without probable cause and in violation of the constitutional right to be free on bail prior to trial, and beatings and other abuses by jail guards. It is ironic that the government's claim to respect the privacy of the detainees apparently is shielding violations of their rights.

In addition to keeping secret the names of those whom it has jailed, the government has adopted a blanket policy closing the immigration hearings to the press, the public, and even the families of all of those individuals picked up on immigration violations in the terrorism investigation. Instead of providing for individualized determinations as to the necessity for a particular hearing to be closed or for particular evidence to be heard in a closed hearing, the policy simply commanded that all hearings would be closed, even over the objections of the detainees who wished to have their hearings pubic, without consideration of the nature of the charges or the evidence to be offered at the hearing. The policy was announced by the Chief Immigration Judge at the direction of the Attorney General.[17] It was not adopted pursuant to any new authority contained in the Patriot Act, or pursuant to any pre-existing statutory authority. Rather, it was defended as an exercise of plenary executive power in the immigration field.

That policy has now been challenged by newspapers and others on the grounds that it violates the First Amendment right of access to court and administrative proceedings.[18] In one particular case, the trial court granted a preliminary injunction and ordered the deportation proceedings to be open, on the grounds that there is a likelihood of success on their claim that the blanket closure of deportation hearings is unconstitutional. The government appealed, and the appeals court refused to grant the government a stay of the order opening the one case, on the grounds that the government failed to demonstrate a likelihood of success on the merits.[19]

Unconstitutional Preventive Detention

There is growing evidence that the government has abandoned any effort to comply with the constitutional requirement that an individual may only be arrested when there is probable cause to believe that he is engaged in criminal activity or is in violation of the immigration statutes. What we know about the individuals who are in jail is limited, but we have every reason to believe that only a mere handful of them have been linked in any way to terrorism or to any of the hijackers. Indeed the government itself has filed papers admitting that it has "cleared" more than half of those individuals of any connection to terrorism. Its own affidavits in the lawsuits notably fail to allege that any of the detained individuals are involved in terrorism. On the other hand, it appears that virtually all the detainees are either Arabs or Muslims, or believed by the government to be such.

The government has turned the presumption of innocence on its head and is now seeking to jail individuals it deems suspicious until the FBI can clear them. The FBI has been providing a form affidavit to the immigration judges seeking to keep these individuals in jail that relies primarily on a recitation of the terrible facts of September 11 instead of containing any facts about the particular individual evidencing any connection to terrorism, much less constituting probable cause.[20] The affidavit simply recites that the FBI cannot, at this time, exclude the possibility that the detainee may have some information that could be relevant to the investigation. In the meantime, the individual is held in jail.

In carrying out this policy, the government is relying on legal authorities on the books before September 11 but not used in this way. First, it has brought minor criminal charges, such as document fraud or credit card fraud, against some individuals. The Assistant Attorney General admitted that these charges would usually not even be prosecuted under prosecutorial guidelines.[21] Even if they were, being charged with such crimes would not have resulted in pretrial detention for a period of time that sometimes exceeds the sentence that would be imposed upon conviction.

The second basis used for jailing people is the suspicion that they are in violation of the immigration laws. While the government's refusal to reveal the identities of these individuals makes it difficult to know exactly what is going on, the government did release a list of the charges brought against more than seven hundred people. Fewer than five of those charges relate to terrorism; the majority appear to

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

be technical immigration violations, for which individuals would not have been jailed prior to September 11.

In the immigration context, the Executive Branch has also claimed new powers unilaterally to hold persons in jail pretrial on immigration charges. On October 29, without going through the legislative process and quite apart from the Patriot Act, the Department of Justice announced a new regulation that gave it the authority to automatically stay any bail decision issued in an immigration court.[22] The new rule decreed that when an immigration judge ruled that an individual should be released on bail, the government could automatically stay that decision and keep the individual in jail pending appeal. The government would no longer be required to persuade an appeals court that it should enter a stay while the government brought its appeal. It is not known at this time how often the government has invoked this authority to keep individuals detained in connection with its September 11 investigation.

The third basis used for detentions is a pre-existing law allowing the detention of individuals who have material information concerning a criminal proceeding.[23] Before September 11 it was a little-used statute that allowed the government to jail someone who is a material witness in a criminal case in order to secure his or her testimony at trial. It specifically requires that before detaining someone, the government must make every effort to secure his or her testimony in some other way, for example, by deposition. The use of the material witness statute since September 11 has been shrouded in secrecy. The government admits that it has people jailed under that statute; it refuses to say how many; it has refused to identify which courts have issued material witness warrants, so that the press and public can go to those courts to challenge the secrecy orders; and it has refused to release even the language of the secrecy orders on which it relies in refusing to release the identities of the courts that have entered such orders. Instead it has claimed only that individuals have been jailed as material witnesses in grand jury proceedings and therefore grand jury secrecy rules prohibit the release of any information about them. The identities of those being held as material witnesses and the basis for holding them are being sought in the Freedom of Information Act case seeking the names of the jailed individuals.[24]

The use of the material witness statute in this way has also been challenged by an individual who was jailed as a material witness and then indicted for lying to the grand jury. The federal district court in New York threw out perjury charges against Osama Awadallah, who had been held as a material witness in the post-September 11 investigation, on the ground that his detention was unlawful because, since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.[25] The government is likely to appeal.

All of these circumstances raise serious questions about the effectiveness of the current effort. Are the Justice Department and the FBI carrying out a focused investigation with the difficult work necessary to identify and detain actual terrorists, or is this simply a dragnet, which will only be successful by chance? The fact that one thousand or even five thousand individuals in a country with eight million undocumented immigrants are arrested is no assurance that the truly dangerous ones are among them.

A final comment: this is not such an easy question politically. It is not a question of balancing the rights of terrorists versus the security of the rest of us. That would be easy. Rather, it is a question of balancing the violations of the rights of others – foreigners, religious and ethnic minorities – to make the majority feel safer, and that politically is a much more difficult problem to deal with. It is an essential problem to deal with so that we do not sacrifice rights for some illusory notion of security.

Conclusion

In the darkest days of the Cold War we found ways to reconcile the requirements for security with those of accountability and due process, by taking both interests seriously. No less is required if, in the long run, we expect to be successful in the fight against terrorists who care nothing for either human liberty or individual rights.

We need to look closely at how security interests can be served while respecting civil liberties and human rights. It is time to give serious consideration to whether promoting democracy, justice, and human rights will, in the long run, prove to be a powerful weapon against terrorism along with law enforcement and military strength. Current U.S. government policy assigns no weight to respecting civil liberties as useful in the fight against terrorism. But protecting civil liberties is necessary if we are to be truly effective in what is likely to be a long and difficult struggle.

Notes

1. Department of Justice, *Transcript: Attorney General John Ashcroft Announces Reorganization and Mobilization of Nation's Justice and Law Enforcement Resources: 8 November 2001, Department of Justice Office of Public Affairs*, online: <http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_08 .htm>.
2. *USA Patriot Act*, Pub. L. 107–56, Sec. 213.
3. *Transcript: Press Conference with Attorney General John Ashcroft, Senate Minority Leader Trent Lott (R-MS), Senate Judici-*

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ary Committee Vice Chairman Orrin Hatch (R-UT), Senate Intelligence Committee Ranking Member Richard Shelby (R-AL), 2 October 2001, The U.S. Capitol (available from the Federal News Service).

4. *USA Patriot Act*, Pub. L. 107–56, Sec. 412.
5. *Ibid.*
6. *Zadvydas* v. *Davis*, U.S. Supreme Court, June 28, 2001.
7. 66 Federal Register 57833, 16 November 2001.
8. Department of Defense Military Commission Order No. 1, 21 March 2002, online: <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> .
9. Tom Brune, "U.S. Evades Curbs in Terror Law," *Newsday*, 26 April 2002.
10. Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies; Justice Dept. to Share Number in Federal Custody, INS Arrests," *The Washington Post*, 9 November 2001.
11. List of Federally Charged Defendants, filed by the Department of Justice in *Center for National Security Studies* v. *Department of Justice* (U.S. District Court for the District of Columbia) No. 01-2500, (*CNSS* v. *DOJ*), online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
12. INS Special Interest List, Joint Terrorism Task Force, filed by the Department of Justice in *CNSS* v. *DOJ*, online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
13. Steve Fainaru and Amy Goldstein, "Judge Rejects Jailing of Material Witnesses; Ruling Imperils Tool in Sept. 11 Probe," *The Washington Post*, 1 May 2002.
14. *Center for National Security Studies* v. *Department of Justice* (U.S. District Court for the District of Columbia) No. 01-2500.
15. A second lawsuit has also been filed seeking the names of those being held in New Jersey jails, under New Jersey right-to-know law. The U.S. government intervened in that case, but the New Jersey Superior Court ruled that the county jails must release the names of the individuals being held there on immigration charges. The case is on appeal as of this writing. *ACLU of New Jersey* v. *County of Hudson*, No. L-463-02, slip op. (N.J. Super. Ct. Law Div. Apr. 12, 2002), online: <http://www.judiciary.state.nj.us/ditalia/aclu.htm>.
16. Memorandum in Support of Motion for Summary Judgment, filed by the Department of Justice in *CNSS* v. *DOJ*, online: <www.cnss.gwu.edu/~cnss/cnssvdoj.htm>.
17. Memorandum from Chief Immigration Judge Michael Creppy, 21 September 2001.
18. See *Detroit Free Press* v. *Ashcroft*, No. 02-70339, 2002 U.S. Dist. LEXIS 5839 (E.D. Mich. Apr. 3, 2002).
19. See *Detroit Free Press* v. *Ashcroft*, No. 02-1437 (6th Cir. Apr. 18, 2002).
20. While the FBI affidavits are difficult to find, one filed in a bail proceeding in immigration court appears to contain the general formula. It says:

    > In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status,the FBI notified the INS. The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may posses knowledge useful to the investigation of the terrorist attacks on the World Trade Center and the Pentagon. The respondent, Osama Mohammed Bassiouny Elfar, is one such individual. . . .
    >
    > At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained. . . . In the meantime, the FBI had been unable to rule out the possibility that respondent is somehow linked to, or possesses the knowledge of the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation.

21. C-SPAN, *Transcript: C-SPAN Washington Journal Featuring Assistant Attorney General Viet Dinh, 11 December 2001.*
22. 66 Federal Register 54909-54912, 31 October 2001.
23. U. S. C. sec. 3144.
24. See *CNSS* v. *DOJ*, note 13 supra.
25. *United States* v. *Awadallah*, No. 01-Cr-1026, slip op. at 59 (S.D.N.Y. Apr. 30, 2002), online: <http://www/nysd.uscourts.gov/courtweb/Default.htm>.

Kate Martin is Director, Center for National Security Studies, in Washington, D.C. This paper originally was presented as a speech to the Conference on Terrorism, Law, and Democracy, sponsored by the Canadian Institute for the Administration of Justice, Montreal, Canada, 25 March 2002.

© Kate Martin, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Refugee Policy after September 11: Not Much New

Reg Whitaker

Abstract

Conventional wisdom holds that the terrorist attacks of September 11 have "changed everything." In the case of refugee policy, it would appear the salience of security and enforcement aspects has increased at the expense of human rights and humanitarian concerns. In the light of actual practices in the immigration and refugee security field in recent years, there is actually more continuity than discontinuity resulting from the current crisis. Existing standards and procedures are confirmed, rather than altered, by new legislation and practices. Refugee policies have increasingly been understood within a national security discourse, well before September 11.

Résumé

La sagesse traditionnelle prétend que les attentats terroristes du 11 septembre ont « tout changé ». Pour ce qui est de la politique ayant trait aux réfugiés, il semblerait que les considérations de sécurité et d'application de la loi ont pris le pas sur les droits de la personne et les préoccupations humanitaires. En fait, si l'on considère la pratique sur le terrain en ce qu'il s'agit des mesures de sécurité liées à l'immigration et aux réfugiés, on retrouve bien plus de continuité que de discontinuité à la suite de la crise actuelle. La nouvelle législation, ainsi que les nouvelles procédures, confirment les normes existantes plutôt que de les changer. Les politiques concernant les réfugiés sont de plus en plus comprises à l'intérieur d'un discours de sécurité nationale et cela était le cas bien avant le 11 septembre.

In the aftermath of September 11, it was conventional journalistic wisdom that the world had changed forever. Certain events do have profound repercussions. Pearl Harbor brought the U.S. into a global military and diplomatic presence from which it has never really retreated. September 11 has obviously precipitated a "war on terrorism," the attack on and overthrow of the Taliban regime, and a new global counterterrorist campaign that steps up U.S. intervention in a host of countries to unprecedented levels. September 11 has dramatically reconfigured government agendas in the U.S. and among its allies, including Canada. New laws that redraw the lines between individual and group rights on the one hand and security on the other have been rapidly passed in a number of Western countries.

There is no point in denying the depth and the scope of the changes that September 11 has wrought. But there is a danger of exaggerating the transformation. It further bloats the already overblown reputations of Osama bin Laden and al Qaeda to speak as if this handful of suicide bombers caused by themselves the wholesale transformation of Western societies and governments. To revert for a moment to Pearl Harbor, the forces that compelled America into a new global role were not only external, but arose from within America itself. Pearl Harbor discredited the isolationists overnight and empowered the interventionists, but this was made possible by the very real strength and reach of the interventionist and expansionary forces themselves. Pearl Harbor precipitated a resolution of a deep conflict within the U.S. state and society, rapidly accelerating and compressing a process that was already underway, and had been for some time.

As a formative event, September 11 displays similar contours. There were forces and processes at work within the U.S. and the West, some previously impeded, that have been unblocked and accelerated by September 11. Septem-

© Reg Whitaker, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

ber 11 precipitated the resolution of a number of conflicts already in existence. But the long-term changes effected by September 11 were those that corresponded to interests and forces that had shown considerable strength before September 11. In that sense we might say that September 11 was more a precipitating than a formative event.

Let me be more specific. The post-Cold War world had been witnessing a gathering set of contradictions surrounding the process of globalization. There are a number of such contradictions, but I wish to focus on one particularly salient set: the contradiction between the licit and illicit, the legal and the illegal, the above ground and the underground, the bright and dark sides of globalization. Increasingly, the world of transnational capitalism was being shadowed by its dark doppelgänger. Transnational corporations are shadowed by international criminal mafias; national armies by terrorist cells; global commerce by the illegal arms, drugs, and sex trade; global finance by money laundering networks; legal migration of people by organized illegal human traffic. A globalized world is being undermined by borderless threats. And the forces of the dark side are not only taking full advantage of the latest technologies that make the licit global economy possible, but they mimic the organizational forms and strategies that have proved so potent in internationalizing enterprise. This is the old Hobbesian problem of competitive individual rational maximizing behaviour leading ineluctably to general insecurity, the war of all against all, now extended to the global stage. The Hobbesian answer was the transfer of individual power to Leviathan, the common power. In the era of globalization and borderless threats, the problem has to be redefined: How to police not national territory but what Castells has aptly dubbed the "space of flows"? How to reconstitute Leviathan, preferably as a multilateral enterprise, or perhaps, more ominously, as directed by the U.S., the world's only superpower.

There were many powerful forces already working toward a global solution to the policing problem. Generally, this could be seen as a hybrid between a multilateral and an American Leviathan, with awesome surveillance capacities. But these forces also faced numerous contradictions. Take money laundering – general agreement that something should be done and that a U.S.-led global surveillance regime was the answer began to fall apart when individual corporate actors realized that Uncle Sam was going to be peering into their financial transactions and those of their clients. Progress faltered, stuttered, became bogged down. Then September 11 unblocked the process when President Bush noted that the financing of terrorist cells could be tracked and stopped by pursuing the money laundering trail, and that it was the firm resolve of his government to do exactly that. Since the terrorists had destroyed the very citadel and symbol of global finance, the World Trade Center, transnational capital quickly lost its scruples about maintaining the sanctity of its clients' financial information. September 11 simply accelerated a process already well in place but not fully up to speed.

How does this translate into the treatment of refugees in Canada? September 11, it is said, has caused a reversal of Canada's priorities. A human rights and humanitarian discourse surrounding refugee movements has quickly been superseded by a national security discourse, with dire consequences for genuine refugees. Harmonization of immigration security policies and practices with the U.S., as part of a perimeter security agenda to avert economically costly border controls, would, some have argued, undermine Canadian sovereignty, and make us less liberal, less tolerant, more like the security-conscious Americans.

I would argue on the contrary that we are not seeing a reversal but an acceleration of trends already evident well before September 11. Refugee policies post-September 11 are pretty much like refugee policies pre-September 11, but more so.

Let me quote from Audrey Macklin's fine assessment of C-36, the Anti-Terrorism Act: She argues that C-11, The Immigration and Refugee Protection Act , which preceded September 11, already "casts a wide net over non-citizens rendered inadmissible on security grounds, expands the detention power over designated security risks, and reduces access to independent review of Ministerial security decisions." She goes on to note that "the immigration law has long done to non-citizens what The Anti-Terrorism Act proposes to do to citizens – without public outcry and with judicial blessing."[1]

Take some of the contentious aspects of C-36. As I testified myself before the Justice Committee of the House of Commons on C-36, the evidence provisions of the Act, which drew criticism for severely restricting the rights of the individual and expanding unreasonably the rights of the state, are actually nothing new, and have been operating in immigration security cases for some time, plunging the defendants into Kafkaesque situations in which the Crown's precise case and its supporting evidence can be speculated about but never known for certain. I have myself seen this happen time and again when appearing as an expert witness in a series of high-profile immigration security cases. C-36 was simply trying to *Stinchcombe*-proof the practice of non-disclosure of evidence that might damage national security, following that Supreme Court decision.[2] It was not clear that they even needed to do this, since *Stinchcombe* dealt with criminal intelligence rather than security intelligence information, but the attitude was obviously: better safe than sorry.

© Reg Whitaker, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

On the matter of non-disclosure of security evidence, Canada actually has a record of greater restrictiveness than the U.S. Indeed, one of the contributing factors in the U.S. to the unfortunate decision to institute offshore military tribunals to try al Qaeda suspects was the apparent inability of the court system to guarantee that sensitive intelligence information might not be disclosed. In Canada, military tribunals would be unnecessary, not because Canada is more liberal than the U.S., but because it is more restrictive in the protection of national security information in court.

Or take the matter of the indefinite detention of refugee claimants and other non-citizens about whom security doubts need to be resolved. The U.S. has been moving toward a wider net of detentions on suspicion alone. If U.S. pressures force Canada into following suit, it has been argued that Canada would have to reverse the Singh decision,[3] and that this would radically alter Canadian practices and the liberal philosophy that lies behind them. But detention of refugees under threat of deportation on security grounds is a practice widely used already; see *Suresh*,[4] and earlier *Baroud*[5] (both cases in which I have been involved), in which the defendants were detained for lengthy periods awaiting court decisions. There are many other examples. To be sure, Canada, to its credit, continues to insist that detention must be for cause, and has resisted American and British trends toward detention on suspicion alone. But the non-disclosure of much of the evidence on which security certificates are based make this a somewhat hollow example of liberalism.

Refugee policies in Canada have long been formulated within a discourse that gives a privileged place, an overriding priority, to national security. Humanitarian considerations have never been absent, but neither have they ever been dominant, in the past or the present. Post-war refugee resettlement policies were firmly set, both internationally and nationally, within the political context of the Cold War. The very definition of a legitimate refugee claimant was coloured by Cold War ideology, and Canadian policy, relatively admirable from a humanitarian perspective in comparative context, was always subject to an ideological double standard as between refugees from Communist regimes and those fleeing right-wing, anti-Communist regimes. In the post-Cold War world, this four-decade old frame of reference has more or less disintegrated, but in its place there are new definitions of risk, and some old responses. The Cold War pooling of intelligence on immigration has been updated and made more sophisticated in the current era, but the targets are more varied, depending on which regions of the world are generating violent refugee-producing conflicts. Domestic and international security considerations continue to play a leading role in the formulation of rules for granting asylum. This continues to be contested terrain, with conservative critics charging that security rules are too lax, while refugee advocates and liberal critics assert that security considerations are impeding the fulfillment of humanitarian obligations.[6]

In this context, the effect of September 11 has been to strengthen the conservative critics, while weakening the liberal case. It must be said that this is not entirely without justification. September 11 was above all an attack on civil society, indeed was designed by its perpetrators as a message to spread terror and insecurity throughout civil society. With the carnage at the World Trade Center, the terrorists have clearly demonstrated that they operate under no constraints about the mass murder of civilians. The technical potential exits for the use of chemical, biological, or nuclear weapons of mass destruction. Thus there has been a very strong populist reaction to the evidence of the abuse of the refugee system by terrorists intent upon turning the West's liberal institutions against it in particularly horrendous ways. That these have been very few in number set against the far larger numbers of genuine and deserving refugees is an argument with relatively little purchase on the popular imagination, even though it is an argument that must be reiterated in the interest of fairness.

It is not efficacious under present circumstances to disregard or decry as unfounded the contemporary imperative to tighten up requirements for refugee acceptance. To do so is not only to fly in the face of public opinion, but to fly in the face of a rational public policy response to a grave security threat. Some asylum seekers have abused the good faith and generosity that Canada has shown, in ways that go far beyond the manipulation of the system by economic migrants or other bogus claimants who have been condemned so often in the past by conservative critics. Given the potentially catastrophic consequences, the risk of even a few terrorists slipping into North America via the refugee route must be assessed as high by those whose responsibilities are primarily the protection of homeland security.

This does not mean that humanitarian standards should be, or need be, thrown out the window. It does mean that the terms of the debate have shifted significantly. Liberal arguments that fail to take reasonable account of security requirements will not get far, but liberal arguments that seek to balance security requirements with humanitarian objectives will still be heard. Yet this situation is really not qualitatively different than it has been at any time in the post-war era. Perhaps anxieties are more pronounced than in the immediate past, but there was an earlier panic, during the initial stages of the Cold War in the late 1940s and early 1950s, and this resulted in permanent institutional and legal residues that continue to shape policy down to today.

© Reg Whitaker, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

In short, the shift in the terms of debate today is nothing new. A cyclical process responding to perceived external threats to domestic security is still at work, and can be expected to yield some security ground to liberal and humanitarian values once again when the immediate impact of the crisis recedes.

Some liberal critics see the effect of September 11 as force-feeding Canada an American-style security consciousness that is alien to a country with more tolerant, progressive traditions. While Canada, peripheral to the imperial centre that is, and long has been, the primary target of hostile forces, has slightly more space to develop modest liberal, humanitarian practices, the difference is one of degree, and the margin has always been small. Moreover, pressures to intensify American-style security standards come not only from the United States, but, very importantly, from forces inside Canada, some bureaucratic, but many emanating from sections of civil society that find insistent expression in Parliament from the right-wing parties, from provincial premiers, and from the conservative media. These forces, more favourable to national security than to humanitarian considerations, are every bit as enduring an aspect of the Canadian political culture as those more favourable to the "human security" agenda of recent years.

Canadian refugee advocates sometimes counterpose to the American model an *imagined* Canadian community – liberal, tolerant, progressive – that is, to some considerable degree, an *imaginary* Canada. Would a harmonized immigration security system with the U.S., as envisaged in the schemes for "perimeter security" of North America, compel rending changes in the Canadian way? It is hard to see how. We have for some time operated on much the same assumptions about who are admissible and who not. We have common databases on who are the bad guys, and which the bad countries and organizations. Our basic motivations are the same – to retain legitimate humanitarian considerations, while not permitting these to seriously undermine the protection of national security from terrorism and crime. Besides, there is much that is distinctive in Canadian immigration policy that will remain untouched by the harmonization of security rules and practices. One example: the long-standing desire of Quebec to use its constitutional role in immigration to actively support francophone immigration is a distinctive feature of Canadian policy. The U.S. has no security or other interests that would in any way challenge this distinctive priority.

If there has been a gap between the Canadian and U.S. records in immigration security, it is not one of rules and standards, but simply of enforcement, due to the allocation of fewer resources in the past to this area in Canada. That was already changing before September 11, pushed by the case of Ahmed Ressam, the al Qaeda terrorist from Algeria, apprehended attempting to enter the U.S. in late 1999 with explosives on his way to an operation to bomb the Los Angeles airport. C-11, the new Immigration Act, had already posed tougher admission requirements. Critics had argued that the problem with C-11 security provisions was with inadequate enforcement resources, not content. When the enforcement gap closes, as it will, with further infusions of cash into policing and security, there will be even less difference between the two countries, at least in this one area of immigration security. In any event, exploratory talks on perimeter security among Canadian and American officials had begun even before Ressam, let alone September 11, and the impetus came as much from the Canadian as from the American side.

Having made these points, are we implying that Canada, in its post-September 11 refugee policies, is abandoning, or severely curtailing, its humanitarian commitments to genuine refugees? Not necessarily. The refugee security discourse has itself been premised upon humanitarian considerations. Cold War refugee policies derived in part from genuine concerns about the humanitarian costs of Communist totalitarianism. True, less attention was paid to the humanitarian costs of right-wing anti-Communist dictatorships, but such instances of hypocrisy should not be allowed to obscure the original humanitarian roots of the post-war policy of opening the door to those fleeing repressive regimes. In this regard, we should take seriously Irwin Cotler's argument that post-September 11 anti-terrorist laws and actions can be seen as part of a human security, or human rights, agenda.[7] This involves a number of compelling points. First, civil society must be protected against acts of mass murder. Second, immigrant groups and individuals in Canada must be protected against the kind of violence and intimidation practised by terrorist groups organizing support (or what sometime amounts to little more than protection money) among their expatriate communities. Finally, on a global scale, the climate of insecurity resulting from the violence of lawless and borderless non-state actors has to be reduced if other parts of the global human agenda are to be achieved.

Of course, there is always a price to be paid when security outweighs liberalism, even if momentarily. In the post-September 11 world, there is a serious humanitarian (and multicultural) price tag attached to the inevitable appearance of ethnic profiling as a tool in the policing of terrorism. Young Arab and Muslim men – especially those coming from countries like Egypt, Algeria, Saudi Arabia, and Yemen, where al Qaeda recruiting has been most effective, will certainly get more attention than other, low-risk

© Reg Whitaker, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

groups. In part this is an inescapable result of cost-effective policing. What looks to those on the receiving end as racism or cultural victimization appears to police and security forces simply as sensible risk management.

There are some mitigating circumstances. There is a point of contrast between September 11 and past experience that reflects favourably on the behaviour of governments today. In the immediate aftermath of the attacks, the American President and his Attorney General were at pains to indicate that the Arab and Muslim communities in the U.S. were in no way to blame, and that any retaliatory violence directed against these minorities would be met with the full force of the law. These statements were not given as asides, but were delivered as important front and centre assertions of government policy. They were echoed forcefully in Canada by Prime Minister Jean Chrétien. C-36, despite its condemnation by Arab and Muslim groups who testified against it before the Justice Committee of the House of Commons, does not direct anti-terrorist attention toward any identifiable ethnic or religious group. It does include strengthened hate provisions directed against those who would attack mosques or other minority cultural institutions. It is safe to conclude that North American governments have learned some things from the mistakes of history. The shameful treatment of the Japanese communities in the Second World War will not be repeated for Arab and Muslim communities in the aftermath of September 11.

Mitigating circumstances will not, however, be much appreciated by those on the receiving end of risk-aversive policing that in practical terms does amount to ethnic profiling. Both Canada's humanitarian obligations with regard to refugees and the integrity of its multicultural social fabric will be under some stress from the differential impact of September 11 on people from Middle Eastern countries.

So far the "war on terrorism" has been relatively successful. If no further attacks on North America are forthcoming, the repressive implications of September 11 will tend to recede, and long-term damage to pluralist tolerance should be minimal. If, on the other hand, more attacks like September 11, or worse, do occur, we can be assured that national security will rapidly overwhelm liberal humanitarian considerations, in refugee policy as elsewhere. That is a future we all wish devoutly to avoid. But to prevent such a dismal scenario, some compromises between security and freedom have to made in the present.

Notes

1. Audrey Macklin, "Borderline Security." In *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, ed. Ronald J. Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001) 384, 394.
2. *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326.
3. *Singh* v. *Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 549.
4. *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] SCC 1.
5. *Baroud* (Re), (1995) F.C.J. No. 829, May 1995.
6. Reg Whitaker, "Refugees: The Security Dimension," *Citizenship Studies* 2:3 (November 1998) 413–34.
7. Irwin Cotler, "Thinking Outside the Box: Fundamental Principles for a Counter-Terrorism Law and Policy." In *The Security of Freedom*, *op. cit.*, 11–30.

Reg Whitaker is Distinguished Research Professor Emeritus at York University and Adjunct Professor of Political Science, University of Victoria. *This paper was first presented at a conference entitled "Peacekeeping or Gatekeeping: Canadian Security Policy after September 11," hosted by the York Centre for Security Studies at York University on February 7 and 8, 2002.*

© Reg Whitaker, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Human Security and Refugee Protection after September 11: A Reassessment

Raquel Freitas

Abstract

In the aftermath of the September 11 attacks, the security environment in the Western world has changed considerably. Threat perception and risk management are being reassessed, and the word "security" has acquired an added relevance in the political agenda. This paper addresses a particular derivation of the concept of security, which is human security, from the perspective of refugee protection and human rights of the individual, assessing the advantages and disadvantages, together with the possible uses and misuses of the notion in the post-September 11 context. In particular, it deals with the question of what has changed that could demand greater attention in crafting a human security regime, which may in specific regions be inclusive of some but exclusive of others. It concludes by cautioning against a drift of the concept towards incorporating too many different elements that may be used perversely and against the interests of refugees.

Résumé

À la suite des attentats du 11 septembre, l'environnement en matière de sécurité a considérablement changé dans le monde occidental. La perception des menaces et la gestion du risque ont acquis une nouvelle pertinence dans l'agenda politique. Cet article examine un aspect particulier de la notion de sécurité, c.à-d. la sécurité humaine, du point de vue de la protection des réfugiés et des droits de la personne de chaque individu. Il tente d'en évaluer les avantages et les inconvénients, aussi bien que les usages et abus possibles dans le contexte de l'après 11 septembre. Plus spécifiquement, il lance une réflexion sur la question de savoir ce qui a changé dans ce nouvel univers qui demanderait plus d'attention afin qu'on puisse façonner un régime de sécurité humaine qui, dans certaines régions, inclurait certains groupes et en exclurait d'autres. L'article conclut avec une mise en garde contre une dérive de la notion pour inclure trop d'éléments disparates qui pourraient être utilisés d'une manière perverse et contre les intérêts des réfugiés.

Since the end of the Cold War, and in particular in the mid-1990s, after a succession of violent crises that resulted in the death of thousands of civilians, the concept of human security came to light with a strong moral stance and a project of responsabilization of the international community for the fate of the victims of conflicts, as well as for a host of other problems that degraded the human condition. Already in the 1970s there were significant attempts to create better standards of living worldwide through the project of the New International Economic Order (NIEO), but these were eventually replaced in the 1980s by neo-liberal economics.[1] The concept of human security emerged in the 1990s as a renewed attempt to increase the well-being of the individual at all levels, taking the emphasis away from the traditional defence-oriented, statist view of security.

The post-September 11 environment raises new challenges in the international system, regarding not only the traditional concept of security, but also the construction of the concept of human security. This article is interested in understanding how the concept of human security shapes the panorama of refugee protection and what has changed in this new world that could call for greater attention in crafting a human security regime. It is argued that September 11 emphasized a number of existing ambivalences and

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

a mixture of antagonistic forces of closure and openness: a combination of the post-Cold War trend of universalism and world politics with a renewed state-centrism on the one hand, and an apparent increasing incompatibility between human rights and internal security on the other hand.[2]

The resurgence of the notion of "internal security" reinforces its already problematic relation with "human security." The random development of the latter concept may leave it open to different interpretations, which derive too much from the intended goals of most of its promoters. Depending on its positive or negative framing, "human security" in the post-September 11 environment may reverse the present tendency to associate anti-terrorism policies with diminishing refugee protection, thus increasing concern for refugees, or it may contribute to consolidating the forces of closure and emphasize the dynamics of inclusion/exclusion.

The article proceeds first with a critical overview of different approaches to security, without attempting to provide one definition, and focusing on the dimension of the concept that impinges on the issue of refugee protection and on how it can be framed. It then provides an account of the role of the concept of human security in the international system and of how refugee protection is conceived in the same system, before and after September 11. Finally it concentrates on the specific impact of the terrorist attacks on refugee protection and the actual and potential role of the concept of human security in such context.

The Emergence of the Concept of Human Security

Multiplicity of Approaches

The concept of security originated in foreign policy. Initially it concerned protection of national territory and population, the main attributes of the state. In some countries it evolved into a foreign policy option that overcame the militaristic sense of security based on an anarchic international system, and took on a humanitarian dimension.[3] In other countries the reconceptualization was part of comprehensive defence reviews that shifted security to an internal level as a result of generalized internal violence.[4]

The first significant references to "human security" appear in the early 1990s, at the origins of the Common Security Forum (CSF), an international research centre, whose aim is to explore economic, political, and other conceptions of security and which promotes dialogue among academics, governments, and institutions doing research on global security issues.[5] In addition, several other institutions actively promote the concept; these include the Human Security Network; Commission on Global Governance; the Global Environmental Change and Human Security Project; and the Commission on Human Security.

Several initiatives at the level of international organizations such as NATO, the World Bank, and in particular the UN, have also contributed to bringing about and promoting the concept of human security. Namely, the UN Secretary-General's Agenda for Peace focused on the impact of the end of the Cold War on international security and promoted an integrative approach to human security.[6] The most significant UN initiative so far has been the 1993 UNDP Human Development Report,[7] proposing a concept of human security based on the pillars of freedom from fear and freedom from want. The threats identified were grouped into seven main categories: economic, food, health, environment, personal, community, and political.

"Human security," as has been framed by these actors and institutions, entails the logic of universal rights to minimum standards of life, placing the individual instead of the state as the referent object of security and at the centre of concern not only regarding physical security but also regarding economic, social, environmental, and human rights security. This extended framework has been emphasized in particular in the context of the United Nations High Commissioner for Refugees (UNHCR), whose populations of concern have been increasingly deprived of the minimum standards of security in situations of conflict and of mass displacement.[8] This has led the former High Commissioner, Sadako Ogata, to endorse the concept of human security, with strong support from the government of Japan. In her own words: "Refugee protection is a set of legal instruments, operational activities and material contributions that can restore a sense of security in people whom flight has deprived of everything. . . ."[9] This is in line with the integrative conception of human security and the promotion of a link from relief to development in refugee protection and conflict situations. In the context of refugee protection, human security becomes particularly useful for advocacy purposes since it overcomes the limits set by a strict interpretation of the UNHCR's mandate as it integrates all categories of people, whether formally refugees or not. However, the use of the concept is riddled with ambivalence deriving from the need to combine human rights concerns with state interests.[10]

Universalism and indivisibility of "human security" are two of the main characteristics of the concept. The ambition of universalism aims at going beyond the idea of state-centred world politics where each state is responsible for the security of its territory and population, by placing the responsibility for all individuals at the level of the international community, and coordinating the efforts and activities at the level of different types of actors.[11] The

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

importance of the individual as holder of universal rights, among them that of security, is illustrated by the increasing number of legal rules directed at individuals rather than states.[12]

In the same logic of universalism and indivisibility, some approaches to "human security" develop conceptions that aspire to being general models, more or less applicable to any society in the world. Bajpai suggests an audit of human security in the line of the human development audit carried out annually by UNDP, which would assess the conditions of safety and freedom of individuals measured by direct and indirect threats to security and by the capacity of the decision-making structures (i.e., not only states) to deal with such threats.[13]

This conception is rooted in the idea that human security is indeed a universal and objective quality of social life, where the different components are integrated and indivisible. Although in ideological terms very valuable, there are problems with this approach in that it would need a very clearly delimited concept definition and also the assignment of structures responsible for and capable of enforcing such human security standards and which could be made accountable for such a role. In Bajpai's framework responsibility is attributed to state, sub-state and non-state actor levels and therefore removed from the sole state-centred responsibility, which has the effect of dispersing accountability. Further, it may be used to legitimize declaring certain groups as having acceptable levels of "human security," when not all indicators are considered or at the same level, since such measurement would always be focused on a number of specific items. This would in turn legitimize increasingly restrictive refugee policies and take even more responsibility away from the international community of states.[14]

The ambition of universalism has also been contested by authors who argue that the concept of human security is not universal but rather a Western construction[15] and that appropriating the nation-state-based security model for use in regions with a different history and culture may add to the problems instead of solving them.[16] Indeed, many dimensions that "human security" encompasses are cultural and context-dependent. Thus, as Lipschutz puts it, security is an "intersubjective phenomenon" rather than an objective condition, and different regions construct it differently.[17]

Other criticisms of the human security concept, in particular the UNDP version, argue that it is too vague, not objectively measurable and too woolly, too encompassing and lacking specification.[18] The concept of human security is still in evolution and not only academics but also policy makers and activists should consider carefully the nature of their positions and possible implications when promoting their ideas.[19]

Dissecting human security

There is an intense debate regarding the nature of the concept of security,[20] how it should be conceptualized, and in particular regarding the advantages and disadvantages of widening it.[21]

Waever draws attention to the "securitizing" dimension of the concept of security and to the fact that broadening should not be made without considering the political implications and the historical connotations that the concept of security bears. For him the referent object is still the state, and ". . . addressing an issue in security terms still evokes an image of threat-defense, allocating to the state an important role in addressing it. . ."[22] which, according to the author, is not always an improvement.

Conceiving security as a social construction, the constructivist perspective posits the existence of a normative dilemma in securitizing immigration and refugee issues. According to Huysmans, by taking security away from the state and to the societal, private, or individual level we run the risk of delegitimizing not only the state but also of legitimizing nationalistic and xenophobic reactions.[23]

Lipschutz demonstrates how important the state-centric differentiation between the self and the enemy is for security as a discourse and points to the post-Cold War difficulty of finding new enemies.[24] In the present context, one should caution that just as a new significant enemy has been found – "terrorism" – so also the contestable nature of what a terrorist is may induce confusion with refugees and lead to their construction as enemies or at least elements to be excluded from the newly threatened and insecure societies.

The important elements in assessing human security are not just the concept in itself, but how and in which context it is framed,[25] and which other concepts are associated with it. At the current stage of loose definition of "human security," the attached concepts are the determining factors in providing the framing and the referent object. I suggest that depending on the framing process and on the ideological association with other concepts and referent objects, "human security" will take on a positive or a negative value as far as human rights values and refugee protection aspects are concerned.

In the literature, the concept of human security oscillates from a focus on states[26] as referent object, to a focus on individuals[27] and on society.[28] Focusing on the framing ideologies, I would here propose a differentiation within the concept of human security itself, i.e., that of human security and human insecurity. I suggest that the intended interpretation of "human security" as an ideological project

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

is associated with human rights and world governance conceptions, while "human insecurity" is associated with internal security and state-centric conceptions of the international system.

In the context of refugee protection different ideological projects that use the term "human security" may have distinct referent objects, which define which security is at stake: in the case of human insecurity the referent object is the citizen of a particular community (citizen security from external threats), while in the case of human security it is the refugee (refugee security). These distinctions are intended to provide analytical clarity and help delimit the boundaries of what is conceived as human security.

Human security and human insecurity. The main element in this distinction is the qualification of positive and negative security. The broadened concept of security, in particular the human security version, entails a positive conception of security in the sense of an absence of threats to the well-being and quality of life, whereas other conceptions of security rely much more on the very construction of those threats. This negative dimension I will call human insecurity. Eriksson develops a theory of threat politics, which includes two main dimensions: framing and societal salience. Both threats and risks are seen as social constructions and the politics of framing are seen as an important instrument of power.[29]

Here we conceive of human security and human insecurity in opposing terms in order to highlight the essentially contradictory terms in which the concept "human security" can be framed. Human security is then associated in normative terms with efforts to promote global governance and universal well-being without the intention of constructing threats (insecurity), but of promoting their absence (security), namely through the association with human rights. On the other hand, "human insecurity" is more closely associated with the promotion of internal security in exclusionary terms.

A. "Human security" and human rights. The low enforcement of first-generation human rights in the world has to some extent kept the refugee regime going, despite increasing reluctance of Western states to admit refugees and a selective application of humanitarian funds and resources which has been to a great extent dependent on the media impact and Western interests in specific emergencies. Regarding second-generation human rights, the situation has been even worse, with states unwilling to provide funds for reconstruction of societies, or for the promotion of economic and social conditions for development.

"Human security" appears as a way to push forward the two generations of rights and link them with a strong agenda, namely the proposal of the creation of an Economic Security Council.[30] The problem, as pointed out by some observers, is that sometimes it is difficult to establish a distinction between "securitarian" ideology and human rights since often the discourses are not very far from each other, often sharing the same vision of what is "insecure," and only differing regarding the proposed solutions. Hence the need for due contextualization of alternative discourses such as critical security and human rights in relation to the dominant one.[31] Further, moving the discourse of refugee protection from the realm of human rights to that of security risks not only operates a switch in perspectives and wordings, but also changes the focus from the refugees to the receiving state.[32]

B. "Human insecurity" and internal security. There are two types of "human insecurity" that may affect refugee protection: the fear of terrorism and the fear of "invasions" of migrants who enter illegally and abuse the asylum system.[33] As it is difficult to establish whom the terrorists are, an artificial "inside/outside" or "inclusion/exclusion" framework[34] is established that impacts particularly on refugees and asylum seekers.

The construction of security entails a construction of risk perceptions, which also depends on the different social groups: one group in particular, the individualistic, is likely to see increasing refugee numbers as a threat, depending on their positive or negative impact on economic growth.[35] In this case, people, or the polity, feel threatened in their "well-being" by the presence of so many immigrants and by the uncontrollable nature of their arrival and presence in the territory.

Human security and citizen security. Instead of displacing the referent object from state security to human security, a "human insecurity" framing turns the citizen into the referent object,[36] in "an attempt to generate a democratic and participatory response to the thorny issue of protection and repression."[37] Although citizen security and logics of public order and safety refer to something different than common approaches to human security, it is a fact that such exclusionary logics can easily appropriate the concept, due to a perceived absence of state capacity to uphold public order. That is to some extent related to a certain feeling of impotence of Western states regarding their capacity to determine who is admitted into the country, which increases the likelihood of restrictions on those that resort to the asylum system: "In a world of risk this is an area where states perhaps believe they can, either individually or collectively, continue to be assertive."[38]

According to Harvey one should look at the constitutive principles of democratic polities to understand the potential for contradiction between what we call citizen security and the security of "others": "The treatment of asylum-

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

seekers brings to the fore a tension between notions of democratic citizenship and 'borderless' strains of liberalism that are anchored in the idea that rights attach to the person."[39] Even if these two are not in themselves irreconcilable, the risk is that they are framed as such, in particular when individual welfare and the presence of refugees are perceived as incompatible, as is the worrying case in many countries in Europe and in Australia.[40]

Human security and refugee security. Here lies the main problem with the referent object: whose "refugee security"? Is it security from refugees, or is it security of refugees? The debate persists about whether to consider refugee movements as "human security threats."

Although Suhrke does not discard the security paradigm as inappropriate for migration, she cautions against a hasty classification of population displacements as a human security threat.[41] Zimmermann enumerates a number of categories of threats ". . . posed by migration to a stable and productive world order": spill-over of refugee crises; severe persecution of minorities; destabilization of states; failed states; technological sources such as landmines; root causes.[42] Also Weiner has identified five broad categories of ways in which migratory movements can threaten security: when refugees and migrants are working against the regime of their home country; when they pose a risk to their host country; when immigrants are seen as a cultural threat; when they are perceived as a social or economic threat; when the host country uses immigrants as instruments to threaten the country of origin.[43]

In this case the referent object of security is clearly the host society. But is it a human security threat? Treated in the sense of a threat, it is rather a societal[44] or international security threat, or human insecurity. Treated in the sense of ensuring protection to those displaced it is human security. Here is the ambivalence of framing possibilities and contexts.

Whitaker underlines the political significance of the scare of refugee tides in the immediate post-Cold War context ". . . in a world where the 'refugee' has been under reconstruction as an object of popular anxiety and aversion."[45] Indeed, the major problem is when one speaks of refugees in the context of "human security *threats,*"[46] which leads to the idea that something else is threatened. In fact what causes the population movement is a lack of human security (if the referent object is the migrants and not others), but the expression may end up being interpreted in the sense that we here conceive as "human insecurity," i.e., that the movements themselves are threats. In the most general formulation, they can constitute human security threats if their massive presence destabilizes the host society, and even the Security Council designates such movements as threats to international peace and stability.

The Conceptualization of "Human Security" and of Refugee Protection in the Contemporary International System

The Ambivalent International System

For analytical purposes, the post-Cold War world can be characterized by the coexistence of two different types of structures: a state-centric one based on the Westphalian conceptions of states as autonomous and independent territorial units, and a world system based on post-statist conceptions of world governance and an emphasis on the individual as the central unit of concern. Despite considerable progress in establishing the rudiments of an international polity through the development of international institutions,[47] the international system is increasingly characterized by a strong degree of uncertainty and instability.[48]

While this has led to a tendency for the erosion of sovereignty,[49] it has at the same time contributed to a less clear notion of where responsibilities lie for issues that have been put on the international agenda. Also an increasing number of non-state actors with significant influence in the international system contribute to this disaggregation.[50] One consequence of removing responsibilities for protection away from a state-centric framework may be that no entity is held accountable any more. This "upgrading" of humanitarian rights to the "cosmopolitan" sphere[51] has already led to a significant degree of carelessness by states – which in the end retain most of the funding power – regarding the protection of refugees, with the argument that they are protected in their territories by some international institution.[52] If the state has its responsibilities removed, and on top of that it has a chance to appropriate the human security discourse to security issues that suit internal political goals, then refugee protection is worse off. In this context, the concept of human security falls prey to the dominating tendencies in the international system, which is characterized by the coexistence of contradictory forces[53] that belong to different framing processes of the world and international politics.

At the same time, the refugee protection regime has been increasingly undermined by state policies that promote closure rather than openness and by lack of political will to keep their commitment to the 1951 Convention on the Status of Refugees. There is a return to the state-centric framework as a reaction to globalization and to the effect of mass migration, which has been an ongoing trend and ". . . has engendered a growing sense of exposure or vulnerability to what had previously seemed distant and inconsequential."[54] It has also resulted in ". . . a more tightly regulated public space for the marginalized."[55] This trend, which is underpinned by the notion of internal security, has since September 11 been emphasized by the reaction to terrorism.

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Actors and Institutional Aspects

As politics is about choices and priorities there has been a need to prioritize certain pressing human rights concerns and bring them into the international agenda with a renewed emphasis. This was done by attempting to bridge the needs and problems of the poor and destitute with the interests of states and thus the concept of human security joined the normative with the pragmatic approach.

Several UN officials have been trying to promote a vision of human security based on human rights norms, in particular second-generation rights, which were not cherished by some countries, including the U.S.[56] Thus a broad and integrative concept of human security was developed. NGOs and civil society in general have also had a prominent role in helping the UN disseminate the concept of human security, in particular by promoting research on the issue.[57] Despite the moral motivations of these actors, it is clear that many of these approaches were stimulated both by institutional ambitions of promoting grand visions of new concepts[58] and by the need to attract funds and resources for new issues.[59]

A number of countries have also significantly contributed to the emergence of the new concept; among them the most prominent were Norway, Canada, and Japan. Other countries, such as South Africa, have developed their own notions of human security. However, among the countries that actively promoted human security there are significant divergences. While South Africa has a clear internal version of human security, Norway, Canada, and Japan, in their program of "middle-power foreign policy," are more predisposed towards the foreign policy dimension of the concept. But even among the latter there are distinctions, since Canada emphasizes a more humanitarian type of human security, based on first-generation human rights, while Japan emphasizes more the economic dimension, i.e., second-generation human rights.[60]

According to Baldwin, most of the efforts to redefine security

> . . . are more concerned with redefining the policy agendas of nation-states than with the concept of security itself. Such proposals are usually buttressed with a mixture of normative arguments about which values of which people or groups of people should be protected, and empirical arguments as to the nature and magnitude of threats to those values.[61]

However, the extent of security review and revision since the 1990s has varied tremendously.[62] While in the United States and Western Europe not much has changed, the so-called "middle powers" have operated more profound reviews and policy revisions. Also many former Soviet-bloc states and democratizing developing countries, including South Africa, have been obliged to fundamentally re-examine their security assumptions.

The latter has undergone one of the most comprehensive defence and security reviews in the developing world, much of which was a result of the military's ambition for task expansion.[63] Securitizing an issue can be a way of legitimizing the appropriation and manipulation of new issue-areas by the power holders.[64] Abiri analyzes the cases of securitization of cross-border migration in Sweden and Malawi and concludes that in both cases it was used as a channel for political purposes: "In Malawi, the securitization is carried out as a way to consolidate democratic rule, while in Sweden it is used as a way to recapture faith in politics."[65]

Indeed, political and institutional aspects are very important in explaining the way the concept of human security is framed and used. In some cases it becomes clear that there are significant institutional divisions within the governments of states, and it is expected that such tension occurs between ministries of foreign affairs with foreign policies that are active in human rights, and in particular in the promotion of human security, and ministries of internal affairs that are concerned about the protection of the citizens. Evidence in Canada shows that there isn't much inter-ministerial agreement regarding the definition and use of human security.[66]

A final issue of concern in the present international system, which requires caution and a clear delimitation of the concept of "human security" by activists as well as academics and decision makers, is the rise in right-wing and even extremist anti-immigration parties that use any kind of rhetoric to pursue their political purposes.

The Impact of the Terrorist Attacks on "Human Security" and Refugee Protection

The September 11 attacks were an overwhelming event not only for the magnitude of the crime and appalling nature of the act and of its planning, but also for its symbolic nature. The events led not only observers but also decision makers and politicians to reconsider the state of world politics. The attacks led to an abrupt and unprecedented state of emergency, where exceptional security measures were enforced, which had immediate impact on refugee policy and legislation – although in some countries more than others – and may have an impact on how refugees are perceived in the different countries regarding security constraints, not only in the short but also in the long run.

Many countries introduced restrictive measures, including front-end security screening for all asylum-seekers immediately upon their arrival at land-borders and airports.[67] The U.S. initially ground to a halt and then reduced its

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

resettlement program drastically,[68] creating an enormous backlog and risking undermining the whole refugee resettlement structure.[69] After the attacks on the U.S., the government adopted new and unprecedented immigration legislation in an expedited manner on September 26,[70] and soon after tried to impose specific measures in the framework of counterterrorist co-operation with the EU,[71] and also tried to impose the "perimeter continental security" on Canada.[72] This reflects a worrying policy of internationalization of the "state of exception."[73]

In a very interesting critique of the expansive definition of security, Jayasuriya claims that the new debate extends U.S. "law and order" to the transnational arena. In her own words, these developments ". . . reinforce the emergence of a new form of the regulatory state that has the 'securitization of civil society' as a key governance strategy. In fact, it is possible to see in some aspects of these developments the 'internationalization of the state of exception' that Neumann so brilliantly analyzed."[74]

Whitaker also points out the degree of institutionalization of international co-operation promoted by the U.S. to combat terrorism, which ". . . rests upon certain consensual definitions of the nature of the threat."[75] Terrorism is a contestable concept and a clear definition is also hard to come by.[76] Further, as Bigo points out, there is a danger of overexpanding the concept of "terrorist" to the ridiculous extent of including youth demonstrators in the same lot as Bin Laden. The same observer criticizes the justification of security measures aimed at limiting immigration and asylum on the grounds of the insecurity situation created by the attacks and calls for a study of the impact of these new measures on a range of issues.[77]

In Germany, advocacy groups reported that efforts to include adequate human rights safeguards for refugees in proposed asylum legislation suffered a serious setback in the aftermath of the September 11 attacks with many viewing the new legislation as a necessary measure to strengthen national security.[78] In Greece, Afghan refugees who arrived after the September 11 attacks received a hostile reception as the government refused to allow them to apply for asylum, violating its obligations under the Refugee Convention. In Hungary, all Afghan asylum seekers were transferred from open reception centres to facilities with heightened security measures.

One of the immediate effects was a reappearance of the word "security," used in very narrow terms.[79] The main issues of concern are the restrictiveness of how asylum law and entry regulations are applied, but in particular the legitimation of situations of detention at borders and significant increases in deportations.[80] These, as well as other measures that go well beyond counterterrorism, have been justified with the need to maintain internal security, and there is very little concern for clarifying that refugees should not be seen as threats to such security. However, in many countries, not only in the U.S. but also Europe and Australia, ethnic and minority groups such as Afghan refugees and Muslim immigrants were termed "terrorists".[81]

Uncertainty of the whole counterterrorist process leads to what Whitaker calls a ". . . definitional stew of disparate elements," where refugee claimants submitting to security screening for terrorist connections face a real-life lottery, with uncertain rules and unpredictable results.[82] While the increased use of confidential information without regard for data protection requirements is applied with the justification of internal security against terrorism, it may well be used against the interests of legitimate refugees.[83]

After the attacks on the Twin Towers, civil-rights organizations immediately called attention to the idea that the fight against terrorism should not serve to justify repression and argued for advancing human development as one of the main principles to pursue in response, including the concepts used by UNDP for expanding human security, such as freedom from fear and freedom from want.[84] Thus, not all outcomes of policy changes have been bad, and there seems to be a new impetus for promoting economic development and sustainability, in other words, a sufficient degree of "human security" that will at least prevent certain parts of the world from being so desperate. The future will tell whether the present commitments will last and translate into effective policies, but the international community should at least make sure that they don't serve to legitimize exclusionary policies of other type. Further, the perceptions of newcomers, namely refugees, as a threat is not merely a post-September 11 event. Already before that, such perception was widespread.[85]

One of the most serious problems of internal security against terrorism that affects refugee protection is that asylum is political, and the acceptability or not of particular migrants is dependent on the relation of the host country with the country of origin, as there is always the fear that the refugee may use the host country as a base for eventual terrorist activities.[86] There is also the problem that the country of origin may have a distorted notion of "terrorist," which makes it politically difficult for the host country to accept those who duly should receive protection from persecution for having wanted to restore democratic values in the country of origin.

In sum, the terrorist attacks emphasized the contradiction between internal security and human rights and clearly made refugee security more difficult. These contradictions were present at the internal level, as exemplified in the Canadian government's way of dealing with the issue: while

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

in internal affairs the reaction was to reinsure the security of the *citizens*, in the foreign office there was more concern to emphasize the need to respect the rights of the *refugees*.

As pointed out above, the terrorist attacks but also, I would argue, an ongoing trend of reaction to globalization have resulted in a generalized resurgence of nationalism, and this is confirmed by the shift in the strategy of the global civil society project that is redirecting attention towards new emphasis on the state as central element of international decision making.[87]

Conclusion

Because the concept of human security is at this stage so loose and all-encompassing, it can easily turn into a subtle instrument for justifying restrictions and underlining the sense of community and internal security, in particular when the motivation behind such change has the magnitude of the September 11 events. Terrorism strengthens the position of those actors who defend a version of negative framing of human security through the construction of threats to internal security and of "human insecurity" notions.

However, in the post-September 11 world one has to consider not only the immediate and direct effects of the attacks on the Twin Towers, but also the previous trend of restrictionism regarding acceptance of refugees and migrants. It is too simplistic to focus exclusively on the impact of a single overwhelming event although it has significantly contributed to reinforcing conditions that already preceded it. Indeed, counterterrorism framings are to a large extent based on the opposition between refugees and citizens as referent object of security. The events of September 11 have a high likelihood of further biasing opinions towards the criminalization of foreigners, in particular those coming from specific parts of the world and with a background of political activism. This is to add to the general attitude of criminalization of those asylum seekers who are smuggled into a country in search of protection.

The problem with the human security approach is that many of those who promote it tend to plunge too easily into a world politics or cosmopolitan approach, forgetting that the state still has a fundamental role in international relations. Here, the importance of the agent who is trying to bring about a change in the international system is underlined: the state is the identifiable criterion by which to judge whether we are talking about human security or just internal security, as its institutions have enormous framing power. Thus, when defining the concept of human security, the ideological motivations of the framing agent should be made explicit and delimited. Since it is assumed that human security as a concept and a human rights program may work well if it is clearly defined and formulated within a world politics framework, the current reversal towards the state as the central element in international relations calls for careful reflection on the concept's potential and consequences in particular as far as refugee protection is concerned.

Notes

1. Chris Brown, "The Normative Framework of Post-Cold War International Relations." In *The New Agenda for International Relations*, ed. Stephanie Lawson (Cambridge: Polity Press, 2002).
2. Policies relating to human rights and human security are predominantly located in world governance logics of decision making, while those related to terrorism and internal security are predominantly located in state-centric logics. See Sandra Lavenex, *The Europeanization of Refugee Policies: Between Human Rights and Internal Security*. Doctoral dissertation. (Florence: EUI, 1999).
3. This is the case of the so-called "middle powers", such as Canada, Norway, and Japan.
4. South Africa is one of the best and most studied examples. See Gavin Cawthra, *From "Total Strategy" to "Human Security": The Making of South Africa's Defence Policy 1990–1998*. Working Papers, 8. (Copenhagen: COPRI, 1999).
5. Sarah Edsen, *Human Security: An Extended and Annotated International Bibliography* (Cambridge: King's College, University of Cambridge, 2001).
6. See full text online: <http://www.un.org/Docs/SG/agpeace.html>.
7. See full text online: <http://hdr.undp.org/reports/global/1993/en/default.cfm>.
8. The deterioration of the refugee protection regime in terms of decreasing willingness of states to receive refugees, together with the increasing numbers of forced migrants, led to policies that tend to keep these populations in need closer to – if not inside – their country of origin. This means they are physically much more vulnerable to the collateral effects of wars. The lack of political will to address these situations has led the High Commissioner to call for efforts to ensure the physical security of the refugees and other displaced and even non-displaced populations.
9. Sadako Ogata, "Human Security: A Refugee Perspective." Ministerial Meeting on Human Security Issues of the "Lysoen Process" Group of Governments, May 1999: 5.
10. Anne Hammerstad, "UNHCR, Refugee Protection and State Security," *Security Dialogue* 31, no. 4 (2000): 391–403.
11. George Maclean, "Instituting and Projecting Human Security: A Canadian Perspective," *Australian Journal of International Affairs* 54, no. 3 (2000): 269–276.
12. G.H. Fox, "New Approaches to International Human Rights: The Sovereign State Revisited." In *State Sovereignty Change and Persistence in International Relations*, ed. Sohail H. Hashmi, (University Park: Pennsylvania State University Press, 1997), 105–30.

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

13. Kanti Bajpai, *Human Security: Concept and Measurement*. Occasional Paper, 19. (New Delhi: Kroc Institute, 2000).
14. See B. Frelick, "Secure and Durable Asylum: Article 34 of the Refugee Convention," *World Refugee Survey 2001* (2001): 42–55.
15. See Kinhide Mushakoji, "Human Security as an Integrative Concept for the UN," *Prime* 2 (94): 40–52.
16. Ellen Lammers, *Refugees, Gender and Human Security: A Theoretical Introduction and Annotated Bibliography*. (Utrecht: International Books, 1999): 49.
17. Ronnie D. Lipschutz, "Negotiating the Boundaries of Difference and Security at Millennium's End." In *Security*, ed. Ronnie D. Lipschutz (New York: Columbia University Press, 1995), 213.
18. Heather Owens and Barbara Arneil, "The Human Security Paradigm Shift: A New Lens on Canadian Foreign Policy?" *Canadian Foreign Policy* 7 (99): 1–12.
19. On the debate over the political role of security analysts, see Ole Waever, "Securitizing Sectors? Reply to Eriksson," *Cooperation and Conflict* 34, no. 3 (99): 334–40; Johan Eriksson, "Observers of Advocates? On the Political Role of Security Analysts," *Cooperation and Conflict* 34, no. 3 (99): 311–30; Kjell Goldmann, "Issues, Not Labels, Please!: Reply to Eriksson," *Cooperation and Conflict* 34, no. 3 (99): 331–33.; Michael C. Williams, "The Practices of Security – Critical Contributions: Reply to Eriksson, *Cooperation and Conflict* 34, no. 3 (99): 341–44; see also Jef Huysmans, "Dire et écrire la sécurité: le dilemme normatif des études de sécurité," *Cultures et Conflits* 31–32, no. Automne-hiver (98): 177–202.; K.M. Fierke, "Meaning, Method and Practice: Assessing the Changing Security Agenda," in *The New Agenda for International Relations*, ed. Stephanie Lawson (Cambridge: Polity Press, 2002).
20. One of the most commonly agreed features of the concept is its contested nature. See Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed. (New York: Harvester Wheatsheaf, 1991).; Richard Little, "Ideology and Change," in *Change and the Study of International Relations: The Evaded Dimension*, eds. Barry Buzan and Barry Jones, (London: Pinter, 1981); Arnold Wolfers, "'National Security' as an Ambiguous Symbol," *Political Science Quarterly* 67, no. 4 (52), 481–502. For an argument that downplays such contested nature of the concept and emphasizes the practical conditions for its disregard, see David A. Baldwin, "The Concept of Security," *Review of International Studies* 23 (1997): 5–26.
21. See Eriksson, Johan, *op. cit.;* Barry Buzan, Ole Waever, and Jaap De Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 1998), 2–5.
22. Ole Waever, "Securitization and Desecuritization." In *On Security*, ed. Ronnie D. Lipschutz, (New York: Columbia University Press, 1995), 47. This author defines security problems as "…developments that threaten the sovereignty or independence of a state in a particularly rapid or dramatic fashion, and deprive it of the capacity to manage by itself." *Ibid.,* 54.
23. Jef Huysmans, *op. cit.*
24. Ronnie D. Lipschutz, *op. cit.*
25. Johan Eriksson, ed., *Threat Politics: New Perspectives on Security, Risk and Crisis Management* (Aldershot: Ashgate, 2001), 6, defines a frame as "…the power struggle for a shared narrative, in our case about what counts as 'threat', 'risk' and similar negative concerns." In this essay we will consider also positive concerns as a useful tool to distinguish different possible types of framing of "human security."
26. Traditional conceptions of security.
27. Anna M. Florini and P.J. Simmons, "North America." In *The New Security Agenda: A Global Survey*, ed.. Paul B. Stares (Tokyo: Japan Center for International Exchange, 1998); David T. Graham and Nana K. Poku, eds., *Migration, Globalisation and Human Security* (London: Routledge, 2000); Nana K. Poku, Neil Renwick, and John Glenn, "Human Security in a Globalising World." In *Migration, Globalisation and Human Security*, ed. David T. Graham and Nana K. Poku (London: Routledge, 2000).
28. See the Copenhagen School, namely Ole Waever, Barry Buzan, Morten Kelstrup, and Pierre Lemaitre, *Identity, Migration and the New Security Agenda in Europe* (London: Pinter, 1993).; and sociological approaches with a focus on identity, Martin Shaw, "There Is No Such Thing as Society: Beyond Individualism and Statism in International Security Studies," *Review of International Studies* 19 (93): 159–75: 160.
29. Johan Eriksson, *op. cit.*
30. George Maclean, *op. cit.*
31. Jef Huysmans, *op. cit.*
32. Elisabeth Abiri, "Migration and Security from a North-South Perspective: Sweden and Malawi." In *Migration, Globalisation and Human Security*, eds David T. Graham and Nana K. Poku (London: Routledge, 2000), 72.
33. "Fear of mass migration, for example, and the social and political instabilities that it can engender, characterizes the political relations of the United States and Mexico, France and Northern Africa, and Germany and its Eastern neighbors." Peter J. Katzenstein, "Conclusion: National Security in a Changing World." In *The Culture of National Security Norms and Identity in World Politics*, ed. Peter J. Katzenstein (New York: Columbia University Press, 1996), 524.
34. For the problematization of the problems of inclusion and exclusion in political theory and also in the context of immigration and refugee movements, see R B J Walker, *One World, Many Worlds: Struggles for a Just World Peace* (Boulder, Colo.: Lynne Rienner, 1988); R B J Walker, *Inside-Outside International Relations as Political Theory*. Cambridge Studies in International Relations, 24. (Cambridge: Cambridge University Press, 1993); M. Dillon, "Sovereignty and Governmentality: From the Problematics of the 'New World Order' to the Ethical Problematic of the World Order," *Alternatives* 20 (95): 323–68.
35. Ulf Bjereld, "Cultural Theory, Risk Perceptions among Political Elites and Public Opinion." In *Threat Politics: New Perspec-*

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

tives on Security, Risk and Crisis Management, ed. Johan Eriksson (Aldershot: Ashgate, 2001).

36. "For the analyst, the referent object of security became the state. In this world, security came from being a citizen, and insecurity from citizens of other states." Nana K. Poku, Neil Renwick, and John Glenn, *op. cit.*, 12. On the conceptualization of security for the individuals qua persons and not qua citizens, see K. Krause and M. Williams, eds., *Critical Security Studies: Concepts and Cases* (London: UCL Press, 1997).
37. See Rachel Neild, "From National Security to Citizen Security: Civil Society and the Evolution of Public Order Debates." Web page, 1999, Democratic Development Publications (refers to the first part, which is written by Warren Allmand); online: <http://www.ichrdd.ca/english/commdoc/publications/de mDev/d emDevPub.html.paper> (date accessed: 16 February 2002).
38. Colin J. Harvey, "Refugees, Rights and Human Security," *Refuge* 19, no. 4 (2001): 94–99: 95.
39. *Ibid*., 96.
40. Interview with Ruud Lubbers, High Commissioner for Refugees, in *Refugees Magazine.* "Year in Review: Ruud Lubbers Reviews His First Year in Office (Interview)," *Refugees Magazine*, no. 125 (2001): 20.
41. Astri Suhrke, "Environmental Change, Migration, and Conflict: A Lethal Feedback Dynamic?" In *Managing Global Chaos: Sources of and Responses to International Conflicts*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall (Washington, D.C.: United States Institute of Peace Press, 1996).
42. Warren Zimmermann, "Migrants and Refugees: A Threat to Security?" In *Threatened Peoples, Threatened Borders: World Migration and U.S. Policy*, ed. Michael S. Teitelbaum and Myron Weiner (New York: The American Assembly, Columbia University, 1995): 107.
43. Myron Weiner, "Security, Stability and International Migration," *International Security* 17 (92–93): 91–126.
44. On societal security and insecurity, see Ole Waever, Barry Buzan, Morten Kelstrup, and Pierre Lemaitre, *op. cit.*
45. Reg Whitaker, "Refugees: The Security Dimension," *Citizenship Studies* 2, no. 3 (98): 413–434: 422.
46. For example: David T. Graham and Nana K. Poku, *op. cit.*, looks at a range of security and human security issues related to the displacement of civilian populations and shows how the tenuous existence of migrants can lead to a myriad of human security threats.
47. John G. Ruggie, *Constructing the World Polity: Essays in International Institutionalization* (London: Routledge, 1998).
48. Reg Whitaker, *op. cit.*
49. R B J Walker, "Security, Sovereignty, and the Challenge of World Politics," *Alternatives* 15 (90): 3–27.
50. Among these are included international bureaucracies such as the UN, as well as non-governmental organizations devoted to humanitarian causes. On the influence of non-state actors in the international system, see Thomas Risse, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions.* (Cambridge: Cambridge University Press, 1995); Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998); Karsten Ronit and Volker Schneider, eds., *Private Organizations in Global Politics* (New York: Routledge, 2000).
51. Here understood as a construction of the international system where the individual is the holder of human rights and entitlements, and where "…the institutions involved in their implementation, both formal and informal or civic, proceed from the international to the national and local levels, rather than vice-versa as is the case with democracy." David Beetham, "Human Rights as a Model for Cosmopolitan Democracy." In *Re-Imagining Political Community Studies in Cosmopolitan Democracy*, ed. Daniele Archibugi, David Held, and Martin Koehler (Cambridge: Polity Press, 1998), 59–60. For a development of the characteristics of cosmopolitan positions, see T. W. Pogge, "'Cosmopolitanism and Sovereignty.'" In *Political Restructuring in Europe Ethical Perspectives*, ed. Chris Brown (London: Routledge, 1994).
52. This has been the case in several instances of UNHCR intervention in humanitarian emergencies, where the presence of the organization in the country of origin led to the "legitimization" of border closures. On the risk of such focus on human security leading to a lowering of the humanitarian goals and of the possible expectations for refugees regarding their life in exile, see Elisabeth Abiri, Elisabeth, *op. cit.*, 73.
53. James N. Rosenau, *Thinking Theory Thoroughly: Coherent Approaches to an Incoherent World* (Boulder: Westview Press, 2000).
54. Paul B. Stares, *The New Security Agenda: A Global Survey* (Tokyo: Japan Center for International Exchange, 1998): 12.
55. Colin J. Harvey, *op. cit.*, 95.
56. Jan Egeland, *Impotent Superpower -Potent Small State: Potentials and Limitations of Human Rights Objectives in the Foreign Policies of the United States and Norway* (Oslo: Norwegian University Press, 1988).
57. For a list of NGOs and research centres divided by region, see Sarah Edsen, *op. cit.*
58. Ellen Lammers, *op. cit.*
59. Anna M. Florini and P.J. Simmons, *op. cit.*
60. Sarah Edsen, *op. cit.*, 85.
61. David A. Baldwin, *op. cit.*, 5.
62. Gavin Cawthra, *op. cit.*
63. Gavin Cawthra, *op. cit.*
64. Ole Waever, *op. cit.*
65. Elisabeth Abiri, *op. cit.*
66. See Xavier Furtado, "Human Security and Asia's Financial Crisis. A Critique of Canadian Policy," *International Journal* LV, no. 3 (2000): 355–75; and Kanti Bajpai, *op. cit.*
67. *Refugees Magazine*, *op. cit.*, 6.
68. Aristide Zolberg, "Guarding the Gates in a World on the Move," Social Science Research Council Essays, online: <http://www.ssrc.org/sept11/essays/zolberg.htm> (accessed 25 April 2002); Human Rights Watch., "World Report 2002," Human Rights Watch web page, online: <http://hrw.org/

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

wr2k2/refugees.html#Refugee Protection Post September 11> (accessed 25 April 2002).

69. See August Gribbin, "Security Leaves Refugees Stranded," *Washington Times*, 2002.
70. *Human Rights Watch, op. cit.*
71. Statewatch, "Statewatch News Online: Bush Demands for EU Cooperation on Justice and Home Affairs," online: <http://www.statewatch.org/news/2001/nov/06uslet.htm.> (date accessed: April 25, 2002).
72. Kanishka Jayasuriya, "9/11 and the New 'Anti-politics' of 'Security," Social Science Research Council Essays, online: <http://www.ssrc.org/sept11/essays/jayasuriya.htm> (date accessed: April 25, 2002).
73. *Ibid.*
74. *Ibid.*
75. Reg Whitaker, *op. cit.*
76. See Sharryn J. Aiken, "Manufacturing 'Terrorists': Refugees, National Security, and Canadian Law (Part 1)," *Refuge* 19, no. 3 (2001): 54–73; David J. Whittaker, ed. *The Terrorism Reader* (London: Routledge, 2001); see also Amnesty International, *Rights at Risk: Amnesty International's Concerns regarding Security Legislation and Law Enforcement Measures*, AI Index: ACT 30/001/2002, 2002.
77. Didier Bigo, "To Reassure, and Protect, after September 11," Social Science Research Council Essays, online: <http://www.ssrc.org/sept11/essays/bigo.htm> (date accessed: 25 April 2002); also Amnesty International, *op. cit.*, and the fear that the fight against terrorism may be used to justify repression and undermine the institution of asylum.
78. *Human Rights Watch, op. cit.*
79. See, for instance, European Commission document COM (2001) 743, 5 Dec. 2001; see also Framework Decision on combating terrorism agreed by the JHA Council on 6 December 2001 and 27 December 2001 – Council "Common Position on Combating Terrorism."
80. *Human Rights Watch, op. cit.*
81. Kanishka Jayasuriya, *op. cit.*
82. Reg Whitaker, *op. cit.*
83. See for example Council of the European Union, *Strategic Committee on Immigration, Frontiers and Asylum: Meeting With the United States, 26.10.01*, 2001.
84. The Center for Democracy and Technology, "Groups Call for Liberty and Security in September 11th Aftermath," available online: <http://www.cdt.org/security/011101liberty.shtml.> (date accessed: 25 April 2002).
83. Warren Zimmermann, *op. cit.*
84. Reg Whitaker, *op. cit.*
85. See Jeffrey Ayres and Sidney Tarrow, "The Shifting Grounds for Transnational Civic Action," Social Science Research Council Essays, online: <http://www.ssrc.org/sept11/essays/ayres.htm> (date accessed: 25 April 2002); and "My own view is that scholars of refugee law need to engage with work in deliberative democracy in order to sketch an approach that would present a real challenge to the current practices of states," Colin J. Harvey, *op. cit.*, 96.

Raquel Freitas is a Ph.D. candidate in the Department of Social and Political Sciences at the European University Institute (Florence), developing research on the role and mandate of the United Nations High Commissioner for Refugees (UNHCR) in the present international system.

© Raquel Freitas, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Development and Conflict Prevention: Reflections on Rwanda

An Interview with Professor Peter Uvin

Erin K. Baines

Development assistance organizations are paying greater attention to the causes of conflict, asserting a link between poverty and violence and affirming the potential of designing more conflict prevention sensitive development policies and programs. The Liu Centre for the Study of Global Issues at the University of British Columbia and the Canadian International Development Agency recently hosted the Vancouver Roundtable on Development, Conflict and Peacebuilding: Responding to the Challenge, on February 14–15, 2002, where invited experts explored the possibilities of linking development and conflict prevention more effectively. Noted for his extensive field experience in following up the OECD-DAC Guidelines on Conflict, Peace and Development in 1999, as well as recent articles in 2001 and 2002 and a book in 1998 on the role of the international development agencies in Rwanda, invited Roundtable participant Professor Peter Uvin of Tufts University agreed to be interviewed by IIR Liu Centre post-doctoral fellow Erin Baines to elaborate his framework for taking action, presented at the Vancouver Roundtable.

Given that each conflict situation is "too different, too unique, too idiosyncratic to generalize across cases," as you wrote in "Some Reflections of Good Donor Practice," what can we expect from a Canadian strategic response to the issue of development and conflict prevention?

There are seven features that characterize a good policy on development and conflict prevention. These seven features are relevant for non-conflict prevention related development work as well. They hold for all development work, suggesting that there is nothing unique about conflict prevention work. Now it would be interesting to tease out what would be specific only to development trying to prevent conflict, as opposed to development just doing development. But do such situations exist?

I do not believe you can come to very meaningful and strong predictors about violent conflict or what you can do to prevent violent conflict. All you can do is ask the right questions and set up mechanisms and lenses that allow you to constantly be aware and adapt.

Some of these seven features are widely accepted, while some are widely non-accepted, or non-practiced. First, you have to be prevention-oriented as a matter of total routine; it ought to be so ordinary that you do not need to talk about it any more. For example, it is now expected that, if you were to do anything in development and you totally disregard gender issues or poverty issues, people will ask you …"what decade are you coming from?" This ought to be the case with conflict. This is both a relatively easy one, for it requires little money and time, and a very hard one, for it is at this level that much resistance exists.

Second, you have to be knowledge based; you will never be able to deal intelligently with conflict dynamics without good knowledge. I think that is widely accepted. The question is whose knowledge counts, which is a very important and totally undervalued matter. We have to put vastly more resources into local knowledge generation. But I think that is the case also for non-conflict development work.

You have to always invest in local knowledge creation to ensure that there are strong and existing dynamics for intellectual reflection and speaking out about conflict issues once they force themselves onto the agenda. This is one thing that foreign aid can do better than others, to create

© Erin K. Baines, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

the kind of spaces for people to do this, because in [cases of violence] these spaces often do not exist or are weak. So that is something that could be done better….

Third, we ought to be more flexible in financial mechanisms and administrative mechanisms, capable of making short-term change with a long-term perspective. We typically do not have much of a long-term perspective. At the same time, we aren't very good at the short term either, wherein overnight or in the course of a week we can dramatically change course. So, our focus needs to be shorter and longer at the same time. That's tough, but not inconceivable, and there are mechanisms that exist already; there just need to be more.

Fourth, your aid machinery needs to be light, and based on what exists internally. This is not simply the old "partnership" or participation approach. We need a much stronger way of working that supplements or complements people's own actions but never substitutes for them. That is a difficult rule to live by, because there is so much need out there, and consequently so much temptation to just do something. Also, we tend to be deeply invested in what we do. I am confronted with it myself because I am developing for some donor a project in Rwanda to support the *gacaca* process.[1] This project is my baby. I convinced people to fund it. But it has been difficult and time-consuming to hire Rwandans to run the project. The job may be too outspoken, too dangerous, too hard, too narrow, they are not impartial, and so on. But should we do a project if we cannot find Rwandans ready to carry it? Should we substitute for local effort? I tend to think not: we should only do it if they are doing it already. That would be my normal position in normal development circumstances. Could we make the case that conflict situations are particular? Given the danger for local people and our comparative advantage in creating space and extending protection to people who speak beyond the limited discourses that prevail during periods of violent conflict, we maybe should make some exceptions to the rule that we don't substitute. Foreigners are not Hutu or Tutsi, they are not subject to the same pressure, they are not so afraid, they do not have family or bear the psychosocial trauma around this, so here is a case to relax the rule. Still, one should have a very clear vision about how to minimize the role of the foreigners, and to ensure you promote a maximum of local and not foreign knowledge on Rwanda, because that is what Rwandans are lacking. More than food, more than anything, they are lacking space to conceive their future. So the basic rule still holds, even in an extreme case like Rwanda, that we need to create procedures and processes that are more likely to promote and engage local knowledge.

Fifth, we need to be more principled, which brings us to human rights, which are more or less the only principles that are universally accepted. Attention to a human-rights based approach to development, which isn't about writing legal statements or creating commissions, but about instituting social practices that lead to enforceable rights.

Sixth, we need to become more self-critical. We must look at ourselves and our funding and behaviour patterns in terms of how they affect dynamics of violence or exclusion or structural violence, or human rights violations. If we cannot solve all these matters, we should at least try to do less harm.

Finally, we need to be more coherent. We need more coordination without giving up local capacities to make choices and to be in charge. It might be possible for some donor countries or agencies to occasionally create projects that seek to facilitate coordination or to pay the cost of coordination by setting up investment in knowledge creation, facilitation, negotiation, and so on, simply with the aim of creating dynamics where the total would be more than the sum of the parts. In the development business, almost systematically, the total is less than the sum of the parts. If we could just create means to change that, we could do so much more.

The OECD calls this "innovation in diversity." For example, some programs are going much further in terms of engaging people, taking more risks and being more willing to support innovative initiatives. Other donors could simply co-fund these. Joint evaluations are another possibility, where agencies try to learn together, potentially also doing joint identifications, even if they cannot get to joint actions.

When was the last time you were surprised by an international response or action regarding conflict prevention or peacebuilding? How much hope do you hold out for the international community to adopt this "package"?

It is simply doing certain things better, new tools and better knowledge management. Agencies like DFID and CIDA have made significant progress in thinking through all this. Some things go much further, I agree, such as losing our power, to not substitute, to make ethical and operational choices based on information from local people.

I am trying to think of the last time I was surprised. I am often surprised by inaction; by people I know personally and I know what they think and yet they still don't manage to do what they know is necessary. I have never been a senior policy maker so I don't really know what it feels like; I have been a guy in the field and I know what that feels like. When you hang out with senior policy makers, you see that they are greatly constrained; even if they are deeply committed to any part of the "package" they are typically so overworked, running from one crisis to another. Anything that is not a crisis is basically not going to make it onto their

© Erin K. Baines, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

agenda; by the time it does so, you have lost the capacity to do much of what we were talking about, it seems, and thus standard approaches are applied. So, I have been surprised by the sameness in response. Private corporations seem to have better ways of dealing with the challenge of change.

In the case of Rwanda, you suggest in "Difficult Choices in the New Post-Conflict Agenda" that very divergent interpretations of the nature of the RPF-dominated government guide donor policy and programs, often with incoherent results and bypassing difficult ethical questions. Why do Western donors fall into such binary camps in this case? Is there a grey area for interpretation?

There is a part in the article that I cut out for lack of space. According to me, in a case like Rwanda, it is actually both sides that are right. It's not "either/or," but "both/and." The Rwandan government can be both deeply committed to a future in which ethnicity doesn't matter any more and at the same time deeply distrustful of the other ethnic group. It can be committed to a vision of democratic involvement, and yet want to hold onto power at all costs. It can be deeply free market and liberal oriented, and yet do everything possible to ensure that no independent private sector emerges. These things seem to hold simultaneously. Real life, especially after violent conflict, is nothing but grey zones.

You could also argue that most donors act in a similar grey manner: even though they interpret and think about the situation in quite strong terms, the practice of diplomacy favours not rocking the boat. Being radical is not how you do diplomacy. Diplomats don't really speak out very loudly even though behind closed doors they tell you they are totally distressed with the government. So in practice most play in grey areas…but not because this is a conscious strategy to deal with the dualistic nature of reality, but rather because that is how you do diplomacy. So, can you as a donor work in the grey zone, based on a fine understanding of the way black and white mix to become grey, rather than as a simple result of the fact that diplomacy is all based on grey suits? That clearly is not easy, because on what ethical basis are you going to enter the grey zones and make judgments and set goals?

If you want to go grey, you must ask those whose lives are affected by it. Ask them vastly more. Think of villagization in Rwanda. For years, people in the international community had strong feelings on the matter. Some donors were deeply opposed to it, while others were willing to support it, but hesitantly. In response, most dragged their feet, so they did the grey thing. As far as I know, it took more than two years for the first organization to actually ask farmers what they thought about villagization policy themselves. Oxfam and also a Dutch group ended up doing this, a fascinating piece of work. What came out of that was much more "in between": Rwandans were neither totally opposed to it, nor totally in favour of it. It depended on their own personal trajectories, their own sense of security risks, and especially the process by which the policy was implemented. It took much too long before this "voice" came to be represented at the table. Again, this gets back to knowledge creation. We need to do vastly more listening, feeding it directly and unfiltered up to policy – our own and other actors'. And the donor can play a role there; we don't expect small farmers to go to the office of the President and make a good point. But you can do it yourself as a foreigner. So do it.

Selected Publications by Peter Uvin

Aiding Violence: The Development Enterprise in Rwanda. West Hartford, CT: Kumarian Press, 1998.

"The Influence of Aid in Situations of Violent Conflict." OECD/DAC Informal Task Force on Conflict, Peace and Development Cooperation, 1999.

"Difficult Choices in the New Post-Conflict Agenda: The International Community in Rwanda after the Genocide." *Third World Quarterly*, vol. 22, no. 2 (2001): 177–89.

"Reading the Rwandan Genocide." International Studies Association, 2001.

"Some reflections on good donor practice." Paper presented at the Vancouver Roundtable on Development, Conflict and Peacebuilding: Responding to the Challenge, February 14–15, 2002, Liu Centre for the Study of Global Issues, University of British Columbia. Online: <http://www.liu centre.ubc.ca/liu/events/conferences/140202c onflict-dev/ overview.htm>.

In "Difficult Choices," you made the argument that "the new post-conflict agenda … amounts to a licence for intervention so deep and unchecked it resembles colonialism…" On the other hand, you do not advocate pulling out, but rather a number of areas donor could improve, resembling "the package" proposed above – knowledge, flexibility, consultation, substance, coherence. If this occurred, would neo-colonialism be averted? Does it increase control or decentralize?

In some ways, a lot of the coherence and post-conflict discourse does sound like we are saying, "How can we gang up better on Third World governments?" – by making a united front, with no crack, as if everything is our business. Two points. One, to some extent, there is a reason to gang

© Erin K. Baines, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

up in this world. There actually are an awful lot of governments and people in governments that deserve a lot of ganging up on. They use violence, abuse, killing, stealing, lying, and so, and I see little in the name of sovereignty, partnership, and respect that could justify our complicity with that. So I don't mind ganging up a little bit.

On the other hand, it is true, for change to be more sustainable, it can't come from outside. I think the seven points I described are a way to avoid this kind of problem – especially the ones that evoke the most silence when I raise them, such as the "whose knowledge?" point and the "never substitute" one. It is true, if you do five out of seven but not those two, then we miss the crucial parts. Would that still be better than current practice? Would principled ganging up still be better than unprincipled ganging up?

Note

1. *Gacaca* is a form of traditional participative popular justice at the local level that allows Rwandans to bring to trial those accused of participation in the 1994 genocide.

Erin K. Baines, Ph.D., is a SSHRC Postdoctoral Fellow at the Institute for International Relations at the Liu Centre for the Study of Global Issues, University of British Columbia.

© Erin K. Baines, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Roundtable Report

Migration and Security: September 11 and Implications for Canada's Policies

Suman Bhattacharyya

Abstract

On March 15, 2002, the Canadian Centre for Foreign Policy Development, in partnership with the Centre for Refugee Studies at York University, held a roundtable meeting in Toronto to assess the implications for Canada's policies concerning migration resulting from the terrorist attacks of September 11. The purpose of this event was to draw on the knowledge and insight of participants from a wide range of civil society sectors to inform policy development. Discussants proposed a coherent framework for Canada's migration policy that emphasizes the safety and well-being of migrants. Policy advice generated from this roundtable concerns Canada's overall approach to migration policy; Canada's immigration and refugee system; and continental and international implications for Canada's policies.

Résumé

Le 15 mars 2002 s'est tenu à Toronto une table ronde organisée conjointement par le Centre canadien pour le développement de la politique étrangère (CCDPE), et le Centre for Refugee Studies de l'université York dans le but d'évaluer les implications des politiques canadiennes en matière d'immigration après les attentats terroristes du 11 septembre. Le but de la réunion était de puiser dans le réservoir de connaissance et de discernement des participants provenant d'horizons très divers de la société civile afin de guider le développement des politiques. Les panélistes ont proposé une structure cohérente pour la politique du Canada en matière de migration qui met l'emphase sur la sécurité et le bien-être des migrants. Les recommandations politiques issues de cette table ronde ont trait à l'approche d'ensemble du Canada en matière de politique sur la migration, le système canadien relatif à l'immigration et aux réfugiés, et les implications continentales et internationales des politiques du Canada.

Introduction

Links between migration and security issues have acquired renewed relevance in the post-September 11 context. Recognizing this, the Canadian Centre for Foreign Policy Development, in partnership with the Centre for Refugee Studies at York University, organized this meeting to explore the policy implications of migration and security in light of September 11. Participation consisted of individuals from academia, the NGO/IGO community, and government. The event was one of a series of roundtables supported by the Canadian Centre for Foreign Policy Development in response to September 11.

This report outlines discussions on key issue areas as well as the domestic and international policy implications. (It does not necessarily reflect the opinions of all roundtable participants.) Roundtable participants proposed a coherent approach to post-September 11 migration policy, emphasizing the safety and well-being of migrants. The policy advice generated from this event was the result of a consensus at the roundtable on the changing nature of the concept of security in the post-Cold War context; evolving trends in Canadian migration policy; and new challenges for migration policy in light of September 11.

Context: Global Migration Trends

Given the rapid population growth in developing countries, for some, the pressure to migrate will become stronger. As well, political instability, environmental factors, and ethno-religious conflict are further reasons behind an upsurge in

© Suman Bhattacharyya, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

global migration. It was agreed that people leave their countries of origin because of disparities in human security. Global migration is sure to continue, regardless of any change at the policy level. The difference now compared to earlier periods of history is that migration primarily involves people of lesser economic means. The challenge of the twenty-first century will be to reconsider traditionally held notions of citizenship. As well, the concerns of internally displaced persons (IDPs) have acquired renewed significance.

Theoretical Basis: The Changing Nature of Security Discourse

Participants noted that conventionally, security was seen as the protection of states from military threats to their sovereignty. Keeping with this conception, migration was not seen as a genuine security issue, with the notable exception of the mass movement of people resulting from military warfare. In the post-Cold War era, however, there has been a profound rethinking, by some, of the concept of security. This debate began with the sectoral security paradigm envisaged by the Copenhagen School, which included political/economic security, social security, and environmental security. Though this provided some scope for linking migration and security, the state remained at the centre, argued roundtable participants.

The shift in emphasis from protection of the state to protection of all people only developed through emergence of the Human Security perspective. From the Canadian standpoint, Human Security is defined as a "people-centred approach to foreign policy which recognizes that lasting stability cannot be achieved until people are protected from violent threats to their rights, safety or lives."[1] Referring to this change as a "humanistic breakthrough," it was argued that the human security paradigm was successful in broadening the definition of the concept to encompass the security of all people. Building on this, it was noted that in the post-September 11 world, Human Security has been universalized in academic and policy circles. How this model will be articulated remains a continuing challenge for Canada. Recognizing this, roundtable discussants recommended that in terms of migration, security should be defined as threats to people's security *as they move and once they arrive at their destination.* Therefore, the security of the migrants must be protected and discourse must be modified to reflect this reality. Discussants were also quick to point out that despite the post-Cold War emphasis on democracy and human rights, these two cornerstones of human security have been instituted at low levels. As well, the mere presence of democratic institutions does not imply human rights will be safeguarded.

Conceptions of Security Post-September 11

It was argued that the post-September 11 international system remains fragmented and, recognizing this, decisive factors will be political rather than military. However, despite previous gains in Human Security, the concept of security has become re-militarized after September 11. For instance, the term has been recast by some to refer to "protection of the state from terrorists." Others noted that the term "security" has become a fashionable way to cover a much wider array of issues. In addition, security of "the nation" has acquired greater significance. In particular, further emphasis has been placed on protecting notions of "national values." Keeping with this trend, citizenship has been linked to duties, obligations, responsibilities, and vague notions of civilization. As well, human rights and democratization may suffer with the military pursuit of terrorist groups. Finally, it was argued that the seeming preparedness of the Canadian public to relinquish their civil liberties for the sake of "security" is troubling. By contrast, one participant suggested that the depth of the response to September 11 may offer a strategic opening for a redefinition of security.

Trends in Canadian Migration Policy

Historically, Canada has faced the continuing challenge of maintaining the security of labour to support the security of capital, participants noted. In addition, concerns with "national culture" figured prominently in Canadian migration policy. However, notions of a single, unified national culture became untenable due to changing demographic patterns. Trade also became linked to the security of capital, with Canadian migration policy serving this need. More recently, it was argued that concerns with terror have been linked with hegemonic security. Participants also pointed out that an increasing number of workers enter Canada on temporary work permits, from periods ranging from a few months to several years. The needs of these would-be migrants should be more actively pursued.

Concerns for the Canadian Immigration and Refugee System Post-September 11

On a conceptual level, it was argued that the interpretation that migrants are a security threat to the receiving country is problematic. The focus should thus be shifted to the security of the migrants, or the marginalized population. Hence, a tension exists between the security of the state and the security of the migrants. A shift towards a state-centred definition of security marginalizes those outside of the state framework, such as internally displaced persons (IDPs). Finally, others emphasized that it is troubling that the categories of migrants (e.g., refugees, IDPs, etc.) are becoming more blurred.

© Suman Bhattacharyya, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

More specifically, in the Canadian context, participants argued, the post-September 11 political climate has engendered renewed attacks on the refugee determination system. In addition, refugees have been more easily scapegoated as potential terrorists or factors that cause harm to society. Slight changes have also occurred in the treatment of newcomers by immigration officials, including increased detention and a lack of entitlement to legal rights. Increased racial profiling was another observation noted by participants. The Canadian visa system has also been the subject of criticism, for which it has been labelled a "soft target."

Policy Recommendations

1. General

Overall, policy makers should continue to use the Human Security model. More specifically, participants recommended that Canada develop a systematic approach to address the root causes of migration. This would include addressing the multiple interacting determinants of ethnic conflict and terrorist activities, including demographic, environmental, and inequality, both within and between countries. In doing so, the gap between policy and practice must be redressed. To this end, a two-pronged scheme should be adopted that addresses the root causes at the ground level while restructuring immigration policy. Others suggested that Canada harmonize its various migration policies. Efforts should also be made to find means of integrating the advice and expertise of refugees living in Canada.

In addition, post-September 11 security issues cannot adequately be redressed through a migration review. Rather, Canada should concentrate on improving the intelligence system in order to detect these threats more effectively. As well, a multi-layered plan including surveillance, increased airport security, and better coordination between different agencies should be implemented. It was agreed that tougher measures against would-be migrants would not resolve security problems.

2. Recommendations for Canada's Immigration and Refugee System

Keeping with recent studies warning of the repercussions of a population decline, Canada should "broaden its door" to accept more immigrants. To this end, Canada's immigration system should develop further schemes for economic migrants. In addition to programs for professional immigrants, Canada should also focus on attracting skilled tradespeople.

It was also recommended that Canada increase its service allocation for refugees and other migrants, partly due to reasons related to September 11. As well, increased support should be allocated toward training front-line workers in cultural sensitivity and country conditions. Further supervision should be instituted in order to ensure that proper service standards are maintained. As well, further attempts should be made to recruit experienced staff familiar with the country conditions of would-be migrants. Most participants agreed that racial profiling should be abandoned in favour of random checks; others noted that both methods are ineffective.

Human rights also figured prominently in discussions, with calls for the implementation of a human rights framework in all migration and security policies. Refugee claimants should also be granted full access to legal rights, as societal security must not override individual rights. To this end, refugee claimants to Canada should have the right to choose the location of their first claim. Further, participants emphasized that mandatory detention should be avoided at all costs.

3. Continental and International Policy Implications

Participants agreed that Canada should not implement a common border policy with the United States. On this issue, Canada should resist attempts to create a Schengen-type policy. While information-sharing should continue with the United States, Canada should not support attempts to develop joint bodies devoted to migration policy. In addition, participants recommended that a standing committee review all bilateral agreements on migration policy with the United States. Canada should also develop requirements for stakeholder involvement, transparency, and further democratization of the process. Finally, in a bilateral memorandum of understanding on migration policy, Canada should not sacrifice the safeguards it offers to refugee claimants, especially the location from which asylum claims can be made.

On the international level, the Canadian government should uphold its international obligations while developing policy. It was also suggested that Canada formulate a policy that views international migration in relation to development issues (i.e., human rights, governance, and social justice) and international development in relation to migration issues. As well, development assistance should be linked to peace-building, strengthening civil society, and media freedom in order to help resolve conflicts that cause international migration.

Finally, to safeguard migrant rights, Canada should sign and implement provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[2] Participants also noted that Canada should implement the recommendations of the Report on Canada (2000) of the Inter-American Commission on Human Rights.[3]

© Suman Bhattacharyya, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Conclusion

Roundtable participants proposed a policy that emphasizes the rights and safety of migrants, in opposition to calls for further measures to protect the societal security of the state. As well, in order to address security pressures resulting from September 11, the Canadian government must apply a holistic approach requiring coordination of all relevant government agencies. This framework must address the root causes of international migration and global conflict while ensuring that Canada does not abrogate its international obligations. Finally, the roundtable emphasized that Canada should remain active in ensuring that migration is a prominent issue on the international level.

Notes

1. "Human Security Program," on-line: Department of Foreign Affairs and International Trade, Human Security Homepage: <http://www.humansecurity.gc.ca/psh_brief-e.asp> (date accessed: May 9, 2002).
2. "International Convention on the Protection of the Protection of the Rights of All Migrant Workers and Members of their Families," on-line: Office of the United Nations High Commissioner for Human Rights (UNHCHR) Homepage <http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm> (date accessed: May 9, 2002).
3. "Report on Canada (2000)," on-line: Inter-American Commission on Human Rights Homepage: <http://www.cidh.org/countryrep/Canada2000en/table-of-contents.htm (date accessed: May 9, 2002).

Suman Bhattacharyya is a policy analyst at the Canadian Centre for Foreign Policy Development at the Department of Foreign Affairs and International Trade.

© Suman Bhattacharyya, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Problématique du genre dans les situations de détresse : le cas des réfugiés en Afrique

Danièle Laliberté-Beringar

Résumé

Le présent article vise à faire le point sur les rapports hommes/femmes dans les zones de regroupements liées aux guerres et surtout dans les camps de réfugiés. Il vise également à montrer comment les situations de conflit accentuent les inégalités entre les sexes à tous les âges. Pour ce faire, nous avons considéré la littérature scientifique de la dernière décennie, mais également les politiques et programmes du Haut Commissariat des Nations Unies pour les réfugiés (HCR). Le texte est divisé en sept composantes principales : la place du genre dans la recherche sur les réfugiés, dans l'aide internationale aux réfugiés et dans le droit des réfugiés; un survol statistique, la transformation des rôles associés au genre, l'impact différentiel du déplacement selon le genre, la vulnérabilité des femmes et des filles réfugiées.

Abstract

This article tries to take stock of male/female relationships in assembly areas related to wars, and especially in refugee camps. It also aims at showing how conflicts heighten inequalities between the sexes at every age level. The approach adopted has been to review scientific literature of the last decade, as well as the policies and programs of the UN High Commissioner for Refugees (UNHCR). The text is divided into several main parts: the place occupied by gender in research on refugees, in international aid, and refugee rights; a statistical overview; the transformation of the roles associated with gender; the difference in the impact of displacement depending on gender; and the vulnerability of refugee women and girls.

La place du genre dans la recherche sur les réfugiés

Les études sur les réfugiés, ainsi que les études féministes du développement et de la migration forcée, ne se sont que récemment intéressées à la problématique du genre dans le cas des réfugiés. Nombreux sont les chercheurs et les praticiens — en majorité des hommes occidentaux — qui auparavant traitaient les réfugiés comme un groupe homogène inconsciemment assimilé à l'image de l'adulte mâle.

Il est possible de tracer un parallèle entre l'évolution de la théorie féministe, de la recherche sur la migration forcée et de la prise en compte du genre dans le développement[1]. L'approche centrée sur la femme dans la migration forcée a été adoptée (*Women in Forced Migration* ou WIFM) parallèlement à celle dans le développement (*Women in Development* ou WID). Par la suite, l'approche fondée sur le genre et la migration forcée (*Gender and Forced Migration* ou GAFM) a été élaborée conjointement avec l'approche genre et développement (*Gender and Development* ou GAD). Dans les faits, l'approche femme dans la migration forcée est toujours prépondérante et renforce la marginalisation de l'expérience féminine[2]. En effet, les analyses considèrent le traitement différentiel accordé aux femmes en raison de leur sexe, plutôt que de se concentrer sur la construction de l'identité de genre selon le contexte géographique, historique, politique et socio-culturel.

Il y a eu cependant un accroissement des recherches sur les femmes réfugiées durant les années quatre-vingt. Toutefois, seules des recherches marginales portant sur des questions typiquement féminines se sont penchées sur les femmes réfugiées ou les structures de genre[3]. Ces recherches sont demeurées exploratoires et n'ont pas mis en évidence les différences basées sur le sexe[4]. On a négligé l'impact du statut de réfugié sur la vie individuelle et sur la relation des femmes avec les hommes[5]. De plus, lorsqu'il est pris en compte, le genre n'est qu'une variable parmi d'autres. L'augmentation de l'usage du mot genre dans le contexte

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

des migrations forcées n'implique pas nécessairement que les programmes soient davantage sensibilisés au genre en cause. Enfin, l'application de l'approche en fonction du genre dans la migration forcée requiert de profonds changements institutionnels.

La place du genre dans l'aide internationale aux réfugiés

Les relations de genre structurent la vie des réfugiés et l'administration de l'assistance humanitaire[6]. Ce n'est que depuis l'exode des réfugiés indochinois en 1978-81 que les organismes d'aide humanitaire ont commencé à prendre en compte l'effet du genre sur l'expérience de refuge, dans la formulation de leurs politiques et la planification de leurs interventions. Un certain nombre d'événements internationaux ont accéléré le processus en amenant de multiples intervenants à partager leurs expériences et à développer des stratégies communes. Ainsi, en 1981, l'*Intergovernmental Committee for Migration* a organisé un séminaire sur l'adaptation et l'intégration des femmes réfugiées et migrantes. En 1985, le HCR a organisé une table ronde sur la femme réfugiée à laquelle ont participé des politiciens et des organismes non gouvernementaux (ONG). La première recommandation du HCR portant sur la protection de la femme réfugiée a d'ailleurs été adoptée par le comité de direction cette année-là. En 1987, le comité de direction du HCR a admis que des directives devaient être établies afin d'améliorer l'assistance et la protection de la femme réfugiée. C'est ainsi qu'il a mis en place un groupe de travail chargé de revoir ses programmes. Puis, en novembre 1988 a eu lieu la première consultation sur la femme réfugiée, organisée par le *NGO Working Group on Refugee Women*, à laquelle ont participé des groupes de réfugiés, des organismes internationaux et des institutions d'enseignement. Il en a résulté un guide visant à répondre aux besoins spécifiques des femmes réfugiées.

Durant la dernière décennie, en s'inspirant du plan d'action de Beijing, la politique et les activités du HCR ont évolué en visant l'égalité entre les genres[7]. Ainsi, le HCR a publié en 1990 une politique sur la femme réfugiée visant à faciliter l'accès et la participation des femmes à ses programmes[8]. Puis, en 1991, il a produit un guide sur la protection de la femme réfugiée. Ce guide vise à améliorer la situation des femmes et à répondre à leurs besoins spécifiques, et ce en considérant leurs rôles productifs et sociaux. Un programme de formation du personnel (*People-Oriented Planning* ou POP) a vu le jour en 1992, afin de mieux identifier et adresser les besoins des réfugiés selon leur genre. Ce programme (révisé en 1999) est devenu le principal outil facilitant l'application de la politique sur la femme réfugiée. Il est basé sur le principe que l'analyse des rôles sociaux et économiques joués par les femmes, les hommes et les enfants dans la communauté est un pré-requis à la planification des activités de protection et d'assistance des réfugiés[9]. Le HCR a ensuite produit un document portant sur la violence sexuelle à l'égard des réfugiées[10].

Cependant, une évaluation interne[11] aurait démontré que la politique du HCR n'aura d'impact que si ce dernier effectue des changements institutionnels[12]. Bien que le progrès fait par le HCR face à l'application de sa politique en Afrique soit variable, le rôle des femmes africaines dans le développement des programmes pour les réfugiés et dans l'administration des camps et des établissements devient prépondérant[13]. Lors de la revue (juin 2000) des progrès accomplis par la communauté internationale depuis Beijing, on a reconnu les efforts faits en vue de protéger les droits des femmes et des filles dans des situations de conflit[14]. Cependant, on recommande de nouvelles actions nationales et internationales afin d'assurer la participation réelle des femmes dans les décisions et la mise en place d'activités de développement et de processus de paix. La conférence internationale sur les enfants affectés par la guerre, tenue à Halifax en septembre 2000, a réitéré la nécessité de mieux tenir compte du genre dans les missions de maintien et de consolidation de la paix[15].

Le genre dans le droit des réfugiés

Les instruments juridiques internationaux permettant de gérer l'assistance et la protection des réfugiés depuis les années cinquante (tels que la Convention des Nations Unies de 1951, le Protocole de 1967 et la Convention de l'OUA de 1969)[16] sont basés sur le postulat que les femmes et les hommes vivent les situations de crise de la même manière. La principale critique féministe du concept de réfugié proposé par ces conventions est qu'elles ne reconnaissent que les formes de persécution frappant les hommes. Elles ne mentionnent d'ailleurs pas explicitement l'oppression basée sur le genre[17].

Comme les femmes sont plus rarement actives dans la sphère publique, elles participent peu aux groupes politiques, religieux ou raciaux susceptibles d'être persécutés. Par ailleurs, la violence contre les opposants à un régime n'est pas confinée à la sphère publique, elle se manifeste parfois sous la forme de violence dans le ménage et la famille[18]. Les femmes sont discriminées sur la base de leur sexe et de la position sociale subordonnée de leur genre, victimes d'actes commis à des fins d'intimidation, de gratification sexuelle ou d'humiliation. Elles sont parfois torturées ou persécutées en raison des activités politiques d'un membre de leur famille. Elles sont également discriminées pour avoir transgressé les lois ou les normes sociales[19]. L'essor du fondamentalisme islamique favorise la discrimi-

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

nation et la persécution des femmes qui refusent d'adhérer aux codes de conduite prescrits par la religion[20]. Cependant, les formes de violence (dont le viol) contre les femmes ne sont pas vues comme des violations des droits humains en vertu desquelles elles pourraient prétendre être persécutées[21].

C'est durant la Décennie de la femme (1976-1985), proclamée par l'Assemblée générale des Nations Unies, que la communauté internationale a manifesté un intérêt grandissant à l'égard des problèmes et des besoins spécifiquement féminins[22]. Bien que la persécution basée sur le genre ne soit toujours pas mentionnée dans les instruments juridiques internationaux, certains juristes ont reconnu à partir des années quatre-vingt la nécessité de réinterpréter la notion de persécution pour permettre aux femmes de réclamer le statut de réfugiée. Le HCR a donc clarifié son interprétation de la définition : les femmes persécutées en raison de leur appartenance à un groupe social particulier (le groupe des femmes) peuvent maintenant prétendre au statut légal de réfugiée. Il encourage les gouvernements à mettre en place des procédures d'asile prenant en compte les questions relatives au genre. C'est ainsi que le Canada (1993), les États-Unis (1995), l'Australie (1996) et le Royaume-Uni (2000) ont développé des directives spécifiquement pour les demandes d'asile des femmes[23]. Le HCR tente maintenant de favoriser l'égalité de genre dans ses programmes et de recruter du personnel féminin pour traiter les requêtes de statut[24].

Un survol statistique

On mentionne généralement dans la littérature que les femmes et les enfants dépendants forment de 75% à 80% des réfugiés et des personnes déplacées. Cette proportion atteindrait d'ailleurs plus de 90% chez certaines populations réfugiées[25]. Les lacunes des données empiriques ont pour conséquence des généralisations appliquées à tort à toutes les situations[26]. Or, selon les statistiques du HCR pour l'année 1999 (tableau 1), les femmes ne constituent que 49,7% des 2 341 850 personnes relevant de son mandat et pour lesquelles il connaît la structure démographique de la population. Par ailleurs, les femmes sont majoritaires en Afrique de l'Ouest (52,8%) et en Afrique du Nord (50,9%). La distribution par âge indique que dans toutes les régions, le pourcentage de femmes est généralement plus élevé que celui des hommes chez les soixante ans et plus (52,7% pour l'ensemble de l'Afrique). Ce pourcentage est toutefois inférieur pour les autres groupes d'âge au sud de l'Afrique, en Afrique centrale et de l'Est. Par contre, en Afrique de l'Ouest il est supérieur dans tous les groupes d'âge, tandis qu'en Afrique du Nord il n'est inférieur que chez les 5–7 ans. Cependant, ces données ne reflètent que partiellement la situation, puisque le HCR ne connaît pas la structure démographique de l'ensemble des réfugiés, et parce qu'il se concentre plus particulièrement sur les personnes dont il est responsable.

Il est donc nécessaire de considérer chaque situation dans sa spécificité. Ainsi, deux recensements des réfugiés

Tableau 1
Pourcentage de femmes par groups d'âge et région d'asile, Afrique, fin 1999

Région d'asile	0–4	5–17	18–59	60+>	Autre inconnus	Total	Nombre (sexes réunis)
Afrique centrale	45,5	45,6	47,6	52,0	51,4	48,2	166 260
Afrique de l'Est	49,9	47,9	46,6	50,8	50,1	48,1	1 159 660
Afrique du Nord	51,7	48,0	53,1	56,7	...	50,9	168 040
Afrique de l'Ouest	51,6	50,8	54,8	53,6	60,1	52,8	815 280
Sud de l'Afrique	49,7	44,0	28,8	51,9	...	33,3	32 610
Total Afrique	50,5	48,9	49,5	52,7	51,0	49,7	2 341 850

Source: UNHCR (2000c). *UNHCR Global Report 1999.*

Note: la composition démographique est disponible pour un ensemble de 5,4 millions de personnes l'Note : la composition démographique est disponible pour un ensemble de 5,4 millions de personnes sur l'ensemble des continents. Les données fournies dans ce tableau nereprésentent donc pas nécessairement le nombre total de réfugiés dans chaque pays. Ainsi, au premier janvier 2000, plus de 6 250 540 individus relevaient du mandat du HCR en Afrique.

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

(1976 et 1988) et une enquête (1986-1987) réalisés dans un établissement de réfugiés burundais en Tanzanie ont démontré que les femmes ne sont pas plus nombreuses. Dans les camps de réfugiés somaliens au Kenya (Hagadera), on a observé un surplus de 10% de femmes dans les groupes d'âge allant de 19 à 44 ans, mais une insuffisance de femmes au-dessus de 45 ans[27]. Le surplus de femmes serait dû à l'effet de la migration sélective, les hommes s'absentant du camp pour exercer des activités professionnelles ou militaires. Les vieilles femmes resteraient dans le pays d'origine plus fréquemment que les vieux, ou auraient un taux de mortalité plus élevé. Dans les camps de réfugiés ougandais au Soudan (1982), certaines femmes ont été désignées à tort chefs de ménage parce que leur mari était associé au ménage d'une coépouse2[8].

Une étude réalisée auprès des réfugiés éthiopiens en 1988 a par ailleurs démontré que les ménages dirigés par des femmes ne sont pas plus nombreux que ceux dirigés par des hommes[29]. Une autre étude auprès des réfugiés éthiopiens au Soudan a quant à elle révélé que les hommes sont majoritaires dans cinq des six établissements étudiés[30]. Le fait remarquable est que les ménages dirigés par des femmes sont plus nombreux qu'ils ne devraient l'être dans une population patrilinéaire et patrilocale. En effet, près de 15% des ménages sont dirigés par une femme, le phénomène étant deux fois plus fréquent dans les sites organisés que dans les établissements spontanés. D'autres recherches, toutefois limitées aux sites organisés, démontrent que de 20% à 30% des ménages réfugiés au Soudan sont dirigés par une femme. Les exigences de la fuite et du processus de déracinement seraient à l'origine de cette situation.

Les stratégies d'assistance et de protection ne sont efficaces que lorsqu'elles tiennent compte des différences dues au genre, à la classe, à l'âge, à l'éducation, à la taille et à la composition du ménage. Dans tous les cas, il est indéniable que les bouleversements survenus avant, pendant et après la fuite altèrent la structure familiale traditionnelle[31]. Les hommes adultes sont fréquemment tués, incarcérés ou recrutés pour des activités militaires, tandis qu'un certain nombre effectuent des migrations professionnelles. Ces migrations brisent les familles nucléaires et augmentent dramatiquement le nombre de femmes effectivement en charge des enfants et des personnes âgées. Ce phénomène a été suffisamment documenté pour affirmer qu'il est réel, malgré l'absence de statistiques[32]. La situation de ces réfugiées souvent devenues chef de ménage pour la première fois, est aggravée par le fait que le statut de la femme est désavantageux[33]. D'ailleurs, les ménages dirigés par une femme sont plus à risque. La modification de la structure démographique de la population dans les camps de réfugiés affecte le rôle et la position dévolus à chaque genre dans la communauté[34].

La transformation des rôles associés au genre

Les conflits armés et les migrations forcées bouleversent les cycles de production et de reproduction en changeant la définition des rôles et les relations de genre au niveau du ménage et de la société. Dans certains cas (par exemple les réfugiés burundais en Tanzanie), la continuité dans les relations sociales permises par la présence de parents dans le pays d'accueil perpétue et même renforce les rôles culturellement définis[35].

Cependant, la crise entraînée par le statut de réfugié provoque souvent une redéfinition des rôles et comportements traditionnels associés au genre. Les bases socio-culturelles de respect entre les genres sont modifiées. L'interdépendance des identités et des rôles associés au genre peut s'accentuer, par exemple chez les réfugiés éthiopiens et érythréens dont l'expérience du refuge a varié selon le sexe[36]. Les relations sociales de ces derniers ont été fragmentées, tandis que sont apparus des sentiments de contradiction, de conflit et d'ambivalence par rapport au sens de soi. Les relations entre les genres sont parfois perturbées parce que les hommes vivent une crise d'identité et subissent le déclin de leur statut socio-économique. En interrogeant les réfugiés burundais à Lukole en Tanzanie, Turner[37] note que les hommes et les femmes considèrent que leur arrivée dans le camp a été suivie d'une décadence morale (prostitution, divorce, polygamie, jeunes hommes mariant des femmes plus âgés…). Alors que le HCR souhaite développer l'idéal d'égalité entre les genres, les hommes croient que l'organisme prend leur place. Son autorité sur les femmes transcende leur autorité traditionnelle, parce qu'il les a remplacés comme pourvoyeur des besoins du ménage. Paradoxalement, la politique participative du HCR a favorisé l'ascension sociale d'un groupe de jeunes hommes semi-éduqués tentant de regagner leur masculinité perdue.

Les programmes d'assistance jouent un rôle crucial dans la position des genres dans le nouveau contexte social. Par leur attitude, les organisations internationales, les gouvernements d'accueil et le personnel des camps de réfugiés confinent les femmes dans des rôles de production et de reproduction spécifiques[38]. De plus, la participation féminine au leadership communautaire est limitée.

La participation des femmes au leadership

L'axiome selon lequel les réfugiés doivent participer à la gestion de leur situation est accepté, mais son corollaire n'a pas encore été reconnu – les femmes devraient être représentées au même titre que les hommes[39]. On sous-estime la capacité d'adaptation des femmes, que l'on incite à jouer le rôle passif de victimes[40]. Elles sont souvent exclues des structures politiques[41], des débats et prises de décision concernant

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

leur avenir et celui de leur communauté[42]. C'est d'autant plus vrai que les camps sont planifiés par des hommes et pour des hommes, ce qui accentue la marginalisation économique et sociale des femmes[43].

Selon le HCR, les femmes n'ont jamais été délibérément marginalisées, mais il reconnaît avoir insuffisamment considéré la spécificité de leur vie quotidienne parce que les porte-parole des comités de réfugiés sont généralement des hommes[44]. L'éducation et les capacités linguistiques des hommes facilitent leur recrutement préférentiel pour offrir les formations et les services dans les camps de réfugiés[45].

Les normes culturelles, le manque de qualification ou un problème d'estime de soi écartent parfois les femmes de la planification et de la réalisation des programmes d'assistance. Des relations de pouvoir et une division du travail inégalitaires entre les genres existent souvent dès le milieu d'origine[46], mais le déplacement amplifie ces inégalités. Le HCR tente de redresser ces déséquilibres en offrant des programmes de formation pour amener les femmes à contribuer effectivement à la gestion communautaire[47]. Cependant, l'accès aux ressources dans les camps de réfugiés demeure limité pour les femmes.

L'accès aux ressources dans les camps de réfugiés

Les administrateurs du camp, les donateurs et les membres du gouvernement sont essentiellement des hommes qui allouent les ressources aux hommes. Dans bien des sites organisés, l'accès aux ressources (terre, cultures, nourriture et habillement) est généralement contrôlé par le représentant mâle du ménage[48]. Le HCR remet généralement les cartes d'identification des réfugiés aux chefs de ménage, ce qui augmente le pouvoir des hommes et entraîne des difficultés économiques en cas de rupture ou quand ils abandonnent leur épouse[49].

Comme les ménages dirigés par une femme comportent généralement un moindre nombre d'adultes, ils sont désavantagés par un accès différentiel au marché du travail. De plus, l'idéologie des donateurs à l'égard des rôles dévolus aux genres affecte l'offre d'activités génératrices de revenu dans les camps[50]. Ainsi, l'accès des femmes à l'équipement est réduit, tandis que la valeur marchande de leurs biens de production est inférieure à celle des hommes.

On a observé que les tendances patriarcales de la société d'origine et des programmes d'établissement ont défini les modalités d'accès aux ressources des réfugiés burundais en Tanzanie[51]. Comme les Burundaises ne contrôlaient pas les moyens de production, leur accès aux ressources leur permettait tout juste d'atteindre le seuil de subsistance. Le taux de mortalité des familles nucléaires sans homme adulte était au-dessus de la moyenne. Les relations de genre sont donc déterminantes dans la reconstruction et la survie des ménages. La redistribution des tâches entre les genres est souvent inévitable.

La redistribution des tâches au sein des ménages

En général, la charge de travail des femmes en exil augmente, car en plus de leurs fonctions traditionnelles, elles assument certains rôles et responsabilités des hommes. Mais on assiste parfois à une redistribution des tâches au sein des ménages[52]. Ainsi, à Ikafe, en Ouganda, les réfugiés soudanais assument des tâches typiquement féminines (récolte, ramassage du bois, puisage de l'eau), pour éviter que leur conjointe ne se fasse violer dans les champs ou sur les routes. Les femmes seules demeurent vulnérables puisqu'elles n'ont pas accès à un tel partage de tâches.

Afin de faire vivre leur famille, elles acceptent plus facilement que les hommes d'occuper des postes très mal payés. Elles prennent alors en charge les hommes sans emploi. La contrepartie est que certains hommes, dévalorisés par leur perte de statut économique, sombrent dans l'alcoolisme et deviennent violents à leur égard. En l'absence d'occasions d'emploi, elles développent des idées créatives afin de survivre. Afin d'assurer la survie de leur famille, les femmes tchadiennes se sont ainsi engagées dans de multiples activités économiques dans les camps et parmi les populations locales[53].

Cependant, on a observé que les changements dans les rôles modifient le contrôle de la nourriture dans le ménage. Ainsi, dès que les récoltes viennent, les hommes écartent les femmes des décisions concernant la vente, le stockage et la consommation des semences et de la nourriture[54]. Le système de distribution de l'aide alimentaire est politisé sur la base du genre[55]. La distribution des vivres est l'objet de rapports de force qui désavantagent les femmes et en conséquence les ménages dirigés par une femme[56]. Pourtant, les femmes ont démontré leur plus grande efficacité, et ce, d'autant plus dans des situations de malnutrition, par exemple au Rwanda, où elles répondaient mieux aux besoins des démunis[57].

L'impact différentiel du déplacement selon le genre

Les problèmes des femmes sont généralement abordés en référence aux droits humains universels, ou selon une étroite conception de la discrimination sexuelle face à leur accès à ces droits[58]. Pourtant, les femmes réfugiées subissent l'effet de la migration forcée d'une manière particulière et leurs besoins spécifiques sont souvent ignorés par les chercheurs et les praticiens. Les conditions économiques, sociales et politiques de l'expérience passée et présente des femmes réfugiées jouent un rôle déterminant[59].

Les opérations d'urgence se sont toutefois améliorées depuis que le personnel du HCR a reçu une formation pour

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

identifier et répondre aux besoins spécifiques des femmes et des enfants[60]. Le HCR a reconnu leurs besoins spéciaux en soins de santé, en équipement, en logement (par exemple, la construction de latrines éloignées de celles des hommes), ainsi que par rapport à la violence et à l'exploitation sexuelles[61]. Cependant, on considère d'abord les femmes comme reproductrices, tandis que leur rôle de productrices est ignoré. Les prochaines sections se rapportent au besoin fondamental que constitue la santé.

La santé différentielle des réfugiés selon le sexe

Les agences d'aide humanitaire et les chercheurs reconnaissent que le genre est un facteur déterminant de la santé dans les situations de refuge. La morbidité différentielle n'est que partiellement d'origine biologique, car elle dépend aussi de la position sociale réciproque des genres, de leur perception de la maladie et de l'adéquation des services médicaux offerts selon le sexe[62]. L'établissement et la gestion d'un camp de réfugiés doivent tenir compte des besoins pratiques des femmes enceintes et de celles ayant de jeunes enfants. Les maternités fréquentes et à risque ont d'autant plus d'impact dans les situations extrêmes où les femmes ont un accès limité à un logement, à des conditions hygiéniques et à une alimentation convenables. C'est pourquoi dans la plupart des programmes du HCR les femmes enceintes et qui allaitent reçoivent un surplus de nourriture[63].

Une recherche effectuée auprès des réfugiés somaliens au Kenya (entre 1992 et 1996) a démontré que le contexte social particulier au camp de réfugiés affecte plus la santé des femmes, particulièrement en cas de grossesse ou d'allaitement[64]. Le risque vécu par celles-ci est relié à leur position sociale et à leur statut dans la société, qui limitent leur accès à la nourriture et aux autres ressources. D'une part, on soupçonne que l'allocation de la nourriture dans les ménages favorise les garçons et les hommes. D'autre part, pour assister leur mère dans les tâches domestiques, les filles se retirent plus fréquemment des programmes nutritionnels s'adressant aux jeunes. Par ailleurs, les programmes impliquent rarement les femmes dans la planification de l'aide, et les traitent inégalement lors de la distribution. Des données qualitatives ont indiqué au Malawi que les ménages de réfugiés mozambicains dirigés par des femmes sont plus à risque que les autres par rapport à la santé et à la nutrition[65].

Bien que les services médicaux dans les camps soient essentiels, les femmes n'y font pas nécessairement appel. La communication avec le personnel majoritairement masculin constitue une contrainte majeure. Certaines femmes refusent de participer au dépistage de maladies contagieuses par peur du rejet familial et des conséquences sur leurs perspectives de mariage[66].

La santé reproductive

En 1994, la santé reproductive a été reconnue comme un droit humain fondamental à la Conférence internationale sur la population et le développement au Caire. Afin de diminuer les taux de mortalité maternelle et infantile, conjointement avec d'autres agences, le HCR a défini un *Minimum Initial Service Package* (MISP) pour les situations d'urgence[67]. Les programmes de santé reproductive offrent des services de planification familiale (incluant les questions relatives à l'avortement) et des consultations prénatales et postnatales. Ils visent aussi à prévenir et à traiter les maladies sexuellement transmissibles, à prévenir et à gérer la violence sexuelle, et comportent des activités de sensibilisation aux pratiques traditionnelles néfastes.

Le HCR a également produit un manuel de pratique pour le personnel de terrain[68]. Cependant, en raison de contraintes budgétaires, la santé reproductive est rarement une priorité dans les camps de réfugiés. Les services négligent les adolescentes en visant prioritairement les femmes adultes[69]. Les réfugiées sont parfois les initiatrices de ces services; elles en ont ainsi catalysé l'introduction à Lumasi au Rwanda[70]. Dans la corne de l'Afrique, le HCR organise des activités de sensibilisation pour éliminer les croyances et pratiques nuisibles à la santé des femmes[71]. Elles visent à éliminer l'excision, le jeûne après l'accouchement et le mariage des fillettes. En effet, le mariage des adolescentes dès leur première menstruation entraîne des naissances prématurées[72]. On tente aussi de démontrer aux hommes atteints du SIDA que contrairement à ce que prêchent certains guérisseurs traditionnels, une relation sexuelle avec une jeune fille ne constitue pas un remède à la maladie[73].

La vulnérabilité des femmes et des filles réfugiées

La vulnérabilité des femmes a été reconnue dans plusieurs résolutions internationales depuis le rapport du HCR à la *World Conference of the United Nation's Decade for Women* (1980)[74]. Ce thème est devenu prioritaire dans la littérature scientifique, qui traite les femmes en victimes plutôt que d'analyser le processus de transformation de leur vie[75]. Il faudrait étudier la discrimination et l'agression qui les frappent en raison de leur genre au lieu de mettre ainsi l'accent sur leur vulnérabilité[76].

Les violations des droits humains, la violence et la persécution basées sur le genre augmentent durant les guerres et les conflits armés. Elles constituent des tactiques de guerre et de terrorisme[77]. Alors que les hommes risquent de se faire battre ou tuer[78], les femmes sont exposées à la violence sexuelle. C'est pourquoi le *Sphere Project* (1998), qui propose une charte humanitaire et des standards à respecter dans la gestion des désastres, insiste sur la prévention de la violence basée sur le genre et l'exploitation

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

sexuelle[79]. Les idéologies de genre existant en temps de paix auraient un impact sur les pratiques de genre durant les guerres[80]. Cette violence liée au genre fait partie des processus globaux reliés aux relations de genre au sein du ménage et aux idéologies du chez-soi (*home)*. L'identité de genre et par conséquent les ressources disponibles pour les réfugiées sont directement reliées à la manière dont le chez-soi et le ménage les ont historiquement définies en tant que femmes. Le ménage est vu ici comme une organisation sociale et économique qui supporte la survie de ses membres dispersés dans la diaspora à travers le monde. Le concept de chez-soi est un complexe d'idées qui se réfèrent à la sphère domestique, à la communauté et à la nation d'origine. Le corps de la femme deviendrait ainsi la cible de la violence et le symbole de la nation violée. Le viol et la prostitution sont les deux formes de violence sexuelle les plus répandues. Le HCR a ainsi défini la violence sexuelle en 1987 :

> [s]exual violence against women and girls usually occurs in situations in which women are forced into a relationship, a contact or an act in which they have no independent right to decide how they wish to behave with men. A feature of these situations is that women are restricted in their freedom and independence. Sexual violence takes on a variety of forms: assault, rape, sexual abuse of children, maltreatment of children, forcing women into prostitution or to pose for pornographic purposes. Violence may occur both in private and in public situations. A feature of all expressions of sexual violence is the psychological and/or physical violation of women's or girls' integrity[81].

La violence sexuelle

En 1993, le Comité exécutif du HCR a adopté une résolution recommandant le développement de mesures sur la protection des réfugiés et la violence sexuelle[82] (UNHCR 1993 cité dans UNHCR 1995). En se basant sur les recommandations de son personnel de terrain, le HCR a développé (1995) des directives administratives, médicales, psychologiques et légales afin de prévenir et de traiter les cas de violence sexuelle dans le contexte des camps[83]. Il a ainsi introduit des services d'aide psychosociale et médicale pour assister les femmes abusées physiquement[84]. Il est toutefois déplorable que l'accent soit mis sur les services curatifs plutôt que sur des mesures préventives[85].

Paradoxalement, alors qu'elles se réfugient pour fuir la persécution et la violence, les femmes augmentent le risque de violence sexuelle durant la fuite et l'exil[86]. La violence sexuelle engendre une souffrance immédiate et comporte des conséquences à long terme, telles que des traumatismes psychologiques, des grossesses non désirées, des maladies sexuellement transmissibles et le rejet familial.

Ainsi, des Éthiopiennes et des Érythréennes ont été torturées sexuellement en raison d'actions politiques par des membres de leur famille[87]. D'autres femmes sont agressées sexuellement par des individus qui utilisent leur position de pouvoir dans les zones de conflits, aux frontières et dans les camps. L'exil les éloigne de leurs familles et de leurs protecteurs communautaires traditionnels[88]. Les rôles culturels stéréotypés et inégalitaires associés au genre, basés sur l'hypothèse que la femme est un être inférieur et dominé, perpétuent la violence sexuelle et domestique dans les camps[89]. Des membres de leur propre communauté profitent du démantèlement des structures et des valeurs sociales pour commettre de telles exactions[90]. Des femmes sont abusées par un membre du ménage ou par leur employeur, et durant les activités d'assistance humanitaire[91]. De même, les mineures non accompagnées habitant dans la famille élargie ou chez des non-parents sont parfois agressées sexuellement par les hommes du ménage[92].

Les réfugiées soudanaises en Ouganda étaient violées alors qu'elles tentaient d'assurer la survie de leur famille en cherchant de la nourriture ou en cultivant la terre[93]. Alors qu'elles avaient besoin de soins immédiats, les centres de santé avaient été pillés ou manquaient de personnel qualifié. Les femmes violées avaient honte et hésitaient à dénoncer cet acte par peur d'être rejetées par la communauté ou abandonnées par leur mari. Des filles devenues les esclaves sexuelles des militaires par la force étaient rejetées lors de leur retour dans la communauté.

Les sévices sexuels commis contre les filles et les femmes tchadiennes en raison de la guerre civile sont bien documentés et démontrent que les forces gouvernementales et les rebelles y ont participé[94]. Elles sont violées par les militaires qui les soupçonnent de cacher les rebelles, et par ces derniers qui les accusent de les dénoncer au gouvernement.

Au Rwanda, des violences propres au contexte d'un conflit armé généralisé ont échappé au contrôle social pour s'étendre à presque toutes les femmes sans défense[95]. La cruauté physique s'est manifestée à travers le viol, la mutilation des organes associés à la reproduction, la servitude et le mariage forcé. Des hommes ont profité de la situation pour épouser les femmes les plus convoitées et leur imposer des conditions matrimoniales qu'elles auraient refusées en temps de paix.

La prostitution

La prostitution devient parfois une stratégie de survie de la part des femmes pour répondre à leurs besoins et à ceux de leurs dépendants. Leur mari les force parfois à se prostituer, et elles sont exploitées par les réfugiés entremetteurs, les clients et la police. C'est surtout le manque d'occasions d'emploi qui amène les chefs de ménage à se prostituer à

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

l'intérieur ou à l'extérieur des camps96. L'existence du phénomène, bien que marginal, ternit la réputation de l'ensemble des réfugiées et provoque des abus physiques et psychologiques. Ainsi, les autorités et le public soudanais sont convaincus que la prostitution est très répandue chez les réfugiées éthiopiennes, alors que la plupart exercent une autre activité pour gagner leur vie. Celles qui ont recours à la prostitution ne le font que ponctuellement, quand elles n'ont pas de solutions de rechange, que les salaires sont faibles et le coût de la vie trop élevé. La prostitution met en péril leur sécurité en augmentant leur vulnérabilité au SIDA et aux grossesses non désirées. De plus, elle bouleverse le système de valeurs transmis aux jeunes générations. Ainsi, au Libéria, chez les personnes déplacées, l'activité sexuelle est devenue une stratégie de survie symboliquement courageuse, et elle constitue, avec le viol, un rite de passage vers l'âge adulte. Beaucoup de ces jeunes manquent d'encadrement et d'un système de valeur guidant leurs décisions et comportements sexuels[97].

Conclusion

Ce bilan des rapports de genre dans les situations de détresse a révélé les multiples facettes des inégalités engendrées par la migration forcée. Cependant, l'absence de cadre théorique global limite la compréhension de l'effet du genre dans l'expérience du refuge. Un cadre analytique devrait être développé sur la base des nombreuses stratégies de survie socio-démographiques des individus, des ménages et des communautés. Comme les conséquences de la migration forcée sont vécues plus intensément à l'échelle du ménage, ce dernier constitue un objet d'étude important pour comprendre l'adaptation des réfugiés à leur nouvelle situation[98]. Il serait certainement utile de considérer l'ensemble du processus de refuge dans le cadre d'une étude biographique visant la crise vécue dans le pays d'origine, la fuite, l'intégration dans le pays d'asile, la réinstallation dans un tiers pays et le rapatriement. De telles recherches devraient comparer la situation de réfugié dans le camp à celui dans les populations d'accueil. La situation des personnes déplacées pourrait être comparée à celle des réfugiés ayant traversé une frontière internationale. Cependant, un préalable à ces pistes de recherche est d'améliorer les méthodes de collecte de données auprès de ces groupes vulnérables de la population. Ces informations permettraient certes d'améliorer l'aide humanitaire offerte aux réfugiés.

Notes

1. Indra Doreen, « Not a 'Room of One's Own' », dans Indra Doreen, *Engendering Forced Migration. Theory and Practice* (New York, Oxford: Berghahn Books, 1999), 1–22.
2. Heaven Crawley, « Gender, persecution and the concept of politics in the asylum determination process », *Forced Migration Review* 9 (December 2000) : 17–20.
3. Barbara E. Harrell-Bond, 1987, « Refugee Issues », dans P. Reason et J. Rowan, éd., *Human Inquiry. A Source Book of New Paradigm Research* (Chicester: John Wiley, 1987), cité dans Marie Indra Doreen, « Ethnic Human Rights and Feminist Theory: Gender Implications for Refugee Studies and Practice », *Journal of Refugee Studies* 2, no. 2 (1989) : 221–42.
4. Helene Moussa, *Storm & Sanctuary. The Journey of Ethiopian and Eritrean Women Refugees* (Dundas, Ontario: Artemis Enterprises, 1993).
5. Doreen, « Ethnic Human Rights and Feminist Theory… ».
6. *Ibid.*
7. UNHCR, *UNHCR Global Report 1999* (Genève: UNHCR, 2000).
8. UNHCR, *A Framework for People-Oriented Planning in Refugee Situations Taking Account of Women, Men and Children. A Practical Tool for Refugee Workers.* Mary B. Anderson, Ann Brazeau et Catherine Overholt (Genève: UNHCR, 1992).
9. *Ibid.*
10. UNHCR, « Executive Committee Conclusion No. 73 (XLIV) (1993) on Refugee Protection and Sexual Violence », dans UNHCR, *Sexual Violence against Refugees. Guidelines on Prevention and Response* (Genève: UNHCR, 1995).
11. *Ibid.*
12. Ruth Marshall, « Refugees, feminine plural », *Refugees* 100 (1995) : 3–9.
13. Patrick Matlou, « Upsetting the Cart: Forced Migration and Gender Issues, the African Experience », dans Doreen, *Engendering Forced Migration*, 128–45.
14. Srilakshmi Gururaja, « Gender dimensions of displacement », *Forced Migration Review* 9 (December 2000) : 13–16.
15. *Ibid.*
16. Ainsi, selon la Convention (1951) et le Protocole des Nations Unies (1967) relatifs au statut des réfugiés, le terme réfugié s'applique à toute personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve en dehors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays; ou qui, si elle n'a pas de nationalité et se trouve à l'extérieur du pays où elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner (Nations Unies, 1983). L'Organisation de l'Unité Africaine (OUA) a élargi cette définition en 1969 afin de l'adapter au contexte africain. Selon la Convention de l'OUA, « le terme réfugié s'applique également à toute personne qui, du fait d'une agression, d'une occupation extérieure, d'une domination étrangère ou d'événements troublant gravement l'ordre public dans une partie ou la totalité de son pays d'origine ou du pays dont elle a la nationalité, est obligée de quitter sa résidence habituelle pour chercher refuge dans un autre endroit à l'extérieur de son

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

pays d'origine ou du pays dont elle a la nationalité » (OUA, 1969).
17. Moussa, *Storm & Sanctuary*. Crawley, « Gender, persecution and the concept of politics…».
18. Crawley, « Gender, persecution and the concept of politics... ».
19. Nasreen Mahmud, « Crimes Against Honour: Women in International Refugee Law », *Journal of Refugee Studies* 9, no. 4 (1996) : 367–82. Crawley, « Gender, persecution and the concept of politics…».
20. Khadija Elmadmad, « Muslim Refugee Women », dans Doreen, *Engendering Forced Migration. Theory and Practice*, 261–71.
21. Moussa, *Storm & Sanctuary*.
22. Johnson, 1989, cité dans Girma Kebbede, « The Agonies of Displacement: Ethiopian Women Refugees in Khartoum, Sudan », *Geojournal* 23, no. 2 (1991) : 99–106.
23. Nathalia Berkowitz, « Gender guidelines for the UK », *Forced Migration Review* 9 (December 2000) : 21.
24. UNHCR, *UNHCR Global Report 1999* (2000).
25. UNHCR, *UNHCR Issues – Women* (2000) en ligne: <http://www.unhcr.ch/issues/women/women.htm> .
26. Patricia Daley, « Gender, Displacement and Social Reproduction: Settling Burundi Refugees in Western Tanzania », *Journal of Refugee Studies* 4, no. 3 (1991) : 248–66.
27. Marleen Boelaert, Fabienne Vautier, Tine Dusauchoit, Wim Van Damme et Monique Van Dormael, « The Relevance of Gendered Approaches to Refugee Health. A Case Study in Hagadera, Kenya », dans Doreen, *Engendering Forced Migration. Theory and Practice*, 165–76.
28. Barbara E. Harrell-Bond, *Imposing Aid. Emergency Assistance to Refugees* (Oxford : University Press, 1986).
29. Kebbede, « The Agonies of Displacement…».
30. Mekuria Bulcha, *Flight and Integration. Causes of Mass Exodus from Ethiopia and Problems of Integration in the Sudan* (Uppsala : Scandinavian Institute of African Studies, 1988).
31. UNHCR, *Unit Plan and lessons plans for ages 15–18 in Civic Education: 'Refugee Women'* (2000) en ligne: <http://www.unhcr.ch/teach/tchcived/15-181p.htm>.
32. UNHCR, *The State of The World's Refugees in search of solutions*. Oxford University Press (1995) en ligne: <http://www.unhcr.ch/ refworld/pub/state/95/box2_1.htm>.
33. UNHCR, « Women in war-torn societies », dans UNHCR, *The State of the World's Refugees -A Humanitarian Agenda* (1997) en ligne: <http://www.unhcr.ch/refworld/pub/state/97/box4_3.htm>.
34. Boelaert *et al*, « The Relevance of Gendered Approaches to Refugee Health… ».
35. Daley, « Gender, Displacement and Social Reproduction… ».
36. Lucia Ann Mcspadden et Helene Moussa, « I Have a Name: The Gender Dynamics in Asylum and in Resettlement of Ethiopian and Eritrean Refugees in North America », *Journal of Refugee Studies* 6, no. 3 (1993) : 203–25.
37. Simon Turner, « Vindicating masculinity: the fate of promoting gender equality », *Forced Migration Review* 9 (December 2000) : 8–9.
38. Lina Payne, « Food Shortages and gender relations in Ikafe settlement, Uganda », *Gender and Development* 6, no. 1 (March 1998) : 30–36.
39. Callaway, 1985, cité dans Kebbede, « The Agonies of Displacement… ».
40. Daley, « Gender, Displacement and Social Reproduction… ».
41. Doreen, « Ethnic Human Rights and Feminist Theory… ».
42. Harrell-Bond, *Imposing Aid. Emergency Assistance to Refugees.*
43. John Sorenson, « An Overview: Refugees and Development », dans Adelman Howard et John Sorenson, *African Refugees. Development Aid and Repatriation* (Boulder et Londres: Westview Press, 1994), 175–90.
44. Christiane Berthiaume, « Do we really care? », *Refugees* 100 (1995) : 12–13.
45. Wallace Tina, « Taking the lion by the whiskers : building on the strengths of refugee women », dans Wallace Tina et Candida March, *Changing Perceptions. Writings on Gender and Development* (Oxford: Oxfam, 1991), 60–67.
46. UNHCR, « Refugee Women », dans UNHCR, *1999 Global Appeal and Programme Overview* (1999) en ligne: <http://www.unhcr.ch/fdrs/ga99/women.htm>.
47. *Ibid.*
48. Harrell-Bond, *Imposing Aid. Emergency Assistance to Refugees.*
49. Moussa, *Storm & Sanctuary*.
50. Daley, « Gender, Displacement and Social Reproduction… ».
51. *Ibid.*
52. Payne, « Food Shortages and gender relations in Ikafe settlement, Uganda ».
53. Madi Passang et Noelle Nodjal, *The flight, exile and return of chadian refugees. A case study with a special focus on women.* A synthesis of research conducted by Madi Passang, Noelle Nodjal and the research team of the Chadian National Institute of Social Sciences. Prepared by Carol Watson for the United Nations Research Institute for Social Development (1996).
54. Payne, « Food Shortages and gender relations in Ikafe settlement, Uganda ».
55. Nasreen Mahmud, « Crimes Against Honour: Women in International Refugee Law ».
56. Tina, « Taking the lion by the whiskers : building on the strengths of refugee women ».
57. Marshall, « Refugees, feminine plural ».
58. Doreen, « Ethnic Human Rights and Feminist Theory… ».
59. Tina, « Taking the lion by the whiskers : building on the strengths of refugee women ».
60. Marshall, « Refugees, feminine plural ».
61. UNHCR, *UNHCR Issues – Women* (2000) en ligne: <http://www.unhcr.ch/issues/women/women.htm>.
62. Boelaert *et al*, « The Relevance of Gendered Approaches to Refugee Health… ».
63. UNHCR, *Health Care and the Refugee Family* (1995) en ligne: <http://www.unhcr.ch/issues/women/rm09510.htm.
64. Boelaert *et al*, « The Relevance of Gendered Approaches to Refugee Health… ».

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

65. Alastair Ager, Wendy Ager et Lynellyn Long, « The Differential Experience of Mozambican Refugee Women and Men », *Journal of Refugee Studies* 8, no. 3 (1995) : 265–87.
66. Boelaert *et al*, « The Relevance of Gendered Approaches to Refugee Health… ».
67. Médecins sans frontières, *Refugee Health. An approach to emergency situations* (Londres: Macmillan, 1997).
68. Marshall, « Refugees, feminine plural ».
69. Nanette Ecker, « Where There is No Village: Teaching About Sexuality in Crisis Situations », *Siecus Report* 26, no. 5 (June/July 1998) : 7–10.
70. Heather Courtney, *Spacing children, preventing AIDS* (1995) en ligne: <http://www.unhcr.ch/issues/women/ rm10005. htm>.
71. UNHCR, *UNHCR Global Report 1999* (2000).
72. Ecker, « Where There is No Village: Teaching About Sexuality in Crisis Situations ».
73. *Ibid.*
74. Moussa, *Storm & Sanctuary*.
75. Daley, « Gender, Displacement and Social Reproduction… ».
76. Moussa, *Storm & Sanctuary*.
77. UNHCR, « Refugee Women », dans UNHCR, 1*999 Global Appeal and Programme Overview* (1999) en ligne: <http://www.unhcr. ch/fdrs/ga99/women.htm>.
78. Payne, « Food Shortages and gender relations in Ikafe settlement, Uganda ». Mcspadden et Moussa, « I Have a Name… ».
79. Gururaja, « Gender dimensions of displacement ».
80. Wenona Giles, « Gendered Violence in War », dans Doreen, *Engendering Forced Migration.*
81. UNHCR, 1991, cité dans Mahmud, « Crimes Against Honour: Women in International Refugee Law »: 368.
82. UNHCR, « Executive Committee Conclusion No. 73 (XLIV) (1993) on Refugee Protection and Sexual Violence ».
83. UNHCR, UNHCR Issues – Women (2000).
84. UNHCR, « Refugee Women », dans UNHCR, 1*999 Global Appeal and Programme Overview* (1999) en ligne: <http://www.unhcr. ch/fdrs/ga99/women.htm>.
85. Indra Doreen, « Interview with Barbara Harrell-Bond », dans Doreen, *Engendering Forced Migration.*
86. UNHCR, *The State of the World's Refugees in search of solutions.* Oxford University Press (1995) en ligne: <http://www.unhcr. ch/ refworld/pub/state/95/ box2_1.htm>.
87. Moussa, *Storm & Sanctuary*.
88. Mahmud, « Crimes Against Honour: Women in International Refugee Law ». Mcspadden et Moussa, « I Have a Name… ».
89. Ecker, « Where There is No Village: Teaching About Sexuality in Crisis Situations ».
90. UNHCR, *The State of the World's Refugees in search of solutions.*
91. Kebbede, « The Agonies of Displacement: Ethiopian Women Refugees in Khartoum, Sudan ».
92. Ecker, « Where There is No Village: Teaching About Sexuality in Crisis Situations ».
93. Payne, « Food Shortages and gender relations in Ikafe settlement, Uganda ».
94. Women's Commission of the Human Rights League of Chad & the Editors, « Women Denounce Their Treatment in Chad », dans Meredeth Turshen et Clotilde Twagiramariya, *What Women Do in Wartime* (Londres, New York: Zed Books Ltd, 1998), 118–28.
95. Édith Mukakayumba, « Rwanda : la violence faite aux femmes en contexte de conflit armé généralisé », *Recherches féministes* 8, no. 1 (1995) : 145–54.
96. Tina, « Taking the lion by the whiskers : building on the strengths of refugee women ».
97. Ecker, « Where There is No Village: Teaching About Sexuality in Crisis Situations ».
98. Atsuko Matsuoka et John Sorenson, « Eritrean Canadian Refugee Households As Sites of Gender Renegotiation », dans Doreen, *Engendering Forced Migration,* 218–41.

L'auteure est titulaire d'un PhD du Département de Démographie de l'Université de Montréal. Elle a alors étudié l'effet de la migration de refuge sur la nuptialité tchadienne. Elle y a aussi réalisé une maîtrise en démographie portant sur l'universalisation de l'immigration internationale au Canada. Elle est présentement chargée de programmes pour l'Afrique de l'Ouest dans l'organisme non gouvernemental World Vision Canada. À ce titre, elle est responsable du design, du suivi et de l'évaluation de programmes multisectoriels dans les pays suivants : Ghana, Mali, Mauritanie, Niger, Sénégal, Sierra Leone et Tchad. Elle est intéressée par les questions relatives aux réfugiés et aux personnes déplacées, plus particulièrement à la problématique des femmes et des enfants dans le contexte des conflits armés.

© Danièle Laliberté-Beringar, 2002. Cette œuvre en libre accès fait l'objet d'une licence Creative Commons Attribution-NonCommercial 4.0 International License, laquelle autorise l'utilisation, la reproduction et la distribution de l'œuvre sur tout support à des fins non commerciales, pourvu que l'auteur ou les auteurs originaux soient mentionnés et que la publication originale dans Refuge : revue canadienne sur les réfugiés soit citée.

Protecting the Borderline and Minding the Bottom Line: Asylum Seekers and Politics in Contemporary Australia

Simon Philpott

Abstract

In late 2001, the Australian government put asylum seekers at the centre of its re-election campaign by refusing to accept 438 asylum seekers picked up by the Norwegian cargo ship Tampa. It then introduced legislation giving the Commonwealth powers to interdict asylum seekers at sea, and to forcibly return them to the port of embarkation. These measures extend the punitive regime of mandatory detention in privately owned and operated centres. This paper examines recent legislative and identity politics in the context of the long-standing white Australian fear of invasion from the north.

Résumé

Vers la fin de l'année 2001, le gouvernement australien plaça les demandeurs d'asile au centre de sa campagne électorale pour un nouveau mandat en refoulant 438 demandeurs d'asile recueillis par le navire cargo Tampa. Le gouvernement déposa ensuite un projet de loi conférant au Commonwealth des pouvoirs accrus lui permettant de stopper des demandeurs d'asile en haute mer et de les reconduire de force à leur port d'embarquement. Ces mesures étendent aussi la politique répressive de détention obligatoire dans des centres appartenant au secteur privé et exploités par le secteur privé. Cet article se penche sur les politiques législatives et identitaires récentes dans le contexte de la crainte qu'ont les australiens de race blanche de longue date d'une invasion venant du nord.

Introduction and Political Context

Australian social researcher Hugh MacKay regularly convenes focus groups to test the national mood and gauge the temperature of certain issues. His July meetings with voters indicated "strong…passions aroused by fears of illegal immigrants" from which he concluded that the government's new policy of rejecting asylum seekers is "a calculated attempt to inflame those fears and heighten our sense of insecurity for blatant political purposes."[1] The new policy was a response to the "*Tampa* crisis" of August and September during which the Australian government refused to allow 438 mainly Afghan asylum seekers to land on Australian soil, a decision which involved the Australian Special Air Services (SAS) taking command of the Norwegian container vessel the MV *Tampa*. The *Tampa*, at the request of Australian Search and Rescue (AusSAR), had picked up the asylum seekers from a small wooden fishing boat seventy-five nautical miles from Christmas Island (Australia) and 246 nautical miles from the Indonesian port of Merak on August 26. AusSAR instructed the captain of the *Tampa*, Arne Rinnan, to sail for Merak where permission to land the asylum seekers had been given by the Indonesia Search and Rescue Authority. However, the asylum seekers protested this course of action and threatened the captain and his crew. Rinnan contacted authorities at AusSAR, told them of the situation and met no opposition to his request to make for Christmas Island. He was told to anchor offshore once he arrived and await customs officials. But in the early hours of August 27, a Department of Immigration and Multicultural Affairs (DIMA) official acting on instructions from the secretary of the Prime Minister's department, contacted Rinnan, threatened charges for breaches of the Mi-

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

gration Act, and instructed Rinnan to sail for Indonesia. However, Rinnan anchored his ship just outside Australian waters and waited while a heated argument developed between the Australian and Norwegian governments. Rinnan's repeated requests that a doctor be sent to the ship were ignored by the Australian government. Concerned about the deteriorating health of the asylum seekers aboard his ship and determined to secure medical assistance, Rinnan contacted the harbourmaster at Flying Fish Cove, Christmas Island, late in the morning of August 29 and informed him he was sailing into Australian waters. Within half an hour, the Prime Minister, John Howard, instructed the SAS to board and secure the ship, which was done by the early afternoon. Finally, on the evening of August 29, Rinnan, increasingly concerned about the health of the asylum seekers and their psychological state, sent an emergency "pan-pan" call, second only to a mayday call in its seriousness. An SAS doctor was provided and after about an hour concluded that no one on board was sufficiently ill to warrant being brought ashore.[2]

But this three-day stand off was just the beginning of the *Tampa* affair. While the government succeeded in passing new legislation that makes it more difficult for asylum seekers to enter Australia and reduces their access to legal remedies once they have, it was not before the Federal Court became involved, and a High Court challenge to the legislation, ultimately unsuccessful, was announced by a private Australian citizen. Moreover, the Australian government has had a very public disagreement with the government of Norway, suffered severe damage to its diplomatic relations with Indonesia, and has suffered public and private criticism from the United Nations. Its attempts to prevent asylum seekers reaching Australia by diverting them to other countries for processing are continuing and currently involve Nauru and Papua New Guinea. The government of Kiribati also offered its services while the Fijian government finally rejected an Australian government request to house and process asylum seekers.[3] Most significant, perhaps, has been the capitulation of the Australian Labor Party to government-fuelled populist outrage concerning the "flood" of asylum seekers entering Australia. It has, with very few quibbles, supported the government's legislation and its new policy of, where possible, refusing to allow asylum seekers to land on Australian soil.

Just over two weeks after the so-called *Tampa* crisis began, a journalist attempted to calculate the cost of the operation to that point. He estimated expenditure of between A$70 million and A$112 million, or approximately A$160,000 per head on the asylum seekers. This is between twice and 3.3 times as much as it would have cost to land and process the asylum seekers in the normal way.[4] That the government could revitalize its flagging electoral fortunes while spending what appears to be a disproportionately large sum of money when a "decidedly bleak" mood of disenchantment with it prevailed reveals a great deal about the state of identity politics in contemporary Australia.[5]

Indeed, the "crisis" has provoked extraordinary political passions in Australia. Prior to being overwhelmed as a news event by the attacks on the World Trade Center and the Pentagon, newspaper based chat-rooms reported unprecedented volumes of correspondence and participation, much of it bitter and polarized. But the new policy of simply refusing to accept asylum seekers arriving by boat appears to be a political master stroke on the part of the Prime Minister, with newspaper and television polls consistently indicating overwhelming support for his actions. Cynical or not, John Howard's decision to stand up to the so-called illegals and queue jumpers continues his government's practice of applying the test of "national interest" to all instances in which "internationalist" co-operation or generosity is required.[6] Moreover, that the Australian government rejected UNHCR assurances that the *Tampa* "crisis" could be "solved very quickly" because Norway, the U.S., New Zealand, and Sweden had agreed to accept asylum seekers who qualified as refugees, indicates that human welfare may have been sacrificed for potential political gain.[7]

This article argues that the vilification of asylum seekers continues a discursive practice with origins in colonial Australia. Fears of invasion, of being swamped or overwhelmed by an Asian world routinely perceived as restive and hostile, have regularly characterized Australian debates about its future. The sight of even relatively small numbers of asylum seekers landing on Australian soil dissipates confidence that the qualities that define Australian national identity can survive, and swiftly undermines the oft-heard claims that Australians support the underdog, are profoundly egalitarian, and insist on a "fair go" for everyone.[8] Moreover, despite the relatively small numbers of asylum seekers that have arrived by boat since the first five people arrived in Darwin harbour in April 1976, they have remained the objects of negative public opinion.[9] This suggests that, in the absence of careful political management, there exists a potential threat to immigration, the refugee resettlement program, and the policy of multiculturalism that have been the foundation of Australia's ethnically plural society for most of the last three decades.

The discursive denigration of asylum seekers simultaneously fosters public hostility to them and creates the possibility for them being handed over to private sector control in which bottom-line considerations take precedence over concerns such as justice, dignity, or rights. Distancing the

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

"asylum seeker" from the "citizen" enables new punitive regimes to be constructed and in ways that alleviate the government of responsibility precisely because asylum seekers are routinely regarded as being without rights because of their "criminal" conduct.[10] The politics of legislative reform and the winding back of entitlements for asylum seekers are, therefore, explored in this article, as are specific issues arising from privatization of asylum-seeker care.

Neo-liberalism and the Politics of Identity in Contemporary Australia

The re-election of the conservative Coalition government on November 10th owed much to its uncompromising stance on asylum seekers. Indeed, at polling booths voters were greeted by posters of a stern-looking Prime Minister, standing at a lectern, fists clenched, with the words "*We* decide who comes to this country and the circumstances in which they come" emblazoned beneath his image.[11] This continues a political history in which the peaks and troughs of John Howard's career have coincided with interventions on identity issues. As Opposition leader during the later 1980s, Howard was criticized for his public rumblings about the growing number of Asians among immigrants arriving in Australia and spoke out against the policy of multiculturalism which had enjoyed bipartisan support until he became leader of the Opposition.[12] Negativity within the Liberal Party stirred up by his views was to cost Howard the leadership of the party in May 1989. But as desperate for an election victory as they were to find a leader that might deliver it to them, the Liberals again turned to Howard in 1995 and he delivered office in early 1996. Having learned from his earlier (bitter) experiences, Howard has proven to be a shrewd if divisive manipulator of identity politics.

For example, the Coalition's[13] 1996 election campaign theme was "For All of Us". The slogan implied, and Howard argued, that Labor had long since stopped listening to ordinary Australians and governed for cultural elites and minorities. These included the arts community, indigenous peoples, republicans, pro-Asianists, unionists, ethnic community lobbyists, and others whose visions for Australia were at odds with Howard's rather more traditional imagining of a nation of relaxed, comfortable, and happy nuclear families. However, opponents of the Coalition, especially indigenous Australians, quickly interpreted the slogan to mean, "For All of Us (but Not Them)".

In government, John Howard was very slow to condemn the 1996 maiden parliamentary speech of independent MP Pauline Hanson. The speech, xenophobic and often factually inaccurate, argued that indigenous people occupied a privileged place in Australian society and that harm was being done to Australia by immigration and the policy of multiculturalism. In the days following her incendiary comments, Howard observed that: "I thought some of the things that she said were an accurate reflection of what people feel." For weeks, Howard defended Hanson on the grounds of free speech despite the absurdity of many of her allegations and claims.[14] The government also desperately sought ways to limit native title claims arising from High Court decisions recognizing native title in 1992 and 1996. Its public (scare) campaign included a celebrated incident where Howard was interviewed on television holding a map of Australia with large tracts of the continent shaded to demonstrate the alleged threat to "backyards" that native title implied.[15]

The Howard government's second term, perhaps tempered by a greatly reduced majority, was less explosive, though eventful.

However, the decision to put asylum seekers somewhere near the centre of an election campaign (albeit in the language of "defending Australia's borders") marks a significant shift in tactics on the part of the Australian government. Not only does it officially encourage a kind of empathy fatigue among existing Australian citizens and residents (including former asylum seekers and refugees), it follows upon legislative reforms that reduce the rights of asylum seekers to legal remedies and extend Commonwealth powers of interdiction at sea. Moreover, the ferocity of the public backlash encountered by the Labor Opposition when it raised questions about aspects of the government's legislative response led it to support the Border Protection Bill in an attempt to salvage its dwindling electoral prospects. Arguably, the treatment of asylum seekers, particularly their mandatory detention, is now less open to challenge than at any time in the recent past.[16] Yet, the lack of scrutiny of a policy pursued by only three other countries in the world, Greece, Turkey, and Poland, coincides with mounting evidence of ethical and other problems with the management of immigration detention centres by the privately owned firm, Australasian Correctional Management Pty Ltd (ACM).[17]

The Discursive Construction of Incarceration

How have these most desperate of people been so completely dehumanized that, at the height of the "*Tampa* crisis," different callers to talk-back radio in Australia called for them to be shot or forcibly restrained by the administration of sedative drugs? Arguably, the work of denigrating asylum seekers draws upon enduring historical narratives of threats from the north. Contemporary government discourses of danger (to Australian security) and management (of the human threats to sovereignty) merely burnish old fears and give them new focus.

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

The arrival of asylum seekers in growing but modest numbers from the mid-1990s onwards partly fulfills the self-constructed nightmare of "invasion." That they arrive in relatively small numbers, unarmed, and with few resources, is irrelevant.[18] Their presence both nourishes and adds to the deeply embedded cultural fear of invasion. And, under the circumstances of perceived externally derived threat to national and personal security, a surprisingly virulent hostility emerges in public discourse. David Walker has most impressively explored the long history of invasion fears in his book *Anxious Nation* where he notes the use of metaphors of flood and inundation a century ago, but with respect to the Chinese.[19] Moreover, in the context of contemporary asylum seekers, his comments concerning late nineteenth century fears remain apt:

> By the 1880s it was commonplace to depict Asia as a world of huge populations 'teeming' with a terrible energy. Asia was a force about to engulf the world's underpopulated zones. Added to these powerful stereotypes was the theme of a malign Oriental intelligence, patiently manoeuvring for advantage…[20]

Interestingly, among the most powerfully negative images of asylum seekers is that of the queue jumper, an expression routinely used by the government and media alike. It too resonates with the view of the Asian other as having a malign and advantage-seeking intelligence that offends the ordered and justice-seeking ways of (white) Australians. But Ghassan Hage reminds us that Asians are not always constructed as cool and calculating in their designs on Australia. Indeed, in the context of a discussion of Geoffrey Blainey's controversial book *All for Australia* (1984), Hage refers to the image of an "irrational" (Asian) tide bearing down upon Australia:

> It is their lack of rationality, compared to the White Australian, which constitutes them into such dangerous 'unthinking matter' inexorably moving to overtake Australia and which no reasoned argument can stop.[21]

Australian literature has also been liberally sprinkled with invasion scenarios, including John Marsden's *Tomorrow When the War Began*, a novel aimed at teenagers that has been reprinted twenty-six times since being published in 1994.[22] Even during the years of so-called Asian engagement, Australians were presented with the rather stark alternative of dealing with Asia on its own terms, or simply being left behind in the scramble for economic development.[23] The same images of being overwhelmed, swamped, diluted, or disappeared by Asian economic power are summoned as they are in more specifically racially motivated fears of military invasion. As former Labor immigration minister, Nick Bolkus, observes:

> This is a frightened country … For decades now we've been afraid of someone invading us from somewhere and I think that mentality still permeates much of the country. It is amazing the cross-section of the people who are infiltrated with this fear, the degree of xenophobia that exists as well, and envy.[24]

However, these remarks need elaboration because it is not a fear of all foreigners seeking refuge in Australia that pervades imaginings of invasion. That the panic is motivated by race and religious concerns and the image of the boat is demonstrated by the absence from detention centers of the two most numerous groups of "illegals," British and American nationals who have overstayed their visas and who constitute 20 per cent of "illegals."[25] Tracing the asylum-seeker issue through two Australian broadsheets, the *Brisbane Courier Mail* and the *Sydney Morning Herald*, between January 1997 and December 1999, Sharon Pickering's summary of the images used clearly relates the contemporary issue of asylum seekers to more traditional fears of Asian invasion:

> According to the BCM and SMH we are soon to be 'awash', 'swamped', 'weathering the influx', of 'waves', 'latest waves', 'more waves', 'tides', 'floods', 'migratory flood', 'mass exodus' of 'aliens', 'queue jumpers', 'illegal immigrants', 'people smugglers', 'boat people', 'jumbo people' 'jetloads of illegals', 'illegal foreigners', 'bogus' and 'phoney' applicants, and 'hungry Asians' upon 'our shores', 'isolated coastlines', and 'deserted beaches', that make up the 'promised land', the 'land of hope', the 'lucky country', 'heaven', 'the good life', 'dream destination', and they continue to 'slip through', 'sneak in', 'gathering to our north', 'invade' with 'false papers' or 'no papers', 'exotic diseases', 'sicknesses' as part of 'gangs', 'criminal gangs', 'triads', 'organized crime', and 'Asian crime'. In response, 'we' should have 'closed doors', only sometimes having 'open doors', we should respond with the 'navy and armed services at the ready', 'we' should 'send messages', 'deter', 'lock up', and 'detain', 'we' should not be 'exploited', 'played for a fool', be seen as 'gullible' or be a 'forelock-tugging serf'.[26]

Since Pickering's article was published in mid-2001, two Australian ministers have supplemented the list with references to terrorists. On September 14, the Minister for Defence, Peter Reith, linked the refusal to land the Afghans on the *Tampa* and the more general "…clamp-down on border protection against boat people….with efforts to combat terrorism."[27] Four days later, on September 18, the Junior Minister for Finance, Peter Slipper, said: "There is an un-

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

deniable linkage between illegals and terrorists…because…some of those people come from the country that is the centre of terror." Asked by journalists for evidence of this linkage, Slipper simply observed that because the so-called illegals were from the Taliban's Afghanistan, it was "…not beyond the realms of possibility…" that some asylum seekers may have been involved in terrorist activity.[28] The undeniable link would appear in the context of the Minister's own words to be rather more in the realms of speculation and hearsay.

Recent hostility towards Muslim asylum seekers has also been worsened by a spate of rapes in Sydney attributed to Lebanese (Muslim) Australians whose victims were allegedly targeted for being "Australian."[29] Journalist Paul Sheehan's comments on Muslim immigrants, poverty, crime, and violence led to an angry response from another *Sydney Morning Herald* journalist, Nadia Jamal, a Lebanese-Australian.[30] The fact that both used statistical evidence to support contradictory arguments is indicative of the complexities of employing "science" to make sustainable claims about ethnicity. This is partly because fear, perhaps the most significant response aroused by the presence of immigrants and asylum seekers, is not amenable to empirical resolution and yet, like pain, when one is in its grip it can be overwhelming.[31] And, in this instance, fear is shadowed by anger in the form of "…growing anti-Muslim paranoia."[32]

But the presence of increasing numbers of Muslims in Australia is, arguably, partly an unintended consequence of U.S. support for and arming of Islamic opposition to the Soviet presence in Afghanistan that eventually led to the emergence of the Taliban and its aggressive opposition to Saddam Hussein's regime in Iraq. Moreover, the deregulation of Australia's economy and labour market over the last two decades has created a pervasive sense of insecurity in some sections of Australian society. Ironically, the Coalition government has probably gone further than its predecessors in promoting the alleged social benefits of economic deregulation even when it has meant economic pain and social dislocation. However, it has proven far more reluctant to renegotiate the fundamentals of what it means to be Australian in identity debate. Thus, unstructured, unregulated, and incalculable numbers of potential asylum seeker arrivals, a form of "globalisation from below" as Australian cultural theorist McKenzie Wark describes it, threaten the government's control over identity issues. The very presence of the asylum seeker's body is a critique of national sovereignty *and* the trade inequalities and developing world indebtedness that seems to be one feature of increasing globalization. The greater the inequalities in global trade, the more people join the flows of human beings escaping economic and political hardship. But discourses, such as those of some anti-globalization sentiment, that attempt to reassert the primacy of states cannot contribute to stemming the flow of people to the more privileged nations unless they systematically address the structural inequalities of the global economy. On this view, the effectiveness of political and economic barriers to outsiders erected by privileged nations will continue to be undermined because they recreate the very circumstances which lead to people fleeing entrenched disadvantage and the political violence characteristic of inequality. As Wark argues:

> The most telling human critique of globalisation is not the black-clad protestors in Seattle or Genoa, it is the still, silent bodies of the illegals, in ships, trucks, car boots, passing through the borders. The placeless proletariat.[33]

But, Wark notes, missing from what he calls the new global disorder is a way to make a claim to a right outside of the space of the nation-state. The stateless refugee simultaneously speaks of the presence of states failing in basic duties to citizens and the failure of other states to acknowledge responsibility for victims of the former.

In Australia, two factors have combined to enhance tensions about asylum seekers and immigration more generally. Firstly, it was during the 1980s that deregulation of the Australian economy commenced in earnest. This led to general erosion of wages and conditions as a result of the so-called Accords between successive Labor governments and the Australian Council of Trade Unions (ACTU) and to periods of high unemployment, high interest rates, and general feelings of insecurity in the Australian polity. Secondly, in the ten years prior to Labor's assuming office in early 1983, immigration from Asia accounted for approximately 21 per cent of the total, whereas in the ten years between 1983 and 1992 it accounted for more than 41 per cent.[34] However, the overall size of the immigration intake did not increase greatly, rising only from 1,008,376 during the decade 1970–79 (including a post-World War II high of 185,325 in 1970) to 1,068,128 during the decade 1980–89. Moreover, very few asylum seekers arrived by boat between 1982 and late 1989.[35] On this view, the tensions surrounding asylum seekers are an admixture to feelings of economic insecurity and the altered ethnic mix of the annual immigration intake rather than its increased size.

Supporters of Labor's attempts to broaden and deepen ties with Asia warned from the later 1980s onwards that it had failed to explain the alleged benefits of deregulation, immigration, and multiculturalism to the public. Feelings of insecurity about the future were intensified by threats to key institutions of the federation social contract, such as centralized wage fixing, and in the context of the bust that

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

followed the 1980s boom. All this occurred at a time of growing unease, fostered by opponents of immigration and multiculturalism, about the numbers of Vietnamese, Cambodians, and Lebanese in the immigration intake.[36] Nonetheless, and despite growing public discord with Labor's immigration policy, then Prime Minister Paul Keating argued forcefully against sporadic claims that Australia was being Asianized, saying in 1994: "We do not, and cannot aim, to be 'Asian' or European or anything else but Australians."[37]

However, it was also in 1994 that the Keating Government introduced mandatory detention for asylum seekers after a brief period where unauthorized arrivals escalated. These were mainly Cambodians, Iraqis, and Afghans. Whilst the power to detain resided in the 1958 Migration Act, the move to mandatory detention reflected the then government's view that refugee advocates were making excessive use of court processes to prevent the removal of asylum seekers whose claims for refugee status had failed. The idea of mandatory detention was to deter unauthorized arrivals.[38]

With the defeat of the Keating Government in 1996 came major changes, particularly in the context of Keating's image of Australia's as a confident, outward looking, cosmopolitan middle power. With "For All of Us," the Coalition touched upon an aggrieved sense in the community and shifted the focus of debates from Keating's so called big picture to an idea of "…security [that] has functioned…as a drive for historical, strategic, economic and ontological *certitude.*"[39]

In this environment, and ominously for asylum seekers, major dilemmas of justice and identity are reduced to tasks of management.[40] In a broad critique of John Rawls and others who subscribe to what she calls virtue theories of politics, Bonnie Honig warns that anxieties arising from confrontations with political subjects that do not conform to ordered political institutions are intolerant and contribute to processes that reduce politics to administration and communitarian consolidation.[41] Privatization of asylum-seeker welfare is made possible because government attacks on people that it calls "illegals," "queue jumpers," or "bogus refugees" implies their breach of administrative process and their abuse of the Refugee Convention, removing the need for government involvement. The criminalization of asylum seekers mitigates public sympathy and, simultaneously, brings into disrepute the Convention that protects asylum seekers. Sections of the media contribute to the denigration of the Refugee Convention by describing Australia's international treaty obligations as, for example, the "UN loophole," implying covert government conspiracies to admit asylum seekers or by calling upon extremist critics who provide profoundly negative assessments of asylum seekers.[42] Front-page headlines such as the Melbourne *Herald-Sun*'s "Alien Scam" sum up the negative impact the media can have on a political issue fraught with racialized fears.[43]

Privatizing Detention

In April 1997, the Australian government sought proposals for the detention and management of people detained under the Migration Act from seventeen selected organizations. Australasian Correctional Management (ACM), a wholly owned subsidiary of the U.S.-owned Wackenhut Corrections Corporation, won the tender. The middle and upper management of the parent company, Wackenhut, is largely composed of former FBI and CIA operatives and the company has been subjected to a U.S. congressional investigation for its practices. It has also been connected to chemical and biological weapons producing consortiums.[44] However, the overall range of Wackenhut's activities is so extensive as to be beyond the scope of this article.[45] The company's founder, former FBI agent George Wackenhut, apparently a great believer in incarceration, observed in a documentary aired on Australian television in late 2000 that: "They're [Australia] really starting to punish people, as they should have all along. This year we are going to make $US400 million."[46] It is not clear whether Wackenhut's comments are squarely directed at asylum seekers in detention in ACM facilities but it is a disturbing picture of Wackenhut's understanding of the purposes of this aspect of his business. But it also conforms to the view, currently popular, if not encouraged by the Australian government, that asylum seekers *ought* to be punished.

ACM owns and operates six detention centres around Australia, in which are held approximately 3500 asylum seekers, including children, who account for about one-third of the detainees. In July 2001, it was reported that the profits of ACM had increased 350 per cent in two years on the back of increased numbers of asylum seekers reaching Australian shores. Annual turnover for ACM is A$200 million, making Australia's Department of Immigration and Multicultural Affairs, Wackenhut's third-largest customer.[47] As a wholly owned subsidiary of a foreign corporation, ACM is not obliged to disclose detailed operating accounts, meaning it is difficult to determine what percentage of its operating revenue and profits are derived from the ownership and operation of the immigration detention centres compared to its prison operations. However, ACM's profits increased from A$4.1 million in 1998, to A$7.5 million in 1999, to A$14.75 million in 2000, and the rate of increase of profit more closely parallels the increase in asylum seeker arrivals than growth in the prison population under ACM's control. ACM accounted for about 20

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

per cent of Wackenhut's gross revenues, 11 per cent of its consolidated revenues, and almost 50 per cent of Wackenhut Corrections Corporation's profit of US$19 million in 2000. The Minister for Immigration, Philip Ruddock, acknowledged that the growth in ACM's profits was a result of an increase in the numbers of asylum seekers reaching Australian shores in 2000.[48]

ACM's ability to make refugee detention profitable partly arises from its capacity to operate detention centres at a lower per-head cost than the government. For example, it has reduced the daily management cost of asylum seekers to approximately A$112 per day, down from a high of A$145 per day immediately before the Commonwealth handed control to the private sector in November 1997. Financial effectiveness, rather than the welfare of asylum seekers, has featured prominently in government discourse in favour of the privatized centres. For example, the performance measures of dignity and privacy have been removed from publicly available records concerning the contracts between ACM and the Commonwealth, and Freedom of Information requests on these issues have been denied for reasons of commercial confidentiality.[49] On this view, the profitability of ACM and the Australian government's desire to reduce the costs of compliance with the Refugee Convention take precedence over the needs and rights of asylum seekers. Indeed, notwithstanding ACM's first right of refusal on the three-year contracts to run the detention centres and its desire to continue providing the service, the Australian government has invoked a clause in the agreement with ACM allowing it to tender for a new service provider on the grounds that ACM's offer is not financially competitive. This is an exercise described by the Minister for Immigration as "…testing the market to obtain best value for money…" and may see a new service provider in the near future.[50]

But arguably, the related desires of the Australian government to save money and ACM's desire to make it has been costly in every sense of the word, a point emphasized by the acting Commonwealth Ombudsman, Oliver Winder. In an investigation into the operation of the detention centres, Winder found:

> …evidence at every IDC [Immigration Detention Centre] of self-harm, damage to property, fights and assaults, which suggested there were systematic deficiencies in the management of detainees…These observations raised serious concerns about the standard of care being provided to detainees.[51]

Allegations of brutality, sexual assault, and other denials of the rights of detainees have been common and have been investigated, but out of the public domain. Indeed, Philip Flood, the Chair of a departmental inquiry (the Minister has consistently rejected calls for a judicial inquiry, presumably because it would enable witnesses and perpetrators to be subpoenaed and would offer protection to those that wished to testify against ACM), was scathingly critical of the handling of a series of serious allegations of impropriety against ACM staff.[52] Commercial confidentiality prevents the public from knowing whether financial penalties were applied to ACM and, if so, their extent.

A Parliamentary committee also visited the six camps during 2001 and noted alleged assaults on detainees by ACM staff, poor facilities, inadequate medical treatment, and high levels of psychological anxiety arising from these circumstances. As one (Labor) committee member observed: "No one can visit these centres without being profoundly moved, nothing prepares you for the visible impact." Rejecting the parliamentary committee's recommendation that detainees be released after fourteen weeks, Immigration Minister Philip Ruddock, argued that committee members were "naïve" and lacked the life experience to make such recommendations.[53]

Attempting to maintain the bottom line means that ACM facilities also have particularly harsh security measures. For example, in Villawood Detention Centre in Sydney, detainees are assembled four times a day and have to produce their photographic id and passes.[54] ACM officers, with two-way radios turned up to maximum volume and slamming doors behind them, check sleeping dormitories each hour of the night, generally in an invasive and aggressive manner, including shining torches in the faces of sleeping detainees, adults and children alike. As one ACM employee observed: "Yes, many of my fellow officers are bastards to the detainees and treat them like dogs." The primary reason for this intrusiveness is to minimize escapes as they attract financial penalties under performance targets set by the Commonwealth.[55] Moreover, ACM's drive for profits has contributed to its poor reputation with sections of the non-government welfare community. For example, when the Woomera detention centre was expanded, ACM pressured charitable organizations to provide items such as curtains and other materials associated with setting up the facility, as well as clothing for the detainees. It did not offer any payment for these goods, representing the detainees as people in need and therefore as deserving of assistance by the charities. At least one other commercial arrangement with St. Vincent de Paul was not honoured by ACM.[56]

Minimizing costs, and the desire to maintain control over the flow of information in and out of the centres, also meant that they were very poorly equipped, particularly early in ACM's contract. Initially, children had no access to recreational facilities, not even balls. Adults were denied

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

access to any kind of media, were not allowed to send or receive letters or to make or receive phone calls, and endured inadequate facilities as numbers in the centres swelled with new arrivals. Boredom has been noted as central to the regular bouts of protest and occasional violence in the camps.[57] At least one recent review of ACM facilities indicates that they remain grossly inadequate.[58]

Medical care of asylum seekers may also be compromised by the imperative to keep costs under control. For example, a local doctor contracted to provide care to Woomera detainees noted that the dispensary at the camp did not fill at least one prescription he provided to an inmate because the drug was regarded as excessively expensive. The same doctor registered his concern that the intravenous administration of a particularly strong sedative to an agitated detainee by nurses took them out of their skills depth and was done in a clinic in which proper monitoring facilities were not available.[59]

The inability of the media and other non-government organizations to access detention centres means that it is difficult to determine how economic demands shapes day-to-day policy in the centres. But rioting, hunger strikes, instances of self-harm at the camps, and the tales of misery told by former detainees indicate that there are many problems in the centres. Perhaps a policy of mandatory detention will inevitably produce problems of violence and unhappiness, but the profitability of ACM suggests that far more could be done to ease the anxiety and enhance the personal security and welfare of asylum seekers. Indeed, ACM also benefits from the undervalued labour of detainees, paying them approximately one-quarter of what the general prison population earns for similar work. Twelve hours labour may earn an asylum seeker a phone card worth $15 or $20.[60] A six-hour shift in the kitchen may pay A$10–15 or a day cleaning latrines A$5.[61] Arguably, this practice is possible only because ACM is using what it calls "non-citizens" to undertake this work and because few people in Australia have raised objections, the union movement having been noticeably silent on the issue of asylum seekers. Given that ACM is a profit-making concern, the use of labour that is not properly recompensed raises serious ethical questions.

There seems little doubt that despite government claims of taxpayer value for money in the detention and care of asylum seekers, the market has not been kind to asylum seekers themselves. They are compulsorily detained in facilities that at least two government-commissioned inquiries have condemned as inadequate. Their welfare is at least partly measured in terms of corporate profit. Perhaps of greatest concern is the fact that by placing the market between itself and asylum seekers, the Australian government, and the people it represents, can be shielded from the moral questions that might be raised by the policy of mandatory detention primarily in the context of commercial confidentiality.

The "crime" of asylum seekers is to have arrived in Australia without appropriate visas and other identity documents. This is a situation that British Home Secretary Jack Straw acknowledges arises from the fundamental contradiction in the Refugee Convention that confers a right to apply for asylum but fails to impose a corresponding obligation on the part of governments to admit asylum seekers to enable them to exercise the right.[62] Thus, arguably, the most vulnerable of people find themselves not only stateless and in an uncertain legal realm but in the hands of a company whose primary concern must, by definition, be the making of a profit from their incarceration. Protecting itself from the financial penalties that would have arisen from the breakout of rioting detainees at the Woomera detention centre in August 2000 dictated that employees of ACM use water cannon and tear gas on detainees, the only times in Australian history that such measures have been used against rioters.[63] This is a stark reminder of the gulf between the treatment of citizens and "non-citizens" in contemporary Australia.

Legislative "Reform" and Electoral Politics in the Wake of the Tampa

A Conservative political commentator and a former senior member of John Howard's staff, Gerard Henderson, notes that in neither of two major foreign policy addresses in August in which the government's third-term agenda was outlined were refugees or asylum seekers mentioned by the Prime Minister.[64] Nonetheless, when the decision was taken to refuse the *Tampa* permission to disembark its 438 asylum seekers later in August, the government took an opportunity not only to reinvigorate its electoral standing, but to draft new legislation in an attempt to deter asylum seekers. In sending the SAS to take control of the *Tampa* and in refusing to allow the asylum seekers to set foot on Australian soil (which would automatically invoke the Migration Act), the government argued that it was operating within the law. Whilst there was some division on this point, it was generally regarded that the government was within its rights.[65] However, on August 29th, it introduced the Border Protection Bill into the Parliament in an attempt to shore up its legal position and ensure that it was in breach of no laws. The legislation was to be retrospective and was to give the government the following powers, not just in respect to the *Tampa*, but all subsequent ships carrying asylum seekers.

Firstly, the government sought the power to remove any ship, without reason, from Australian waters. Secondly, the

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

bill authorized the use of reasonable force to remove a ship. Thirdly, officers using such force and the Commonwealth itself were to be immune from criminal or civil prosecution arising from its use. Fourthly, no decision to remove a ship from Australian waters was to be subject to judicial review. The bill also removed, for the purposes of migration, Ashmore reef (approximately 220 miles from the Australian mainland) and Christmas Island from territories mandated as Australia.[66] Simon Evans from the Faculty of Law at Melbourne University argued that the bill was dangerous on several grounds and publicly appealed to Members of the House of Representatives and to Senators not to adopt the bill in its original form. Among his concerns was the lack of opportunity to scrutinize the bill with respect to the use of force. He also noted that the discretion conferred on agencies of the Commonwealth to use force was absolute. He observed that there was an absence of preconditions for the use of force (including there being no requirement that instructions to leave Australian waters be understood by a ship's master, assuming there was one, and no requirement to check the seaworthiness of the vessel or the health of those on board). He also raised concerns about the absence of judicial review of decisions to remove ships or boats from Australian waters and argued the legislation probably did not comply with Australia's obligations under the Refugee Convention.[67]

Labor, having supported the government up to this time, opposed the legislation in its original form because it extended Commonwealth powers and combined with Australian Democrats and a Greens senator to defeat it in the Senate.

Meanwhile, the government engaged in a flurry of diplomatic activity. It attempted to engage Indonesia with the problem but failed as the Indonesian President, Megawati Sukarnoputri, allegedly furious at John Howard's public comments on Indonesia's responsibility for the asylum seekers, refused to take or return the calls of the Australian Prime Minister.[68] Indeed, the Indonesian Foreign Minister, Hassan Wirayuda, accused the federal government of turning "…the issue of illegal immigrants into a political commodity…"[69] Australia's relations with Norway also quickly deteriorated into mutual and public criticism.[70] The UNHCR criticized the government's decision and actions but was quickly rebuffed by the Prime Minister.[71] However, as early as August 30th, the Australian Foreign Minister, Alexander Downer, contacted Sergio Vieira de Mello, the UN's chief administrator in East Timor, and requested that a refugee camp be made available to house the 438 asylum seekers still stranded on the deck of the *Tampa*. The UN Secretary General, Kofi Annan, quickly intervened and vetoed the plan.[72]

Finally, on September 1, the government achieved the breakthrough it had sought. Nauru, the world's smallest republic with a population of just twelve thousand and notable for being an impoverished and ravaged former phosphate mine, was effectively bribed by the Australian government to accept the asylum seekers for processing. John Howard described this as "…a truly Pacific solution…," a statement of some audacity given that less than a month prior to the arrival of the *Tampa*, Howard had refused to attend the annual Pacific Islands Forum, held in Nauru.[73] The Australian government signed a Memorandum of Understanding guaranteeing Nauru diesel to fuel the island's generators at a cost of about A$13m per month until May 2002. Debts of A$1 million owed to Australian hospitals by citizens of Nauru were cancelled. The number of sporting and education scholarships provided to residents was doubled from ten to twenty and infrastructure assistance for maritime surveillance, telecommunications, and its airline were promised.[74] As a result of this deal, the asylum seekers were transferred from the MV *Tampa* to HMAS *Manoora* on September 3rd. Having been refused permission to transship the asylum seekers through Dili, the *Manoora* sailed for Pt. Moresby in Papua New Guinea.

Back in Australia, lawyer Eric Vadarlis and the Victorian Civil Liberties Council brought similar but separate actions in the Federal Court challenging the legality of the government's actions. On September 11 Justice North found that the asylum seekers had been illegally detained on the MV *Tampa* after their rescue on August 26. He instructed the *Manoora*, which by now had picked up a second group of mainly Iraqi asylum seekers, to return to Australia and disembark all the asylum seekers for processing.[75] However, the government appealed and on September 18th, the court overturned the decision of Justice North, arguing that the government indeed had the right to refuse entry to the asylum seekers. Significantly perhaps, the Chief Justice dissented in a 2–1 decision. However, the decision became redundant when Labor, having seen its electoral support plummet after opposing the original Border Protection Bill, agreed on September 18 to support it with minor amendments. These were that a vessel could only be returned to sea if it was seaworthy and that officers of the Commonwealth had to act in good faith and use no more force than was warranted if they were to avoid judicial scrutiny of their actions.[76] In keeping with the government's concern with bottom line issues, it argues that one of the key aspects to its new legislation is reduction of costs associated with detention and processing of asylum seekers.[77]

The political imperative of recapturing or neutralizing the 936,621 voters (8.43 per cent of the votes cast) that supported Pauline Hanson's One Nation Party with its

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

1998 election policies of zero immigration and temporary protection visas for refugees partly explains Labor's falling into line behind the government. In short, the Coalition proved itself willing to open up deep social divisions in the quest for electoral support and comprehensively outflanked Labor. Polling in the lead-up to the November 10 election showed that many former One Nation voters indicated their support for the Coalition. Indeed, as Margot Kingston notes in her analysis of the official Liberal Party campaign launch:

> Only one other politician made it into the Howard snaps beamed onto the wall behind the podium before the speeches began. Philip Ruddock. He made it twice – Howard and Ruddock together, smiling in a sea of white faces on the street…It's the election winner alright, the boat people. What made my skin crawl was the thrill John Howard, Philip Ruddock and the Liberal crowd got from them…blood lust. Victory is ours.[78]

Most of Australia's political journalists writing during the campaign concluded that through the "*Tampa* crisis" the government managed to recapture the vast bulk of One Nation supporters.[79] On this view, it is not surprising that Liberal party polling data shows Philip Ruddock is one of the government's most respected and admired ministers because of his consistent tough line on asylum seekers. Indeed, this information, which long precedes the appearance of the *Tampa* on the Australian horizon, may indicate the government's nascent awareness of the political possibilities of a calculated assault on asylum seekers and their rights. Peter Mares, author of a recent book on the treatment of refugees and asylum seekers in Australia, observes: "I come reluctantly to the conclusion that Mr Ruddock is one of the government's frontline players in the shabby politics of division."[80]

John Howard argues that it is in the Australian national interest that a line be drawn in the sand because of "…what is increasingly becoming an uncontrollable number of illegal arrivals."[81] But "uncontrollable" far better describes the circumstances that lead to many Afghans and Iraqis fleeing their homes for the often expensive and highly dangerous flight to Australia by boat. Any attempt to control the flow of asylum seekers entails a meaningful engagement with the political and social circumstances that uproot people. In the unlikely event of that occurrence, an alternative would be the investment of reasonable resources much closer to the point of origin of asylum seekers so that their claims can be processed more expeditiously than is currently the case. The honorary Afghan consul in Australia, Mahmoud Saikal, likens securing a place through formal channels in the present system to winning a lottery.[82] The enduring irony of the current situation is that the Australian government, through the so-called Pacific Solution, is now engaged in precisely the people trafficking it claims to abhor.

Conclusion

Asylum seekers reaching Australian shores have been subjected to a policy of mandatory detention since 1994 and have been in the hands of the private sector since late 1997. The policy of detaining all asylum seekers who arrive without appropriate documentation is pursued by only a small minority of countries and is a policy that concerns refugee advocate groups and the UNHCR. Despite government claims to the contrary, Australia is not unusually generous in the context of the numbers of refugees it resettles. In the context of comparatively small numbers of unauthorized arrivals compared to many other countries, mandatory detention of asylum seekers is not only a harsh response to vulnerable and often traumatized people, but also is central to a discursive regime of criminalization. Moreover, that asylum seekers are detained in sometimes remote and climatically inhospitable locations and in facilities routinely criticized for their poor quality demonstrates the distinctly regressive and punitive nature of the policy.

The Howard government's persistent arguments that value for money is important in managing asylum seekers is indicative of the prioritization of bottom-line considerations over basic human rights. Privatization of public utilities and other government services has generally been represented as legitimate to citizens not only because the service is provided more cheaply, but because the service is of a higher standard. The latter argument has not been made with respect to the welfare of asylum seekers. However, the capacity to transfer the care of asylum seekers from the state to the private sector arises in a broader historical context of hostility to perceived threats to Australian sovereignty and security arising in the north. While demonization of Asian "invaders" was routine in Australian political discourse from the middle decades of the nineteenth century, in the context of a more diverse and multicultural Australia, after about 1970, both major parties avoided blatant politicization of community concerns about immigration and multiculturalism. The Howard government has decisively broken with that bipartisanship and has been willing to place potential electoral gain ahead of the maintenance of social cohesion and the welfare of asylum seekers.

Government and media representations of asylum seekers as queue jumpers, illegals, bogus refugees and so on, have served to foment empathy fatigue among Australian citizens. Moreover, representations of asylum seekers as making unreasonable and extravagant claims upon Austra-

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

lia and Australians, see them lumped together with other members of the so-called politically correct community in neo-liberal identity politics discourse. On this view, asylum seekers become another vector of UN "interference" in Australian affairs, a particularly sensitive issue given the UN's criticisms of the Howard government's policies towards indigenous peoples and women's rights. Successful denigration of asylum seekers as criminals and cheats not only enables the government to distance itself from their claims for consideration for residency in and citizenship of Australia, it brings the UN and the Refugee Convention into disrepute. At a time when the numbers of peoples of concern to the UN exceed twenty million, this development in an advanced and prosperous Western liberal democracy is of concern. Moreover, should countries like Canada, Britain, the U.S., and Germany follow the politically popular example set by Australia and forcibly close their borders, the already fragile architecture of global refugee management could suffer serious harm, particularly if poorer countries are saddled with even greater numbers of displaced peoples.

Notes

1. Hugh Mackay, "The Devil You Know," *Sydney Morning Herald*, 13 October 2001; online: <http:www.smh.com/news/0110/13/review/review3.html> (date accessed: 13 October 2001).
2. David Marr, "Arne Rinnan, a Man Who's Not Like Us at All," *Sydney Morning Herald*, 22 December 2001; online: <http:www.smh.com.au/news/0112/22/opinion/opinion2.html> (date accessed: 22 December 2001).
3. Andrew Clennell, "Refugee Plan May Backfire, Says Ruddock," Sydney Morning Herald, 6 December 2001; online: <http://www.smh.com.au/news/0112/06/national/national5.html > (date accessed: 6 December 2001).
4. Mike Seccombe, "Do the Sums – It Doesn't Add Up," *Sydney Morning Herald*, 11 September 2001; online: <http://www.smh.com.au/news/0109/11/national/national6.html> (date accessed: 11 September 2001).
5. Mackay, "The Devil You Know."
6. Anthony Burke, "Australia's Asian Crisis," *Australian Humanities Review* (June 2001): 11; online: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-June-2001/ burke/html> (date accessed: 15 October 2001).
7. Marian Wilkinson, "Canberra Rejected Tampa Plan," *The Age*, 20 October 2001; online: <http://www.theage.com.au/news/national/2001/10/20/FFX1M7OV YSC.html> (date accessed: 20 October 2001).
8. The number of asylum seekers reaching Australian shores is comparatively small compared to the experience of European countries. DIMA statistics released on 4 July 2001 indicate 12,327 asylum claimants have arrived by boat since 1989. The total for 1999–2000 was 4,174. In 2000, Britain received 97,660 asylum applications; Germany, 78,760; the Netherlands, 43,890; Belgium, 42,690; and France, 38,590. See William Maley, "Security, People Smuggling and Australia's New Afghan Refugees," *Australian Journal of International Affairs* 55, no. 3 (2001): 352.
9. Bob Birrell, "Why Howard Was Right," *The Age*, 7 September 2001; online: <http://theage.com.au/news/state/ 2001/09/07/FFXKQNWF9RC.htm l> (date accessed: 7 September 2001). See also David Marr, "Still Adrift," *Sydney Morning Herald*, 22 September 2001; online: <http://www.smh.com.au/news/0109/22/review/review3.html> (date accessed: 22 September 2001).
10. For example, outspoken Liberal Party senator Ross Lightfoot, in a letter to the editor of Australia's national newspaper, described asylum seekers as "criminals" and argued that may be carrying "communicable, pandemic, epidemic or parasitic diseases" and that their cultural differences and numbers threatened Australian security. He recommended compulsory repatriation. See Ross Lightfoot, *The Australian*, 24 November 1999, letters.
11. See an image of the poster online at <http://members.iinet.net.au/~postpub/8ball/data 11meateater/Howard_comp.html>.
12. Andrew Markus, *Race: John Howard and the Remaking of Australia* (Crows Nest: Allen & Unwin, 2001) 87.
13. The Coalition is the Liberal Party of Australia and the National Party, the latter a small, rurally based party.
14. Markus, *Race*, 100–1.
15. *Ibid.*, 42.
16. Labor remains deeply divided by mandatory detention in the wake of its disastrous electoral defeat. However, as of early February 2002, there are indications that Labor may abandon its support for the policy though no firm policy is yet being articulated.
17. As recently as late October 2001, the Inspector of Custodial Services in Western Australia, Professor Richard Harding, described immigration detention centres in Australia as "unacceptably overcrowded" and as providing "disgracefully inadequate medical and dental services." See *The Age*, "Detention Centres a Disgrace: Watchdog," 30 October 2001; online: <http://www.theage.com.au/news/national/2001/10/30/FFX95HJJ ETC.html> (date accessed: 30 October 2001).
18. The UN argues there are 3.5 million Afghan refugees in Pakistan, Iran, and India, while in late August 2001 it was estimated that six thousand asylum seekers, mainly Afghans and Iraqis, might reach Australian shores before the end of the year. There were 13,733 places in the refugee and special humanitarian in 2000–1 of which 5,700 went to "illegal arrivals." Of the offshore places granted, 3,997 went to refugees and 3,116 to "special humanitarian grants." Germany accepted 95,110 refugees in 1999 and Britain 71,150. Australia is not in the top ten countries for the number of asylum seekers arriving without authorization. See Andrew Clennell, "Our Refugee 'Crisis' Is a Drop in the Ocean," *Sydney Morning Herald*, 30 August

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

2001; online: <http://www. smh.com.au/news/0108/30/national/national8.html> (dated accessed: 30 August 2001).
19. David Walker, *Anxious Nation: Australia and the Rise of Asia 1850–1939* (Brisbane: University of Queensland Press, 1999).
20. Walker, *Anxious Nation*, 7.
21. Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Annandale: Pluto, 1998), 221.
22. See <http://www.panmacmillan.com.au/johnmarsden/>.
23. Meaghan Morris, "White Panic or Mad Max and the Sublime," in *Trajectories: Inter-Asia Cultural Studies*, ed. Kuan-Hsing Chen (London: Routledge, 1998), 255.
24. Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (Sydney: UNSW Press, 2001) 156.
25. Caroline Graydon, "Why New Refugee Laws Set a Bad Precedent," *Sydney Morning Herald*, 24 November 1999; online: <http://www.smh.com.au/news/ 9911/24/features/features4.html> (date accessed: 24 November 1999).
26. Sharon Pickering, "Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia," *Journal of Refugee Studies* 14, no. 2 (2001): 172.
27. Tom Allard, "Reith Links Boat People, Terror Fight," *Sydney Morning Herald*, 14 September 2001.
28. Australian Associated Press, "Minister Claims Link between Boatpeople and Terrorists," *Sydney Morning Herald*, 18 September 2001; online: <http://www.smh.com.au/news/0109/18/national/national100.ht ml> (date accessed: 18 September 2001).
29. Paul Sheehan, "Migrant Failure Stories Inspired Passions over the Tampa," *Sydney Morning Herald*, 5 September 2001; online: <http://www.smh.com.au/news/0109/05/opinion/opinion1.html> (date accessed: 5 September 2001).
30. See Nadia Jamal, "Incensed at Blaming Lebanese Muslims for the Woes of World," *Sydney Morning Herald*, 6 September 2001; online: <http://www.smh.com.au/news/0109/06/opinion/opinion1.html> (date accessed: 6 September 2001).
31. Linda Green, "Fear as a Way of Life," *Cultural Anthropology* 9, no. 2 (1994): 230.
32. Jennifer Hewett, "Skipper Howard All at Sea without a Moral Compass," *Sydney Morning Herald*, 31 August 2001; online: <http://www.smh.com.au/news/0108/31/opinion/opinion5 .html> (date accessed: 31 August 2001).
33. McKenzie Wark, "Margot Kingston's Webdiary," *Sydney Morning Herald*, 31 August 2001; online: <http://www.smh.com.au/news/webdiary/0109/01/A59804-2001Aug 31.html> (date accessed: 31 August 2001).
34. See Markus, *Race*, 227.
35. Mares, *Borderline*, 68.
36. See Stephen Fitzgerald, *Is Australia an Asian Country*? *Can Australia Survive in an East Asian Future* (St. Leonards: Allen & Unwin 1997).
37. Burke, "Australia's Asian Crisis," 7.
38. Birrell, "Why Howard Was Right."
39. Burke, "Australia's Asian Crisis," 3.
40. *Ibid.*, 4.
41. Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993) 12–15.
42. Mares, *Borderline*, 87–88.
43. *Ibid.*, 32.
44. "Of Jails, Spies and Chemical Weapons" *The Guardian*, 4 August 1999; online: <http://www.cpa.org.au/garchve1/965 wack.htm> (date accessed October 4 2001).
45. See Mares, *Borderline*, 69–72.
46. Bernard Lagan, "The More Punishment the Better to Fill George Wackenhut's Coffers," *Sydney Morning Herald*, 12 December 2000.
47. ACM's operating revenues were A$191million in 2000, A$102 million in 1999, andA $76 million in 1998.
48. Mark Colvin, "Rise in Asylum Seekers Increase Detention Profits," *PM*, 27 July 2001; online: <http://www.abc.net.au/pm/s336839.htm> (date accessed: October 4 2001).
49. Mares, *Borderline*, 77.
50. Mark Colvin, "Govt to Tender Out Detention Centre Contract," *PM*, 25 May 2001; online: <http://www.abc.net.au/pm/s302750.htm> (date accessed: 4 October 2001).
51. Agence France Presse, "Watchdog Slams Australian Immigrant Detention Centres," 5 March 2001; online: UNHCR Homepage <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=search> (date accessed: 4 October 2001).
52. See Mares, *Borderline*, 3; UNHCR 2001.
53. *BBC News Online: World: Asia-Pacific*, "Australian PM Firm on Asylum Rules," 19 June 2001; online: <http://news.bbc.co.uk/low/english/world.asia-pacific/newsid_1396000/1396254.stm> (date accessed: 4 October 2001).
54. Lagan, "The More Punishment the Better to Fill George Wackenhut's Coffers."
55. Mares, *Borderline*, 61.
56. *Ibid.*, 74–75.
57. *Ibid.*
58. *The Age*, "Detention Centres a Disgrace: Watchdog," 30 October 2001; online: <http://www.theage.com.au/news/ national/2001/10/30/FFX95HJ JETC.html> (date accessed: 30 October 2001).
59. Mares, *Borderline*, 44–45.
60. Lagan, "The more punishment the better to fill George Wackenhut's coffers."
61. Mares, *Borderline*, 60–61.
62. *Ibid.*, 185.
63. *Ibid.*, 35.
64. Gerard Henderson, "How Foreign Policy turned on Howard," *Sydney Morning Herald*, 4 September 2001; online: <http://www.smh.com.au/news/0109/04/opinion/opinion1 .html (date accessed: 4 September 2001).
65. Sarah Crichton, "Australia Has Right to Board Vessel," *Sydney Morning Herald*, 30 August 2001: online: <http://smh.com.au/news/0108/30/national/national5. html> (date accessed: 30 August 2001).
66. Simon Evans, "A Legal Expert's Perspective," *Sydney Morning Herald*, 29 August 2001; online: <http://www.smh.com.au/

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

news/0108/29/national/national400.ht ml> (date accessed: 29 August 2001).

67. *Ibid.*
68. Keith Loveard and Linda Doherty, "PM Unruffled as Megawati Fails to Call Back," *Sydney Morning Herald*, 1 September 2001; online: <http://www.smh.com.au/news/0109/01/national/national3.html> (date accessed: 1 September 2001). See also "Words That Wounded," *Sydney Morning Herald*, 7 February 2002; online: <http://www.smh.com.au/news/0202/07/national/graphic1.html> (date accessed: 7 February 2002).
69. Lindsay Murdoch and Andrew Clennell, "Politics behind Tampa Crisis, Says Indonesia," *Sydney Morning Herald*, 6 September 2001; online: <http://www.smh.com.au/news/0109/06/national/national11.html> (date accessed: 6 September 2001).
70. Simon Mann, "Howard's Stance Absurd, Says Norway," *Sydney Morning Herald*, 30 August 2001; online: <http://www.smh. com.au/news/0108/30/national/national3.html> (date accessed: 30 August 2001).
71. Tom Allard and Sarah Crichton, "Share Refugees, Says UN," *Sydney Morning Herald*, 1 September 2001; online: <http://www.smh.com.au/news/0109/01/national/national1.html> (date accessed: 1 September 2001). See also Patrick Barkham, "UN Attacks Canberra Blockade," *The Guardian*, 14 September 2001; online: <http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763 ,551784,00.html> (date accessed: 14 September 2001).
72. David Marr and Marian Wilkinson, "The Pacific Solution," *Sydney Morning Herald*, 22 October 2001; online: <http://www. smh.com.au/news/0110/22/national/national15.html> (date accessed: 22 October 2001).
73. Hamish McDonald, "Canberra Bullyboys Lack Intelligence to Stem the Tide," *Sydney Morning Herald*, 4 September 2001; online: <http://smh.com.au/news/0109/04/opinion/opinion2.html> (date accessed: 4 September 2001).
74. *Sydney Morning Herald*, "Nauru Clinches Deal to Take Boatpeople," 10 September 2001; online: <http://www.smh.com.au/news/0109/10/national/national109.ht ml> (date accessed: 10 September 2001). See also *Sydney Morning Herald*, "Nauru's $20m Australian Pay-off for Taking Refugees," 11 September 2001; online: <http://www.smh.com.au/news/0109/11/national/national5.html> (date accessed: 11 September 2001).
75. *Sydney Morning Herald*, "Government to Appeal Tampa ruling," 11 September 2001; online: <http://www.smh.com.au/news/0109/11/national/national/104.html> (date accessed: 11 September 2001).
76. Margot Kingston, "Beazley Backs Howard's Tough Line on Boatpeople," *Sydney Morning Herald*, 18 September 2001; online: <http://www.smh.com.au/news/0109/18/national/national103.ht ml> (date accessed: 18 September 2001).
77. *Border Protection (Validation and Enforcement Powers 2001) Bill 2001*, Parliament of Commonwealth of Australia, Explanatory Memorandum, 3; online: <http://www.liberal.org.au/border/BPVEEM.pdf> (date accessed: 11 November 2001).
78. Margot Kingston, "Howard's Australia," *Sydney Morning Herald*, 28 October 2001; online: <http://www.smh.com.au/news/webdiary/2001/10/28/FFXX3RN OBTC.html> (date accessed 28 October 2001).
79. See, for example, Michelle Grattan, "Reprehensible Use of Boat People to Sink Labor," *Sydney Morning Herald*, 6 November 2001; online: <http://www.smh.com.au/ballot01/0111/06.ballot2.html> (date accessed: 6 November 2001).
80. Mares, *Borderline*, 160.
81. Allard and Crichton, "Share Refugees, Says UN."
82. Clennell, "Our Refugee 'Crisis' Is a Drop in the Ocean."

Dr Simon Philpott is Lecturer in International Relations at the University of Newcastle, England. He is the author of Rethinking Indonesia: Postcolonial Theory, Authoritarianism and Identity.

© Simon Philpott, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

Book Review

The Security of Freedom: Essays on Canada's Anti-Terrorism Bill

Ronald J. Daniels, Patrick Macklem, and Kent Roach
Toronto: University of Toronto Press, 2001. 499 pp.

The first and largest thing to say about this book is that its very existence is a remarkable academic feat. The organization of the conference on which it was based and the subsequent emergence of the book together took no more than three weeks. The editors had to move fast: the bill that they planned to place under close academic scrutiny had been introduced in the aftermath of the events of 11 September and was going through the legislative process at rapid speed. But their own expedition meant that the book was available to make an impact before its discussion of the issues had been rendered irrelevant by events.

Rushed though parts of the volume inevitably are, the overall effect is of a high quality piece of work. There are eight parts (comprising no fewer than twenty-five essays) dealing with the anti-terrorism bill from numerous perspectives, ranging from the theoretical (an excellent first part on "the security of freedom") through the political ("the charter and democratic accountability") via excursions into the criminal law, criminal justice, the financing of terrorism, and information gathering into a final couple of parts on, respectively, "international dimensions of the response to terrorism" and "administering security in a multicultural society."

The four essays in this last section on multiculturalism are probably of most direct interest to readers of this journal. Lorne Sossin's study of the intersection of administrative law with the anti-terrorism bill is well researched and detailed. On the other hand, Ed Morgan's short contribution ("A Thousand and One Rights") pursues an analogy with *A Thousand and One Nights* that probably sounded a lot better from the rostrum than it reads in the isolation of one's study months after the event. Audrey Macklin's well-written and imaginative piece on "Borderline Security" develops an important point about how the "waning" of "geo-political borders" is being matched by a "displacement of their functions to other socio-legal processes and phenomena" with one of the consequences (reflected in the anti-terrorism bill) being greatly increased opportunities for "heightened surveillance, harassment, ethnic profiling, and the like." Sujit Choudhry's study of ethnic and racial profiling in relation to section 15 of the Charter is well argued and serves to remind the reader (not necessarily intentionally) of the openness of Canadian constitutional adjudication and of the consequent choice that the judges will have when the legal challenges to profiling come before the courts. The piece ends with the "provocative" proposition that *everyone* should be subjected "to intrusive investigation both by airport security personnel and immigration officers" since this would "comport entirely with the equality guarantee." But equality (whether of misery or of joy) is surely not the sole criterion by which to judge policy making and the content of legislation.

The rest of the book also provides much of general interest to the concerned public-minded lawyer. Of exceptional interest are the comments from the Department of Justice with which the volume concludes. The immediacy of these contributions, reproduced apparently verbatim here, gives the reader a strong sense of the intensity of the moment out of which this book grew. The events of 11 September 2001 continue to reverberate around the democratic world, providing a purported basis for the reconstruction of the relationship between the individual and the state not only in Canada but also in the United Kingdom, the United States, and the European Union. Beyond the liberal democratic West, the leaders of many nations have fastened upon the threat of terrorism as an excuse for the extension of their personal power. Once not so long ago it was the "red scare" that posed the greatest threat to civil liberties and human rights. Now, after a brief liberal hiatus in the 1990s it is the seemingly unending "war against terrorism" that poses the latest, and perhaps greatest, challenge to liberal institutions.

The importance of this book lies in its attempt to engage head on with these fundamental issues. As Dean Daniels puts it in his introduction, these "essays … contain important contributions to the very necessary democratic debate"

© Conor Gearty, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.

to be had about this Bill, with Canada's "robust democratic process" being one that "honours our free and democratic society and distinguishes it from those who would use violence and weapons, not essays and speeches, for political ends." The interesting question that the book can't answer is whether it did make an impact on the legislative events that followed it, in other words whether the combined power of the conference and these published essays was sufficient to sway decision makers in any way, or at least to inhibit their subsequent exercise of powers under the Act. A society that claims to be open and democratic must be one in which the government of the day not only boasts about the fact that argument takes place but is also willing to respond flexibly when it hears points to which it can give no morally adequate reply.

Conor Gearty is professor of human rights law at King's College, London.

© Conor Gearty, 2002. This open-access work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License, which permits use, reproduction and distribution in any medium for non-commercial purposes, provided the original author(s) are credited and the original publication in Refuge: Canada's Journal on Refugees is cited.