CANADA'S PERIODICAL ON REFUGEES

REFUGE

Vol. 18 • No. 4 November 1999

DIVERSE PERSPECTIVES ON REFUGEE ISSUES

Racism and Canadian Refugee Policy

Sharryn Aiken

Introduction

This issue of Refuge provides a space for both participants and faculty of the 1999 Summer Course on Refugee Issues to share ideas on the broad themes related to the seven day intensive programme. Now in its 8th year, the Summer Course hosted a remarkably diverse group of participants and faculty from around the world. In addition to Canada, participants came from South Africa, Uganda, India, Australia, Belgium, Portugal, Germany, the United Kingdom as well as the United States and reflected the full spectrum of institutional, academic, legal and non-governmental sectors. The papers included in this special issue reflect the diversity that is intrinsic to the course itself.

Michael Bossin identifies the current issues or trends affecting refugees around the world and highlights, in particular, the increasingly restrictive responses by governments in both the North and South. Jason King provides an in depth case study of Ireland's policies, tracing the historical transformation of a nation best known for its out-migration to one that receives growing numbers of refugees. King demonstrates how an emergent discourse of Social Darwinism and competition for limited resources has manipulated public opinion about asylum seekers and refugees. In "Notes from the Field in Kigoma" Paul Spiegel and Mani Sheik contribute a public health analysis of the conditions in refugee and displaced persons camps in the "post-emergency phase." Spiegel and Sheik aim to ensure that programs implemented by NGOs in the field are more effective in improving the quality of life and addressing the "post emergency" needs of camp residents. Lúcio Sousa provides a short note on the evolution of refugee policies in Portugal. From the perspective of medical anthropology, David Lumsden considers the dimensions of "exile." Lumsden explores the current uses and misuses of the diagnosis of "Post-traumatic Stress Disorder" and urges us to avoid the presumption of pathology for populations in exile. The last word in this issue has been reserved for Iris Almeida, who offers her reflections on the newly minted Statute of the International Criminal Court as a tool for enforcing international justice.

CONTENTS

CANADA'S PERIODICAL ON REFUGEES
REFUGE

Centre for Refugee Studies
Suite 322, York Lanes
York University
4700 Keele Street, Toronto
Ontario, Canada M3J 1P3
Phone: (416) 736-5663
Fax: (416) 736-5837
Email: refuge@yorku.ca

Vol. 18 • No. 4
November 1999

Editor
MICHAEL LANPHIER

Guest Editor
SHARRYN AIKEN

Technical Editor
ISRAEL DORON

Assistant Editor
JENNIFER MILLS

French Translation
PAUL LAURENDEAU

Refuge is dedicated to the encouragement of assistance to refugees by providing a forum for sharing information and opinion on Canadian and international issues pertaining to refugees. *Refuge* was founded in 1981.

It is published six times a year by the Centre for Refugee Studies, York University, Canada. *Refuge* is a non-profit, independent periodical supported by private donations and by subscriptions. **It is a forum for discussion, and the views expressed do not necessarily reflect those of its funders or staff.**

Current subscription rates for one year (six issues) are: Canada Cdn.$50; all other countries U.S. $60. (Cheques must be drawn on a Canadian or a U.S. bank.) Current volume single issues are available at $10 per copy.

Please enclose your purchase order or payment.

ISSN 0229-5113

Racism and Canadian Refugee Policy

One topic which surfaced in a number of sessions during the Summer Course was the question of racism. Guest faculty member Rudhramoorthy Cheran spoke of the relationship between "race," labour and migration and the extent to which systemic racism continues to inform exclusionary refugee policies, particularly in settler societies of the North. In this regard, Anthony Richmond poses the following questions:

> ...are we creating a system of global apartheid based on discrimination against migrants and refugees from poorer developing countries? Or are we simply acting rationally to protect the integrity of our social systems and harmonize our immigration policies? Will the emerging new world order ensure justice and equality of treatment for immigrants and refugees, or will it create a system that privileges some and deprives others of their rights? [1]

My contribution to this issue of Refuge represents an attempt to elaborate on Professor Richmond's concerns in the context of contemporary Canadian refugee law, policy and practice. After a brief review of the historical record, the focus of this inquiry will be the defining elements of the refugee program, the impact of selected Supreme Court of Canada decisions in the area of refugee law as well as the current agenda for legislative and policy reform.

Canada's Historical Record

One of the central myths of our national identity is that Canada is an egalitarian, pluralist society free from the scourge of racism that exists in the United States and throughout most Western societies. Indeed, the Commission on Systemic Racism in the Ontario Criminal Justice System noted that racism has "a long history in Canada" and remains a defining feature of Canadian society.[2] While the primary focus of the provincial study was the criminal justice system, the commissioners emphasized that "[r]acism has shaped immigration to this country and settlement within it..."[3] The Immigration Act of 1910 gave Cabinet wide discretion to exclude prospective immigrants on the basis of "race" and circumscribed the power of the courts to review any decision of an immigration officer (including decisions concerning which "races" could be deemed genetically unsuitable and therefore excluded) by a privative clause.[4] Among measures adopted to deter immigrants from Asia and other "alien" parts of the world in the early part of this century, the federal government imposed a "continuous journey rule" which permitted entry to only those persons who arrived in Canada from "one continuous journey" and "through ticket" from their country of origin.[5] The explicit racism of the government's immigration policy was reinforced in the reasons provided by a judge of the British Columbia Court of Appeal when he dismissed a challenge of the continuous journey rule:

> Better that peoples of non-assimilative- and by nature properly non-assimilative-race should not come to Canada, but rather, that they should remain of residence in their country of origin and do their share, as they have in the past, in the preservation and development of the Empire.[6]

A combination of law and policy aimed at sustaining the British character of Canada and excluding those who were deemed incapable of contributing to the government's assimilationist project of nation building was responsible for a relatively static population of racialized groups in Canada through to the 1950s. Census figures indicate that prior to 1961, only 3 % of immigrants were persons of colour.[7]

The Contemporary Context

Canada became a signatory to the United Nations Convention relating to the Status of Refugees in 1969. In 1972 the government welcomed Ugandan refugees of Asian ancestry fleeing the barbarism of Idi Amin and the next year, thousands of Chileans who sought refuge after Pinochet's coup. In 1978 a new Immigration Act came into force, described by Kelly and Trebilcock as the beginning of a new era of Canadian immigration law.[8] For the first time

the objectives of Canada's immigration policy were explicitly spelled out. These included the attainment of Canada's demographic goals, promoting family reunification, upholding Canada's humanitarian tradition with regard to refugees and displaced persons and fostering the development of a strong economy. Enshrined in the preamble, the Act recognized the need to, "...ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex." [9]

The new Act created four classes of immigrants: refugees, family class, assisted relatives and independent immigrants, each of which would be selected separately. The incorporation of key provisions of the Refugee Convention directly into the Immigration Act was an important milestone.[10] The elimination of the language of discrimination and racism that had characterized Canada's immigration law since the first immigration bill was passed in 1869,[11] together with the express commitment to values of universalism and equality appeared to represent a paradigmatic shift. Yet despite these lofty ideals, systemic racism persisted in Canadian refugee policy and practice. As suggested by Simmons, the government merely shifted from a neo-colonial, racist immigration strategy to one which could be described as "neo-racist" - one which "reveals significant racist influences and outcomes within a framework that claims to be entirely non-racist."[12]

Since the overhaul of Canada's immigration program in 1978, Canada opened its doors to thousands of racialized refugees from "non-traditional" source countries in Africa, Asia and the Americas. In 1979, Canada played a leading role in resettling tens of thousands of Vietnamese refugees in the aftermath of a decades-long war. As a result of these efforts the United Nations awarded the people of Canada the prestigious Nansen Medal, "in recognition of their major and substantial contribution to the cause of refugees." However, Canada's record of compliance with international human rights standards and the Refugee Convention in particular has been uneven. The government's responsiveness to refugee crises around the world has frequently been informed by geo-political considerations and racism rather than respect for international legal obligations and the spirit of humanitarianism which the Immigration Act allegedly enshrines.

Refugee Resettlement

While human rights tragedies were unfolding in the apartheid regime of South Africa, in Sudan, Ethiopia, the Great Lakes region and more recently, Sierra Leone, Canada has resettled no more than 1,000 refugees from all of Africa in any year since the 1980s. The distribution of Canadian visa posts around the world and the allocation of resources to these offices continue to reinforce these trends. In 1998 there were only four immigration offices to service all of sub-Saharan Africa.[13]

The current rules for selecting refugees from abroad make use of "establishment criteria" as defined in the points system for selecting skilled workers. In addition to demonstrating that they are at risk of persecution as a convention refugee or are facing a refugee-like situation, applicants must convince a visa officer that they will be able to adapt to life in Canada and will be able to successfully establish themselves within one year of arrival.[14] Subjective and highly discretionary considerations with regard to the refugee's "personal suitability" frequently supplant the assessment of the refugee's need for protection. Despite widespread criticism of the government's refugee resettlement program,[15] the government is committed to maintaining the establishment criteria in overseas selection.[16] Officials suggest that a more "flexible" approach may be adopted with refugees needing to demonstrate the potential to establish within three years rather than the current one year.[17] Nor does there appear to be any intention of eliminating the nine hundred and seventy five dollar "Right of Landing Fee" imposed on all adult refugees and immigrants since 1995. The fee, resonant of the Chinese head tax imposed in the earlier part of this century, has been defended by the government as "a small price to pay to come to the best country in the world" and necessary to offset at least some of the costs of settlement programs (arguably, the success of the government's deficit reduction strategy makes this argument less persuasive in 1999). The government claims that the fee is not discriminatory because it applies to everyone. Yet given the disparities between Canadian currency and currencies in the South as well as between the rich and the poor in most countries of the world, the fee amounts to a regressive flat tax that violates fiscal fairness.[18] While statistical data is unavailable, there is anecdotal evidence to support the contention the among those disproportionately impacted by this modern day head tax are racialized refugees from the South, where the fee very often represents up to three years salary.[19]

For 2000 the government is projecting that refugees will represent approximately 12 per cent of total immigration, consisting of 7,300 government assisted and 2,800 to 4,000 privately sponsored refugees as well as between 10,000 and 15,000 refugees who will arrive in Canada on their own and successfully proceed through the in-land determination system.[20] The current system for selecting refugees from abroad has resulted in systemic discrimination for poor refugees from poor countries (a population that is largely, if not exclusively, racialized). It is in this context that Canadian visa officers routinely reject urgent and deserving protection cases referred by legal officers from the United Nations High Commissioner for Refugees. It deserves mention in this regard that neither the Canadian Human Rights Act nor the Charter of Rights and Freedoms apply to visa officer decisions outside of Canada.[21] In the absence of any independent monitoring mechanism, the Department of Citizenship and Immigration's most significant sphere of activity is almost immune from scrutiny. The Department is the only Canadian authority that has the power of arrest without the concomitant

safeguard of civilian oversight or recourse to Charter remedies. Complaints about racist treatment by immigration officers are supposed to be addressed by the very department that is the subject of the complaint.[22]

The Supreme Court and Refugees in Canada

In 1985 the Supreme Court released its decision in *Re Singh and Minister of Employment and Immigration and 6 other appeals*,[23] holding that where a serious issue of credibility is involved, fundamental justice required that credibility be determined on the basis of an oral hearing. Wilson J. found that the system for determining refugee status inside Canada failed to meet the procedural guarantees of section 7 of the Charter of Rights and Freedoms. Prior to *Singh* refugee claimants did not have an oral hearing or an opportunity to address the evidence the government might have with respect to their claim. Instead they recounted the events that led to their departure from their country of origin in an examination under oath with an immigration officer who then forwarded the transcript of that examination to the "Refugee Status Advisory Committee", which made a decision on the claim without ever hearing from the claimant. Three of the six justices in the Supreme Court's ruling in *Singh* confirmed that everyone present in Canada as well as anyone seeking admission at a port of entry was entitled to protection of the Charter.[24] Refugee advocates and lawyers celebrated the decision and each year continue to commemorate the date of the decision's release in April as "Refugee Rights Day" across the country. In the short term, the implications of Singh were quite dramatic. The government had to spend millions of dollars to set up a refugee determination system that included procedures for a full oral hearing and the right to counsel. Pursuant to Bill C-55, which established the Immigration and Refugee Board, refugee claimants inside Canada were now afforded a "quality" status determination by an independent, quasi-judicial tribunal. Developments in the wake of Singh, however, clearly demonstrate the extent to which legal victories so easily slide into irrelevance. In the aftermath of the decision the government took swift steps to limit access to the refugee determination system by limiting the appeal rights of claimants in Canada, and increasing measures of interdiction to ensure that fewer refugees actually reached Canada in the first place. Introduced in 1987, Bill C-84, known as the Deterrents and Detention Act, authorized the government to turn away ships in the internal waters of Canada, the territorial seas or twelve miles beyond the outer limit of the territorial waters when there are "reasonable grounds" for believing the vessels are transporting anyone in contravention of the Act. Another provision of the Bill made it an offence to assist anyone to come to Canada who was not in possession of proper travel documents, regardless of whether they were bona fide refugee. Transportation companies were subject to fines (or technically levied administration fees) if they brought any improperly documented passenger into Canada. Since 1990 the government has maintained an "enhanced control strategy", consisting of a network of immigration control officers stationed around the world to prevent migrants without proper documents from reaching Canada.

In 1992 the Supreme Court narrowed the application of *Singh* in the case of a permanent resident seeking to challenge a provision which denied an appeal on "humanitarian and compassionate grounds" to residents who were ordered deported for organized criminal activity. Sopinka J. held that "the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[25] A year later, in *Dehghani v. Canada*, the Supreme Court extended the citizen/non-citizen distinction in holding that the questioning of a refugee claimant in a "secondary examination" at the border was equivalent to the routine procedures to which any non-citizen seeking entry was subject. Consequently the implied compulsion and questioning did not constitute detention within the meaning of the Charter and did not attract any procedural rights to due process or the right to counsel.[26] As a result of this ruling, statements made by refugee claimants at the port of entry in the absence of counsel were increasingly introduced in the refugee hearing. For some decision makers, these "prior inconsistent statements" were considered compelling proof of a claimant's lack of credibility, regardless of the circumstances under which the evidence was obtained and even in the face of indications that the claimant had misunderstood questions posed by the immigration officer. In the same year amendments to the Immigration Act (Bill C-86) were introduced which centred on abuses to the system by outsiders. Included in the package of amendments was a provision which required convention refugees to produce "satisfactory" identity documents in order to be landed.[27]

Prior to the passage of Bill C-86, the Immigration Act exempted convention refugees from the requirement to provide identity documents. Among those disproportionately affected by the new requirement have been Somali refugees. Since the collapse in 1991 of the Siyad Barre regime in Somalia, there has been no central government and thus no institutions to issue identity documents. The last legal Somali passports were issued in 1989 and by 1994 all of the valid Somali passports had expired. Even before the collapse of the government, however, a large majority of the population did not register their births, marriages or divorces, a cultural reality that is shared by many other countries, especially in Africa.[28] Three years after Bill C-86 was implemented, in a professed effort to address community concerns, the government set up the "Undocumented Convention Refugee in Canada Class", imposing a mandatory five year waiting period on all Somali refugees seeking permanent residence. The five year period is calculated from the date of receiving a positive decision from the Immigration and Refugee Board, with the result that the total period of time that "undocumented" refugees have to wait prior to landing is at least seven years. There are

currently some 13,000 refugees, primarily Somali women and children and a comparatively smaller group of Afghans, in legal limbo as a direct result of the identity document requirement.[29] While protected from refoulement, refugees without landed status are unable to be reunited with family members whom they would have otherwise been able to sponsor, or even leave the country for the purpose of a temporary visit in another country. Due to the age restrictions of the family class sponsorship program (subject to a few, narrow exceptions, dependent children can only be sponsored when they are under 19 years of age), parents who may have been forced to leave children behind in refugee camps in an effort to secure safety for themselves and their family in Canada, will never be able to sponsor any child who was over the age of eleven years when left behind. In addition refugees in the "Undocumented Refugees in Canada Class" are denied access to post-secondary education, professional training programs, bank loans for small business and in many cases even employment. These restrictions have produced the social marginalization of a whole community of refugees. Both the United Nations High Commissioner for Refugees and the United Nations Committee on Economic, Social and Cultural Rights have expressed concern about the plight of thousands of convention refugees in Canada who have been denied permanent residence status. [30]

The government has justified section 46.04(8) and later, the Undocumented Convention Refugee in Canada Class, using the rhetoric of maintaining the safety of Canadian society, suggesting that without identity documents, there is no way to confirm whether or not the refugee is a war criminal or a terrorist. Former Citizenship and Immigration Minister Lucienne Robillard stated somewhat equivocally that these measures are about "balancing risk to Canada against compassion." Yet there is no evidence of widespread danger. The refugee hearing itself provides an opportunity for extensive examination of identity issues. Refugee applications are routinely turned down if it is found that the individual is not who she or he claims to be. Prior to landing, every refugee is routinely subjected to a security screening process conducted by the Canadian Security Intelligence Service. For the few who have managed to obtain refugee status on the basis of misrepresentation or concealment of any material fact, proceedings can be initiated against the particular individual pursuant to existing provisions in the Immigration Act.

In 1998 the Supreme Court of Canada had another opportunity to consider the question of refugee rights, this time in the context of the interpretation of the "exclusion clause" set out in Article 1F(c) of the Refugee Convention. Mr. Pushpanathan was a Sri Lankan national who had been convicted in Canada of conspiracy to traffic in a narcotic. The government sought to deny him refugee protection on the basis that drug trafficking was against the "purposes and principles of the United Nations" and therefore within the ambit of the grounds set out in the Refugee Convention for exclusion. The Court held that even though international drug trafficking was an extremely serious problem that the United Nations had taken extraordinary measures to eradicate, in the absence of clear indications that the international community recognized drug trafficking as a sufficiently serious and sustained violation of human rights as to amount to persecution, individuals should not be deprived of the essential protections contained in the Convention for having committed those acts. Bastarache J. emphasized that the "overarching and clear human rights object and purpose" was the background against which interpretation of individual provisions of the Refugee Convention should take place.[31]

The *Pushpanathan* case is a good example of a how a seemingly progressive decision can be rendered relatively meaningless as a result of the broader political context. While Mr. Pushpanathan's case was wending its way to the Supreme Court, rules implemented pursuant to Bill C-86 established a system of refugee eligibility determination which gave immigration officers the power to exclude refugee claimants based on recognition in another country and broadened grounds of criminality accompanied by certification as a "public danger." In addition, claimants who came to Canada by way of a prescribed "safe third country" were to be inadmissible, a measure that would have a disproportionate impact on non-European refugees who are subject to Canadian visa restrictions and the lack of direct routes to Canada (although no safe countries have been designated to date). What the Court afforded in terms of procedural protection to refugee claimants at the stage of the status determination hearing – the right not to be excluded from consideration as a refugee, once determined eligible by an immigration officer to make a refugee claim, had already been addressed at the front end of the process. Section 46.01(1)(e)(i) of the Immigration Act authorizes immigration officers to find any refugee claimant ineligible to claim refugee status based on being criminally inadmissible and includes within its ambit persons who have been convicted either in Canada or another country of an offence that is punishable by a term of imprisonment of ten years or more and are designated by the Minister as a "public danger." Should Mr. Pushpanathan attempt to seek asylum in Canada today, it is likely that an immigration officer would deny him access to the refugee determination system. There would be no appeal from that decision - just judicial review on narrow, restrictive grounds. Even if an individual could establish that there were substantial grounds for believing that they were at risk of torture if returned to their country of origin (the test set out in the United Nations Convention against Torture), the government may act to deport them without access to a refugee hearing. In the past few years the deportation of persons at risk of torture and other serious human rights violations has become increasingly common.[32] The African Canadian Legal Clinic has documented that the common denominator among persons who have been subject to removal based on a

public danger opinion is that they are members of racialized groups.[33]

The Current Agenda for Legislative Reform

"New Directions", the government's white paper released in January 1999, reinforces and extends the government's apparent preoccupation with security. Apart from the modest proposal to reduce the waiting period from five to three years for the Undocumented Convention Refugee in Canada Class, a series of new measures have been recommended aimed at addressing the "problem" of undocumented refugees. These measures include enhanced interdiction to intercept "improperly documented" people before they arrive in Canada, increased disembarkation checks as passengers leave aircraft, collaboration with other countries to develop a system of data collection on illegal migration and the prospect of detention for refugee claimants who refuse to "cooperate" in establishing their identity. In the introduction to this section of the white paper the government describes the current situation:

> In reaffirming its commitment to an open immigration system and to the protection of refugees, the government wishes to ensure a sound immigration and refugee system that is not open to abuse.
>
> Canada, together with other major Western industrialized countries, has committed to developing a multi-disciplinary and comprehensive strategy to address the common problem of illegal migration.[34]

What seems clear from the foregoing is that despite a stated commitment to refugee protection, the government's agenda for reform is predicated on stereotypes of refugees as criminals and threats to the security of Canada.[35] More specifically, the proposals reinforce the myth that refugee claimants who arrive with forged documents (often the only feasible way for an individual to escape a situation of danger and travel to a country of asylum) or "unsatisfactory" documents (i.e.. that do not conform to Western standards), are "queue jumpers" and not genuine refugees.[36] Apart from a refugee intake that has remained relatively constant over the past decade, representing between nine and twelve percent of the country's overall immigration levels in any given year,[37] there is no evidence that Canada has an illegal migration problem that could possibly account for the measures suggested in the white paper. The arrival this summer of 590 Chinese migrants on boats from Fujian province sparked a national debate reminiscent of the controversy surrounding the arrival in 1986 of a group of Tamils from Sri Lanka off the coast of Newfoundland and then, the following summer, a boatload of refugee claimants from India.[38] Back in 1987 Parliament had been called into a special emergency session to introduce the Detention and Deterrents Act. In an address to the Canadian Club in Vancouver in September this year, Minister Caplan acknowledged that she shared the frustrations of many Canadians who "believe that the migrants are not genuine refugees but queue-jumpers."[39] She also stated:

> Our shared sense of compassion and fairness has been enshrined in our Constitution. It is embodied in our Charter of Rights and Freedoms, in our immigration and refugee laws, and in the legal judgments that serve and protect everyone in Canada.[40]

In her speech the Minister made many references to Canadian's generosity, citing the recent case of the Kosovar refugees (in which the government undertook an emergency airlift of approximately 7,000 ethnic Albanians and subsequently provided returnees with generous repatriation allowances). However, the solution she proposed to address the problem of human smuggling was to strengthen worldwide intelligence and tracking systems. In this vein she noted that last year Canadian immigration control officers overseas successfully prevented 6,300 people lacking proper documentation from getting to Canada; "but we can do better." In endorsing these measures, there has been no reference to the need for adequate safeguards to ensure that people fleeing persecution will be assured their right to seek asylum. As outlined above, Canada already operates an aggressive interdiction program that subjects Canadian citizens and residents, as well as refugees and visitors, to degrading treatment on their way to Canada on the basis of their colour or national origin.[41] With the imposition of visa requirements[42] and carrier sanctions to the stationing of immigration officers abroad, vast numbers of bona fide refugees are being caught up in the web of immigration control with devastating results.[43] Canadian law, policy and practice with regard to refugees represent a classic example of systemic racism. By using the logic of sanitary coding (the law is framed in neutral, objective language), and the technique of equivocation (the rationale for the law is framed in terms of keeping out system abusers while at the same time upholding the principles of the Constitution and international law), the government has been able to avoid any accountability for the adverse effects of its efforts to manage the immigration program on racialized refugees.[44] Viewed from the lens of recent experience, the due process guarantees achieved through the *Singh* decision have failed to protect substantive rights for refugees.[45] Furthermore, in the hands of judges these guarantees have merely served to reinforce a neo-racist, anti-refugee policy agenda.

The content and objectives of Canadian refugee law and policy have been shaped by a multiplicity of factors, including economic requirements, ideological and political considerations as well as international human rights obligations.[46] As emphasized by Jakubowski, the relationship among these factors is exceedingly complex, particlarly now, as the country's population grows more diverse.[47] In the contemporary context, refugee law and policy are informed by competing and often contradictory philosophies. Nevertheless, as the text of the law and legal discourse in the general area of immigration has evolved from its explicitly racist orientation to one of "objective" neutrality, racism in its less obvious, systemic forms has persisted. As we approach the new millennium, the

project of anti-racism in Canada remains a "work in progress." My response to Richmond's questions, is that here in Canada we are quite far from the vision of an anti-racist refugee program. Building a society in which all persons, including refugees, are accorded justice and equality should be a critical priority for both Canada and the emerging new world order. ■

Notes

1. Anthony H. Richmond, *Global Apartheid, Refugees, Racism and the New World Order* (Toronto: Oxford University Press, 1994),at 208.
2. See F.Henry et al., *The Colour of Democracy:Racism in Canadian Society* (Toronto: Harcourt Brace & Co., 1995) at 59-101.
3. *Report of the Commission on Systemic Racism in the Criminal Justice System* (Ontario: Queen's Printer, 1995) at ii.
4. Canada, Statutes, 9-10 Edward VII, C.27, s. 38(c).
5. Other measures included the Chinese Immigration Act of 1885 which imposed a head tax on all Chinese men arriving in Canada and set shipping conditions intended to make it more difficult to transport people from China; and the Chinese Immigration Act ("Chinese Exclusion Act") of 1923 which effectively prohibited any Chinese immigration from 1923 until it was repealed after the Second World War, in 1947. Chinese Canadian National Council, *It's Only Fair!*, 1988; See also B. Singh Bolaria and P. Li, *Racial Oppression in Canada*, 2nd ed., (Toronto: Garamond Press, 1988).
6. In 1914 an Indian businessman chartered a ship, the Komagata Maru, from Hong Kong to Vancouver carrying 376 Indian passengers. Upon arrival in the Vancouver harbour, the government promptly issued deportation orders against the passengers. The passengers hired a lawyer to challenge the validity of the deportation orders, the Immigration Act of 1910 and its continuous journey regulation. Arguments in support of the passengers were dismissed by all five justices of the British Columbia Court of Appeal. Two months after it arrived the Komagata Maru with its Indian passengers on board was escorted out of the Vancouver harbour by naval ship. *Re Munshi Singh* (1914) 20 BCR 243.
7. N. Won, "Section 15 Race Litigation," Unpublished Paper prepared for the Race Issues Sub-Committee of the Court Challenges Program, 1999, at.21.
8. N. Kelly and M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), at.390.
9. *Immigration Act, 1976*, S.C. 1976-7, c.52, s.3
10. Not all of the *Convention's* provisions were incorporated into domestic law. The *Convention's* important provisions with regard to the social and economic rights of refugee claimants and convention refugees have not been fully implemented. Article 34, for example, requires states to "facilitate the assimilation and naturalization of refugees...and make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."
11. Numerous authors have documented the extent to which exclusionary language in the legislation itself together with practices which permitted immigration officers wide discretion to reject applicants on the basis of "race" or national origin characterized Canadian immigration law from Confederation until well after the second world war. See for example, D. Matas, "Racism in Canadian Immigration Policy" in C. James ed., *Perspectives on Racism and the Human Services Sector* (Toronto: University of Toronto Press, 1996); L.M. Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood Publishing, 1997); V. Knowles, *Strangers at our Gates: Canadian Immigration and Immigration Policy, 1540-1997* (Toronto: Dundurn Press, 1997); J.W.St.G.Walker, *"Race", Rights and the Law in the Supreme Court of Canada* (Canada:The Osgoode Society for Canadian Legal History and Wilfred Laurier University Press, 1997), at. 303-305.
12. A. Simmons, "Racism and Immigration Policy" in V.Satzewitch ed. *Racism and Social Equality in Canada* (Toronto: Thompson Educational Publishing, 1998), at. 91.
13. Citizenship and Immigration Canada, "A Stronger Canada: 1998 Annual Immigration Plan" at 6-8.
14. *Humanitarian Designated Classes Regulations*, SOR/97-183 as am. SOR/98-271, s. 4(1) (c).
15. See, for example, W. Giles, "Aid Recipients or Citizens?" in W. Giles et al. (eds.), *Development and Diaspora: Gender and the Refugee Experience* (Dundas, Ont.: Artemis Enterprises, 1996), at 45. Ten countries in the world are actively committed to refugee resettlement programs on an annual basis: Canada, Denmark, Finland, The Netherlands, New Zealand, Norway, Sweden, Switzerland and the United States. The American refugee resettlement program does not import immigration criteria into overseas refugee selection.
16. This is confirmed in the government's white paper released in January 1999. See *Building on a Strong Foundation for the 21st Century:New Directions for Immigration and Refugee Policy and Legislation ("New Directions")*.
17. Statement by a senior CIC official at the NGO Consultation on the Refugee Resettlement Model, Ottawa, October 25-26, 1999. It is interesting to note, however, that at this meeting a majority of immigration officials voted to eliminate the use of establishment criteria from overseas refugee selection. Unfortunately the group itself has no authority to actually implement this view.
18. Citizens for Public Justice, "What would it cost to remove the $975 Right of Landing Fee," December 1998.
19. Canadian Council for Refugees, "Impact of the Right of Landing Fee," February 1997.
20. The Minister made the immigration levels announcement on November 1, 1999 pursuant to s. 7(1) of the Immigration Act. Citizenship and Immigration Canada, "Canada...The Place to Be, Annual Immigration Plan for the Year 2000."
21. *Lee v. Canada (Minister of Citizenship and Immigration)* (1997), 126 F.T.R. 229; *Ruparel v. Canada (Minister of Employment and Immigration)*, [1990] 11Imm. L.R. (2d) 190; See also, C.Tie, "Only Discriminating Visa Officers Need Apply: Visa Officer Decisions, the Charter and Lee v. Canada (Minister of Citizenship and Immigration) 42 Imm. L.R. (2d) at 197-209.
22. The Canadian Council for Refugees has highlighted this problem in a draft document entitled *White Paper: Anti-Racism Analysis*, February 1999. The CCR has recommended that the *Immigration Act* be amended to incorporate an independent, external mechanism to monitor the Immigration department and receive complaints.
23. [1985] 1 S.C.R.177.
24. This was the view of Justices Wilson, Dickson, and Lamer. Although the Court was unanimous in result, it was split on the question of the Charter's applicability to the case. Nevertheless, over time Wilson J.'s reasoning became the accepted point of departure for the Court in terms of refugee cases.

25. *Chiarelli v. Canada* [1992] 1 S.C.R. 711; 16 Imm L.R.(2d) 1 at 20.

26. *Dehghani v. Canada (Minister of Employment and Immigration)* [1993] 1 S.C.R. 1053. For an analysis of the Supreme Court decisions in *Chiarelli* and *Dehghani*, see Pearl Eliadis, "The Swing from Singh: The Narrowing Application of the Charter in Immigration Law" (1995) 26 Imm. L.R. (2d) at 130.

27. Section. A46.04 (8) of the amended *Immigration Act* states: "An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependent of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document."

28. A. Brouwer, "What's in a Name?: Identity Documents and Convention Refugees" (Ottawa: Caledon Institute of Social Policy, 1999), at. 4.

29. Brouwer, op cit., at.5.

30. D. McNamara, Letter to Canadian Council for Refugees, from Dennis McNamara, Director, Division of International Protection, UNHCR, 14 May, 1997; United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee of Economic, Social and Cultural Rights*, E/C.12/Add.31 United Nations Economic and Social Council, December 4, 1998. Note that a section 15 *Charter* challenge of section A46.04(8) of the *Immigration Act* is currently pending as an action before the Federal Court, Trial Division.

31. *Pushpanathan v. Canada(Minister of Employment and Immigration)* (1998), 206 N.R. 76 (S.C.C.)

32. In 1997 Canada ignored a request from the Committee against Torture in the case of *Tejinder Pal Singh v. Canada* and in 1998, from the Inter-American Commission on Human Rights in the case of *Roberto San Vincente v. Canada*. See "Canada deports Venezualan", *The Globe and Mail*, 13 March 1998, A7; and Amnesty International, "Refugee Determination in Canada: The Responsibility to Safeguard Human Rights," Response to the Government of Canada's White Paper, February 1999.

33. African Canadian Legal Clinic, "No Clear and Present Danger", Unpublished Draft Discussion Paper, Toronto, 1999.

34. *New Directions*, op cit., at. 46.

35. Numerous studies have confirmed that there is no established connection between immigration and crime. Immigrants are actually less likely to commit major crimes than the Canadian-born, and are under represented in the national prison population. According to the most recent available statistics, 20.5% of the Canadian population over 15 had been born outside the country, while only 11.9% of the total prison population were foreign born. See D. Thomas, "The Foreign Born in the Federal Prison Population", Paper presented at the Canadian Law and Society Association Conference, Carleton University, 8 June, 1993 (figures are for 1993); and J. Samuel, "Debunking Myths of Immigrant Crime", Toronto Star, June 17, 1998.

36. African Canadian Legal Clinic, "Brief to the Legislative Review Secretariat" March 1999, at. 9.

37. Citizenship and Immigration Canada Statistics compiled by the Canadian Council for Refugees, October, 1998.

38. See, "Boat People Need a Return Ride", *The Globe and Mail*, July 13, 1999, A 10.

39. "Remarks by The Honourable Elinor Caplan, Minister of Citizenship and Immigration, to the Canadian Club", Vancouver, British Columbia, September 9, 1999, at. 3. It deserves mention that Fujian province is a region in which Canadian government and business have invested heavily. A situation of high unemployment, low wages and few government supports has been exacerbated by Canadian policies promoting mega- development projects, deregulation and privatization of the state run industries in Fujian and elsewhere in China. See Kelly D'Aoust, "Canada's policies on refugees: an issue of responsibility" and Nandita Sharma, "Exposing the real snakeheads" (Oct./Nov.1999) Kenisis, at. 9-11. Fujian province has one of the highest levels of state corruption in China. An immigration lawyer reports that the average resident of Fujian province would have to the pay the equivalent of between $30-40,000 to "buy" an exit visa in order to leave the country legally. The corruption, together with the exceedingly slow processing times of the Canadian visa office in Bejing (an average of 31 months to process a skilled worker application compared to 15 months in Hong Kong visa office) act as additional "push" factors for illegal migration. Processing statistics are from *Lexbase*, September 1998.

40. "Remarks by The Honourable Elinor Caplan", Ibid., at.2.

41. Canadian Council for Refugees, "Comments on Building on a Strong Foundation for the 21st Century", March 1999.

42. In the first nine months of 1997 there were 1,285 refugee claims form the Czech Republic, primarily from Czech Roma, who were fleeing persecution at the hands of neo-nazi skinheads. The European Roma Rights Centre, the International Helsinki Federation and even Canada's own Research Directorate of the Immigration and Refugee Board documented the growing racist violence as well as the police complicity in attacks against the Roma community. Close to half of the Roma claims considered by the Board were accepted but in October 1997 the Canadian government imposed a visa requirement for all citizens of the Czech Republic, effectively preventing any other Roma refugees from seeking asylum in Canada. Canada currently imposes visa requirements on nationals from over one hundred countries. As human rights abuses increase in particular countries, the less likely it is that a Canadian visa officer will even grant a visitor's visa to an applicant. See Canadian Council for Refugees, "Refugees in Canada: Canadian Refugee and Humanitarian Immigration Policy", 1998; — " Interdicting Refugees", May 1998; Research Directorate, Immigration and Refugee Board, Issue Paper, Roma in the Czech Republic: State Protection, November 1997.

43. A recent example of Canadian interdiction practices occurred in February 1998 when the government funded the chartering of an airplane which returned a boat load of 192 Tamil asylum seekers to Sri Lanka. Soon after their boat was intercepted off the coast of Senegal, the Tamils were "voluntarily" on their way home where they were all arrested and held in detention for several weeks. At least one of these individuals was subsequently rearrested and tortured. In the only public acknowledgement of this interdiction action almost a full year later, a Canadian government spokesperson boasted of the success in saving the country from "illegal economic migrants." Sri Lanka is a country in which the arrest, abuse and torture of Tamils by state security forces continues to be widespread. The government's comments were reported in an article in the *Globe and Mail*, 16 January 1999. The real story, however, had surfaced some five months earlier in two Amnesty International bulletins: AI Index, ASA 37/19/98; ASA 37/21/98.

44. See Jakubowski, op cit., p. 88 for a discussion of "ideological deracialization" in the context of the "Safe Third Country" rule, a provision introduced in Bill C-86.

45. M. Mandel, "The Charter and Immigration" in *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishers, 1994), at. 240-257.

46. J.E. Elliott and A. Fleras, Unequal Relations: An Introduction to Race and Ethnic and Aboriginal Dynamics in Canada, 2nd edition (Scarborough: Prentice- Hall Canada, 1996), at 290.

47. Jakubowski, "Managing Canadian Immigration: Racism, Ethnic Selectivity, and the Law" in E. Comack et al. *Locating Law, Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999), at 100. □

Sharryn Aiken is a faculty associate of the Centre for Refugee Studies and teaches immigration law at Osgoode Hall Law School.

The author gratefully acknowledges Janet Dench and R. Cheran for their comments on an earlier version of this paper.

So Many Refusals: Northern/Southern Perspectives on Current Issues of Refugee Protection

Michael Bossin

Abstract

This paper provides a general overview of the global situation regarding refugees. Specifically, the paper focuses on current trends affecting refugees, and the responses of the developed and developing worlds to those issues. Restrictive measures in the north, designed to limit the numbers of asylum seekers in developed countries, correspond with a decrease in security for refugees in the south. It is suggested that there are clear linkages between the two situations.

Résumé

Cet article fournit un aperçu général de la situation globale des réfugiés. Plus particulièrement, on y analyse les tendances fondamentales qui affectent les réfugiés, et les réponses apportées par le monde développé et le monde en développement à ces questions. Les mesures restrictives au Nord, conçues pour limiter le nombre de demandeurs d'asile dans les pays développés, sont concomitantes à un net déclin des conditions de sécurité pour les réfugiés au Sud. Il est avancé ici qu'un lien certain est à établir entre ces deux situations..

The human rights organization, Amnesty International, recently conducted a review of its work with refugees. The report begins with a quotation from a Mauritanian refugee in Senegal. She says:

> As a refugee you live a life hearing no - no you cannot stay in your own home; no you cannot come into this country; no you cannot stay; no I cannot help; no I don't have time. So many refusals. You lose your dignity. I know Amnesty cannot be the one to say yes, but at least it is a place where we are able to hear: we are with you, we are trying, we will do our best. That offers hope and hope sustains our dignity.[1]

The comment can be taken as praise for the human rights organization and, by extension, other non-governmental agencies which have advocated for the rights of refugees and encouraged and lobbied governments to uphold their obligations towards displaced people. Regrettably, it is also illustrative of the frosty reception refugees increasingly face in the nineties by countries around the world. "So many refusals".

This afternoon, I have been asked to speak about current issues affecting refugees and specifically, the responses to those issues in the industrialized world and in the less developed world - in the north and in the south.[2] This is simply an overview, meant to leave you with a general idea of what "the big picture" entails. Hopefully, it will provide a context to that remark, "So many refusals".

I shall begin by identifying several issues, or trends, which have affected and continue to affect refugees in the past decade. Afterwards, we shall examine some governmental responses to those issues and trends.

Current Issues/Trends- The Numbers

In its report, The State of the World's Refugees, 1997-98, the United Nations High Commissioner for Refugees (hereinafter "the UNHCR") notes:

> While it may be an age-old problem, the issue of forced displacement has assumed some particularly important - and in several senses new - dimensions in the final years of the 20th century. First and foremost, the numbers have been staggering.[3]

In 1998, the UNHCR estimated that some 50 million people around the world might legitimately be described as victims of forced displacement.[4] That is almost double the population of Canada.

It is true that in some parts of the world, the number of refugees has decreased in the past decade. This is the case in Africa, Asia and Latin America.[5] However, one should be cautious in labelling this a trend. While the numbers have gone down in these regions, in Europe, the number of refugees has increased dramatically. [6] Also, refugee flows develop as a response to a particular crisis or situation and therefore fluctuate with the times. The "trend" of decreasing numbers in Africa, for example, could be reversed tomorrow. Moreover, even if reduced from levels of 10 years ago, the numbers are still extremely large.[7]

One should be clear that the figure of 50 million is not comprised solely of refugees as defined by the 1951 UN Refugee Convention,[8] those who are outside their country of nationality. A significant proportion of the estimated 50 million are people displaced within their own borders.

Regardless of their legal status, all displaced persons place a demand on the world for some type of humanitarian response. The cost of housing, feeding and in other ways accommodating the displaced is affected by the high numbers. Moreover, that cost extends beyond what can be quantified in dollars. For the host countries and regions, there is a price to be paid in environmental,

Michael Bossin is an immigration/refugee lawyer and lectures at the University of Ottawa. He is currently the vice-president of Amnesty International Canada's English-speaking branch.

social and political terms as well. Today, people forced to flee are greeted not only with compassion, but with a measure of anxiety and resentment as well. The level and quality of each response, one could argue, is partly contingent on the numbers arriving.

Changing Profile

One important factor affecting human rights and refugee protection in the past ten years has been the end of the Cold War and the collapse of the Soviet Union. Until that dissolution, tension between the Soviet bloc and Western countries provided a constant, significant backdrop to issues of refugee determination.

The Convention definition itself was influenced by East-West conflict. Explains commentator James Hathaway, the Convention refugee definition was "carefully phrased to include only persons who have been disenfranchised by their state on the basis of race, religion, nationality, membership in a particular social group, or political opinion, matters in regard to which East bloc practice [had] historically been problematic."[9] In other words, for the West in particular, during the Cold War, there was always a political incentive for granting asylum to people escaping from East bloc countries. With the collapse of the USSR and other Communist regimes, that incentive has diminished.[10]

Another consequence of the end of the Cold War is that these days, there are fewer "traditional" refugees - persons escaping specific and relatively individualized forms of punishment.[11] Ten years ago, the profile of the asylum seeker was often that of an individual targeted for his or her political activities, students and intellectuals fleeing dictatorships in Latin America, or dissidents escaping Soviet bloc countries for having expressed anti-government views.[12]

Refugees in this decade are more likely to have fled from their countries en masse, from recent human rights disasters such as Somalia or Rwanda. Such migrations are large in number and occur over a relatively short period of time.

Since the collapse of the Soviet Union, there has been a dramatic increase in ethnic-based violence. In a number of instances, depopulation of an ethnic minority from a region has become an objective of the majority, and not just a consequence of the violence. Hundreds of thousands have been forcibly expelled ("ethnically cleansed")from Bosnia, Kosovo and the Caucasus states of the former Soviet Union in this manner on account of their ethnic identity. Left behind is an "ethnically pure" population, sympathetic to the ruling power.

Finally, as a result of the changing political landscape, and, in part, the lifting of travel restrictions in former East bloc countries, asylum seekers are emerging from areas previously unaffected by refugee problems. The former Soviet Union and former Yugoslavia are obvious examples, but new flows of refugees have also arisen in recent years: from Bhutan and Tibet crossing into Nepal; from Myanmar into Bangladesh and Thailand; and from Bhutan, Sri Lanka and Tibet into India.[13]

Internally Displaced Persons

There has been a dramatic increase in the number of internally displaced people in the world. These are people who have been forcibly displaced and who remain, whether by necessity or choice, within their country of origin. In 1996, the UNHCR estimated that there were 34 countries in the world with internally displaced populations. This was up from 5 countries in 1970.[14] The U.S. Committee for Refugees estimates that there are more than 20 million internally displaced people in the world today.[15] The UNHCR figures are even higher, somewhere "in the region of 25 to 30 million."[16]

The challenge of providing assistance to internally displaced persons is formidable, as access to such populations is limited, or impossible. Moreover, despite the substantial work of the UN Secretary General's Representative on the Internally Displaced, "those who remain displaced inside their own countries tend to fall outside of the international institutional framework of protection and assistance."[17]

Why is this happening? In part, the phenomenon of internally displaced persons is a reflection of the growing number of internal conflicts in the world. Also, in some cases, it reflects the emphasis on countries enforcing the "right of individuals to remain in their country". The enforcement of this "right" has prevented people from seeking asylum (another internationally recognized right), and forced people to remain against their will in unstable situations.[18] In Bosnia and Sri Lanka, for example, the departure of people has been blocked by government or opposition forces wishing to maintain control over the civilian population.[19]

Widening Gap Between the Rich and Poor

Indirectly affecting refugee flows is the fact that the gap between the richest and the poorest countries in the world is widening. During the past three decades, the income differential between the richest 5th of the world's population and the poorest 5th has more than doubled. It has gone from 30:1 to 78:1.[20]

In the less developed regions, at least 89 countries now have lower per capita incomes than they had 10 years ago. According to the UNCHR:

Many of the world's poorer nations are now locked into a vicious circle of economic stagnation, environmental degradation and impoverishment, reinforced in some cases by rapid rates of population growth.[21]

This combination of circumstances, of course, is a recipe for disaster. Although poverty and economic stagnation alone do not produce forced population displacements, they certainly create a climate for instability, repression, internal conflict and human rights abuses.

Clearly, this does not happen in every case. Lesotho, Namibia, Tanzania and Zambia are four examples of countries from southern Africa which, though very poor, have managed to avoid this type of situation. They, however, are the exception to the rule. "In general, there is ample evidence to demonstrate that countries with low and declining standards of living are particularly prone to complex emergencies, refugee outflows and other forms of forced displacement."[22]

In addition to creating situations where people flee human rights abuses, this economic polarization also prompts individuals to seek a better life elsewhere. Many of them, unable to reach that goal through "regular" or "legal" means, end up claiming to be refugees.[23]

The Phenomenon of Collapsing States

In many parts of the world, Africa in particular, state structures have been greatly weakened, in some cases to the point of disintegration.

States withdraw from their traditional role of providing basic services, such as health, education and social welfare, and begin to lose their ability to perform some fundamental functions of the state, such as collecting taxes, paying officials and maintaining law and order. When this happens, people turn to other "structures" for security - the clan, for example, or other types of communal associations. This, in turn, reinforces the potential for internal social and political conflict. In the extreme cases - Afghanistan, Burundi, Liberia, Sierra Leone, Somalia - the political link between the state and its citizens is severely ruptured. In essence, the state simply dissolves.[24] Clearly, where state structures disintegrate, forced population displacements are likely to ensue.

Non-State Actors

The most obvious form of persecution is the abuse of human rights by organs of the state, such as the police or military.[25] Ten years ago, the majority of refugees were in fear of their own governments, which acted against them either directly or through persecuting groups or individuals who acted with the tacit approval of governments. Today, the agent of persecution is equally likely to be a non-governmental entity - organized crime, armed militias, or even an individual, for example in cases of domestic violence or female genital mutilation. In such cases, the state is sometimes unwilling to provide protection to the person concerned. In others, however, the state, though willing to protect, is unable to do so effectively. The likelihood of non-state actors being involved in acts of persecution is particularly great, of course, where the state structure has collapsed.

Response of Governments in the North/South

Before beginning an analysis of how governments have responded to current refugee issues and trends, a few preliminary points should be made. First, policies and practices in northern and southern states are not simply a direct response to the trends which I have identified. It is more complicated than that. In fact, many of the programs in place today were initiated years ago, in response to different pressures.

Secondly, comparing the refugee situation in the developing world, as opposed to the industrialized north, is a bit like comparing apples with oranges. The overwhelming majority of refugees (roughly 90 per cent, according to a 1997 Amnesty International report) are to be found in the south.[26]

In the south, one sees massive movements of refugees. In the north, as a rule, one sees individual asylum seekers.[27] In part, this is because of barriers to refugee migrations that have been established by the industrialized countries. In part, it is due to geography. That is, most of the political situations leading to the displacement of people are located in the south.

These factors, to a great extent, dictate different responses to different circumstances in the north as opposed to the south. That being said, there are linkages between the two regions with respect to refugees. Most refugee claimants in the developed world come from the developing world in the south. Many travel through other northern and southern states before reaching their final destination. As well, countries in the south rely on monies from the north to effectively deal with the inflow of refugees to their territory. Finally, how each region deals with refugee flows is well known to the other and has an influence on each other's policies and practices in this regard.

The North

Over the past decade, countries in the developed world have introduced an array of measures designed to prevent or deter people from seeking asylum in their territories. These measures were prompted, in large part, by a perceived "crisis" in the industrialized world. In the 1980s, there was a sharp increase in the number and severity of refugee movements around the world.[28] The response to this development can be characterized as either panic or "compassion fatigue".[29] Unless action was taken, states reasoned, they were at risk of being over-run by claimants. It was assumed that many of the asylum seekers were not genuine refugees. They were accused of abusing the system of refugee determination,[30] "jumping the queue" ahead of legitimate refugees and immigrants and, in general, taking advantage of the generosity of northern states.

Governments were also concerned about the growing number of refugee claimants arriving at their borders without proper identity documents, or without documents at all. Described as an "irregular movement" of people[31], this phenomenon had implications for security and was perceived by some as a major abuse of the system.

With the increased number of refugee claimants, the cost of processing claims,

and providing housing, social services, and health care to the claimants, grew accordingly. In a time of budget austerity, and an environment of increasing xenophobia, governments in the north decided to take steps to substantially reduce the number of asylum seekers arriving at their borders.

Restricting the Flow

To reduce the flow of refugee claimants coming to their countries, governments in the industrialized states have adopted a number of measures in recent years. These include:

imposing visa restrictions on refugee-producing countries.[32] To enter many northern countries, citizens of southern states require a visa authorizing such entry. Without the visa, airlines will not permit travellers to board their planes; imposing sanctions or fines on airlines and other carriers who transport people to northern states without proper documents;[33] initiating pre-boarding checks at airports, to ensure that passengers boarding aircraft are in possession of proper documents;[34] and in some cases, interdicting vessels at seas and turning them back.[35]

If a refugee claimant is able to make it all the way to a northern state, in spite of these obstacles, he or she is faced with other barriers. Examples are as follows:

1) In many cases, the claimant will be returned to a "safe third country" and made to claim refugee status there;[36]

2) In a number of countries, asylum seekers are routinely detained;[37]

3) In many jurisdictions, persons coming from so-called "safe countries of origin" are put into a fast track, designed to have their claims rejected promptly with little or no appeal following the negative decision;[38]

4) As well, northern countries have cut back on benefits and rights formerly accorded to persons going through the refugee determination process. Benefits which have been affected by such cuts include welfare, legal aid and health coverage. There have also been restrictions on the right to work and the right to study;[39]

5) Finally, in many countries, a very restrictive interpretation of the Convention refugee definition has been applied by decision-makers. Consequently, very few claimants are recognized as Convention refugees.[40]

It can be safely assumed that the combination of these measures has had the effect of discouraging people from seeking asylum and thereby reduced the number of refugee claimants in those countries where such measures have been imposed. In fact, since 1992, the total number of asylum applications submitted in the industrialized states has dropped significantly, [41] while at the same time, the global scale of forced displacement has continued to grow.[42] One could expand on almost all of the initiatives described above. I shall restrict my comments to just a few.

Visa Restrictions, Preboarding Inspections, and the Safe Third Country Rule

Visa restrictions make it harder for people at risk to easily and quickly escape to safe countries. Simply purchasing a ticket and boarding a plane for a country which has imposed a visa restriction is not an option. Even if all routes to safety are not affected by their imposition, visa restrictions effectively reduce the possibilities for persons at risk.

Admittedly, a visa requirement can curtail a situation in which numerous unfounded asylum claims from a particular country are clogging a refugee determination system. It is submitted, however, that one should not be imposed on a country from which legitimate refugees are fleeing and where there is no evidence of large-scale abuse.

Pre-boarding inspections mean that many legitimate refugees, unable to obtain proper documentation due to the situation in their countries, or forced to travel on false documents to circumvent visa restrictions, are turned back at airports without ever having their refugee claims heard or determined. Countries involved in this practice appear more concerned with preventing undocumented arrivals in their territory than with ensuring refugee claimants are allowed access to a fair and proper determination procedure.

The "safe third country" rule has created the phenomenon of "refugees in orbit", or chain deportations, often with little regard had to whether the "safe" country is obliged to hear the refugee claim or has in place other proper safeguards to ensure that asylum seekers are not returned to countries where they are at risk. In other words, there is insufficient regard given to whether the receiving country is really "safe."

According the European Council on Refugees and Exiles, increasingly, "persons in need of protection (are ending up) in Central, Eastern or Southern Europe ... where mechanisms of refugee protection and assistance are often less well developed."[43]

As one example of this phenomenon, the UNHCR notes that in May 1997, "Lithuania and Belarus were negotiating a readmission agreement which would enable the return of asylum seekers from the former to the latter state, even though Belarus was not a signatory to the international refugee conventions."[44]

Detention

Here is a quotation from a Togolese refugee, a 17 year old girl:

> The police sprayed gas into the room and shut the door...When the policeman ordered me to leave the room he hit me again with his stick, this time on the shoulder. I tried to stand up, but I slipped and fell to the ground. The officer then kicked me in the lower back.[45]

To those of you who have listened to refugees tell their stories, this type of incident may sound familiar. However, this is not a refugee's account of persecution in her country of origin. It is her account of how she was treated after she asked for asylum in the United States.

Detention of asylum seekers has increased dramatically in the past decade in Europe and especially in the United States.[46] In Australia, refugee claimants who arrive without prior authori-

zation are automatically detained.[47] In some countries detention lasts throughout the entire procedure. In others, it is restricted to claimants whose applications are considered "manifestly unfounded".[48]

According to the UNHCR Executive Committee, there are only four reasons for detaining an asylum seeker: to verify identity; to determine the elements of the claim; to deal with people who have used destroyed or fraudulent documents in order to mislead the authorities (as opposed to people who admit travelling on false documents for reasons related to their fear of persecution); and to protect national security or public order. Any other reason for detaining a refugee claimant is unacceptable.[49]

Restriction of Benefits/Rights

Here is another story:

> Bénédicte had been arrested at a memorial for her husband, who had been shot dead during an anti-government rally. In prison, she was repeatedly raped by guards. An older guard finally took pity on her and smuggled her out in a sack.
>
> She arrived in London by train, and then made her way to the Home Office, some miles away, where she applied for asylum. She was subsequently denied welfare payments on the grounds that she had not applied for asylum immediately on arrival.
>
> A legal challenge was made to the Court of Appeal about the denial of welfare payments, which ruled in her favour. One of the judges stated:
>
> A significant number of genuine asylum seekers now find themselves faced with a bleak choice: whether to remain here destitute and homeless until their claims are finally determined or whether instead to abandon their claims and return to face the very persecution they have fled.
>
> The legal victory was short-lived. In July 1996, the British parliament passed legislation denying welfare payments to all those who failed to apply for asylum immediately on arrival and to people appealing against rejection of their asylum claim. However, in October a new High Court ruling required local government authorities to provide some assistance to asylum-seekers. In December, for the first time in 50 years, the Red Cross distributed food parcels in London. The recipients were destitute asylum-seekers.[50]

Refugee claims can take a long time to be processed - often several years - during which the applicant is in a legal and social limbo. Denying applicants access to basic needs such as adequate food, shelter and medical care only aggravates their sense of insecurity and isolation.

Although social assistance and similar matters are not addressed in the UN Refugee Convention, the denial of such benefits to asylum seekers is certainly contrary to the spirit of that document.

Restrictive Interpretation of the Refugee Definition

One last story, taken from a 1997 Amnesty International report on refugees:

> Diabasan Natuba sought asylum in Germany after escaping from a Zairean prison, where she was tortured because she had been caught photocopying party materials. The German authorities rejected her claim on several grounds. They stated that Zaire's president does not control the military and therefore torture by soldiers does not constitute state persecution. They asserted that she had committed a crime by photocopying documents, so her detention was legitimate. They said that the fact that she had travelled on a borrowed passport undermined her credibility. Most extraordinary of all, they said that her story was not credible because many other Zaireans had recounted similar incidents. In mid-1996, she was sheltering in a church in Germany, terrified of being deported back to Zaire.[51]

This is a prime example of the type of restrictive interpretation of the refugee definition, not to mention an ignorance concerning country conditions, which has led to similar refusals of legitimate claims. In this country, the Supreme Court of Canada has recognized that a well founded fear of persecution may exist where the agent of persecution is not the state, where the state is either unable or unwilling to offer protection to the person concerned, and where the ground(s) for persecution are one or more of those enumerated in the Convention definition.[52] This interpretation of the refugee Convention, however, is not universally accepted. In many

countries, as in the example above, state involvement in the persecution is a prerequisite to a finding that the claimant is a Convention refugee.[53] This leaves vulnerable those whose oppressors are non-governmental entities, including armed militias. Obviously, a requirement for direct state involvement would also exclude anyone living in a collapsed state.

The other common ground for refusal of a refugee claim in many jurisdictions is the requirement that the asylum seeker be "singled-out" for persecution. Governments have relied on this principle to deny recognition to claimants coming from countries where the violence is generalized. According to the UNHCR, such a narrow interpretation was never the intention of those who drafted the 1951 UN Refugee Convention.[54]

Consequences of Restrictive Measures

In addition to reducing the numbers of asylum seekers in developed countries, the measures described above have had several other consequences. Rather than "resolving" the refugee problem, these measures have merely diverted the refugee flow elsewhere. Refugees are simply resurfacing in other parts of the world. For example, as of 1997, there were roughly 700,000 asylum seekers in the Commonwealth of Independent States (CIS), 500,000 of whom were in Russia.[55]

Although several CIS countries, such as Estonia and Lithuania have ratified the 1951 UN Refugee Convention, and passed national legislation to implement a refugee determination procedure, the capacity to implement the legislation is limited. "As a result, asylum-seekers from outside the CIS region often lack protection, have no legal status, do not benefit from social welfare services and may not even have access to refugee determination procedures."[56] Notes Kathleen Newland, of the U.S. Committee for Refugees, "The increase in formal adherence (to the Refugee and other Conventions) stands in stark contrast to declining observance in practice."[57]

The restrictive measures have also led to a boom in the smuggling business. According to the UNHCR:

> There is now a growing consensus that the restrictive asylum practices introduced by many of the industrialized states have converted what was a relatively visible and quantifiable flow of asylum seekers into a covert movement of irregular migrants that is even more difficult for states to count and control. There is also widespread agreement that such irregular movements are increasingly arranged and organized by professional traffickers.[58]

Legitimate refugees, afraid that they will not be admitted, or will be detained, or will have their asylum claims rejected regardless of the merits of their case, are simply being snuck into countries illegally. Needless to say, involving themselves with smugglers also leaves them open to physical and economic exploitation and risk.

Temporary Protection

In 1992, the UN High Commissioner for Refugees urged states to grant temporary protection to refugee claimants from the former Yugoslavia. The idea was that once the war ended, and it was safe for them to do so, the asylum-seekers would be returned home. Around 15 states, mostly in Western Europe agreed to establish a program of temporary protection, benefitting more than half a million people.[59] Those in danger were provided sanctuary. At the same time, host countries were relieved of the necessity of conducting individual determinations in each case. For these reasons, the temporary protection program was seen to be a success. In Canada, a similar scheme was implemented this year in the case of ethnic Albanians fleeing Kosovo, albeit on a much smaller scale than the European response to the crisis in Bosnia.

It is not clear whether the provision of temporary protection to large groups of refugee claimants is a trend of the future. With respect to Kosovar refugees from Macedonia, for example, Germany accepted 10,000, in sharp contrast to the more than 350,000 former Yugoslavs who found protection there in the early 1990s.[60]

Whether or not they are implemented widely, temporary protection regimes should be applied with care and caution. Those with temporary status have fewer rights than those persons who have been recognized as refugees under the 1951 UN Refugee Convention. For example, they do not benefit from the prohibition against refoulement, which applies to Convention refugees. Their status can be removed by the government for more easily than is the case with Convention refugees. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states:

> Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses.[61] This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes - not of a fundamental character - in the situation prevailing in their country of origin.[62]

Persons not recognized as refugees under the UN Refugee Convention are, in a word, more vulnerable to premature removal by governments sensitive to political and societal pressures. Where an individual recipient of temporary protection fears that he or she may still be at risk if returned home, an opportunity to make an asylum claim should always be available.

The South: A History of Generosity

In general, it can be said that many of the world's poorest nations have a remarkable record of hospitality towards refugees. Malawi, for example, a country of few natural resources, a serious shortage of land and a population of just under 8 million, hosted more than a million Mozambican refugees from the mid-1980s to the early 1990s.[63] Similar acts of generosity have been recorded throughout most of Africa, which continues to accommodate more refugees than any other part of the world.[64]

South and South-West Asia also provide examples of generosity when it comes to refugees. Pakistan and Iran jointly accepted more than 5 million refugees throughout most of the eighties. India has been home to Tibetan refugees from China, Chakmas from Bangladesh and Tamils from Sri Lanka, not to mention refugees from Afghanistan, Bhutan and Myanmar.[65]

In South-East Asia, Thailand has been host to refugees from Cambodia, Laos, Myanmar and Vietnam. In the Americas, Mexico provided asylum to over 100,000 Guatemalans in the eighties and early nineties.[66]

Declining Standards of Protection

Recently there have been troubling signs that protection standards in southern countries, which traditionally have borne the brunt of refugee protection, are in decline. Several of these indicators of declining standards are described below.

Closing of Borders/Refoulemenent

In a number of instances, countries have closed their borders to asylum seekers. This occurred in Tajikistan, Uzbekistan and Pakistan in the latter half of 1996, when Afghans fleeing the Taliban offensive were denied entry. That same year, Tanzania and Zaire closed their borders to Hutus fleeing from Burundi.[67]

In other cases, countries have returned refugees to countries where they may be at risk. In 1996, Thailand denied asylum to refugees from Myanmar and then returned 900 Myanmar women and children to a particularly dangerous part of their homeland.[68]

Decrease of Security in the Country of Asylum

Admission to a country of asylum no longer brings with it a guarantee of safety. Refugees living in camps are often dependent on rations that are distributed by groups responsible for abuses back home. The local power structure in the country of origin is often replicated - as are the abuses.[69]

Many refugee camps around the world have become militarized and politicized. Boys and young men have been forcibly conscripted into armies and militias. Women and girls have been victims of sexual abuse and other kinds of violence. In urban areas, in some countries, refugees are routinely harassed and arbitrarily detained.[70] None of these are necessarily new phenomena, but the prevalence and severity of such incidents is now a major cause of concern.

There are other trends worth noting. In some cases, repatriations are taking place not because conditions have become safe in the refugees' home country, but because they have become too dangerous in the host country, or for political reasons. Repatriations in such circumstances have not been voluntary, but coerced. In the past few years, according to the U.S. Committee for Refugees, refugees have been forcibly repatriated from Iran (to Afghanistan and Azerbaijan), from Bangladesh (to Burma), from Thailand (to Burma and Cambodia), and from Tanzania and the Democratic Republic of Congo (to Rwanda).[71]

In other cases, refugees wanting to go home have been prevented from doing so because the militant groups controlling these populations thought that to let them go would be to their political and military disadvantage. This was the case, for example, with Rwandan refugees in Zaire and Tanzania and Tajik refugees in Afghanistan.[72]

Links between the North and South

Not surprisingly, the restrictive actions of the wealthy states towards refugees have had an effect and influence on countries with fewer resources. According to the UNCHR:

> When the very countries responsible for establishing the international refugee regime begin to challenge its legal and ethical foundations, then it is hardly surprising that other states, especially those with far more pressing economic problems and much larger refugee populations, have decided to follow suit.
>
> Increasingly, when low-income countries close their borders to refugees, they tend to justify their actions by referring to the precedents which have already been set by the more affluent states. "In the current situation, what country would keep its borders open?" asked a government minister in an African country when confronted with an impending refugee influx. "If this was a Western country," he continued, "it would have been well accepted."[73]

In a similar vein, Kathleen Newland writes, "The demonstration of these [restrictive] actions by rich countries has made it easier for poorer countries to justify similar measures: to close their borders to arriving refugees, to push hard for premature repatriation, or to take matters into their own hands and forcibly return refugees."[74]

Is it any wonder that some of the poorer countries are feeling resentful of their northern counterparts? They are expected to respect and observe standards that, from their perspective, the wealthier countries are ignoring or undermining.

Other developments have reinforced this attitude, notably a growing reluctance on the part of the north to subsidize the solutions to refugee-related problems arising in the south. Malawi is one example. After all the generosity shown towards Mozambican refugees by that country, Malawi is now faced with serious environmental problems: deforestation and soil erosion in the regions where the refugees lived. Now that the refugees are gone, Malawi cannot get aid to address this problem.[75]

Understandably, situations like this leave poorer states wary of admitting large flows of refugees into their territory. Many donor states make it clear that they no longer are prepared to support long-term refugee assistance programs in other parts of the world. They want solutions arrived at quickly, and cheaply. This situation is compounded by the worsening economies and the lowering of aid in general to many of the world's poorer nations. A growing number of these states have decided that sustaining large refugee po-

pulations is simply a luxury they can no longer afford.[76]

Xenophobia exists in the developing world as well as in the industrialized world. In both situations, politicians are ready to exploit the fears of the populace, and blame refugees for the country's ills. No doubt, refugees have an impact on a host country: increasing the level of competition for resources which are scarce already. The resources to which I refer are not just food and water, but education, health care and jobs. As mentioned above, refugees can also have a negative impact on the environment of a host country. All of this can lead to resentment from the local populations, who often think - mistakenly - that those in the camps have it better.

Finally, as mentioned above, during the Cold War the superpowers supported countries hosting refugees for political reasons. Now that the cold war is over, and that support is gone, countries are more anxious to improve relations with countries in their own regions. As a consequence, although granting asylum ought to be seen as a humanitarian act, it is now perceived in some quarters as a political one. In other words, admitting refugees from a neighbouring state with whom an alliance has been built, may put that alliance in jeopardy. It is such considerations which explains Thailand's reluctance to admit refugees from Myanmar and Tanzania's eagerness to repatriate Rwandans.[77]

This, too, is an echo of what is happening in Europe. In 1997, for example, the European Union accepted a proposal from Spain which could make it impossible for the citizen of one EU state to seek asylum in another.[78]

Conclusion

All in all, I have not painted a very rosy picture. That being said, perhaps I have presented it to the right group. For those involved in refugee protection, the world has presented you with a formidable challenge. So many refusals. The phrase can be seen not only from the point of view of the refugee, but from that of aid workers, decision makers, lawyers and others in the field. For each refusal there are hurdles to overcome, laws to change and minds to convince. The challenges are many, and I wish you every success in meeting them. ■

Notes

1. Neve, Alex. "Globally, Thoroughly and Effectively Protecting the Human Rights of Displaced Persons", (1999) *Amnesty International*, POL 33/08/98, at 1.
2. In this paper, "the north" or "northern states" refers to developed, industrialized states - specifically those in Europe, North America and Australia. "The south" or "southern states" refers to those countries which, relative to the "north" are developing or undeveloped states.
3. United Nations High Commissioner for Refugees. *The State of the World's Refugees 1997-98, A Humanitarian Agenda, at. 1 - 2 (1998).*
4. Ibid., at p. 2. The UNHCR acknowledges that this figure is highly speculative, given the absence of an agreed definition of 'forced displacement' and the difficulty of collecting accurate statistics on uprooted populations. The nominal figure of 50 million includes around 22 million people of direct concern to the UNHCR, an additional 20 million internally displaced people for whom the organization has no responsibility, and around three million Palestinian refugees who are assisted by the United Nations Relief and Works Agency for Palestine Refugees in the Near East.
5. United Nations High Commissioner for Refugees, *Populations of Concern to UNHCR - 1997 Statistical Overview (1997).*
6. Ibid.
7. From 1988 to 1997, the refugee population of Africa decreased from 4.6 million to 3.5 million. In Asia, the figure went from 6.8 million to 4.8 million. (Populations of Concern to UNHCR - 1997 Statistical Overview, supra).
8. Convention relating to the Status of Refugees, *189 U.N.T.S. 2545*, entered into force on April 22, 1954.
9. Hathaway, James C. , *The Law of Refugee Status, at 8 (1991).*
10. The State of the World's Refugees 1997-98, supra, at 48.
11. Justice, Immigration Law Practitioners' Association, *Asylum Rights Campaign, Providing Protection: Toward Fair and Effective Asylum Procedures*, (1997), at 21.
12. *Globally, Thoroughly and Effectively*, supra note 1, at 11.
13. UNHCR. The State of the World's Refugees 1997-98, supra note 3, at 33.
14. Ibid., at 120.
15. U.S. Committee for Refugees. *World Wide Refugee Information: Who are Internally Displaced Persons?*, from USCR website http://www.refugees.org (1999).
16. UNHCR. The State of the World's Refugees 1997-98, supra at 105.
17. Newland, Kathleen. *The Decade in Review*, U.S. Committee for Refugees, (1999) at 4.
18. Ibid., at 11.
19. The State of the World's Refugees 1997-98, supra, at 34.
20. Ibid., at 14.
21. Ibid., at 15.
22. Ibid., at 16.
23. Ibid., at 16.
24. Ibid., at 18-19.
25. Hathaway, James C., *The Law of Refugee Status*, supra, at 125.
26. Amnesty International, *Refugees: Human Rights Have No Borders*, ACT 34/03/97 at 4 (1997).
27. One reason that the conflicts in Bosnia and Kosovo have drawn so much attention is that they are obvious exceptions to this rule.
28. Lawyers Committee for Human Rights, The UNHCR at 40: Refugee Protection at the Crossroads, at 15 (1991).
29. Ibid, at 16.
30. Ibid.
31. Ibid.
32. Amnesty International. *Refugees: Human Rights Have No Borders*, supra, at p. 55. In 1992, after the war started in Bosnia-Herzegovina, large numbers of people were trying to escape conditions of generalized violence as well as torture, rape, and political killings. That same year, nearly all Western European countries imposed a visa requirement on citizens of Bosnia-Herzegovina. See also UNHCR. *The State of the World's Refugees* , 1997-98, at 191.
33. Ibid, at 55. See also UNHCR. *The State of the World's Refugees 1997-98*, at 191.
34. Ibid, at 55. See also UNHCR. *The State of the World's Refugees 1997-98*, at 191.
35. Ibid, at 55. See also UNHCR. *The State of the World's Refugees 1997-98*, at 191. The most striking example of interdiction at sea in recent years was in June 1992, when the United States intercepted Haitian boat people at sea and summarily returned them, without any examination of their asylum claims. Cubans and Albanians have also been subjected to interdictions at sea.

36. Ibid, at 74. See also UNHCR. *The State of the World's Refugees 1997-98*, at 192-193.
37. Ibid, at 58.
38. Ibid, at 73. See also UNHCR. *The State of the World's Refugees 1997-98*, at 191-192.
39. Ibid, at 63. See also UNHCR. *The State of the World's Refugees 1997-98*, at 194.
40. Ibid, at 51.
41. UNHCR. *The State of the World's Refugees*, supra, at 184.
42. Ibid, at 183.
43. European Council of Refugees and Exiles, Position of ECRE on sharing the responsibility: protecting refugees and displaced persons in the context of large-scale arrivals, ECRE, London (1996), paragraph 14.
44. *The State of the Worlds Refugees 1997-98*, supra, at 198.
45. Amnesty International, *Refugees: Human Rights* Have No Borders, supra, *at 60.*
46. Ibid, at 58.
47. Ibid.
48. Ibid, at 58-59.
49. Conclusion 44 of the UNHCR Executive Committee.
50. Amnesty International, *Refugees: Human Rights Have No Borders*, supra, at 62.
51. Ibid, at 47.
52. *Ward v. Canada (Minister of Employment & Immigration)* (1993), 103 D.L.R. (4th) 1 (S.C.C.)
53. UNHCR. *The State of the World's Refugees 1997-98*, supra at 194.
54. 'Note on International Protection', UNHCR Executive Committee document no. A/AC96/830, September 1994.
55. UNHCR. *The State of the World's Refugees 1997-98*, supra at 199.
56. Ibid, at 199.
57. Newland, Kathleen, *The Decade in Review*, supra, at 4.
58. Ibid, at 199- 200.
59. Ibid, at 209.
60. Newland, Kathleen. *The Decade in Review*, supra, at 7.
61. *Convention relating to the Status of Refugees*, supra, Article 1 C.
62. United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status* (1979). Geneva: Office of the United Nations High Commissioner for Refugees, paragraph 112.
63. UNHCR. *The State of the Worlds Refugees 1997-98*, at 62.
64. Ibid.
65. Ibid.
66. Ibid.
67. Ibid, at 65.
68. Ibid.
69. Amnesty International. *Refugees: Human Rights Have No Borders*, supra, at 22.
70. UNHCR. *The State of the World's Refugees 1997-98*, supra, at 65.
71. Newland, Kathleen. *The Decade in Review*, supra, at 3.
72. UNHCR. *The State of the World's Refugees 1997-98*, supra, at 68.
73. Ibid, at 69.
74. Newland, Kathleen. *The Decade in Review*, supra, at 7.
75. Ibid.
76. Ibid, at 71.
77. Ibid, at 77.
78. Ibid, at 203. □

Porous Nation: From Ireland's 'Haemorrhage' to Immigrant Inundation - A Critique of Ireland's Immigration Act, 1999

Jason King

Abstract

This paper examines the impact of metaphors of fluidity for migratory processes upon the development of public opinion in Ireland, both to trace the effects of historical Irish out-migration on perceptions of recent immigration, and to demystify rhetorical strategies that stigmatize asylum-seekers and refugees in Ireland as part of an expanding pool of illegal immigration, rather than as victims of persecution in need of international protection. The focus throughout the discussion is upon the range of different discourses underlying these metaphors of fluidity and how they become transformed over time, as well as their influence in engendering public hostility towards first emigration and then asylum-applicants and refugees coming into the country, following Ireland's transition from an 'emigrant nursery' to an immigrant host society.

Résumé

Cet article examine l'impact de la métaphore de la fluidité du processus migratoire sur le développement de l'opinion publique en Irlande. Cette analyse est produite à la fois pour retracer les effets de l'émigration historique des irlandais sur la perception qu'ils se font de la récente immigration, et pour désamorcer les stratégies rhétoriques qui stigmatisent les demandeurs d'asile et les réfugiés en Irlande en y voyant la manifestation d'une vague montante d'immigration illégale, plutôt que d'y voir le geste de victimes de persécutions requérant une protection internationale. L'attention de la discussion porte sur l'éventail de discours distincts sous-tendant ces métaphores de fluidité, leur transformation au fil du temps, leur influence sur un engendrement de l'hostilité du public envers l'émigration historique, puis envers la venue au pays de demandeurs d'asile et de réfugiés, au fur et à mesure que l'Irlande se transforme de 'pépinière à émigrants' à terre d'accueil à l'immigration.

Jason King is a doctoral student in the English Department at the National University of Ireland, Maynooth, where he is writing his dissertation on the literature of emigration from Ireland to Canada during the mid-nineteenth century, as well as current representations of asylum-seekers and refugees coming into Ireland today. He is also a volunteer for the Irish Refugee Council, where he has worked both in the Council for Documentation and Research Section as well as in its Legal Research Unit.

Introduction

The most pressing reason for the speedy passage of Ireland's Immigration Bill, 1999, according to the Minister of State for Justice, Mary Wallace, was the need to protect Irish society from the "inflows of criminal elements" (Irish Times, July 2, 1999). Following the High Court judgement in the case of Laurentiu v. Ireland (22 January, 1999) that struck down the deportation provisions of the 1935 Aliens Act, and the upholding of that decision by the Irish Supreme Court (20 May, 1999), Ireland's "deportation loophole" needed to be plugged, stated Minister of Justice, Equality and Law Reform, John O'Donoghue (who tabled the Bill), in order to "prevent and discourage illegal immigration" (Irish Times, January 108; Pollock; Watt, 29-30). One year earlier, Minister O'Donoghue had also expressed his vehement opposition to a proposed amnesty for the backlog of asylum-seekers in Ireland, because "it would send the wrong signal in terms of addressing illegal immigration flows".[1] More recently, a spokesman for the Department of Justice warned that if work permits were granted to asylum-seekers, "the flood gates would be opened".[2] What each of these pronouncements emphasize in common, then, is an implicit association between Irish immigration and threatening metaphors of fluidity: one that gradually elides the distinction between asylum-seekers, "illegal immigration flows", and "inflows of criminal elements" to manipulate public opinion and stigmatize those seeking asylum in Ireland through what Crepeau terms an "illegitimacy transfer" (2-3). Such pronouncements from Department of Justice officials also encapsulate sentiments that have become widespread, as not just reported but inculcated by a large cross-section of the Irish media in the past couple of years (Collins, 103-108; Pollock; Watt, 29-30). As Phillip Watt observes, "the repeated assertion that there is a flood or tide of refugees and asylum-seekers coming to Ireland" has helped create an "atmosphere of fear" and intolerance towards them (29). Indeed, one should not underestimate the extent to which alarmist rhetorical strategies, negative media coverage, and hostile public-opinion not just in Ireland but throughout the Western world effectively constrain, shape and determine respective national immigration and refugee policies (Simon & Lynch). And yet, the invocation of 'floods and tides' to describe Irish migratory processes is not limited to Ireland's recent upsurge in asylum applicants. Rather, it can be attributed to a recrudescence of metaphors of fluidity that have characterized Irish emigration for at least one hundred and fifty years, following the 'Famine tide' of 1847. My intention here is to examine the evolution and transformation of

these metaphors of fluidity in the period between the Famine of 1847 and the Dublin Convention (1990), both to trace the effects of historical Irish outmigration on perceptions of recent immigration, and to demystify rhetorical strategies that stigmatize asylum-seekers and refugees in Ireland as part of an expanding pool of illegal immigration, rather than as victims of persecution in need of international protection.

Metaphors of Fluidity

It is now commonplace to remark that the rhetoric of migration frequently represents population displacements through metaphors of fluidity. Writers employing legal, academic, and journalistic registers all tend to describe population movements as 'influxes' and 'outflows', 'immersions' and 'outpourings', 'floods', 'tides' and 'waves', with varying degrees of self-consciousness about the impact of their figurative language upon perceptions of migration. What is less commonly noted, however, are the discourses underlying these metaphors of fluidity and how they become transformed over time, that is, the extent to which these metaphors themselves are diachronically constructed, and subject to modification and periodization, rather than ahistorical, immutable, and static figures of representation. Accordingly, I want to telescope the representations of two historically disjunctive moments in patterns of Irish migration and survey the evolution and transformation of metaphors of fluidity between them. More specifically, I want to focus first on the period of the rapid expansion and institutionalization of the emigrant trade in the 1830s and 1840s leading up to the Famine migration from Ireland, and then I want to turn to the reverse flow of increasing asylum-seekers coming into the country in the late 1990s, as part of the same process of discourse transformation underlying Ireland's transition from an emigrant to an immigrant host society.

The danger inherent in this type of discourse analysis, however, is that it obfuscates the grim materiality of the conditions and conflicts that give rise to population displacements and refugee movements in the first place (Rapport, 77; Said, 159-161). And yet, it can be argued that nothing has a more immediate impact on the lives of refugees in countries of first asylum and resettlement than public-opinion, their representation by the media, and the rhetorical strategies that are often employed to incite feelings of hostility and even acts of violence against them.[3]

From Gothic to Social Darwinism

My argument, then, is that whereas in the mid-nineteenth-century representations of Irish outmigration were usually encapsulated within a larger Gothic discourse, that depicted it through metaphors of hemorrhaging, blood-letting, and cultural anaemia for the social disruption caused by population depletion, this ultimately becomes superseded in the 1990s by an emergent discourse of Social Darwinism, rooted in the residue of natural selection, competition for limited resources, and economic determinism, that has come to represent the arrival of asylum-seekers into Ireland as a form of natural disaster.[4] In other words, in the period between the Famine and the Dublin Convention (1990) Gothic Supernaturalism gradually gives way to Natural Selection in conditioning metaphors of fluidity for Irish migratory processes.

In saying this, however, I do not want to imply that there is either a simple process of supercession or a reductive dichotomy between the two. Rather, it has been suggested that both the Social Darwinist and Gothic emerge dialectically related to one another within the same nineteenth-century purview and at opposite ends within the same ideological continuum, as Enlightenment and counter-Enlightenment discourses that illustrate either the rigid social application or obverse reaction against the rise of "instrumental rationality".[5] For my purposes though, it is enough to note that in mid-nineteenth-century Ireland the Gothic was the dominant and the Social Darwinist the recessive discourse underlying various representations of the Irish exodus, whereas the two have now become inversely related in the public perception of asylum-seekers and refugees. At issue, in other words, is the way in which each of them gives rise to similar rhetorical strategies that stigmatize migration by construing any deviation in the national population level as a threat to the normative social order.

Porous Nation

What each of these discourses emphasize in common, however, is the fundamental passivity of the Irish nation before migratory pressures that render it prostrate and unable to regulate the population movements that traverse its borders. For whether migration is portrayed as a form of social enervation or immigrant inundation, both discourses construct Ireland as porous, vulnerable, and subject to external migratory controls. Each of these discourses thus also gives rise to fundamental anxieties not only about the liquidation of international boundaries but also, more specifically, about the self-selectivity of those migrant populations who first would exit and then enter the Irish nation. In the Famine period, for example, Irish Nationalist and Tory Unionist commentators alike opposed the outmigration of either the "industrious classes" of an independent Catholic "yeomanry" or the 'lower order of Protestants' through recourse to the same Gothic metaphors of 'draining lifeblood', splintered 'bone and sinew', and social haemorrhage. These, in turn, became absorbed into a critique of the Union between Great Britain and Ireland (1800) as either in need of Repeal or imperial retrenchment for purposes of population retention. More recent constructions of refugees 'flooding into Ireland,' on the other hand, shift the

discourse to apprehensions of strained resources that are figured in terms of an imminent natural disaster. It is partially this rhetorical strategy, for example, that enables the Irish Department of Justice, Equality, and Law Reform to circumvent existing statutory protections for asylum-seekers enshrined in the Irish Refugee Act (1996) with minimal opposition, because of the ostensible need for ad hoc, contingent and discretionary procedures as measures of 'containment' for the 'refugee crisis' that then become normative as Ireland's refugee reception policy (Byrne, 107-117).

Yet to whatever extent Ireland suffers from a 'refugee crisis' it is clearly a crisis of representation. For whether it be in the discursive fields of legal, media, or parliamentary representation, the image of the refugee has become over-determined and conflated with other categories of migrant – so that traditional conceptions of political displacement and enforced migration, whereby refugees come to Ireland because of a well founded fear of persecution abroad, are increasingly destabilized by perceptions of asylum-seekers as economic agents, who misrepresent their displacement in terms of human rights violations to cloak their exploitation of Ireland's supposedly generous social and economic entitlements. What each of these Gothic and Social Darwinist discourses lead to therefore is a concept of migratory self-selection in which, to put it bluntly, 'back then', at the time of the Famine, it was always the best who left, whereas now in the 1990s it is always the worst (economic aliens, parasites, spongers) who would come to Ireland.

Ireland's 'Haemorrhage'

Unlike today, in the mid-nineteenth century, both Irish Nationalist and Tory Unionist commentators feared population depletion rather than immigrant inundation. They each employed a Gothic discourse to object not just to the phenomenon of emigration in general but specifically the departure of their respective population cohorts, and the evacuation of their social bases of support. Each group envisioned Ireland as an organic entity whose steady loss of people they imagined as a form of degenerative illness or social haemorrhaging.

Space restrictions permit only a truncated discussion here of Irish Nationalist and Tory Unionist rhetorical strategies that invoked the same Gothic conventions of blood-letting, haemorrhaging, and collective anaemia to oppose emigration as representing a diminution of their respective political interests; but suffice it to say that writers from both traditions frequently turned to the Gothic to depict the social disruption caused by population depletion. Each would thus equate the emigration of their respective cohorts with a metaphorical loss of blood to foreground its abnormality, its aberrant rather than routine occurrence within the imperial circulation of peoples and commerce. Accordingly, whereas writers in the cultural nationalist publication The Nation frequently employed Gothic metaphors of fluidity to lament the loss of an independent Catholic yeomanry ostensibly at the heart of the nationalist project, for the Tory Unionist Dublin University Magazine it was the migration of the lower class of Protestants that was figuratively seen, as a form of hemorrhaging, to curtail the life span of both the Irish Union and the British Empire.[6] In both cases, though, the Irish nation or the Irish Union was envisioned as equally passive and helpless before the very population losses that would inevitably hasten its own demise.

Immigrant Inundation

If we turn now to more recent perceptions of refugees 'flooding into Ireland', the Irish nation is similarly envisioned as passive, porous, and subject to external migratory controls, albeit for very different reasons. For whereas in the mid-nineteenth century, metaphors for migration were entirely constructed in terms of national depletion, fluid seepage, and loss, the reverse flow of increasing asylum-seekers coming into Ireland tends to be imagined as a form of immigrant inundation, a population stream that threatens to drown the nation in place of its traditional drainage. Against the backdrop of Ireland's transition from an emigrant to an immigrant host society, an emergent discourse of Social Darwinism has gradually superseded its Gothic predecessor, to reconstruct Irish migratory processes in terms of 'floods', 'tides', and as a variant of natural disaster. Under this rubric of Social Darwinism, immigrants to Ireland, mainly asylum-seekers and refugees, are associated not with human rights violations but economic survival strategies, competition for limited resources, and outright opportunism, as the 'spillover' of other nations' poverty that puts Ireland's capacity to sustain its own populace under strain. Accordingly, in the period between the Famine and the Dublin Convention, 'haemorrhaging' has gradually given way to 'sponging', 'vampirism' to 'parasitism', 'blood-lines' to the 'dole-queue', and much more recently, the 'brain drain' to a 'traffickers' haven', as dominant images for would-be migrants in the popular imagination and media coverage of population displacement. A series of paradoxically mixed metaphors emerges here to stigmatize migratory self-selection as a degenerative social influence across a range of different discourses, while implying that the nation's incapacity to regulate its population level has changed little over time.

Evidence of a Social Darwinist mindset is more than apparent in recent press coverage and Oireachtais (parliamentary) debates about asylum-seekers and refugees. As Andy Pollock alleges, "sensational headlines, misleading statistics, unsourced claims, and often plain demonising of asylum-seekers" (15) have frequently marked this press coverage, especially that of Ireland's Independent Newspaper Group. For example, calamitous imagery equating recent immigration with a form of natural disaster has been the recurrent theme in headlines such as "5000 Refugees flooding into Ireland" (Irish Independent, May 29, 1997) and "Demand to curb... tide on refugees" (Sunday World, May 20, 1997). The ensuing apprehension of strained resources in-

forms further headlines like "Services face overload as refugee flood continues" (Sunday Business Post, May 18, 1997), "Refugee Flood to spark home crisis" (Irish Independent, June 12, 1997), "Asylum seekers and homeless vie for shelter" (Irish Times, May 9, 1997), and "Crackdown on 2000 sponger refugees" (Irish Independent, June 7, 1997).

The dominant themes that emerge here are those of a resource burden and burgeoning criminality, both of which come together under the notional banner 'refugee crime-wave' that implicitly associates asylum-seekers with the need for greater law enforcement and cost reduction together under a single heading. Even more inflammatory are alarmist headlines that implicitly link the two to augur social extinction, such as "Refugee rapist on the rampage" (The Star, June 13, 1997) and "Refugees flooding maternity hospitals (Evening Herald, June 6, 1997)," that incite fear of cultural and racial contamination in the very act of inhibiting the host population's capacity to reproduce itself. What entails from such calamitous imagery, then, is a growing sense of necessity for extraordinary measures and the use of discretionary powers to 'contain' the refugee crisis. In times of crisis and natural disaster, in other words, the nation must resort to contingency measures it normally would not countenance to ensure its self-preservation. Calamity, contingency, the threat of extinction, the struggle for reproduction, and instinctive self-preservation: all of these, of course, are variants of a principle of Natural Selection within a larger Social Darwinist discourse.

The influence of Social Darwinism is less evident but also still perceptible in several recent Irish Oireachtais debates on the subject of immigration and refugee policy. "On my appointment as Minister for Justice, Equality, and Law Reform" in June 1997, stated John O'Donoghue last year, "one of the first issues to be brought to my attention was the surge in the number of asylum seekers which had been experienced" after passage of the Refugee Act (1996).[7] "The extent of the surge experienced" – from 424 applicants in 1995 to almost 4000 last year – was such "that the structures provided for in the Act would have been totally overwhelmed from day one, had we gone ahead with its implementation". Therefore, it has only been selectively implemented in tandem with departmental directives that "seek to regulate immigration flows" and prevent them from taking "place in a totally haphazard and unregulated manner".

The Minister's comments are framed then in familiar terms of disaster prevention, cost reduction, and the need for national self-preservation, by erecting discretionary barriers where "there is no legislative framework in place to [restrict] the further influx of migrants". In practice, this has meant adopting a restrictive definition of the Refugee Convention; implementing strictly the removal proceedings of the Refugee Act, including judicious application of the Dublin Convention (Irish Times, May 27, 1999), to circumvent the Act's transparency, multi-stage determination procedure, and measures of procedural fairness; drafting guidelines to root out "Manifestly Unfounded" applications;[8] occasional exclusions of members of visible minorities at border checkpoints (Irish Times, April 24, 1999); and delaying the appointment of independent appeals officers, although this has recently been rectified and is reflected in substantially improved recognition rates (Irish Times, June 3, 1999). "Less amenable to calamitous imagery," on the other hand, notes Byrne, is the mundane reality of "administrative paralysis" that remains the underlying cause of the "logjam" and the "refugee crisis" (110).

Behind these calamitous metaphors of fluidity, however, also lies the more stark, socio-economic parlance of limited resources, demographic pressure, potential labour strife, and strained law enforcement, as a result of "illegal immigration flows". For "the magnitude of the influx" has generated a number of associated costs, Minister O'Donoghue continues, including "social welfare, housing, education, health care, employment, etc.," all of which "must also be borne in mind" when devising immigration and refugee policy. Moreover, external, global factors such as acute poverty, underdevelopment, ever more accessible and extensive transportation links, and people trafficking have all rendered Ireland particularly vulnerable to an increasing "number of persons who seek asylum as refugees when it is economic pressures which are motivating [them] rather than political persecution". In effect, it might be argued that Ireland currently perceives itself to be experiencing the same economically induced, sharp increase in asylum applicants and permutation of the "refugee crisis" that affected many Western European and North American nations in the mid-1980s (Hawkins, 386-389; Kelley & Treblicock, 382-440; Zolberg et al, 278-282), but has reacted by suspending its own Refugee Act as far too cumbersome to handle the increased caseload without ever even putting that legislation fully to the test. It is this prevailing sense of crisis that has informed recent discussion of Ireland's Immigration Bill, 1999.

Immigration or Deportation Bill?

In a rare moment of levity during the discussion of Ireland's Immigration Bill, Minister O'Donoghue began to lecture the House on the etymology of the term "aliens":

> It owes its origin – he explained – to the Latin noun and adjective alienus, which simply conveys a quality of "elseness". Nowadays it is more likely to conjure up images of outer space than of people from other countries. I am happier to see its use discontinued [and replaced by the term "non-national"...] That said, if there is ever an invasion from outer space, I have no doubt——
>
> Mr Howlin: The Minister will deport them.
>
> Mr O'Donoghue: ——the aliens legislation will be revived.[9]

We will put aside the question of whether the outlandish term "aliens"

suggests "invaders from outer space" rather than "people from other countries", and to what extent the rise of science fiction as a genre is ultimately bound up with Cold War politics and fear of the "enemy within". More pertinent here is the fact that Minister O'Donoghue's comments obfuscate the distinction between immigration into Ireland in general – whether it be the movement of "aliens" or "non-nationals" – and the more specific intent and much narrower scope of the legislation: to deport failed asylum applicants and exclude "undesirable non-nationals" from entering the country.[10] The Minister's seemingly liberal adoption of the term "non-national", in other words, conceals the function of the legislation and, according to opposition Deputy De Rossa, his failure to produce any sort of "policy document which outlines government thinking on how immigration will impact upon [Irish] society".[11] As opposition deputy Michael Higgins also objected in the House: "it is a great tragedy that we are considering legislation that is effectively the housekeeping of deportation rather than discussing the principles of a policy on refugees or migrants".

No Queues to Jump

Throughout his term of office, Minister O'Donoghue has insisted upon the need to distinguish rigorously between "genuine refugees" and "illegal immigrants."[12] He has also frequently reiterated that "the reality, in line with international experience, is that at most about 10 percent of applicants will... be found to be refugees"[13] – a statement that quickly became a self-fulfilling prophecy with respect to recognition rates (Irish Times, March 23, 1999), yet remains patently false in light of Canadian experience (Kelley & Treblicock, 427), and is belied even by the Irish Government's own recently instituted independent appeals procedures (Irish Times, June 3, 1999). Both statements must therefore be considered disingenuous, given that Ireland has no immigration policy apart from asylum procedures for voluntary immigrants to avail of, and therefore no legal means of entry to alleviate pressure from irregular population movements. Although the UNHCR suggests that "it is not healthy for the asylum system of any country that there should only be one channel (asylum-seeking) whereby immigrants from outside the EU can get in," Ireland has yet to expand its means of entry, despite repeated calls for some form of regularized immigration (Irish Times, April 30, 1999). "Because the state restricts immigration to the asylum route," adds Pauline Faughnan of the Social Science Research Centre at University College Dublin, that route becomes "abused" (Irish Times, April 30, 1999). Thus, unlike in other western nations, where fraudulent asylum applicants are condemned as "queue jumpers" seeking to circumvent lengthy immigration procedures, in Ireland, in effect, there are no queues to jump.

What follows is that those seeking to immigrate voluntarily to Ireland are caught within a categorical squeeze, between making a spurious asylum application on the one hand, and outright exclusion on the other. "Ab initio, on arrival in the land," states Minister O'Donoghue, "an individual is either an illegal immigrant or a refugee".[14] The Minister is thus in no position to offer the guarantee, at the behest of UNHCR, that Ireland's "immigration and asylum policies do not get confused,"[15] because they are, in effect, one and the same. Nor is he in any position to reassure UNHCR that he seeks to "avoid the public perception that equates refugees with illegal aliens, and weakens the awareness of those in need of protection,"[16] because he himself has frequently and publicly cast doubt upon the validity of the vast majority of asylum applications in Ireland. While it is obvious that all states have to take measures to distinguish between genuine asylum applicants and illegal immigrants as one plank of refugee protection and as a function of sovereignty, it would also seem incumbent upon states like Ireland not to overburden their asylum procedures by restricting access into the country from all other channels. The conclusion that should be drawn here is that some form of elective immigration policy is not merely auxiliary but an essential corollary of refugee protection, and that it is detrimental to the well-being and public perception of asylum applicants when their procedural means of entry is also, by law, the sole conduit of legal (and hence illegal) immigration (also see Habermas for a similar analysis of the politics of asylum in Germany, 141-148).

Finally, it needs to be said that no European country is more vulnerable to the pressure from extra-legal remedies for failed asylum applicants and economic migrants than Ireland. Ireland's history of emigration extends not just from the Famine and Pre-Famine periods but up until as late as the mid-1980s, when officials from the Irish Government vigorously lobbied the United States administration to permit undocumented "Irish illegals" in America to remain (Corcoran). Minister O'Donoghue's remark that "Ireland has traditionally been regarded as a country of emigration rather than immigration"[17] is in many respects a prescriptive instead of a descriptive statement, and it can be interpreted to provide a rationale for shifting the burden of accepting asylum-seekers away from Ireland to other countries of resettlement; but Ireland's history of emigration has also been mobilized very effectively to create feelings of empathy for immigrants and for purposes of advocacy, both in the Oireachtais and in society at large. Ultimately, by framing Ireland's immigration legislation strictly through the lens of refugee determination, Ireland's Justice Department obfuscates not just the more vexing issues surrounding recent Irish immigration, such as, first of all, the nation's glaring lack of policy, determination of absorptive capacity, or statement of a notional desirable rate of increase in lieu of its so-called crisis proportion; but also, secondly, it fails to acknowledge Ireland's profound ethical and historical obligations to permit at least a portion of its economic aliens and non-coerced migrants humanitarian leave to remain, if for no other reason, then because of its robust economic

expansion that increasingly implicates Ireland in a growing network of socio-economic disparities world-wide. It is, after all, very easy for Ireland to insist it is being flooded with immigrants, in the absence of any stipulated policy, normative criterion, or water marker by which to measure its population overflow.

Conclusion

Therefore, in a spirit of intervention, I would like to suggest that the point here is not to refute but to refigure these metaphors of fluidity, in a manner more sympathetic to the plight of Ireland's economic aliens, asylum-seekers, and refugees. In Metaphors We Live By (1980), Lakoff and Johnson state that "metaphors may create realities for us, especially social realities" (156). "In most cases," they add, "what is at issue is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it" (158). "We... pay the cost of this bad [press] coverage," confirms refugee Khalid Ibrahim of ARASI,[18] for "it leads to attacks from people who don't know the reality" (Irish Times, February 25, 1998). Metaphors of fluidity, like that of refugees flooding into Ireland, thus generate a network of social entailments that incur hostility towards would-be migrants, bring pressure to bear on governmental agencies to control and contain the perceived immigration influx, and even give rise to a backlash against visible minorities long settled and established in the country, all because of often misleading presumptions about their economic impact upon Irish society.

And yet, most demographic pronouncements about population excess in twentieth-century Ireland, notes J.J. Lee, contain a "number of silent assumptions, untested empirically," that appear untenable by any comparative criterion (381). By the same token, Ireland's refugee crisis involves such a small order of magnitude on a comparative European or global basis, that it seems more the result of bureaucratic inertia and discretionary policy than any failure in the nation's absorptive capacity to take in would-be migrants. What follows is that Ireland suffers from a form of metaphorical rather than population excess.

We need therefore to reconfigure established metaphors for Irish migration, perhaps even viewing recent immigrants as a badly needed transfusion of people and labour supply to help fuel Ireland's continuing robust economic growth. The Canadian journalist Victor Malarek's prognosis of the so-called Canadian 'refugee-crisis' in the late 1980s might have equal bearing on Ireland today:

> although the number of people claiming refugee status has been growing, -Malarek writes - compared with the thousands accepted by [other] European nations, the [Irish] wave is more like a cresting stream; compared with front-line Third World countries, with millions of refugees confined to camps, it is [but] a trickle.(129-130)

The reconfiguration here of more established metaphors of fluidity, replacing 'floods and tides' with 'streams and trickles', contests the social reality and economic anxieties they construct. It enables a new, comparatively adjusted perspective on Ireland's and other nations' immigrant reception, hopefully one that is more sympathetic and less antagonistic towards asylum-seekers and refugees. ■

References

Byrne, Rosemary. 1997. "On the Sliding Scales of Justice: The Status of Asylum Seekers and Refugees in Ireland," Developments in Discrimination Law in Ireland and Europe, eds. Rosemary Byrne & William Duncan. Dublin: I.C.E.L., p.107-117.

Collins, Adrienne. 1997. "Is Ireland Meeting its International Obligation towards Refugees?", Trocaire Development Review. Dublin, p.93-114.

Corcoran, Mary. 1993. Irish Illegals: Transients Between Two Societies Westport CT: Greenwood Press.

Crepeau, Francois. 1996. "International Cooperation on Interdiction of Asylum Seekers: A Global Perspective" (Ottawa: Canadian Council for Refugees Interdiction Workshop).

Habermas, Jürgen. 1994. "Struggles for Recognition in the Democratic Constitutional State," in Charles Taylor, Multiculturalism: Examining the Politics of Recognition, ed. Amy Gutmann. Princeton, New Jersey: Princeton University Press.

Hawkins, Freda. 1988. Canada and Immigration: Public Policy and Public Concern, 2nd ed., Montreal: McGill-Queen's University Press.

Horkheimer, Max, & Theodor Adorno. 1990. Dialectic of Enlightenment (1944). New York: Continuum.

Kelley, Ninette & Michael Treblicock. 1998. The Making of the Mosaic: A History of Canadian Immigration Policy. Toronto: University of Toronto Press.

Lakoff, George, & Mark Johnson. 1980. Metaphors We Live By. Chicago & London: University of Chicago Press.

Lee, J.J. 1989. Ireland, 1912-1925: Politics and Society. Cambridge: Cambridge University Press.

Malarek, Victor. 1987. Haven's Gate: Canada's Immigration Fiasco. Toronto: Macmillan.

Pick, Daniel. 1989. Faces of Degeneration: A European Disorder, c. 1848 – c. 1918. Cambridge University Press.

Pollock, Andy. 1998. "Address to the Clearun Media Conference," 21 February, 1998, extracted in The Irish Times, February 23, 1998.

Rapport, N. 1997. Transcendent Individuals. New York: Routledge.

Said, Edward. 1984. "Reflections on Exile," Granta 13, p.158-172.

Simon, Rita J. & James P. Lynch. 1999. "A Comparative Assessment of Public Opinion Toward Immigrants and Immigration Policies," International Migration Review 33, no. 2, p.455-467.

Watt, Philip. 1998. "Reporting on Refugees," Focus 57/58, p.29-30.

Zolberg, Aristide, Astri Suhrke, & Sergio Aguao. 1989. Escape from Violence: Conflict and the Refugee Crisis in the Developing World. Oxford University Press, 1989.

Notes

1. Dáil Debates Official Report –10-3-98. PRIVATE MEMBERS' BUSINESS. Asylum Seekers (Regularisation of Status) (No. 2) Bill, 1998: Second Stage. (http://www.irlgov.ie/oireachtas/frame.htm).
2. Oireachtas Committees Public Accounts 20 May 1999 Page 1. (http://www.irlgov.ie/oireachtas/frame.htm). However, it should be noted that as of July 27, 1999, asylum-seekers who have been in the State for more than twelve months will be granted the right to work, pending the determination of their status (Irish Times, July 28, 1999).

3. For reports of incidents of violence and institutional racism suffered by asylum-seekers in Ireland, see the Irish Times (July 7, 1998; November 12, 1998; February 1, 1999; March 2, 1999; April 24, 1999; April 27, 1999).

4. For further consideration of Social Darwinian theory in the context of national and international conflict, population displacement, and conflict resolution, see Otunnu, Ogenga 1997. "Conflict and Conflict Resolution," Refuge 16, no. 6, p.1-5.

5. See Daniel Pick, Faces of Degeneration: A European Disorder, c. 1848 – c. 1918. 1989. Cambridge: Cambridge University Press, p.155-175. For a full length critique of instrumental rationality in the western philosophical tradition, see Horkheimer, Max, & Theodor Adorno. 1990. Dialectic of Enlightenment (1944). New York: Continuum.

6. For two definitive examples of Irish Nationalist and Tory Unionist publications that invoke Gothic conventions of haemorrhaging to oppose the emigration of either affluent Roman Catholics or lower-class Protestants, see William Carleton. 1979. The Emigrants of Ahadarra (1848). repr. New York & London: General Publishing, and anon. 1833. "On the Emigration of Protestants," Dublin University Magazine 1, p.471-483. Moreover, for insightful discussions of Gothic conventions in nationalist and Unionist writing of the Famine period, see Sean Ryder. 1996. "Reading Lessons: Famine and the Nation, 1845-1849," in Fearful Realities: New Perspectives on the Famine, eds. Chris Morash & Richard Hayes. Dublin: Irish Academic press, p.151-163; Jim Mac Laughlin (ed). 1997. "Emigration and the Construction of Nationalist Hegemony in Ireland: The Historical Background to 'New Wave' Irish Emigration", Location and Dislocation in Contemporary Irish Society: Emigration and Irish Identities. Cork: Cork University Press, p.12-25; and Wayne Hall. 1999. "A Tory Periodical in a Time of Famine: The Dublin University Magazine, 1845-1850". The Great Famine and the Irish Diaspora in America. Ed. Arthur Gribben. Amherst: University of Massachusetts Press.

7. Dáil Debates Official Report –10-3-98. PRIVATE MEMBERS' BUSINESS. Asylum Seekers (Regularisation of Status) (No. 2) Bill, 1998: Second Stage. (http://www.irlgov.ie/oireachtas/frame.htm).

8. ADJOURNMENT DEBATE Refugee Legislation 12-10-97. (http://www.irlgov.ie/oireachtas/frame.htm).

9. Immigration Bill, 1999: Order for Second Stage. (http://www.irlgov.ie.80/debates-99/9feb99/sect5.htm).

10. Committee on Justice, Equality & Law Reform Section 1 99/06/29.

11. Immigration Bill, 1999: Second Stage (Resumed). (http://www.irlgov.ie.80/debates-99/9feb99/sect5.htm).

12. See, for example, Asylum Seekers (Regularisation of Status) (No. 2) Bill, 1998: Second Stage & Second Stage (resumed); Immigration Bill, 1999: Order for Second Stage; Oireachtas Committees Public Accounts 20 May 1999 Page 1; Committee on Justice, Equality & Law Reform Section 2 99/06/03; Irish Times (March 23, 1999).

13. Asylum Seekers (Regularisation of Status) (No. 2) Bill, 1998: Second Stage. Also see, Oireachtas Committees Public Accounts 20 May 1999 p.1.

14. Committee on Justice, Equality & Law Reform Section 2 99/06/03.

15. Statement by Mrs. Sadako Ogata, United High Commissioner of Refugees on the occasion of the Inter-Governmental Consultations on Asylum, Refugee, and Migration Policies in Europe, North America, and Australia. The Hague, 17-18 November 1994 (ctd. in Interdicting Refugees. Canadian Council for Refugees: May 1998, p.21).

16. Ibid.

17. Asylum Seekers (Regularisation of Status) (No. 2) Bill, 1998: Second Stage

18. Association of Refugees and Asylum-Seekers in Ireland. □

Background Information on the Centre for Refugee Studies

The Centre for Refugee Studies (CRS) is an organized research unit of York University. Founded in 1988, the Centre for Refugee Studies is successor to the Refugee Documentation Project created in 1981 for the conservation and analysis of research documents and data collected by Operation Lifeline during the Indochinese Boat People crisis. In 1991, CRS was designated as a Centre of Excellence by the Canadian International Development Agency (CIDA).

The Centre for Refugee Studies fosters interdisciplinary and collaborative research in all of its undertakings. Our efforts are focused in areas related to a comprehensive research programme expanding from theoretical to institutional research on the aforementioned areas of study. In carrying out this research, CRS networks with Canadian and international development agencies and academic institutes. CRS invites scholars from abroad to share in the research. Canadian and international students are supported to undertake field studies and conduct related research. Joint research activities with institutions in the developing world are underway. CRS plays a significant role in an advisory capacity with Canadian government and other agencies.

In our education initiatives, the General Certificate programme allows students in the undergraduate programmes (Faculty of Arts, Faculty of Environmental Studies, Atkinson College and Glendon College) to register specifically for the Certificate and to specialize formally in the area of Refugee and Migration Studies and to be awarded the Certificate concurrently with the BA or BES. Students who already have an undergraduate degree can be admitted as special students by the relevant faculties and complete the requirements to receive a Certificate in Refugee and Migration Studies. The Graduate Diploma program offers incentive and recognition to students whose academic focus is on refugee-related issues. The Graduate Diploma programme was developed and passed by the Graduate Faculty Council and subsequently the York Senate in April 1991. The diploma is awarded concurrently to the graduate student who complete the diploma requirements and the degree requirements.

Our communications initiatives involve acquisition efforts through data collection in our Andrew Forbes Resource Centre, a comprehensive publications program including the periodical REFUGE, and a full program of seminars, workshops and conferences.

Asylum and Refugee Status in Portugal

Lúcio Sousa

Abstract

Portugal does not have a tradition of receiving refugees. Similarly, the study of refugee issues is also very incipient. This short paper intends to be a small contribution to this field of research by presenting an analysis of the evolution of the Refugee Status in Portugal.

Résumé

Le Portugal n'a pas de tradition d'accueil des réfugiés. Corrolairement l'étude des questions concernant le refuge y est plutôt limitée. Ce bref article se veut une modeste contribution à ce champ de recherche par la présentation d'une analyse de l'évolution du statut de réfugié au Portugal.

Portugal does not have a tradition of admission and reception of large fluxes of refugees. The exceptions could be the thousands that fled from the Civil War in Spain and the flux of some 200,000 who transited throughout the country to the Americas during the Second World War.

The April Revolution in 1974 brought changes in the political, socio-economic and demographic characteristics of the country, namely the inflexion of the international migration patterns. Among these included the repatriation of some 800,000 Portuguese from ex colonies and the rising of the foreign population.

Lúcio Sousa is an anthropologist finishing his Masters Degree in Intercultural Relations at the Open University in Portugal with a study on refugee integration in the Portuguese society.

Fluxes and recognitions

In this context, the figures of asylum seekers are rather low. Between 1974 and 1997[1] the total applications were 12,782 including 9,665 individual applications and 3,117 family members. These figures are mostly concentrated in two periods around the years 1980 and 1993. Until the end of the eighties most of the asylum seekers came from the Portuguese speaking countries of Africa (PALOP). This African pattern is a main characteristic of the asylum seekers in Portugal and a primary distinction when comparing with other Western European countries.

Only in the period around the year 1993 did the origin of asylum seekers get closer to the European pattern when the largest part of the asylum seekers came from Eastern Europe. Nowadays, the pattern of spontaneous asylum relays again in the African pattern now mainly from West African countries.

But the figures may present only part of the issue. In fact, sociologically, it is arguable that many of those arriving from Angola and Mozambique in the seventies and the eighties could be deemed as refugees[2]. It is possible that this situation can still happen in this decade in the Angolan case[3].

As for the status recognition, between 1974 and 1997, 961 cases were granted (414 for family members). After 1994, the residence permit for humanitarian reasons was given 103 times. Most of these recognitions were from Africa (86%), and 75% from the PALOP. Nevertheless, it is important to mention that between 1974 and 1993 the Portuguese nationality was granted in 2394 cases before the first decision or after a negative one. Of these, the PALOP, especially between 1978 and 1984, account for 2359 (98.5%).

Refugee Status

In order to analyse the evolution of Refugee Status in the Portuguese law we will use Zolberg's (1989)[4] categories of activist, target and victim for describing it.

Although Portugal had signed the 1951 Geneva Convention in 1960 only in 1975 was the New York Protocol signed. In the 1975 Constitution, the asylum was recognised to those who fought towards democracy, hence labelled as the activist.

Only in 1980 the first asylum law, 38/80, was elaborated. This law recognised the refugee status under the Constitution, the 1951 Geneva Convention premises for humanitarian reasons for those coming from war torn countries. The activist, the target and the victim would receive the same level of protection.

This law lasted until 1993 when a new asylum law, 70/93, was created. It incorporated the latest developments in restrictions on asylum procedures arising from the Shengen and Dublin agreements. The changes meant that now only the activist and the target were deemed to receive the status of refugee. The humanitarian asylum was turned into a resident permit for humanitarian reasons for one year, renewable, giving less protection degree to the victim.

Recently the asylum law has changed. In 1998 a new asylum law, 15/98, considers basically the same refugee status for the activist and the target, yet, there is one improvement in the residence permit for humanitarian reasons, (no longer a discretionary measure but turned into a concession).

The novelty arises with the concept of temporary protection, portrayed as way of dealing with large groups. A striking aspect of this concept is that it can be applied both for the victim, the target or even the activist. For example, recently, the Guinea Bissau refugees that come to Portugal can be seen as victims. Mean-

while, the Kosovar refugees can also receive this temporary protection. Despite being victims of war, they are clearly in a situation of target recognisable under the Geneva Convention because they fled due to their ethnic affiliation.

In conclusion, the official fluxes are very small and the main fluxes of such refugees originate from Africa and the PALOP. As for the refugee status we could say that the evolution, after a period marked by the decolonisation linkages and generous concept, has changed towards the European harmonising process, with a more restricted vision of the refugee status and the dazzling diversification of asylum processes. ■

Notes

1. Sources: Division of Refugees (Aliens and Borders Police); Costa, José Martins Barra da (1996), Exílio e Asilo (A questão Portuguesa 1974 - 1996), s. ed., Lisbon, Universidade Aberta.
2. Pires, R., Saint-Maurice, A. (1989), Descolonizações e Migrações, os imigrantes dos PALOP em Portugal, Revista Internacional de Estudos Africanos, n° 10 and 11, p.203-226.
3. Like recent news suggest, see Público 99/01/22.
4. Zolberg, Aristide R.; Suhrke, Astri; Aguayo, Sergio, (1989), Escape From Violence Conflit and the Refugees Crisis in the Developing World, s. ed., New York, Oxford University Press. □

(The author thanks Rosário Tique for comments on the draft.)

Feedback ?

Questions ?

Remarks ?

We welcome them all.

Send your comments to:

refuge@yorku.ca

Notes from the Field in Kigoma, Tanzania

Paul B. Spiegel and Mani Sheik

Abstract

In these short notes the authors provide some insight to their visit to displaced persons camps in Kigoma, Tanzania. This trip marks the fourth set of camps examined in the Post-Emergency Phase Indicators Project, a joint collaboration between the Johns Hopkins Center for Refugee and Disaster Studies, and the International Emergency and Refugee Health Branch at the Centers for Disease Control.

Résumé

Dans ces brèves notes, les auteurs fournissent un aperçu de leur visite au camps pour personnes déplacées de Kigoma, en Tanzanie. Ce voyage marque la conclusion de la quatrième série de visites de camps de réfugiés examinés dans le cadre du Projet sur les Indicateurs d'Étapes en Situation Post-Urgente (Post-Emergency Phase Indicators Project), une collaboration conjointe du Centre John Hopkins pour les Études sur les Réfugiés et les Désastres, et la Section pour la Santé des Réfugiés et l'Urgence Internationale, du Centre pour le Contrôle Épidémique.

This Tanzanian trip marks the fourth set of camps examined in the Post-Emergency Phase Indicators Project, a joint collaboration between the Johns Hopkins Center for Refugee and Disaster Studies, and the International Emergency and Refugee Health Branch at the Centers for Disease Control. So far, we have visited 29 refugee and internally displaced persons camps in the post-emergency phase in Azerbaijan, Thailand and Uganda. An additional visit to six refugee camps during this visit to Tanzania will make a total of thirty-five camps so far. Further visits are planned for Nepal, Ethiopia, and Sudan. In the end, we hope to have studied over 50 different displaced persons (DP) camps in the post-emergency (ER) phase.

The Indicators project, which began one and a half years ago, is funded by the Center of Excellence in Disaster Management, based in Hawaii. It has evolved over time and now consists of the following three main objectives:

1.To analyse existing health information systems (HIS) in displaced persons (DP) camps in the post -emergency phase, and the consequent pro-ision of a confidential report to the non-governmental organization (NGO) managing the HIS.

a) Analysis of HIS allows us to determine the quality of the data we will be actively collecting in the third objective.

b) Systematic analysis of the HIS in each camp, using a standardized HIS evaluation form, will allow us to develop a forthcoming manual for implementing and evaluating surveillance systems in DP camps.

2.To provide training in the camps to health workers at all levels on the importance of HIS; why data should be collected and how it can be used directly in the field to make programmatic changes in order to improve the health of the population which they are serving.

3.To collect three months retrospective data from each camp on programmatic indicators (ie water and sanitation, health personnel, etc...), and outcome indicators (ie mortality and morbidity) using a standardised data collection form. Programmatic indicators, based on statistically modelled data, will be developed, which may guide NGOs programmatic decisions when working in DP camps in the post-emergency phase.

Nearly all of the literature and guidelines currently in use refer to the emergency phase of a DP camp [1]. The emergency phase is generally defined as >1 death/10,000/day [2]. Despite the large increase in mortality during this period, the emergency phase generally constitutes only a small component of the lifecycle of a DP camp. By far, the longest component is the post-ER phase, where the mortality rate is relatively stable. Despite this stability, morbidity and its consequent decrease in the quality of life within the DP population remains a significant problem.

From preliminary descriptive analysis of the data we have collected so far, it appears that the mortality and morbidity patterns of displaced populations change in numerous different ways during the transition to the post-ER phase from the emergency phase. In particular, chronic non-infectious diseases, such as respiratory disease, heart disease, chronic malnutrition, and arthritis, constitute a higher proportion (proportionate mortality and morbidity) of disease burden compared to the acute infectious diseases, which gradually come under control during the emergency phase. As well, certain diseases, such as sexually-based gender violence, reproductive health issues, and psychosocial illness, while perhaps not actually rising, are more easily recognised and addressed during the post-ER phase. Lastly, the demo-graphics of disease mortality and morbidity seem to shift as the phases of the DP camps evolve. In particular, the proportion (age-specific proportionate mortality) of elderly dying as compared to children under five years of age, appears to increase.

Paul Spiegel MD, MPH, Senior Associate in the Department of International Health at Johns Hopkins School of Hygiene and Public Health and the Center for Refugee and Disaster Research. Mani Sheik, MPH, Research Scientist in the Department of International Health at Johns Hopkins School of Hygiene and Public Health and the Center for Refugee and Disaster Research.

It has been our impression during our visits to these camps that many UN agencies and NGOs do not yet fully appreciate the changes in disease profiles as the phases of the DP camp evolve. Indeed, for the most part, these trends have not yet been elucidated in the literature. For instance, many camps are still measuring acute malnutrition (wasting, which is height/weight) in the under 5 population while not examining for chronic malnutrition (stunting, which is height/age). Some NGOs still utilise indicators recommended for the emergency phase, despite the existence of the camp for 5-10 years. First, recommended indicators for the emergency phase are MINIMUM standards only. Thus 15-20 L/person/day of water is the minimum amount recommended during the emergency phase[3]. Second, in long term DP camp situations, some NGOs still have the mistaken belief that they are doing their job properly if they provide only 20 L/person/day of water. We have preliminary noted similar trends with respect to living space/person, the number of cases seen per health care worker in the clinic/day, and other process indicators. Furthermore, we have noted that disease surveillance systems do not always evolve with the development of a camp. If HIS' do not detect changes in disease incidence (both by noting a change in magnitude, as well as having the flexibility to adapt the system by adding or removing disease categories, as needed), then the above-mentioned changes in disease profiles may not be observed and the subsequent programmatic changes cannot be implemented to address them.

In summary, most of the current Public Health guidelines and recommendations for DP camps refer only to the emergency phase. The post-ER phase is by far the longest phase in the lifecycle of a DP camp, and it has been the least studied. Preliminary analysis from the Post-Emergency Phase Indicators Project indicates that the disease morbidity and mortality may be markedly different in the post-ER phase. In particular, chronic as opposed to acute diseases, and non-infectious as opposed to infectious diseases seem to represent a higher proportion of the disease burden than in the emergency phase. The age-specific mortality appears to shift upwards during the post-ER phase. Within the next year, comprehensive analysis of all of the data collected for the Indicators Project will hopefully lead to specific program indicators for DP camps in the post-ER phase, ultimately making the programs NGOs implement more effective and thus reducing disease mortality and morbidity while improving the quality of life. ■

Notes

1. The literature and guidelines in use include: Centers for Disease Control and Prevention. (1992) *Famine-affected, refugee, and displaced populations: recommendations for public health issues.* MMWR 41(RR-13); p.1-76.

Toole, M.J., Waldman, RJ. (1990) Prevention of Excess Mortality in Refugee and Displaced Populations in Developing Countries. *JAMA* 263; p.3296-3302.

Toole, M.J., Waldman, R.J. (1993) Refugees and displaced persons: war, hunger and public health. *JAMA* 270(5); p.600-05.

Sphere Project. Humanitarian Charter and Minimum Standards in Disaster Response. Geneva, 1998.

2. Centers for Disease Control and Prevention. (1992) *Famine-affected, refugee, and displaced populations: recommendations for public health issues.* MMWR 41(RR-13); p.1-76.

3. Sphere Project. Humanitarian Charter and Minimum Standards in Disaster Response. Geneva, 1998. □

Broken Lives?
Reflections on the Anthropology of Exile & Repair

David P. Lumsden

Abstract:

This article provides a rethinking of the concept of 'exile' and promotes its utility regarding both the externally and the internally-displaced. It does so from the perspective of Medical Anthropology. A number of variables affecting and shaping the morality, performance, nature and outcomes of exile are identified. Edward Said's views are discussed; but, must exiles always and forever be viewed or be felt as 'broken lives'? The article argues against a naive presumption of 'universalism' to exile's embodied experience and response; instead, the specificities of cultural meaning systems must be taken into account. Further, it argues against analysts' common presumption of pathology and 'post-traumatic stress disorder' among exiles; instead, evidence for 'agency' and 'resilience' in exile populations' health and coping through time must also, and explicitly, be recognized. Finally, where lives are 'broken', the potential of Truth Commissions and 'forgiveness' to be practices of collective repair is noted. Examples are drawn from Africa, Bosnia, Cambodia, Chile, China, Holocaust survivors, and Tibet.

Résumé

Cet article propose de repenser le concept d''exilé', et vise à démontrer son utilité dans le cas des personnes déplacées à l'intérieur ou à l'extérieur des frontières. L'approche est celle de l'Anthropologie Médicale. Un certain nombre de variables affectant et configurant les moeurs, la performance, la nature et la quantité des exilés sont identifiées. Les vues d'Edward Said sont dis-cutées; mais on se demande si les exilés doivent toujours et à jamais être vus et pressentis comme des 'vies brisées'? L'article développe une argumentation s'opposant à la naïve présomption d''universalité' du phénomène global de l'expérience de l'exil et de la réaction qu'elle engendre. On y affirme qu'il faut plutôt tenir compte de la spécificité des systèmes culturels de significations. L'article argumente aussi contre la présomption, fréquente chez maints analystes, de pathologie ou de 'désordre du à la tension post-traumatique' chez les exilés. Au contraire les manifestation de 'vivacité' et de 'souplesse' dans la santé et l'aptitude des exilés à tenir le coup à terme doivent aussi être reconnues, et ce explicitement. Finalement là ou des vies sont effectivement 'brisées', on observe que les 'commissions de vérité' et le 'pardon' sont des pratiques de rétablissement collectif dont la portée est notables. Les exemples analysés sont tirés du cas de survivants de l'Holocauste, et de ressortissants des pays et continents suivants: Afrique, Bosnie, Cambodge, Chili, Chine, et Tibet.

Professor David P. Lumsden teaches in the Department of Anthropology at York University, Canada, and is President of The Toronto-Chongqing Association.

Introduction: Presumptions of Pathology & Place

The topic of exile and its consequences is a very common, very timely and very complex matter, only some aspects of which can be addressed in any detail in this paper. I approach the topic from the perspective of Medical Anthropology.

The topic is enriched and haunted by the Jewish experience, both in terms of the Babylonian captivity (e.g., still in the OED- 1964: 424) and especially by the Holocaust and psychotherapeutic misinterpretations and overemphasis of the perceived health consequences thereof. Based usually only on clinical or treatment samples, and largely as viewed through the filters of psychoanalysis, the common psychotherapeutic expectation and interpretation from at least the 1950s on and until quite recently, has been one of mental health and familial problems for survivors- even for subsequent generations. I do not here mean in any simple sense the refugee sociologist Theodor Adorno's assertion (1996: 164) by which "Horror is beyond the reach of psychology"- though that perspective alone may be insufficient, or distorting and dehistoricizing. To put the issue very badly, numerous psychiatrists, psychologists and others perceived or claimed pathology and passivity, rather than resilience and agency, in their survivor patients or samples.

Later on, I briefly note the contemporary fixation on, and debatable use of, the diagnosis of "Posttraumatic Stress Disorder' (PTSD), but at this point, the issue I am pointing to is not a minor one for our analytic understanding and practice. If we seek to understand 'exile' in all of its variety, or to focus only on enforced displacement and its consequences, we must be careful not to presume only pathology in survivors of 'trauma' - for that then may be all we are able to 'see' and find, we thereby may well be blind to evidence of resilience in and to transcendence of 'horror'. Resilience and transcendence must always merit our consideration. And we must not just focus, then, on the short-term or immediate emergency period, but rather we must think in terms of, seek data on

and understanding of- and perhaps help prepare some people for, the long-term. The experience of exile and its consequences, including any health consequences, must be sought within and through a comparative, cross-cultural and longitudinal context and understanding, with respect both to individuals and the cultural collectivity.

Though there now is a growing comparative literature to draw on- perhaps most notably to date, despite my reservation, that concerning Cambodian refugees over time, nevertheless the best available template for our understanding of the longitudinal and international consequences of collective 'traumatic' experience remains that of the Jewish Holocaust and its heirs. Of particular note is the compelling critique by the psychologist Norman Solkoff (1992) of "the presumption of pathology", the ignoring of "the adaptive strategies of survivors and their competence as parents" (cf. Loomis 1998) and the ignoring of "possible steeling effects" for strengthening the survivors' children-and other methodological problems, all to be found in (and undermining the validity of) much recent work by health care professionals and researchers. The two most recent studies known to me about Holocaust survivorship and intergenerational 'transmission' (Sorscher & Cohen 1997, Yehuda et al. 1998), in my judgement remain subject to Solkoff's methodological critique. Do 'horrific' events inevitably and permanently mark survivors and their heirs? Solkoff's conclusion is edifying for our comparative study- and is cause for due optimism: in general, "children of survivors are not substantially different from other children" (1992: 356).

A second, distorting presumption needs clarification and updating here. To speak boldly and despite the discipline's awareness of inter-cultural borrowings and hybridity, within Anthropology until the last very few years there commonly was a presumption that each culture had its physical 'place' (not mere 'space', but itself a work of culture, becoming 'place'; cf. Tuan 1977), and thus that if members moved or were dis-placed from that site then, via the move and re-location, their culture would be left behind or lost as they 'acculturated' to the new setting and its dominant culture- and their identities shifting as well.

And further, having gone from place A to place B, the movement halted...all this as if for Anthropology, population movement need necessarily, always, be somehow unusual, abnormal pathological, and linear. Today, of course, we all are concerned with and implicated in a far more 'globalized' and 'simultaneous' system, whose interconnections are more pervasive, intimate, new technology-assisted, speedy and interactive. Culture 'travels' more than ever, its members are more 'diasporic' in nature, its sentiments and memories more multi-sited and moving (Cllifford 1994, Safran 1991, Toloyan 1996). Even exile isn't what it used to be. Today's exiles are but part of a whole World in motion (involving tourists, traders, immigrants, pilgrims, labour migrants, NGO employees, etc.), and the 'place' and experience of exile need not be as out-of-touch with 'home' as may once have been the case and concern-though clearly some constraints may remain (matters of papers and borders: but even borders can travel, Jansen 1998:98).

The changed world and appreciation thereof is such that the anthropologists Rapport and Dawson recently have argued that "a far more mobile conception of home should come to the fore...something to be taken along whenever on decamps" (1998: 7). For them, 'home' is not fixedly 'placed'; rather, 'home' is "'where one best knows oneself' - where 'best' means 'most', even if not always 'happiest'". Or again, more fleshed-out in conception, 'home' refers "to that environment (cognitive, affective, physical, somatic, or whatever) in which one best knows oneself, where one's self-identity is best grounded- or worst, or most, or freely, or most presently, as one deems fit" (1998: 9, 21). Indeed, they argue for great fluidity in or self-placement (1998: 27), for a "recognition that not only can one be at home in movement, but that movement can be one's very home": we thus make our dwelling and express our being through the narration of "moving stories" (1998:30).

The fluidity of their approach is challenging and welcome, yet it clearly begs questions of privilege, differential power, egoistic autonomy and state action. In addition, then, to my underlining of the significance of resilience and transcendence for our appreciation for the narrative and the historical truths of exile, I also in this paper wish to draw attention to an earlier and seemingly rather overlooked consideration of home and 'exile', that of Edward Said, a self-described "American Palestine, an exile" (1992, 1998; cf. Arnold 1999), and well-known literary critic.

Exile as an Aesthetic Project

Said's most extensive 'reflection on exile' remains his very provocative 1984 article, where he defines exile as "the unhealable rift forced between a human being and a native place, between the self and its true home: its essential sadness can never be surmounted" (1984:159: cf. Arendt 1943, 70ff.) - this is not a 'fluid' view, but a 'rooted' one (cf. 1984:165), with a tinge of pathology. However, within that same article, Said in fact presents two views or classes of exile. The one speaks of exile as "an anguish" or as "the compounded misery of 'undocumented' people suddenly lost, without a tellable history" (1984: 160, 161; cf. Malkki, below); these 'mass' exiles have "broken lives" (1984: 163). From that last phrase comes the title of my own paper, but to which I deliberately add the question mark lacking in Said's reflection on this 'class' of movement.

The second 'exile' is a Foucauldian 'technology of the self' (cf. Lumsden 1996): "provided the exile refuses to sit in the sidelines nursing a wound, there are things to be learned: he or she must cultivate a scrupulous (not indulgent or sulky) subjectivity" (Said 1984: 170: Adorno is his exemplar), achieving thereby the ability to act "as if one were at home wherever one happens to be" (1984: 172). This class of exile is meritorious: such 'scrupulous' exile-selves

"cross borders, break barriers of thought and experience" (1984: 170). And, as in all of Said's major 'literary' works, he cites the one and the same passage from a twelfth-century monk (on whom, see Luscombe 1972) – part of Said's Christian heritage- as warrant that the highest moral worth attaches to one's achieving of a detachment from all 'place'. For, "Seeing 'the entire world as a foreign land' makes possible originality of vision" (1984: 171-172, cf. Appelfeld,1998: 197), i.e., a 'contrapuntal' mode of double consciousness. This more elevated, even 'spiritual', class of exile is more 'elite' in its potential membership: it is a cosmopolitan, scrupulously 'intellectual' elite composed, I suspect, of poets and writers, of Said writ large. For these, exile can be an aesthetic- even ascetic, project and mode of being. I borrow from Said's thought to help illuminate cases below.

Other Faces of Exile

A number of 'faces' or more prosaic types of exile can be distinguished. Exile may be voluntary or involuntary, self-imposed or other-imposed, and may be near or far, short-term or long-term or permanent. It may be the experience of an individual of a family or of a collectivity (such as an identified political group or an ethnic group), and that exile may be inherited by the next generation or more, perhaps constructing their lives and outlook in varying ways and degrees with 'myths of homeland and return' (Safran 1991, cf. Clifford 1994). Or, a group's exile may be 'aborted' or cut short- at least for this time round, and its physical return hastened and nurtured by external players- as with the Kosovar case now messily unfolding. I want to speak somewhat more fully about five other faces of exile: external/internal, proper/improper, fraudulent exilic identities or claims, those left behind, and returnees.

External/Internal Exile

"Ex-" indicates 'out' or 'from' place, as opposed to those remaining 'in'. In the fields of Refugee Law and Refugee Studies, whether some one or group has left and crossed over a recognized 'border' helps construct a distinction and differential rights- and perhaps futures, between 'refugees' and those 'internally displaced' (IDPs)- a legal and humanitarian gap thankfully now closing, not least thanks to the anthropologist Francis Mading Deng (1998, cf. L:ee 1996). Exiles, then, may be outside of or still inside of 'their' state boundaries. Just as there are various reasons or pushes & pulls for external exile, so too there are several forms of internal exile or 'inexile' (Weschler 1998a,:164, 213). And indeed, a particular 'cause' or event may well produce both a population of external exiles as well as a population of internal ones.

Forms of internal exile vary in severity, duration and meaning, not least. Internal 'exile' may come about owing to 'natural' disasters (famine, flood), to the effects of the Dam or other state 'development' projects (Lumsden 1993), to political banishment to that state's version of a gulag or one thinks here of that decade or more thanks to and in aide of Mao Zedong's Cultural Revolution, to one's (dis)embodiment under the state-sponsored torture (Weschler 1998a: 213), to civil strife and flight within the state, to being physically in, but not of one's own society as it is currently run. This last form is exemplified, if not among Toronto's homeless, then certainly by the Chilean scholar Helia Lopez Zargosa, whose daily and mental lives were acutely transformed by the military coup of 1973:

> "My political exile started long before I was forced to leave my country... After 11 September 1973, I became part of the defeated sector of Chilean society. Our political creeds, ideologies, values, ways of life, everything we believed in, were devalued and stigmatized. Our meaning had been defeated and had been replaced by the new order. I was left deprived of any social value." (1998: 189)

And later she adds, "Chile was my country of origin but ceased to be my home", (1998: 190, cf. 193,198). This example serves to remind us that 'exile' is not a matter of mere self- or group-movement, but rather intimately implicates meaning systems, moral worlds, cultural symbols and concerns, and subjectivity.

Proper/Improper Exiles

It may seem strange to consider a distinction or binary opposition between 'proper' and 'improper' exiles and exilic behavior, but in fact 'exile' is a social role, one scripted not only by local cultural conventions but also by the desires of potential sponsors or hostlands, by the expectations of humanitarian organizations (cf. Malkki 1996) and by international media (Kleinman & Kleinman 1997) – not always to the benefit of the 'object' of concern.

Some groups of involuntary exiles are judges more media-worthy or sponsor-worthy than others: this is not a fair process, nor is it one based on a simple calculus of differential risk or suffering. The fate of particular groups of exiles comes in and out of 'fashion', for complex or crude reasons not effectively within their own control. Thus, e.g., Canada and its allies have been welcoming into their hostland thousands of Kosovar Muslims-who are white, but at roughly the same time Canada did not reach out to assist and welcome exiles caught up in Sierra Leone's very sever civil strife and dis-placement (cf. Thompson 1999), exiles who are not white... and this despite a genuine, historical link between Nova Scotia and the founders of Freetown since the late 18th – century (e.g., Walker 1992)- a link emotionally reaffirmed by a diasporic pilgrimage from Nova Scotia in 1992. Or, some groups may find hostland acceptance owing to the 'romance' of their perceived struggle- as Lopez Zargosa has pointed out (1998: 192) regarding "the Latin America guerrillero" in and for France. A similar romance assisted the welcoming of post-'Tiananmen' (-1989) Chinese political exiles I both France and the United States, a romance made more salient and successful in this particular case not just because of the presence of a large number of international media in Beijing at the time (to cover Gorbachev's visit), but thanks to a

number of Beijing students ably playing to highly valiant and 'proper' symbols of hostland national identity. Thus the Beijing student demonstrations not only appealed internally to the 70th anniversary of China's May Fourth Movement but also knowingly took place at a time marking the 200th anniversary of the French Revolution, while an icon erected in Tiananmen Square was the 'Goddess of Democracy', evocative of the Statue of Liberty (itself, of course, a gift to the U.S. from France...)! On a far less successful note, I myself have keen memories of debating with some Liberian refugees in Waterloo Camp, Sierra Leone, in 1993, as to why Bosnia and not their case was then in fashion in the West.

Particular symbolic weight and cultural pressure may be placed on exiles', or certain categories', moral or sexual conduct. Helia Lopez Zargosa, e.g., reports her experience as the wife of a Chilean political prisoner. On the other hand (1998: 190), there was an experienced enhancement of gender awareness and accomplishment: "Men became isolated and dependant in prison, while women were forced to take on the 'father / husband' roles. In so doing, we became self-reliant and independent; 'masculine' traits which reinforced our female worth, and were a source of pride". On the other hand, given "the glorification of the political prisoners" in her circle, "We had to keep the positive image of being the wife of a 'hero' and behave accordingly... political prisoners' wives... were under string social pressure to maintain their husband's 'honour' and would be severely punished if they were to transgress these social values" (1998: 190-191). Marriages do not always survive such cultural forces- as with Lopez Zargosa's own later 'abandonment' while in external exile.

Similar pressures by the exile community on its heroes' marital conduct or sexual adventures have been noted among host-'Tiananmen' Chinese 'democracy' leaders (Ma 1993: 380-381). And their engagement with mainstream business activities while in Western exile has also been regarded by fellow exiles as improper conduct, conduct suggesting a decreasing commitment to 'the cause' while also undermining the credibility of their leadership and the moral purity of their roles. Hence, e.g., the harsh criticisms of the quite successful U.S. career of Ms. Chai Ling and Mr. Li Lu, particularly around the tenth anniversary of 'Tiananmen' earlier this month (Burma 1999, Mickleburgh 1999, Wong 1999, cf, Cohn 1999; on Wu'er Kaixi's decline, see Schell 1994). Similarly too, the Burndi Hutu in the refugee camp studied by Malkki (1995- discussed further below) strongly disapproved of the 'improper' – indeed 'disloyal', marital (in this case, inter-marriage with Tanzanians) and entrepreneurial activities of the Hutu town-based 'exiles'.

There is then, a cultural code of conduct (a 'scrupulosity' to use Said's phrasing, or an ascetic 'technology of the self'. to use Foucault's) for properly playing the role of 'exile' even more so for exilic leaders, and a price to be paid for impropriety. Refugee agency or camp administrators, have, and act on, their images of pure/impure 'refugeeness' as well, as Malkki documents (1996: 382-385).

The Fraudulent Exile

The exile status and 'career', with its sometimes evocative pathos and other potential seductions, on rare occasions has attracted fraud- with resulting hurt to persons and/or causes. I present three recent cases:

In one case, a man claiming the identity of a Binjamin Wilkomirski recently published a best-selling book called, Fragments: Memories of a Wartime Childhood, concerning the WWII traumata of his concentration camp life and of his later Swiss fosterage, a work now revealed as but a pastiche of researched lies, indeed as the work of a non-Jew, a case bitingly characterized as the work of a 'memory thief' (Gourevitch 1999). It seems to me to have been deliberate fictioneering, and not the 'false memory syndrome' suggested by another critic (Pendergrast 1999).

The second case is that of a genuine WWII concentration camp dweller who went on to a highly successful career in the U.S. as an 'expert' on the psychology of concentration camp survivors/refugees, as an acclaimed child psychotherapist- i.e., Bruno Bettelheim (Pollak 1997, cf. Arednt 1943: 73), who was revealed after his 1990 suicide, built a career on exaggerated or fraudulent professional claims and who, besides, seemingly was a bully and abuser of the very children in his charge.

The third case involves the winner of the 1992 Nobel Peace Prize, Mayan woman, Rigoberta Menchu, an international icon, thanks to her best-selling 'autobiography', of the indigenous struggle to overcome the three decades of violence and displacement affecting hundreds of thousands of Guatemalans. Yet as the anthropologist David Stoll now rather reluctantly reveals (1999, cf. also Canby 1999), her narrative is erroneous or untruthful in parts, is not the 'pure' eyewitness account first claimed and which attracted so many supporters.

In the Wilkommerski and Menchu cases, debates continue to gather steam over such questions as: can something untruthful, nevertheless speak to truth? whose truth about violence and exile should be listened to or commemorated?, whose 'memories' claim history? And more (e.g. Ozick, 1999).

Those Left Behind

Exiles are not likely to move neatly packaged with all the kin and others they hold dear; it is important to note the distinction between exiles and their support group safely present with them or safely in one or more hostlands, and the case of exiles being haunted by the letters, phone calls, faxes, e-mails or spirits of those whom they had to or did leave behind (e.g. Eisenburch 1990, Wein etal.1995). This last case may constrain exiles' conduct and political activities in the hostland and diaspora- for fear their loved ones may easily be punished in their stead and/or may encourage their yearning and action to 'return'. Or, exiles though their remittances 'home', may send back support to those left behind, thereby perhaps also helping to maintain in power the

very regime they themselves fled. Or, external exiles consciously or unconsciously may choose to 'forget' their parents or others left behind, in favour of making a new life (and new memories) for themselves or for their children in the hostland (see Weine et al. 1997 for a Bosnian Muslim case in the U.S.; cf. Kenkins 1997: 41). Or, the exile's culture or religious tradition may provide meaningful symbolic or ritual ways of meritoriously salving cultural expectations and pangs of conscience regarding those 'abandoned'- as in Cambodian Buddhism's mechanism for living or deceased parents, for the latter's next life.

Returnees

Another face of exile are exiles who return, or who are returned, to their homeland, which by then has changed or has or which soon undergoes significant changes with which they must reckon (e.g., Lopez Zargosa 1998, 194, 197, for Chile, and the Godley 1989 for returnees caught up in Mao's Cultural Revolution of 1966 – 76). Returning may well not complete the exile's trajectory nor bring resolution. One may return to find perpetrators of one's torture, or those who betrayed you or your family, still walking the streets at their ease (e.g. Weschler 1998a). Or, after being a 'proper' exile and returning, you may find, you must now fend off accusations- drawn from liberated regime files, with their cesspool mix of 'truth' claims- that you were an informer (see the Czech case in Weschler 1998b). Other exiles may simply return for a brief healing closure of sorts, and depart again. After 57 years, e.g., Aharon Appelfeld (1998: 190) felt both the pull and the possibility of return, to the Ukraine:

> "An old feeling of guilt, which I had repressed for many years, floated up (in 1996). Its essence was a mass grave in the village of Drajinetz, in which my mother and grandmother were buried. The thought that one day I might stand by that grave in silence would not leave me...

And so, in 1998, he returned, to Cernovitz, where "every street corner reminded me of an outing with my parents, a surprising gift" (1998: 191), and then to 'the scene of the crime' (see Ignatieff 1998):

> "We stood in silence. Many thoughts raced through my mind, but none that I could grasp. My mother's face, whose features I had preserved for so many years, was suddenly erased from my memory" (Appelfeld 1998: 194)

And later he remarks, in a splendid evocation of 'place', "I had seen where she was buried and what you can see from there" (1998: 197) – and he moves on, goes back to Israel.

Some Key Variables and Social Categories

To be an exile does not mean- and we must not presume, that there is but one, 'typical' or essentialist life-cycle to be experienced over time, as say from pre-exile or pre-flight on to encampment or asylum and on to diaspora and/or to return and its aftermath. In addition to the different 'types' I have discussed, there is a diversity of other factors and social categories under the resonant rubric of 'exile', which help shape varying life-trajectories. Moreover, to be an exile of one form or other, may well entail the assumption or discarding of a host of identities (cf. Arendt 1943: 75, 76).

Space precludes my doing little more than specifying some of these pregnant variables, and then categories, affecting the nature, resources, resilience and risks, and processes of exilic experience. Important variables include: cultural constructions of selfhood (e.g., egocentric, sociocentric), embodiment, nutrition, emotions and memory, reputation, gender and sexual orientation, age and generation, type of kinship system, class, ethnicity, conceptions of 'home' or 'place', conceptions of health and health care, idioms of distress and their explanatory models (e.g., see Desjarlais et al. 1995, Kleinman 1988), education and communication systems, faith tradition and the meanings and values of life, death and beyond, plus issues of 'cultural bereavement' (Eisenbruch 1990), as well as exposure or not to encampment and all its issues, and/or the supportive nature, or not, of a host-land or diasporic community.

In understanding and analyzing exile trajectories- or in trying to assist in refugee camps or resettlement agencies, there are a number of social categories of persons and roles which may carry special resilience/risk differentials or special cultural weight for good or ill outcomes, and which therefore are well worth according culturally-sensitive consideration. All these must be approached with a presumption of resilience and agency, not just with one of symptomatology. These social categories include: single women and household heads in exile (Women's Commission/UNHCR), widows, victims of rape and collective dishonour, children of such rape (unless aborted- as among some of Kosovar refugees: Ward 1999), unaccompanied children and war orphans, child soldiers of all sides (said by UNICEF to now total some 300,000 persons under the age of 18: The Economist 1998), those in mixed marriages in situations of inter-ethnic conflict, those totally abandoned or feeling so, perpetrators and victims/heroes of torture or atrocity, the disabled, the ill (as from communicable disorders in camps, etc.), those newly dis-placed, newly resettled or returned, those facing prejudice and discrimination in their new hostland (e.g., Cambodian refugees in Ontario, especially it seems, those in London, Ontario: McLellan 1995), intergenerational difficulties in exile, and not least, those doing extremely well (not just for lessons in resilience, but because these may be targets of intra-community envy or witchcraft).

Again, the particular cultural aspects of each category in each exile must be ascertained, not assumed as being 'universalistic' or 'generic', nor dehistoricized. To take but one example of the complexities hidden in my listing, consider the disabled body in its cultural specificity: the anthropologist Lindsay French has explored the cultural valence accorded loss of limbs- owing to landmines, among Cambodian refugees/returnees (1994). This is not a mere matter of obtaining prostheses. In local Buddhist under-

standing, not to possess a whole body bodes ill for one's next rebirth, and the sense of worth of one's present embodied self is also devalued. Any therapeutic intervention must address this moral construction and stress-load in meaning-full ways. Or consider the various cultural ways and discourses of 'doing de-pression' (psychologized, somatized, etc.: Kleinman & Good 1985, Kleinman 1988)-which also call for cultural expertise in therapy. And not least, seek to know cultural ways of 'doing resilience' too.

Exile Community Milestones

In addition to considering the variables and social categories cited above, special attention should be given to exile community life-cycle milestones over time (e.g., significant anniversaries, transitions of office and generation, etc.), which may pose particular challenges to their meaning-system, continuity, and collective resilience.

To give but one example, consider the Tibetan exile, and the spiritual as well as political leadership of the 14th Dalai Lama (Batchelor & Lopez 1998, Mirsky 1999, Singh 1998). The year 1999 includes the 40th anniversary of the Dalai Lama's flight into Indian exile: how long will an exile community continue to follow a leadership which, after forty years-and years of an insistence on pursuing a non-violent course, has not brought a 'return'closer? A leader, moreover, who in recent years officially has eschewed seeking the totally independent homeland that so many followers desire? Instead, the Dalai Lama seeks his return and but a limited autonomy for Tibet, whereby Beijing will control the delimited region's foreign affairs and defence: and even so, he has not yet received a formal reply. Further, a leader who recently has alienated several thousand Tibetans in exile by ruling that what some worship as a 'protector deity' is in fact a demon (i.e., Dorje Shugden)-and several murders appear to have ensued from this dogma. This questioning, frustration and division within the exile community is exacerbated by the looming succession crisis when the current Dalai Lama, aged sixty-five, dies-for his reincarnation must be located and accepted, and China clearly intends to have a say therein. Might not there then be two rival Dalai Lamas, as there now seem to be rival Panchen Lamas? What does this augur for the exile communities solidarity and well-being, let alone that of Tibet? In the meantime, China waits, and ponders the 'return' of Taiwan.

The Role of Time

Time is, in fact, one of the key variables in understanding and in experiencing exile. As time passes, there may well be constructed a more or less tolerable accommodation to, or exercise in creativity within, exile-nor does the homeland stand still. There is an old saying within my tradition, that time heals-or at least other distractions or enticements arise. If there was symptomatology in the early months or first phase of exile, then such distress may well decline, become but background noise, or disappear in a relatively short period of time.

Indeed, in Weine et al.'s (1997) therapeutic transaction with one Bosnian Muslim family, e.g., it is striking to note that on their first arriving in the U.S., all four members were diagnosed as displaying "severe PTSD and impaired social functioning"; yet "after one year there were minimal trauma-related symptoms and no diagnosable psychiatric conditions among all the family members" (1997: 34). Or, note the case of Tibetan child exiles in India (Servan-Schreiber et al. 1998:78): after 18 months since their arrival, the perceived rates of both PTSD and Major Depression began to drop away. Again we see the vital importance of following exiles over time, and of not presuming inevitable, permanent pathology: it is important to take time and the local phases of exile into account.

Another aspect of this is the cultural construction of 'time': e.g., is time itself moving in a linear or a cyclical path? Consider the case of the Tibetan Buddhist children assessed by Servan-Schreiber et al. (1998). Here the belief in the cycle of rebirth is important for understanding how some 'coped with' or interpreted away and transcended 'trauma': present suffering may imply future happiness:

> "Several subjects mentioned that the traumatic events they had experienced were related to their 'karma' and that they now had paid their karmic debt. They believed that this would free them to enjoy a happier life from this point into the future" (1998: 879).

Time, Memory, and the PTSD Fad

Currently, the most popular diagnosis in use with patients or populations who are involuntary exiles is that of PTSD. This is a diagnosis which intimately entails cultural beliefs about selfhood and emotions (e.g., the perception of "a threat to the physical integrity of self or others, your response involving "intense fear, helplessness, or horror": American Psychiatric Association / APA 1994: 52-53), and about time and memory (e.g., "recurrent and intrusive distressing recollections of the event", even "inability to recall an important aspect of the trauma": APA 1994: 51).

The diagnosis entered the APA's Diagnostic and Statistical Manual of Mental Disorders only in its 1980 Third Edition (or DSM-III), and only as a result of persistent lobbying by U.S. Vietnam War veterans and insurance companies. Its use since has been expanded to apply to a very heterogeneous assortment of 'traumata' (and Weine et al. are willing to expand it further: 1995: 536), whose meaningfulness to those experiencing or exposed to such an event implicates culture as well. The present diagnostic criteria set for this disorder ('event' in time and memory, emotion, as well as 'reexperiencing', 'avoidance' and 'hyperarousal' symptom clusters, etc.) can be found in the DSM-IV (APA 1994), and a consideration of the disorder's 'invention' can be found in the McGill anthropologist Allan Young's recent book (1995; for a psychiatric perspective on PTSD's genealogy, see Kinzie & Goetz 1996).

There are a number of troubling issues about this diagnosis and its location of pathology; my sketch of these must be brief, and I must underline that

research and debate continue: and such controversy is 'healthy'.

(1)The construct seems 'culture-bound'; it very much draws on mainstream North American presumptions of egocentric selfhood-and on the current cultural over-emphasis here on 'victimhood' rather than resilience.

(2)Its use sometimes rests only on clinical or treatment or referral samples-not on general community or 'true prevalence' ones, thereby biasing conclusions towards pathology.

(3) It is clear that symptoms and life-narratives can be manipulated by 'patients' so as to receive or keep this diagnosis, doing so in order to have access to certain benefits : e.g., see Young 1990.

(4) Its use, even in North American populations, may overly fixate on 'the event' as 'cause' while completely failing to investigate the role of pre-event personality traits, and cultural beliefs; this failure is particularly sharp, for it may otherwise help explain who 'gets' PTSD when most do not (Bowan 1997, cf. APA 1994, 51-52).

(5) Its use may overly personalize life-events, focus only on the particular patient shorn of context, by ignoring the collective experience and collective, cultural meanings.

(6) Its use may overly or inappropriately 'medicalize' life-events, which should more meaningfully be seen as political and moral issues requiring moral resolutions more than biomedical interventions (cf. Weschler 1998a:240-241): i.e., its use can dehistoricize and depoliticize involuntary exile-and heroism, ignoring the nature of the event in favour of 'symptoms' (Kleinman 18998, Malkki 1996; but Sack et al. would disagree: 1997: 53-54).

(7) Further, where PTSD us diagnosed, the fact that most of the persons undergoing that 'event' do not, or soon do not, display PTSD also needs to be explained; otherwise, individual and collective resilience, hardiness or courage (as culturally formulated) are scanted or ignored, not checked for (cf. Solkoff 1992, as discussed earlier). In Servan-Schreiber et al. (1998), only 11.5% of the 61 Tibetan child exiles 'had' PTSD (assuming they understood the questions), more so in males, while another 11.5% 'had' major depressive disorder (more so in females-suggesting cultural gender scripts for symptomatology); that team 'suspects' higher real caseness, but at least they do try to identify-and accept, cultural 'protective' factors.

(8) PTSD's validity for use in cross-cultural contexts-or with multi-cultural patient populations here, is contested (see, e.g., Friedman & Jaranson 1994, Marsella et al. 1996, Mears & Chowdhury 1994, 45, Sack et al. 1997); what are the norms or standards for cross-cultural use and credibility with children, adolescents or adults?-Servan-Schreiber et al. (1998: 878) and Mollica et al. (1997: 1104) admit the lack of such validity in their studies of Tibetan children and Cambodian adolescents, respectively.

(9)The use of Western-based assessment instruments may not only be invalid cross-culturally, but also may not capture, not look for nor listen for, culturally-salient experiences and concerns of the particular population. To help address this problem, the anthropologist-paediatrician Maurice Eisenbruch (1990) has developed a 'cultural bereavement interview' schedule for Cambodian refugees (and perhaps, with modifications, for other groups), one which does seek out and capture more of their local idioms of distress than does DSM-IV, say-yet his schedule too, used alone, seems to me to risk over-pathologizing (and cf. Sack et al.'s critique: 1997: 53).

(10) Finally, one sometimes gets the sense that Western health professionals are so wedded to the PTSD explanatory model that, even when their own data show most of their target population are indeed enjoying 'positive' social and / or school or occupational 'functioning' in society, they nevertheless still insist on the population requiring 'treatment' or 'preventative' intervention: i.e., they render resilience suspect (e.g., Mollica et al. 1997: 1105, cf.1104, and Sack et al. 1995: 179-180, 181: both regarding Cambodian adolescent samples). The specific examples I cite also seem to 'forget' that DSM-IV itself (APA 1994, 54) would not permit such disregard: for DMS-IV, the PTSD diagnosis should only be given if there is evidence for "clinically significant distress or impairment in social, occupational or other important distress of functioning". To be blunt, this suggests that, where societal functioning is 'positive' and sufficient, there in no 'need' for biomedical intrusion (unless it's 'make-work'?): let such exiles move-on in their lives. And this brings me to my second-last section or topic, that of the 'creativity' of exile.

Exile as Creativity

I present two cases of the creativity of exile, one the case of an individual, and one of a group. There is some truth in Theodor Adorno's remark (1996: 87) that, "For a man who no longer has a homeland, writing becomes a place to live". A case in point (aside from Said's own life) is that of the Israeli-based author, Aharon Applefeld \, a case documenting the creativity that may flow from, be stimulated by, forced dis-placement, years of exile, and reflections on 'home' memories (1998: 188):

> "I was driven away from home (in 1941) at the age of eight and a half. What does a child of eight and a half remember? Almost nothing. But, miraculously, that 'almost nothing' has nourished me for years. Not a day passes when I'm not at home. In my adopted country of Israel, I have written thirty books that draw directly or indirectly upon the (Ukrainian) village of my childhood, whose name is found only on ordnance maps. That 'almost nothing' is the well form which I draw and draw, and there seems that there is no end to its waters".

He has achieved tremendous creativity, social functioning and international acclaim in the 57 years following dis-placement. And he has done so despite (and partly because of?) his years of 'sleep disturbance': he reports of the 1941 slaughter of Jewish villagers, "Shouts and sobs filled the village for two days, and they continue to arouse me from my sleep", "the sob of the slaughter" (1998: 188, 192). Should he

be medicalized, or applauded and learned from?

The second case, available through the anthropologist Lisa Malkki's work, is fascinating: she studied Burundi Hutu in 'exile' in Tanzania, doing so about 14 or 15 years after 1972 massacres. Her study design provides us with insight into the role of culture, time and memory in two populations of Burundi Hutu. The 35,000 or so Hutu dwelling in the isolated and regulated refugee camp of Mishamo, and the Hutu living some 200 km away in the town of Kigoma- part of the 20,000 or so Hutu said to be in that region. So two types of 'exile' are documented for the one and the same ethnic group, both having lived through the one and the 'same' horrific events- but it should be noted that most of her study respondents were, or had to be, males (1995: 50-51, 178).

The striking difference between these two populations of Hutu is for the Mishamo camp inhabitants, 'exile' and keeping their participation in it 'pure' and strong was the key to their identity as 'a people' or indeed as 'a nation' awaiting its due 'return' to Burundi, via their creation and dissemination of the 'mythico-historical' narratives- "a grand moral historical vision" (1995: 104), a culturally-constructed and solidifying, heroic 'memory'. For them, being a 'refugee' was a cultural process of becoming, was positively valued and was accompanied by an emphasis on demonizing 'the Tutsi' as a collectivity who did not have moral nor even historical claim to the place of Burundi. For the Mishamo Hutu, if they worked at being 'pure', they would be worthy of return and, alas, of triumph back 'home' (i.e., their creativity is therapeutic for them, but sets the stage for future revenge and a cycle of violence).

In contrast, the town-based Hutu did not want to identify their selves as 'Hutu', not as being 'refugees', nor as being in 'exile'. Rather, they pursued several ways to conceal or nullify their Hutu origins, to be economically successful in Tanzania, and to stay there: for most, it was 'an open question' as to whether they would ever return to Burundi (1995: 183). These Kigoma Hutu intermarried with the Ha of Tanzania, or even presented themselves as being Muslim (vs. the Catholic or Pentecostal identities of the Mishamo and Burundi Hutu), or claimed to be Tanzanian 'citizens'- or even obtained such legal status. These Hutu were focused on their individual, situational or pragmatic identity versus the Mishamo inhabitants' emphasis on their collective identity. The Kigoma Hutu feared being put into a refugee camp; for the Mishamo Hutu, the town Hutu were most improper or impure, being set against the intermarriage and commerce that attracted town-dwellers, distracting the latter from 'the cause'. For Mishamo Hutu, "exile was conceived as a perpetual present" (1995: 188), on awaiting "a millennial return", awaiting "reclaiming the nation" (1995:188, 191). For the Kigoma 'Hutu', the past was not alive, the past "had simply passed" (1995: 194) and they had pragmatically moved on. The Mishamo Hutu had not forgotten, not forgiven.

Though Malikki cites three works by Said, his 1984 paper on 'exile' is not referred to; yet it seems to me clear that her Mishamo camp Hutu well fit Said's discussion of the links between exile and what he terms "defensive nationalism", they have constructed "a national history" (which they do tell, vs. Said 1984), 160 perhaps), and they were promoting a "strident ethnocentrism" – which was both their political and their therapeutic practice, just as feeling part of "a nation's struggle against an oppressor" was being both political, moral, spiritual and even therapeutic (and bio-medical) for Tibetan child exiles (Servan-Schreiber et al. 1998: 878-879).

One last topic remains for this paper.

Repair, If Broken

There are a number of mechanisms or practices for repairing cases and times where exile has 'broken lives', has broken a cultural collectivity. One is by commemorating the event, the 'disappeared' and/or the survivors' courage and resilience, in a concrete and public way, with appropriate ritual: i.e., as through placing monuments, museums (e.g., the recent contestation over a Holocaust gallery or museums for Ottawa, the steps towards a Holocaust museum in Berlin, etc.) or other public rites of 'memory'. A second mechanism is to pursue 'justice' through the political, legal and perhaps therapeutic holding of 'war crimes' trials- as in the steps towards an International Criminal Court. A third technology of collective repair, is for the new civilian regime to establish a pursuit of 'truth' rather than of 'justice'- for perhaps otherwise the military may feel a call to 'return'. A number of societies recently have held such Truth commissions: one thinks of Chile, or South Africa's remarkable Truth and Reconciliation Commission, under Archbishop (and Nobel Prize winner) Desmond Tutu- a leadership which underlines the moral or spiritual, rather that legal, purpose, of Guatemala's Recovery of Historical Memory Project (whose founder, Bishop Juan Gerardi, was assassinated right after the report's submission: Goldman 1999) and its separate, UN-backed Truth Commission. These can provide healing narratives, some moral vindication for the collectivity; but not all such societies have taken that step - how will Cambodia's president regime seek resolution if not what some call 'closure' (e.g., The Economist 1999)?

Another, moral and difficult path or technology is that of individual and collective 'forgiveness' (not necessarily followed by 'forgetting'), and I am interested in what may be called the Anthropology of Forgiveness. Weschler (1998a) has tackled the topic, regarding Brazil and especially Uruguay, and not Applefeld's report on today's Ukraine (1998: 195). But for me, the most resonant and challenging effort to lay bare the moral complexities entailed, is that by the Holocaust survivor and Nazi-hunter, Simon Wiesenthal. I commend to your attention, and reflection, the 1998 edition of his treatise on, The Sunflower: On the Possibilities and Limits of Forgiveness, which now comes with 53 short commentaries by an international cast, this including the 14the Dalai Lama. I will not spoil you reading

by giving full details of Wiesenthal's encounter with a dying Nazi soldier during WWII, about what Wiesenthal did and did not do during both that episode and his subsequent visit to the man's mother. The soldier participated in an atrocity of the Jews of a particular town, endeavours to 'confess' to Wiesenthal, and the outcome troubles Wiesenthal down to today: "was my silence at the bedside of the dying Nazi right or wrong?" (1998:97). Is forgiveness morally right and even possible? Who can forgive whom, and how? And when?

This narrative allows me to end this paper underlining the theme of the central importance of morality- a work of culture and conscience and choice. I have explored the many dimensions of exile, and challenge you to reflect on culture and morality, on time and memory, on resilience and agency and courage, and challenge you to avoid the presumption of pathology. The exilic project and its truths- and its triumphs and heartbreaks, cannot be grasped through Biomedicine or Psychology alone. Listen to, reflect on, exile, in our global village in motion. ■

References

Adorno, Theodor. 1996. *Minima Moralia: Reflections from Damaged Life*. London/New York: Verso.

American Psychiatric Association. 1994. *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV). Washington.

Appelfeld, Aharon. 1998. "Buried Homeland." The New Yorker, November 23, 1998: 188-197.

Arendt, Hannah, 1943. "We Refugees." The Menorah Journal 31 (1) : 69-77.

Arnold, Michael. 1999. "What Said Said." Lingua franca 9 (4): 8-9.

Barber, Ben. 1997. "Feeding Refugees, or War" The Dilemma of Humanitarian Aid." *Foreign Affairs* 76 (4), :8-14.

Batchelor, Stephen & Donald Lopez. 1998. "Deity or Demon? The Controversy Over Tibet's Dorje Shugden." *Tricycle*, 7 (3): 58-82.

Bowman, Marilyn. 1997. *Individual Differences in Posttraumatic Response*. London/New Jersey: Lawrence Erlbaum Associates.

Buruma, Ian. 1999. "Tiananmen, Inc." *The New Yorker*, May 31, 1999: 45-52.

Canby, Peter. 1999. "The Truth About Rigoberta Menchu." *The New York Review of Books*, XLVI (6): 28-33.

Clifford, James. 1994. "Diasporas." *Cultural Anthropology*, 9 (3): 302-338.

Cohn, Martin Regg. 1999. "Security forces cordon off Tiananmen." *The Toronto Star*, June 5, 1991, A27.

Deng, Francis Mading. 1998. *Guiding Principles on Internal Displacement*. United Nations/OCHA, 14

Desjarlais, Robert, et al. 1995. *World Mental Health*. Oxford University Press.

The Economist. 1998. "Under-age Killers." *The Economist*, December 12, 1998: 46.

The Economist. 1999. "At last, a trial of sorts in Cambodia." *The Economist*, June 12, 1999: 36.

Eisenbruch, Maurice. 1990. "The Cultural Bereavement Interview: A New Clinical Research Approach for Refugees." *Psychiatric Clinics of North America*, 13 (4): 715-735.

French, Lindsay. 1994. "The political economy of injury and compassion: amputees on the Thai-Cambodia border." In *Embodiment and Experience*, edited by Thomas Csordas. Cambridge University Press, 69-99.

Friedman, Matthew and James Jaranson. 1994. "The Applicability of the Posttraumatic Stress Disorder Concept to Refugees." In *Amidst Peril and Pain*, edited by Anthony Marsella et al., 207-277. Washington: American Psychological Association.

Godley, Michael. 1989. "The Sojourners: Returned Overseas Chinese in the People's Republic of China." *Pacific Affairs*, 62 (3): 330-352.

Goldman, Francisco. 1999. "Murder Comes for the Bishop." *The New Yorker*, March 15, 1999: 60-77.

Gourevitch, Philip. 1999. "The Memory Thief." *The New Yorker*, June 14, 1999: 48-68.

Ignatieff, Michael. 1998. "The Scene of the Crime". *Granta*, 63: 122-149.

Jansen, Stef. 1998. "Homeless at Home: Narrations of Post-Yugoslav Identities". In *Migrants of Identity*, edited by Nigel Rapport and Andrew Dawson, 85-109. Oxford: Berg.

Jenkins, Janis. 1997. "Not Without a Trace: Resilience and Remembering (Commentary)". *Psychiatry*, 60 (1): 40-43.

Kinzie, J. David and Rupert Goetz. 1966. "A Century of Controversy Surrounding Posttraumatic Stress-Spectrum Syndromes: The Impact on DSM-III and DSM-IV". *Journal of Traumatic Stress*, 9 (2): 159-179.

Klienman, Arthur. 1988. *Rethinking Psychiatry*. New York: Free Press.

Kleinman, Arthur and Byron Good, editors. 1985. *Culture and Depression*. Berkeley: University of California Press.

Kleinman, Arthur and Joan Klienman. 1997. "The Appeal of Experience, The Dismay of Images: Cultural Appropriations of Suffering in Our Times". In *Social Suffering*, edited by Arthur Kleinman et al., 1-23. Berkeley: University of California Press.

Lee, Luke. 1996. "Internally Displaced Persons and Refugees: Toward a Legal Synthesis?" *Journal of Refugee Studies*, 9 (1): 27-42.

Loomis, Carol. 1998. "Everything in History was Against them". *Fortune*, April 13, 1998: 64-85.

Lopez Zargosa, Helia. 1998. "Internal Exile, Exile and Return: A Gendered View". *Journal of Refugee Studies*, 11 (2): 189-198.

Lumsden, David Paul. 1993. *Dams, Dis-Placement, and Mindful Distress*. Working Paper Series on International and Behavioural Health. Centre for the Study of Culture and Medicine/Program in Medical Anthropology. Cambridge: Harvard University, 69.

Lumsden, David Paul. 1996. "Théories voyageuses. Foucault, Grant, la Chine et al régionalisation des soins de santé." Anthropologie and Sociétiés, 20 (1): 27-58.

Luscombe, David. 1972. "Saint Victor, School of." In *The Encyclopedia of Philosophy*, edited by Paul Edwards, 7, 277-278. London: Collier-Macmillan.

Ma Shu-Yun. 1993. "The Exit, Voice and Struggle to Return of Chinese Political Exiles." *Pacific Affairs*, 66 (3): 368-385.

Malkki, Liisa. 1995. *Purity and Exile: Violence, Memory and National Cosmology among Hutu Refugees in Tanzania*. Chicago" The University of Chicago Press.

Malkki, Liisa. 1996. "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization." *Cultural Anthropology*, 11 (3): 377-404.

Marsell, Anthony, et al., editors. 1996. *Ethnocultural Aspects of Post-Traumatic Stress Disorder*. American Psychological Association.

McLellan, Janet. 1995. *Cambodian Refugees in Ontario: An Evaluation of Resettlement and Adaptation*. Toronto: York Lanes Press.

Mears, Catherine and Sue Chowdhury. 1994. *Health Care for Refugees and Displaced People*. UK: Oxfam.

Mickleburgh, Rod. 1999. "Revolutionaries scattered in a world of guilt." *The Globe and Mail*, June 3, 1999, A22.

Mirsky, Jonathan. 1999. "The Dalai Lama on Succession and on the CIA". *The New York Review of Books*, XLVI (10): 48-49.

Mollica, Richard, et al. 1997. "Effects of War Trauma on Cambodian Refugee Adolescents' Functional Health and Mental Health Status". *Journal of the American Academy of Child & Adolescent Psychiatry*, 36 (8): 1098-1106.

Oxford English Dictionary (OED). 1964. *The Concise Oxford Dictionary of Current English*. Oxford: Clarendon Press.

Ozick, Cynthia. 1999. "The Rights of History and the Rights of Imagination." *Commentary*, 107 (3): 22-27.

Pendergrast, Mark, 1999. "Holocaust Hoax". *LM(Living Marxism)*, 118, March, 1999: 26-28.

Pollak, Richard. 1997. *The Creation of Dr. B: A Biography of Bruno Bettelheim*. New York: Simon and Schuster.

Rapport, Nigel and Andrew Dawson, editors. 1998. *Migrants of dentity: Perceptions of Home in a World of Movement*. Oxford: Berg.

Sack, William, et al. 1995. "The Khmer Adolescent Project, II: Functional Capacities of Two Generations of Cambodian Refugees". *The Journal of Nervous and Mental Disease*, 183 (3): 177-181.

Sack, William, et al. 1997. "Does PTSD Transcend Cultural Barriers? A Study from the Khmer Adolescent Refugee Project". *Journal of the American Academy of Child and Adolescent Psychiatry*, 36 (1): 49-54.

Safran, William. 1991. Diasporas in Modern Societies: Myths of Homeland and Return." *Diaspora*, 1 (1): 83-99.

Said, Edward. 1984. "Reflections on Exile." *Granta*, 13: 158-172.

Said, Edward. 1992. "Palestine, Then and Now: An Exile's Journey Through Israel and the Occupied Territories". *Harper's Magazine*, 285 (1711): 47-55.

Said, Edward. 1998. "Between Worlds". *London Review of Books*, 20 (9), 7 May, 1998: 3, 5-7.

Schell, Orville. 1994. "Exile Dreams". In his *Mandate of Heaven*, 437-441. New York: Simon & Schuster.

Servan-Schreiber, David, et al., 1998. "Prevalence of Posttraumatic Stress Disorder and Major Depressive Disorder in Tibetan Refugee Children". *Journal of the American Academy of Child & Adolescent Psychiatry*. 37 (8): 874-879.

Singh, Ajay. 1998. "Fires of Frustration". *Asiaweek*, 24 (36), September 11, 1998: 52-56.

Solkoff, Norman. 1992. "Children of Survivors of the Nazi Holocaust: A Critical Review of the Literature". *American Journal of Orthopsychiatry*, 62 (3): 342-358.

Sorscher, Nechama and Lisa Cohen. 1997. "Trauma in Children of Holocaust Survivors: Transgenerational Effects". *American Journal of Orthopsychiatry*, 67 (3) :493-500.

Stoll, David. 1999. *Rigoberta Menchu and the Story of all Poor Guatemalans*. Boulder: Westview Press.

Thompson, Allan. 1999. "Sierra Leone now a 'forgotten crisis'". *The Toronto Star*, May 12, 1999, A7.

Tololyan, Kachig. 1996. "Rethinking Diaspora (s): Stateless power in the Transnational Moment." *Diaspora*, 5 (1): 3-35.

Tuan Yi-Fu. 1977. *Space and Place: The Perspective of Experience*. Minneapolis: University of Minnesota Press.

Walker, James St. G. 1992 *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone, 1783-1870*. The University of Toronto Press, reprint series.

Ward, Olivia. 1999. "The silent horror of Kosovo: Rape". *The Toronto Star*, June 2, 1999, A1 and A21.

Weine, Stevan, et al. 1995. "Psychiatric Consequences of 'Ethnic Cleansing': Clinical Assessments and Trauma Testimonies of Newly Resettled Bosnian Refugees". *American Journal of Psychiatry*, 152 (4): 536-542.

Weine, Stevan, et al. 1997. "A Family Survives Genocide." *Psychiatry*, 60 (1): 24-39.

Weschler, Lawrence. 1998a. *A Miracle, A Universe: Settling Accounts With Torturers*. revised edition. Chicago: University of Chicago.

Weschler, Lawrence. 1998b. *Calamities of Exile: Three Non-Fiction Novellas*. Chicago: The Uni. of Chicago Press.

Wiesenthal, Simon. 1998. *The Sunflower: On the Possibilities and Limits of Forgiveness*. revised edition. NY: Schocken Books.

Women's Commission for Refugee Women and Children/UNHCR. 1997. *Guidelines on the Protection of Refugee Women: Synopsis*. New York: The Commission, 5 pp. Wong, Jan. 1999. "Lunch with Wang Dan: The man who led a million protestors at Tiananmen Square". *The Globe and Mail*, June 2, 1999, c1. Yehuda, Rachel, et al. 1998. "Vulnerability and Posttraumatic Stress Disorder in Adult Offspring of Holocaust Survivors". *American Journal of Psychiatry*, 155 (9): 1163-1171.

Young, Allan. 1990. "Moral Conflicts in a Psychiatric Hospital Treating Combat-Related Posttraumatic Stress Disorder (PTSD)". In *Social Science Perspectives on Medical Ethics*, edited by George Weisz, 65-82. Kluwer Academic Publishers. Young, Allan. 1995. *The Harmony of Illusions: Inventing Post-Traumatic Stress Disorder*. Princeton University Press. ▫

Call for Papers

Refugee Return

***Guest Editors* : Peter Penz, *and* Alan Simmons,**

This issue of Refuge, Canada's periodical on refugees, will address the process of refugee return to their home countries. In a number of cases around the world, peace treaties and similar agreements following displacement-inducing conflicts have made this possible. Examples from the past decade are the return of Guatemalans from Mexico, of Mozambiquans from Malawi, of Chittagong hillpeople from India back to Bangladesh, and of Bosnians from other countries in Europe.

While refugee return seems to be the ideal solution to the refugee problem, it also opens up new problems. Are refugees forcibly returned or do they keep the choice to stay in the country of asylum? Is there a period of asylum residence after which return becomes difficult for reasons of identification and new roots? Do returning refugees get land back if they owned land before their flight? Do they get the same property back or do they get alternative land elsewhere? Do non-returning refugees get monetary compensation for their property? What happens to current occupants of property to which returning refugees are entitled? Are there discrepancies between legal entitlements and implementation? If there has been a change in the ethnic composition of a refugee-origin area, are refugees reluctant to return to such an area? What kind of governmental and international assistance is needed and is being made available? How are the relations between returning refugees, those who stayed and those who moved into vacated property and areas working out? Is a conflict-resolution process required? In what way can local-development strategies alleviate or accentuate such conflicts? Are there lessons for the international refugee-rights regime or for policies on refugee return?
Papers responding to questions such as these can be addressed either thematically or within particular case studies.

Contributions with abstracts and a short biographical note about the author are invited. They should be received no later than January 15, 2000. Papers should be typed, double-spaced, and referenced in the academic format. They should not exceed 16 pages or about 4000 words. Short papers of about 900 words are also welcome. Word-processed submissions may be sent on disc or by email.

On accepte aussi des articles en français. Le style doit conformer aux normes exigés pour les articles rédigés en anglais.

Deadline: January 15, 2000
Inquiries may be directed to:

Peter Penz, CRS Director and Associate Professor in Environmental Studies
Email: ppenz@yorku.ca
or
Alan Simmons, Associate Professor in Sociology
Email: asimmons@yorku.ca

A Standing International Criminal Court: Step By Step Towards the Enforcement of International Justice

Iris Almeida

Abstract

The institutional arrangements for the promotion of peace, truth, justice, reparation and reconciliation of countries that are rebuilding democratic institutions following long years of war and conflict, are complex and should necessarily be varied. This article will focus on one salutary global development, namely the adoption of the Rome Statute for the establishment of an International Criminal Court. The author argues that it is essential that states display courage, tenacity and strong political will in actively pursuing the path of international justice and realizing the project of making the court a reality. The article highlights the contribution that civil society organizations including non-governmental Organizations, women's rights groups, academics, journalists, church groups and legal experts can play in educating their fellow citizens and in encouraging states to ratify the Rome Statute. This article approaches the International Criminal Court from three vantage points: First, the opening up of international law to a diversity of actors in the field of human rights; second, the universality of human rights and third, the emerging alliance between some States and civil society actors in ending the cycle of impunity.

Iris Almeida is the Director of Programmes of the International Centre for Human Rights and Democratic Development, a Canadian organization with an international mandate. It works with people and governments in Canada and abroad to promote human rights and democratic development through dialogue, advocacy, capacity building, and public education.

Résumé

Les dispositions institutionnelles pour la promotion de la paix, de la vérité, de la justice, de la reconstruction et de la réconciliation de pays qui cherchent à reconstituer leurs institutions démocratiques après de longues années de guerre et de conflit, sont complexes et ne peuvent qu'être fluctuantes. Le présent article concentre son attention sur un élément salutaire du développement global, nommément l'adoption des Statuts de Rome pour la mise en place d'une Cour Criminelle Internationale. L'auteur présente une argumentation selon laquelle il est crucial que les états fassent preuve de courage, de ténacité, et d'une ferme volonté politique dans la poursuite active du projet d'une Cour Internationale de Justice, et vers la réalisation effective de ce projet. L'article met en relief le rôle que les organisations issues de la société civile, notamment les organismes non-gouvernementaux, les groupes de défense des droits des femmes, les universitaires, les journalistes, les communauté religieuses, les juristes, peuvent jouer dans l'éducation de leurs concitoyens et dans la promotion d'une ratification par les états des Statuts de Rome. L'article décrit les trois principaux atouts d'une Cour Criminelle Internationale. D'abord, l'ouverture des lois internationales à une diversité d'acteurs dans le champ des droits humains; ensuite, l'universalisation des droits humains, et finalement l'émergence d'une alliance entre certains états et certains acteurs issus de la société civile dans l'interruption du cycle de l'impunité.

Introduction

> War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust and pillage have been the inevitable by-products of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow. If we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than vengeance. We must insist that the highest standards of justice be applied. Justice Murphy, J., dissenting opinion. Trial of General Yamashita, 327 U.S. 1 (1946) 29.

The Twentieth Century is the bloodiest period in the history of humankind. Armed conflicts have killed and maimed millions of people in this century. The United Nations and international relations were dominated by super power rivalry and the defence of their respective hegemonic interests. These blocks and alliances were built strictly within the realm of States and did not include civil society representatives. The perpetrators of heinous crimes were often sheltered from prosecution as long as offending regime remained in power. While the rule of law was flouted and the independence of judiciary was seriously compromised, the international community remained silent.

Today, while international conflicts have ebbed, intrastate conflicts are on the rise.[1] Not only do these wars and

conflicts continue to result in massive destruction of property but what is most despicable is that the overwhelming majority of the casualties suffered are civilians caught in the crossfire of the warring factions or used as "human shields." These civilians are not accidental casualties, but the primary targets of attacks; the "laws of war" are violated not by accident but by design and too often as a matter of policy. While the weapons deployed in present day conflicts are primarily conventional armaments, the consequences of the war machine are manifest through indiscriminate killings, torture, rape and maiming of innocent civilians. During World War II, the percentage of civilian casualties was 5% and has increased to 80% in the 1990s.[2]

The near instantaneous global media coverage highlights in graphic detail stunning images to a world audience, the human cost of some of these conflicts. It brings home the risks and the challenges accompanying the choices of interventions employed by UN member States. Experience has shown that the strategies adopted by the international community in response to such crises and the resources committed to deal with them post facto are too little and too late to be effective.[3]

However, the previous acquiescence of States to massive violations of human rights is slowly breaking down in many parts of the world. The awareness of the public that the culture of impunity[4] stifles transitions to democracy is growing. In the face of the egregious atrocities committed in former Yugoslavia and Rwanda, international public opinion, in part, exerted pressure on the United Nations Security Council to act. The sympathy expressed by the public for the victims of "ethnic cleansing" and "genocide", their outrage at the actions of the violators of human rights and the mobilisation of public pressure on governments played a part in the decisions of the United Nations Security Council in setting up the International Criminal Tribunals for the case of Yugoslavia[5] and Rwanda[6]. Despite their numerous constraints, these tribunals through their arduous work have put the spotlight on serious violations of human rights and have increased international awareness on the problem of impunity.

If the enforcement of international justice is to be effective and sustainable, we would need to adequately address three interconnected issues: 1) the right of the victims and the rest of society to know the facts; 2) the right to a fair, independent and impartial prosecution; and 3) the right of the victims to reparation for the crimes committed. The search for truth, through the investigation and dissemination of facts, and redress to victims through compensation, reparation, rehabilitation and eventually reconciliation are often subject to the vagaries of "realpolitik". An increasing number of civil society organisations hold the view that the prosecution of alleged criminals responsible for heinous crimes is only one part of an effective plan of action to combat impunity. Michael Reisman so eloquently said:

> Courts are indispensable institutions in many domestic criminal and civil systems, and any polity, no matter how structured, must install arrangements, or varying degrees of institutionalisation, to apply the law to concrete cases. But lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call « courts » we have solved or prevented major problems, we should review the fundamental goals that institutions designed to protect our public order seek to fulfil.[7]

A question often raised is whether prosecutions, by encouraging vengefulness and inviting a backlash from threatened combatants, can have the effect of unravelling the fragile peace typical of countries emerging from long and bloody civil strife.[8] Many human rights defenders and a growing number of States, in our view, now believe that peace is not inimical to justice. They are the two sides of the same coin. In this line of reasoning it is better for retribution to be meted out by a court with due process, rather than an indiscriminate continuation of violence and impunity. Plato notes that trials can act as a catharsis for previous wrongs and have the value of deterrence.[9] Prosecutions also signal the end of past atrocities and enhance the faith of citizens in human rights. As Richard Goldstone, the former Prosecutor of the ICTY and ICTR, said, "I have absolutely no doubt that if there was proper enforcement of humanitarian law, the level of atrocities committed in war would substantially decrease."[10]

Currently, efforts in the internationalization of the struggle for human rights are spearheaded by the concerted work of civil society organizations including women's rights activists, academics, national and international non-governmental organizations the world over. These organizations, nationally and internationally, are devising innovative strategies for cooperation and partnership with those States interested in and committed to enforcing international norms and standards, building democratic institutions, fostering democratic participation and accountability. They have grown in strength and numbers since the Vienna World Conference on Human Rights in 1993,[11] the Fourth Conference on Women in Beijing in 1995[12] and the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of the International Criminal Court in 1998.[13]

The situation in many countries is a glaring reminder that States have failed to match their rhetoric with action to promote human rights. The challenge is to put into place effective accountability measures in order to translate the myriad of international covenants, declarations, treaties, resolutions and court decisions into effective rights at the national level, for citizens, victims and the whole of society. Effective action against impunity must start at the national level. However, where the national accountability mechanisms are too weak or compromised to provide justice to the victims, the international community has a responsibility to step in. A growing number of individuals, non-governmental organizations and States have begun to recognize that the principles of sovereignty and non-interference in the internal affairs of a state should not excuse massive and systematic violations of human rights. In fact the State's duty to protect human rights extends not only to its own citizens, but also to the international community as a whole.[14]

This article will focus on one salutary development, the adoption of the Rome Statute for the establishment of the International Criminal Court [hereinafter the Court]. Part I will examine the efforts to set up a Standing International Criminal Court. We will put forward the mosaic of views and actors that formed the canvas of the negotiations in Rome. Part II will appraise key issues addressed in the Rome Statute, drawing, where appropriate, from past jurisprudence. It will focus, in particular, on complementarity with domestic jurisdictions and the innovative treatment of gender-related crimes. Lastly, Part III will consider the next steps towards the establishment of the Court: the work of the Preparatory Commission, the financing of the Court and, most importantly, the ratification of the Rome Statute.

This article will approach the Court from three vantage points. First, the opening up of international law to a diversity of actors in the field of human rights, second, the universality of human rights and third, the emerging alliance between some States and civil society actors in ending the cycle of impunity.

Traditional international law purported only to govern relations between nation-states. It regarded individuals and non-state groups as objects rather than subjects of international law.[15] International law, because of its primitive nature did not have specialized organs to create or to apply norms.[16] This decentralized mechanism allowed human rights instruments to be dealt with in cosy fora where States criticized each other and where the Cold War geo-strategic interests put aside the criticisms of civil society organizations. The analysis of positivists fails to appreciate the reality of those who suffer the scourge of human rights violations. Kelsen notes "it does not matter if law (domestic or international) is applied or not. Violated or not, the law is the law."[17] In the 1990's, however, non-state actors, from the North and South, have had better access to the UN system. This allows human rights defenders to operate on a diverse range of terrains, from the local to the global system.[18]

These efforts have been challenged by some recalcitrant States who refuse to acknowledge the universal nature of human rights and argue that it is a product of Western culture. However as Preis notes, this cultural relativist position is premised on an outdated concept of culture as integrated, holistic and static, rather than on the understanding developed within anthropology that culture is fragmentary, contested and shifting.[19] No society is based on such submission to the authorities so as to accept that innocent civilians can be slaughtered at the whim of the leadership. The struggle against impunity for serious violations of human rights clearly draws upon universal principles of human rights and human dignity.

The third issue is the developing alliance of the human rights movement and some States in breaking the cycle of impunity. This movement is imposing on States in a non-voluntarist manner the importance of according the highest value to jus cogens crimes. These crimes refer not only to conventional written international law,[20] but also to customs and general principles of unwritten international law.[21] The legal basis of jus cogens crimes consists of international pronouncements, or what can be called international opinio juris, reflecting the recognition that these crimes are deemed part of general customary law.[22]

Part I – Tenacious Efforts to Create an International Criminal Court

Cynics have for many years labelled the Court a pipe dream. They have cited the difficulty of apprehending violators of human rights and the concerns expressed by some States on safeguarding national sovereignty and defending their national security interests. While some of these concerns may be legitimate, they need to be balanced with a universal system of enforcing international justice. Moreover, the idea and the efforts to establish an International Tribunal are not new. The Convention on the Prevention and Punishment of the Crime of Genocide[23] adopted on December 9th 1948 envisioned the creation of an international criminal court. The International Law Commission (ILC) prepared a draft treaty but this effort was put on hold once the Cold War set in.

The road to Rome was a long one. The United Nations General Assembly, in 1989, requested the ILC to address the question of establishing an international criminal court and in December 1996, established a Preparatory Committee that prepared a draft text for a Court. The Diplomatic Conference of Plenipotentiaries was organized in Rome from June 15th to July 17th 1998 with the objective of negotiating a Statute to establish an International Criminal Court. Interestingly, drug trafficking, the initial impetus for the Court, was left off the agenda in favour of more serious and pressing issues such as genocide, crimes against humanity and war crimes.

Delegations representing 160 countries, 14 United Nations agencies, 17 inter-governmental organizations and 124 non-governmental organizations

(NGOs) took part in the Diplomatic Conference. Over 700 other NGOs coordinated their advocacy efforts under the umbrella of the Coalition for an International Criminal Court (CICC) and lobbied States from their respective capitals for several months prior to and during the Conference. The 'consolidated' draft Statute contained 1300 bracketed texts with several options to choose from, reflecting the divergence of views on some crucial aspects of the Court.[24] The non-governmental organizations (NGOs) present did not sit on the sidelines. They enjoyed full access to the Committee of the Whole and the Working Groups and carried out intensive lobbying and advocacy efforts. Many States included NGOs as advisers or members on their official delegations and some government delegations took the initiative to meet with NGOs in order to set out and justify their government's stand on key issues. Civil society advocates participated in the six Preparatory Committees between 1996 and 1998[25] and due to their concerted action were extremely effective during the Rome Conference. The commitment, synergy, effective use of electronic communications, and the flexible strategy to encourage and pressure States at different moments during the Rome Conference produced positive results.

The French were insistent on the need for tempering the role of the Prosecutor and to maintain a high threshold on war crimes. The United States delegation, facing intensive opposition to the Court from the Senate Foreign Relations Committee, was concerned that its peace-keepers would be subjected to politically motivated prosecutions from a potential bad faith or overzealous prosecutor. The US delegation wanted to ensure that the Court would be under the control of the Security Council, a position shared by the other permanent members of the Security Council.

In Rome, a group of "like-minded" States such as Canada, Australia, Argentina, Chile, Denmark, Sweden, Senegal, South Africa, Singapore and South Korea, joined by approximately fifty others, played a constructive role in the negotiations towards a final Rome Statute. This group included many enthusiastic Sub-Saharan African States who made a valuable contribution in ensuring that the Rome Statute reflected not just a court for the poorer underdeveloped countries but also one for the world. NGOs met with the like-minded and exerted pressure on them to demonstrate leadership and to use their strength of numbers in the negotiation of fundamental issues on the agenda.

Agreeing on a Statute that would ensure a strong, independent, effective and permanent Court was an extraordinary challenge. However, the momentum generated by the Preparatory Committee, able leadership by the Chairpersons, the precedents of the Nuremberg, Tokyo, the Hague and Arusha Tribunals and the focus provided by the five weeks of intense political and legal efforts in Rome by the NGOs and the like-minded States helped bring this difficult process to fruition. Of the 148 States present and voting, 120 States voted in favour of establishing the Court, 7 States voted against and 21 States abstained.

The adoption of this Treaty marks a historical moment and is one more step in the international community efforts to end impunity for egregious crimes. Unlike the International Court of Justice,[26] whose jurisdiction is restricted to States, the Court will have jurisdiction over 'natural persons' irrespective of whether they are political leaders, ordinary citizens or members of the armed forces.[27] Unlike the Tribunals for the former Yugoslavia and Rwanda, whose jurisdictions are chronologically or geographically limited, the Court will be permanent and, subject to extensive ratification, has the potential for global reach.

Part II – An Appraisal of the Fundamental Challenges Addressed

In order to gain universal acceptance, the Court will focus on crimes of the "most serious concern to the international community as a whole"[28]: Genocide, crimes against humanity, war crimes and, when a definition has been agreed upon, aggression. Furthermore, some treaty crimes found their way into the Rome Statute, albeit in a modified form, such as Crime of Apartheid under Crimes against Humanity.

The Rome Statute does not permit any reservations.[29] The Lawyers Committee for Human Rights, Amnesty International, The International Centre for Human Rights and Democratic Development, Human Rights Watch and numerous national and international NGOs advocated against reservations. Human Rights Watch stressed that "permitting reservations would undermine the force and moral authority behind a Treaty and weaken the nature of the obligations embodied in it.[30]

We will discuss four fundamental issues addressed at the Conference: the definition of crimes, the jurisdiction of the Court, its complementarity with national courts and the inclusion of gender sensitive provisions in the Rome Statute.

1. Defining the Crimes Covered-

1.1 Crime of Genocide: "The Crime of all Crimes."

In article 6 of the Rome Statute, the Crime of Genocide is defined in a manner identical to article II of the Convention on the Prevention and Punishment of the Crime of Genocide.[31] The Crime of Genocide is defined as:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such;
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole and in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

The judgement by the Tribunal for Rwanda in Prosecutor v. Akayesu,[32] and a few judgements by national courts as in A.G. Israel v. Eichmann,[33] and Minister of Citizen-

ship and Immigration (Canada) v. Mugesera[34] provide judicial interpretation. First, "killing members of a group" does not refer to involuntary homicide or unpremeditated killing. An offender must intend to destroy in whole or in part, a protected group. Second, the Rwanda Tribunal noted that the harm need not be permanent and irremediable and included rape and other forms of sexual violence in this provision. Third, "inflicting conditions of life" may include acts relating to "subjecting a group of people to a subsistence diet, systematic expulsion from their homes and the reduction of essential medical services below the minimum requirement."[35]

Fourthly, "imposing measures to prevent births" is clarified in the Genocide Convention, and by the A.G Israel v Eichmann judgement,[36] as such measures that could include sterilization, compulsory abortion, segregation of the sexes and obstacles to marriage.[37] In the Akayesu case, the Tribunal for Rwanda went further, stating: "In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."[38] The five acts enumerated above encompass forms of physical and biological genocide but not cultural genocide, intentionally omitted by the drafters of the Genocide Convention in 1948.[39] Efforts to enlarge the definition of the crime of Genocide to extend to linguistic groups and to political, economic and social groups in the Rome Statute did not meet with success.

1.2 Crimes Against Humanity – in International and Non-International Conflicts

In Article 7 of the Rome Statute, crimes against humanity include acts such as murder, enslavement, forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, persecution against any identifiable group on political, racial, cultural and other grounds, the crime of Apartheid, and other inhumane acts of a similar character, where they are knowingly committed as part of a systematic or widespread attack against a civilian population. These crimes have been elaborated by several treaties and tribunals. These include the Hague[40] and Geneva Conventions on humanitarian law in time of war.[41] Since the Second World War, there has been a consistency in the definition of Crimes against Humanity in international treaties such as the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity,[42] and in the statutes of international tribunals such as the Statute of the International Military Tribunal at Nuremberg,[43] the International Military Tribunal for the Far East,[44] the Tribunal for the Former Yugoslavia[45] and the Tribunal for Rwanda.[46]

The Rome Statute states the criteria of "widespread or systematic" as a key requirement for attacks directed against any civilian population to be considered a crime against humanity. "Widespread" is a term that refers to "the number of victims".[47] It refers to actions carried out collectively and on a large scale. The term "systematic" excludes random acts of violence."[48] The "civilian" population includes all persons who have not taken any active part in hostilities, or are no longer doing so.[49] Of particular significance is the inclusion of gender-related crimes that are defined under 1(g) as "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity". For the first time an international treaty recognizes the crime of persecution against any identifiable group or collectivity on grounds of gender.[50] Lastly, a critical affirmation is that crimes against humanity could occur both in times of peace and in situations of armed conflict.

1.3 War Crimes – Raising the Threshold

Article 8 of the Rome Statute provides an exhaustive list of war crimes provisions. Many States including the United States and France expressed concerns with these provisions and advocated high thresholds. War Crimes are punishable as individual acts, do not require any special intent element and do not normally need to be widespread or systematic. However, the Rome Statute in Article 8 (1) expressly states that the Court shall have jurisdiction in respect to war crimes, in particular, when committed as part of a plan or policy, or as part of a large-scale commission of such crimes.

War Crimes include thirty-four crimes relating to international conflicts and, sixteen crimes relating to non-international conflicts. The Rome Statute essentially codifies the Hague Conventions and the 'grave breaches' of the four Geneva Conventions as well as its Additional Protocols. The Rome Statute codifies a list of gender related crimes similar to those listed as crimes against humanity.

Another subject of contention relates to the issue of child soldiers. Globally it is estimated that there are over 300,000 child soldiers.[51] At the insistence of the US delegation, the compromise language adopted is not recruitment but "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."[52] The most difficult provision to resolve related to the prohibition of nuclear weapons and landmines. There was strong opposition from the major military powers and the largest exporters of such weapons; namely China, Russia and, in particular, the United States. The Rome Statute prohibits the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices[53] and bullets that expand or flatten easily in the human body.[54] Reference to landmines, chemical and nuclear weapons are absent from the Rome Statute.

1.4 The Crime of Aggression: Ambiguity, Disagreement and Postponement

This crime will only come under the jurisdiction of the Court once state parties amend the Rome Statute so as to provide for a definition of this currently ambiguous crime. The negotiators could not reach agreement over this issue, primarily due to the insistence of the permanent members of the Security Council that the Council play a significant role in ascertaining when aggression has occurred.

2. Engendering the Rome Statute – Inclusion of Gender Concerns

Gender-based violence has traditionally not been addressed in international humanitarian law. Rape was first mentioned as a Crime against Humanity in Control Council Law No 10, produced by the Allied powers occupying Germany.[55] There were no prosecutions of rape in trials conducted on the basis of this instrument for a long time. The International Military Tribunal for the Far East found that approximately 20,000 cases of rape occurred with the city of Nanking during the first month of occupation. Sadly, there were no prosecutions. Despite the rhetoric of States on their commitment to ensure the full enjoyment by women of all human rights, violations of the human rights of women have traditionally been neglected. These violations are ignored and often times dismissed as a "natural consequence" of war.

This attitude has begun to change with work of the Tribunals for the former Yugoslavia and Rwanda. Article 5 para. (g) of the Statute of the ICTY and article 3 para. (g) of the Statute of the ICTR expressly include rape as a crime against humanity. At the Rome Conference, a concerted advocacy campaign was spearheaded by the Women's Caucus on Gender Justice to include specific provisions on gender specific crimes. It met with wide support from most non-governmental organizations and some States. Gender related crimes apply to international and non-international conflicts and are explicitly listed in both Crimes against Humanity and War Crimes.[56] The Rome Statute is the first international treaty recognizing the crime of forced pregnancy. Under Crimes against Humanity it includes the crime of persecution against any identifiable group or collectivity on grounds of gender.[57] In addition to the crimes of enforced prostitution and enslavement, the crime of sexual slavery is codified, thus recognizing that the coerced nature of sexual services goes well beyond the crime of slavery. Finally, Article 21 (3) states that "the application and interpretation of law must be ... without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

The Holy Sea and Ireland, backed by some African and Latin American States and a significant number of States in the Arab League,[58] mounted a concerted attack on the inclusion of "forced pregnancy" and the term "gender". They were joined by pro-life activists, mainly from North America, who mounted an aggressive campaign. Their efforts partially failed as these terms were retained. However in an effort to deal with the controversy, the Rome Statute contains a provision which reads "the term 'gender' refers to both sexes, male and female, within the context of society".[59]

On an institutional level, the Rome Statute provides for criteria in the selection of judges taking into account a " fair representation of female and male judges."[60] It also stipulates the need to include judges[61] and advisers appointed by the Prosecutor who have legal expertise on specific issues such as violence against women and children.[62] The Registrar is to set up a Victim and Witness Unit to provide, in consultation with the Office of the Prosecutor, protective measures and counselling services. The Unit is to include staff with expertise in trauma, including trauma related to crimes of sexual violence.[63]

3. Jurisdiction of the Court

The Rome Statute establishes that the jurisdiction of the Court applies to any natural person[64] over 18 years of age[65] who commits a crime within the jurisdiction of the Court, irrespective of official capacity.[66] The jurisdiction of the Court is non-retroactive[67] and applies only to crimes committed once the Rome Statute comes into force and the Court is established. Among the international community, calls have been made to hold criminally responsible the authors of crimes committed in Cambodia, Burundi, Congo (Zaire), and Algeria. These will require ad hoc international criminal tribunals to be established. Further, the Rome Statute sets important preconditions to the exercise of jurisdiction by the Court. The State on the territory of which the conduct in question occurred (territorial state) or the State of which the person accused of the crime is a national (state of nationality of the accused) should be party to the Rome Statute.[68] A state not party to the Treaty may choose to file an ad-hoc declaration consenting to the Court's jurisdiction over a specific crime in question.[69] The criteria for determining jurisdiction does not take into account the identity of the state that has custody of the accused or the state of the victim.

Further still, taking into consideration the concern of France, an important exception is made to the jurisdiction of the Court, which, in the view of many, is contrary to international law and practice. A transitional provision in Article 124 allows a State Party to opt out of the jurisdiction of the Court over War Crimes committed on its territory or by its nationals for a period of seven years after the entry into force of the Rome Statute.

This state consent regime is viewed by many international law experts and human rights defenders as both limiting and cumbersome. On the issue of the selection process of cases, the International NGO Coalition in Rome joined by many like-minded States advocated strongly that if the decision to trigger the Court was left to States Parties and the Security Council, it would compromise

the Court's impartiality and integrity. First, the perception of undue political influence in the initiation of the proceedings may arise. Second, the experience of other international treaties that envisage a state complaint procedure has so far proved that these mechanisms are not effective as diplomatic concerns and economic interests most often take precedence.[70] Third, Security Council actions are hampered by the 'veto' power of the permanent members of the Security Council. In addition, its mandate under Chapter VII of the UN Charter[71] - to maintain and restore international peace and security – would create a risk that the Court would prosecute for politically expedient reasons. It was recognized, however, that referral of a case by the Security Council has the singular characteristic that it is binding on all UN member States, whether or not the States are parties to the Rome Statute. In spite of a contentious debate on the role and powers of the Security Council, which risked jeopardizing the consensus arrived at on other points during the Rome Conference, the negotiators managed to ensure co-operation and avoid subordination of the Court to the Security Council. The resulting compromise is that in order to suspend or delay an investigation or prosecution, the Security Council must adopt a resolution to that effect. The resolution operates a one-year suspension, but can be renewed by a new resolution.[72] However, as a positive vote is required, eight members of the Security Council have to vote in favour of such a resolution and none of the Permanent members must vote against. Action by the Court can be triggered in one of three ways: as a referral by a State party, as a referral by the Security Council acting under Chapter VII powers of the United Nations Charter and by the Prosecutor *propio motu*.

Article 15 of the Rome Statute represents a positive step in the struggle for international justice. It provides the Prosecutor the power to determine whether the case justifies an investigation, based on information from any reliable source. This provides an opportunity for individuals, victims and friends of the Court including NGOs, to bring violations to the attention of the Court. The Prosecutor is required to consult the State before taking "non-compulsory measures" such as interviewing voluntary witnesses. Before launching an investigation, the Prosecutor must request authorization to investigate from the Pre-Trial Chamber, a judicial body of the Court. The mechanism set up thus allows States to participate in investigations but precludes them from hindering the judicial process.

4. Complementarity: Working in Concert with National Courts and States Parties

The Rome Statute seeks to balance the concerns of States who believe that national courts have primary criminal law jurisdiction and the need for justice where domestic courts are unwilling or unable to proceed. Interestingly, in order to determine a state's unwillingness in a specific case, the Court will assess whether the actions of the state demonstrate an attempt to shield a person from criminal responsibility, whether there has been any delay in the national proceedings inconsistent with an intent to bring the alleged criminal to justice, and whether the proceedings are being conducted independently or impartially.[73] To determine a state's inability, the Court will consider, having regard to the principles of due process recognized by international law, whether the state is unable to take the accused into custody, to gather the necessary evidence and testimony and to carry out the proceedings.[74] These decisions may be subject to a review on appeal. At the present time, judicial systems in many countries are discredited for their lack of autonomy from the Executive branch of government or a lack of separation of powers from other branches of government. This is compounded in many developing countries by procedural and structural deficiencies such as scarce resources, excessively formal procedures, heavy caseload and inability of a majority of citizens to access the courts.

The principle of complementarity, supported by all States at the Conference, insures that the Court will respect the state's sovereign right to investigate or prosecute a case over which it has jurisdiction. Article 17 envisages that a case could be challenged not only where the State itself is investigating or prosecuting or has prosecuted but also where a state has decided not to proceed with a prosecution, unless the decision was due to the inability or unwillingness of the State.

Upon ratification, the Treaty becomes part of the national law of the State that ratifies it. The Court is to become an extension of national jurisdiction, relying upon the cooperation of States parties to carry out its functions and to enforce its order. To mention some examples, this cooperation may include, among other matters, the arrest and surrender of a person, collection of evidence, protection of victims and witnesses and seizure of the proceeds of crimes. The Court may also make requests for cooperation from non-state parties. The Court does not itself have the power to order state compliance. In situations where a state party refuses to cooperate, the Court could make a finding to that effect, and refer the matter to the Assembly of States parties or, in some cases, to the Security Council. The Assembly of States parties provides the management oversight[75] to the Court and nominates its judges, ensuring that each has a role in the operation of the Court.

The Rome Statute is a product of many a compromise. The adoption of the Rome Statute and the breadth of support reflected in the results of the vote demonstrates that there is, in the international community today, a growing consensus in favour of an institutional instrument for human rights.

Part III - The Next Steps – Towards the Enforcement of International Human Rights

Neither the NGOs nor individual States claim to be fully satisfied with the end product – the Rome Statute. Yet with some distance and closer review and reflection many agree that on balance it is a good statute, the best we could possibly get at this time. The Rome Statute

marks a step forward for the civil society's goals without precluding further campaigns. As an indication, the most significant deficiency - the limitations on the jurisdiction of the Court - can be progressively overcome by efforts to universally ratify the Rome Statute.

Three primary challenges remain to be addressed. Firstly, the work of the Preparatory Commission,[76] particularly relating to rules of procedure and evidence and the elements of crime. Secondly, the financing of the Court. Lastly, the urgent need for ratification of the Rome Statute by at least 60 States.

1. Work of the Preparatory Commission

From the start of the proceedings, there was general agreement that the subject matter of deliberations and proposals should not deviate from the Rome Statute. Elements of Crime refer to the elements of acts that must be proven by the Prosecutor in order to establish culpability for a crime. One of the major issues included the level of intent for culpability. The US proposed raising the level of intent to commit genocide to require awareness of a wider policy of genocide and action in furtherance of this wider policy.[77] A compromise was reached in informal discussion raising the intent requirement to include the extra - and easier to prove - objective element that "the accused knew or should have known".

With regard to rules of Procedure and Evidence, some of the contentious issues had do to with the French proposals to set elaborate rules that seem to infringe on the independence of the Prosecutor. However, they are gearing up to make a very valuable contribution in highlighting the role of victims. The work of the Commission, to be completed by June 2000, will assist tremendously the process of ratification by States of the Rome Statute by reducing the level of uncertainty about the operation of the Court. However, it highlights the need for vigilance on the part of States and civil society to prevent the development of rules that undermine the progress achieved in Rome.

2. Financing

The financing of the Court is a crucial question which relates to the potential effectiveness, independence and influence of the Court. A lack of funds for the establishment and operations of the Court could lead to politically biased or expedient choices and a reduction in the quality of its operations. States were split between two choices for financing the Court: funding by States Parties to the Treaty and funding out of the United Nations general budget. Some States argued that the regular budget of the UN is a more reliable source of funding, would add to the universal character of the Court and encourage poorer States, otherwise shy of the costs of the Court, to support its creation.

The United States argued that the Court would be a heavy drain on the UN budget and that the Court would have to compete for resources among the myriad of UN priorities. The Rome Statute stipulates that the expenses of the Court and the Assembly of State Parties shall be provided both by contributions made by state parties and funds provided by the United Nations, the latter, in particular, for expenses incurred by Security Council referrals".[78] In addition, the Court will accept voluntary contributions.

Learning from the experience of the Tribunals for the former Yugoslavia and Rwanda is crucial. Creative ways will have to be found to avoid unjustified delays and to ensure efficiency and transparency in the management of personnel and procurement. The amount of political, and thereby financial, support will depend in near term on the number of States Parties to the Court and the quality of its judgements once it begins operations.

3. Ratification of the Rome Statute

Presently, 82 States have become signatories to the Rome Statute. Senegal became the first state to ratify the Rome Statute, followed by Trinidad and Tobago and San Marino.[79] Belgium, Luxembourg, Italy and France have commenced the ratification process. The record of ratification for many of the treaties that relate to the subject matter of the Court is positive. The International Covenant on Civil and Political Rights[80] took ten years to come into force and has 140 ratifications. Its Optional Protocol (which includes international oversight mechanisms)[81] also took ten years and has 93 ratifications. The Genocide Convention[82] took three years and has 124 ratifications.

The early ratification by States of this treaty is crucial so as to maximize on the momentum generated in Rome and the recent decision on the Pinochet case by the Law Lords in Great Britain.[83] An effective strategy for civil society to encourage ratification should focus on: first, ensuring progress in the work of the Preparatory Commission so as to encourage States to design enabling legislation domestically; second, promoting public awareness on the Rome Statute. Third, encouraging key supporter States to lead the way in ratification. Fourth, States, international agencies and NGOs should continue concerted efforts to provide technical and legal assistance to States to change domestic legislation to comply the Rome Statute. Fifth, using available up-coming international events and forums, such as the Summit of the Americas, to keep the issue of ratification on the agenda, formally and informally.

In States with amnesty laws in place, as is the case in the Americas, it is important to emphasize the Court's complementarity with national courts and the non-retroactivity of its jurisdiction. There is a need to appreciate the concerns of States who voted against the Statute and every effort should be made to continue the dialogue with them. However, any attempt to reopen the Rome Statute and dilute its contents or attempts to exploit loopholes so as to undermine the Court should be vigorously opposed and publicly exposed. It has been alleged that the United States is making such an attempt by approaching States supportive of the Court, such as South Africa and Poland, and signing agreements whereby these States promise not to give up any US citizens to the Court.[84] This is consistent with Ar-

ticle 98 of the Rome Statute, which precludes the Court from making a request for surrender or assistance that would require a state to act inconsistently with its obligations under international law to a third party, unless the consent of the third party is given.

Conclusion

The adoption of the Rome Statute on July 17th 1998 marks a watershed in the struggle to end the impunity enjoyed by perpetrators of egregious crimes. There were seven major welcome outcomes of the Rome Conference which had been advocated by civil society organizations, namely: 1) the provision for an Independent Prosecutor; 2) the inclusion of crimes committed during non-international armed conflict; 3) the recognition of gender related crimes, such as forced pregnancy and sexual slavery; 4) the creation of a Victim and Witness Protection Unit; 5) the exclusion of the death penalty; 6) the refusal to permit reservations to the Rome Statute; and 7) the diversity of funding sources for the Court.

Many compromises were made in Rome in order to get a large number of States to support the adoption of the Treaty. Foremost on the list are: 1) the limitation on the Court's jurisdiction where investigation is not triggered by the Security Council; 2) the non- inclusion of nuclear weapons and landmines in the list of prohibitive weapons; and 3) the inclusion of the seven year opt-out provision on war crimes.

As Cherif Bassiouni said, "The ICC will not be a panacea for all the ills of humankind. But it can help avoid some conflicts, prevent some victimization and bring to justice some of the perpetrators of these crimes. In so doing, the ICC will strengthen world order and contribute to world peace and security."[85] To secure an effective Court, it is essential that States display courage, tenacity and strong political will and proceed with ratification of the Rome Statute. Civil society organizations including non-governmental organizations, women's rights groups, academics, journalists, church groups and legal experts have a major role to play in educating fellow citizens and encouraging States to ratify the Rome Statute. Making the International Criminal Court a reality, a universal instrument for retributive and restorative justice in a fractured world, will be a modest, yet worthwhile step forward for the whole of humankind. ■

Notes

1. SIPRI 1997: *Armament, Disarmament and International Security* (Oxford, Oxford University Press, 1998).
2. O. Ramsbotham & T. Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation* (Cambridge: Cambridge University Press, 1996).
3. Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and genocide: Lessons from the Rwanda Experience,* (Synthesis Report) (Denmark: Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, March 1996), at 11.
4. E/CN.4/Sub.2/1993/6. *Impunity* is defined as the impossibility, *de jure* or *de facto*, of bringing criminal proceedings against the perpetrators of human rights violations, as well as civil, administrative or disciplinary proceedings, since they are not subject to any inquiry that might lead to their being accused, arrested, tried and if found guilty, convicted and given appropriate punishment, including reparation for the harm suffered to their victims. *De facto* impunity occurs when those committing the acts in question are in practice insulated from the normal operation of the legal system. *De jure* impunity occurs when the legislature provided exemption of legal responsibility for acts committed in a particular context. This impunity includes clemency measures, prescription, and allowing mitigating circumstances during the trial stage.
5. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res 827, Annex [hereinafter *Tribunal for Yugoslavia*].
6. *Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955,* Annex [hereinafter *Tribunal for Rwanda*].
7. W. M. Reisman, "Legal Responses to Genocide and Other Massive Violations of Human Rights" (1996) 59 Law and Contemporary Problems 69 at 69.
8. S. Huntington, "The Third Wave: Democratization in the Late Twentieth Century" in N.J. Kritz (ed.) *Transnational Justice*, Vol. I, (Washington: United States Institute of Peace, 1995) 69 at 81.
9. Plato, *Protagoras* (New York: Macmillan, 1956).
10. R. Goldstone, "Assessing the Work of the United Nations War Crimes Tribunals" (1997) Stanford *Journal of International Law* 1 at 4.
11. *Vienna Declaration and Programme of Action,* U.N.Doc.A/CONF/157/73 (12 July 1993).
12. *Beijing Declaration and Programme of Action,* U.N. Doc. A/CONF/177/20 (15 September 1995).
13. *Rome Statute of the International Criminal Court,* UN Doc. A/CONF.183/9 [hereinafter *Rome Statute*].
14. See M. Robinson, *Human Rights at the Dawn of the 21st Century,* concluding remarks of the General Rapporteur, Interregional meeting organized by the Council of Europe, Palais de l'Europe, Strasbourg, 28-30 January 1993.
15. I. Cotler, "Human Rights as the Modern Tool of Revolution" in K. Mahoney & P. Mahoney, eds., *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht : Martinus Nijhoff Publishers, 1993) 7 at 11.
16. H. Kelsen, *Théorie pure du droit,* 2d ed., trans. C. Eisenmann (Paris: Dalloz, 1962) at 425.
17. Ibid.
18. S.E. Merry, "Global Human Rights and Local Social Movements in a Legally Plural World" (1997) 12 :2 *Canadian Journal of Law and Society* 244, at 250.
19. A-B. S. Preis, "Human rights as Cultural Practice : An Anthropological Critique" (1996) 18 *Hum. Rts. Q.* 286 at 298.
20. *Statute of the International Court of Justice,* 26 June 1945, 59 stat. 1055, T.S. No 993 [hereinafter ICJ Statute] Article 38 par. 1 lit.a.
21. *ICJ Statute,* 38 par. 1 lit. b, c.
22. M. Ackerhurst, "Custom as Source of International Law" 1974 *British Yearbook of International Law* 1.
23. 9 December 1948, 78 U.N.T.S. 277.
24. *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* UN Doc. (A/CONF.183/Add.2 1998).
25. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 UN Doc. A/51/22, 1996 and Report of the Preparatory Committee on the Establishment of An International Criminal Court, UN Doc. A/CONF.183/Add.2, 1998.

26. *ICJ*, Art 34 (1) Only States may be parties to cases before the Court.
27. Explicitly set out in Rome *Statute of the International Criminal Court*, art. 27, UN Doc. A/CONF.183/9 [hereinafter *Rome Statute*].
28. Ibid. Preamble, paragraph 4.
29. BGBi. Nr. 4031980; international source: 8 I.L.M. 679. (Under article 2 par. 1 (d) of the Vienna Convention on the Law of Treaties, a reservation means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.")
30. Human Rights Watch, Commentary for the March-April 1998 Preparatory Committee Meeting on the establishment of an International Criminal Court, 9. Also see Lawyers Committee for Human Rights, International Criminal Court Briefing Series, Vol. I, Number 7 (1998); Amnesty International, The International Criminal Court, Making the Rights Choices – Part IV. Establishing and Financing the Court and Final Clauses (March 1998) 23.; & International Centre for Human Rights and Democratic Development, Brief on the International Criminal Court, 2 May 1998.
31. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].
32. *Prosecutor v. Akayesu*, 1CTR –96-4-T (on appeal).
33. *A.G. Israel v. Eichmann*, (1968) 36 I.L.R. 18 (D.C.), para. 19.
34. *Minister of Citizenship and Immigration v. Mugesera*, File No. QML-95-00171, July 11, 1996. (Immigration and Refugee Board Adjudication Division), reported (in French) in (1996) 7 Rev. Univ. Droit de l'Homme 190.
35. *Prosecutor v. Akayesu*. ICTR -96-4-T (on appeal).
36. *A.G. Israel v. Eichmann*, (1968) 36 I.L.R. 18 (D.C.), para. 224
37. UN Doc. E/623/Add.2; UN Doc. E/447, p 26 ; UN Doc. A/C.6/SR.82.
38. *Prosecutor v. Akayesu*, 1CTR –96-4-T (on appeal).
39. UN Doc. A/c.6/SR.83.
40. *Convention with Respect to the Laws and Customs of War on Land*, The Hague, (Hague Convention II) 29 June 1899.
41. 1907 *Hague Convention (IV) Convention Respecting the Laws and Customs of War on Land*, Preamble, par. 8; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, Aug. 12 1949, 6 UST 3114, 75 UNTS 31, article 63; *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, Aug. 12 1949, 6 UST 3217, 75 UNTS 85, article 62; *Convention Relative to the Protection of Prisoners of War (Third Geneva Convention)*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135, article 142; *Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 6 UST 3516, 75 UNTS 287, article 158; *Protocol Additional to the Geneva Conventions of Aug 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (First Add. Prot,)*, article 1 para2; *Protocol Additional to the Geneva Conventions of Aug 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Second Add. Prot.)*, Preamble.
42. GA Res. 2391 (XXIII) of Nov. 26, 1968, art. 1. Para. b.
43. *Charter of the International Military Tribunal for Nuremberg*, Article 6 (c). G.A. Res. 95 (I), 1 U.N. GAOR, U.N. Doc A/64/Add. 1, 188 (1946).
44. *Charter of the International Military Tribunal for the Far East*, Article 5 (c). Jan. 19, 1946, T.I.A.S. No. 1589.
45. *Statute of the International Criminal Tribunal for Yugoslavia*, S.C. Res. 827, Article 5.
46. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, Article 3.
47. *Prosecutor* v. *Tadic* (Case. No. IT-94-1-AR72), Judgement of the Appeals Chamber, para 648, October 2, 1995.
48. *Prosecutor* v. *Akayesu*, Judgement, Case No. ICTR-96-4-T, ("Akayesu Judgement"), Sept. 2, 1998, para 579.
49. M. Boot, R. Dixon & C K. Hall *Crimes Against Humanity* p. 47. (Both the Tadic Judgement and the Akayesu Judgements adopted this definition).
50. *Rome Statute*, art. 7(1) (h).
51. Coalition to Stop the Use of Child Soldiers (1999) online: Coalition to Stop the Use of Child Soldiers <http://www.child-soldiers.org/>(date accessed: 27 May 1998).
52. *Rome Statute*, art. 8 (2) (b) (xxvi).
53. Ibid. Art. 8 (2) (b) (xxviii)
54. Ibid. Art 8 (2) (b) (xix)
55. Control Council Law No.10. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No.3.
56. *Rome Statute*, art. 8 (2)(b) (xxii) for international armed conflict and 8 (2) (c) (vi) for non-international armed conflict.
57. Ibid. Art. 7 (1) (h).
58. States that made statements opposing the inclusion of the term gender are: Bahrain, Brunei, Egypt, Guatemala Kuwait, Saudi Arabia, Syria, Qatar, Turkey, United Arab Emirates, Oman, Venezuela and Yemen. The Syrian and Qatar delegates took the lead on these negotiations.
59. *Rome Statute*, art. 7 (3).
60. Ibid. Art 36 (8) (a) (iii).
61. Ibid. Art. 36 (8) (b).
62. Ibid. Art. 42 (9).
63. Ibid. Art. 43 (6).
64. Ibid. Art. 25 (1).
65. Ibid. Art. 26.
66. Ibid. Art. 27 (1) & (2).
67. Ibid. Art. 24 (1).
68. Ibid. Art 12 (2) (a) & (b).
69. Ibid. Art 12 (3).
70. Article 41 of the International Covenant on Civil and Political Rights; Article 21 of the Convention against Torture; 45 & 61 of the American Convention on Human Rights and Article 47 of the African Charter on Human and Peoples Rights have state complaint mechanisms that have not yet been put to use.
71. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945, and no.7. Chapter VII Article 39 notes "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken."
72. *Rome Statute*. Article 16.
73. *Rome Statute* art. 17 (2) (a)(b)(c).
74. Ibid. art. 17 (3).
75. Ibid. art 112 (2) (a).
76. Ibid. Final Act, Resolution F.
77. UN Doc. PCN/ICC/1999/DP.9.
78. *Rome Statute* art. 115 part 12.
79. Senegal ratified the Statute on 2 February 1999, Trinidad and Tobago on 6 April 1999 and San Marino on 13 May 1999.
80. U.N.T.S., vol. 99, p 171.
81. Ibid. Vol. 99, p.171
82. Ibid., vol. 78, p.277
83. *Regina v. Bartle and the Commissioner of Police and others Ex-Parte Pinochet*. 1999. A.C. (H.L.)
84. International Centre for Human Rights and Democratic Development, *ICC Bulletin #2*, May 18 1999.
85. C. Bassiouni, "Preface" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellshaft, 1999) 13 at 15. ❐

REPORTS

- **Somali Refugees in Toronto: A Profile**

  By Edward Opoku-Dapaah, 1995
  ISBN 1-55014-278-x, 130 pp., $12.95.

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

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

  By Janet McLellan, 1995
  ISBN 1-55014-267-4, 142 pp., $12.95.

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

- **Refugee Families and Children: A Directory for Service Providers in Metro Toronto**

  Compiled by
  John Morris and Lydia Sawicki, 1995
  ISBN 1-55014-285-2, 39 pp., $6.95.

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

Available from:

Centre for Refugee Studies

Back Issues of *Refuge*, Canada's periodical on refugees

1. **Environmental Refugees**, Vol. 12, No. 1, June 1992.
2. **Discussion of Immigration Bill C–86**, Vol. 12, No. 2, July/(August) 1992.
3. **General Issue/Refugee Sponsorship**, Vol. 12, No. 3, Sept. 1992.
4. **Eastern European Refugees**, Vol. 12, No. 4, Oct. 1992.
5. **The Tragedy of Somalia**, Vol. 12, No. 5, November/December 1992.
6. **The Review of Rejected Refugee Claims in Canada**, Vol. 12, No. 6, January 1993.
7. **Russia and Central Eurasia**, Vol. 12, No. 7, February 1993.
8. **Africa Issue: Repatriation**, Vol. 12, No. 8, March 1993.
9. **General Issue/Globalization**, Vol. 13, No. 1, April 1993.
10. **Russia and Central Eurasia**, Vol. 13, No. 2, May 1993.
11. **Special Issue on Sri Lanka**, Vol. 13, No. 3, June 1993.
12. **Gender Issues and Refugee Law**, Vol. 13, No. 4, July/August 1993.
13. **Southeast Asian Refugees**, Vol. 13, No. 5, Sept. 1993.
14. **Mozambican Refugees**, Vol. 13, No. 6, October 1993.
15. **Russia and Central Eurasia**, Vol. 13, No. 7, November/December 1993.
16. **General Issue/Sudan**, Vol. 13, No. 8, January 1994.
17. **Integration of Refugees—The Canadian Experience**, Vol. 13, No. 9, February 1994.
18. **Refugees and Peace in Central America**, Vol. 13, No. 10, March 1994.
19. **Horn of Africa**, Vol. 14, No. 1, April 1994.
20. **The Russian Federation**, Vol. 14, No. 2, May 1994.
21. **The Former Yugoslavia**, Vol. 14, No. 3, June/July 1994.
22. **General Issue/IRB and *Rebuilding Trust*/Tamil Immigrants in Canada**, Vol. 14, No. 4, August/September 1994.
23. **Rwandan Crisis**, Vol. 14, No. 5, October 1994.
24. **Refugee Resettlement in Israel**, Vol. 14, No. 6, November 1994.
25. **Refugee Women—Part 1: Issues**, Vol. 14, No. 7, December 1994.
26. **Refugee Women—Part 2: Case Studies**, Vol. 14, No. 8, January 1995.
27. **The Safe Third Country Concept**, Vol. 14, No. 9, February 1995.
28. **Special Issue on Chechnya**, Vol. 14, No. 10, March 1995.
29. **Reformulation of International Refugee Law**, Vol. 15, No. 1, 1996.
30. **Environment, Development and Refugees**, Vol. 15, No. 2, 1996.
31. **International Intervention in Refugee Crises**, Vol. 15, No. 3, 1996.
32. **Early Warning on Humanitarian Crises**, Vol. 15, No. 4, 1996.
33. **Child Refugees**, Vol. 15, No. 5, 1996.
34. **Global Settlement Services**, Vol. 15, No. 6, 1997.
35. **Early Warning and Early Response**, Vol. 16, No. 1, May 1997.
36. **Uprooting and Consequences**, Vol. 16, No. 2, June 1997.
37. **Development-induced Displacement**, Vol. 16, No. 3, August 1997.
38. **Refugee and Immigrant Women: An International Perspective**, Vol. 16, No. 4, October 1997.
39. **Working with Refugees and Internally Displaced Persons**, Vol. 16, No. 5, Nov. 1997.
40. **Conflict, Population Displacement, and Conflict Resolution**, Vol. 16, No. 6, Dec. 1997.
41. **Refugee and Immigrant Women: An International Perspective, Part II**, Vol. 17, No. 1, February 1998.
42. **Human Rights and Refugee Movements in the Newly Independent States of the Former Soviet Union**, Vol. 17, No. 2, April 1998.
43. **Current Issues in Refugee and Human Rights Policy and Research**, Vol. 17, No. 3, August 1998.
44. **Violent Displacement and Post-Conflict Reconstruction: Afghanistan, Uganda, and Rwanda**, Vol. 17, No. 4, October 1998.
45. **New Cargo: The Global Business of Trafficking in Women**, Vol. 17, No. 5, Nov. 1998.
46. **Critical Perspectives on Refugees**, Vol. 17, No. 6, December 1998.
47. ***Not Just Numbers* and *New Directions*: Implications for Canadian Refugee Policy**, Vol. 18, No. 1, February 1999.
47. **Conflict, Human Rights, and Integration of Refugees**, Vol. 18, No. 2, April 1999.
48. **Humanitarian Intervention in the Wake of the Kosovo Crisis**, Vol.18, No. 3, August 1999.

Single copy: Vol 12, 13 &14–$6.50; Vol 15, 16, 17–$10. 10 percent discount on 3–9 issues (copies); 20 percent discount on 10 issues (copies) or more. Special discounts are available for students and exclusively volunteer-run NGOs. P. O. accepted.

Please send your orders to:

Centre for Refugee Studies, York University
Suite 333, York Lanes, 4700 Keele Street, Toronto, Ontario, Canada M3J 1P3
Fax: (416) 736–5837 • Email: refuge@yorku.ca

Refuge • Vol. 18 • No. 4 • November 1999

CANADA'S PERIODICAL ON REFUGEES
REFUGE

Refuge
Centre for Refugee Studies
Suite 322, York Lanes
York University
4700 Keele Street, Toronto
Ontario, Canada, M3J 1P3
Phone: (416) 736-5663
Fax: (416) 736-5837
Email: refuge@yorku.ca

East Timor: Just Another Human Tragedy?

Guest Editor: Steve Hansch

The Centre for Refugee Studies, York University, Toronto, will publish a special issue of* Refuge, *Canada's Periodical on Refugees, on "East Timor – Just Another Human Tragedy?."

The issue will address topics such as:

- Historical and regional background.
- The root causes of the conflict.
- The quest for peace and impediments.
- The dilemma of refugees, returnees and internally displaced persons (IDP).
- Protection and assistance of refugees, returnees and IDPs.
- Repatriation and return in conflict.
- Picking up the pieces: reconstructing war-torn East Timor.
- The roles of national and international organizations in providing humanitarian assistance, peace-building andreconstruction of East Timor.
- Conflict resolution: Regional and global perspectives.

Contributions with abstracts are invited. They must be received not later than November 22, 1999. Papers should be typed, double-spaced, and referenced in proper academic form. They should not exceed 16 pages or about 4000 words. Short papers of about 900 words are also welcome. A short abstract (100 - 150 words) must accompany as well as 2-sentence (institutional) identification of the author. All submission should be word-processed with computerized software and sent on disc or by e-mail attachment.

On accepte aussi des articles en français. Le style doit conformer aux normes exigés pour les articles rédigés en anglais.

Deadline: December 15, 1999.

For further details, please contact:

Steve Hansch, Guest Editor
Humanitarian Affairs Director
Congressional Hunger Center
Washington, DC, USA

E-mail: sh@intr.net

Or

Prof. Michael Lanphier, Editor
Refuge *(Canada's Periodical on Refugees)*
Centre for Refugee Studies, York University
Suite 322, York Lanes, 4700 Keele Street
Toronto, Ontario, Canada M3J 1P3
Fax: (416) 736–5837 • Tel.: (416) 736–5843 or (416) 736–5663
E-mail: lanphier@yorku.ca