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Sanctuary in Context

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Introduction

Sanctuary in Context

Randy Lippert and Sean Rehaag

In recent times, international migrants living without legal status in Canada, the United States, and European countries have resorted to various institutional manifestations of "sanctuary" to resist deportation. Beginning in the early 1980s, the ancient tradition of church sanctuary underwent a revival, with Christian churches providing sanctuary to migrants facing imminent arrest and deportation. These sanctuary practices arose amidst a dramatic increase in the number of asylum seekers arriving in the West and a simultaneous escalation in national and international efforts to discourage and control their arrival through myriad means, including deportation. Since reappearing in the 1980s, sanctuary has shown signs of mutating and moving beyond Christian churches to other faith-based communities and to secular institutions such as universities and cities.

Until recently sanctuary scholarship has focused primarily on sanctuary activity in the US where it emerged as a faith-based social movement in the 1980s. This complex movement spawned a considerable multidisciplinary body of scholarship. Such scholarship ranged from major ethnographic inquiries invoking social movement theory, to thoughtful theological reflections, to sociological questions about deviant behaviour, to careful consideration of legal questions surrounding constitutional freedom-of- religion claims in the wake of US state authorities charging and convicting providers for their sanctuary activities. By the early 1990s sanctuary as a social movement had all but expired in the US context but through their efforts, scholars had effectively exposed sanctuary not only as a substantive realm of interest in its own right but also as a set of practices in which to ground and pursue long-standing questions stemming from diverse disciplines and theories. Yet, despite this rich body of published work, broader inquiries into sanctuary that reach across and beyond US borders are warranted given that sanctuary has occurred outside the US, persisted after the early 1990s, and taken new institutional forms. Situating sanctuary in this broader context provides further opportunity to explore vital questions in social, legal, and political theory pertaining to migration and citizenship processes, civil disobedience, and church-state relations. Opportunities abound to explore these questions both from relatively traditional disciplines and through more contemporary research on social movements, governmental rationality, and identity influenced by the "linguistic turn" in social theory. While studies representing this broader perspective on sanctuary have been undertaken independently, until now a forum in which they can be considered and debated collectively has been lacking.

Accordingly, this special issue of *Refuge* illuminates sanctuary practices and the theoretical insights to which they give rise in fresh contexts and retrospectively returns to previously studied contexts to re-examine how sanctuary has mutated or spawned unanticipated effects. Assembled are five articles by international scholars that address central theoretical issues from social movement, governmentality, and socio-legal perspectives. The five articles are based on new research on sanctuary in Canada, the US, Finland, and France. These are followed by two succinct reports representing current perspectives and positions of key church sanctuary providers in Canada and Germany. This special issue reveals the continued multidisciplinary nature of sanctuary scholarship, with articles authored by a legal scholar, anthropologists, political scientists, and sociologists as well as contributions from faith-based activists intimately involved in sanctuary provision.

Given that the sanctuary movement in the US is by far the most studied and well-known instance of sanctuary activity in a national context, and because of the nascent New Sanctuary Movement's sudden appearance there in 2007, it is most appropriate to open this issue with an article that recasts an understanding of the nature and significance

of that original movement many years after its cessation. In their article "Legacies and Origins of the 1980s US–Central American Sanctuary Movement," Hector Perla and Susan Coutin provide a retrospective exploration of the sanctuary movement. Their insightful take on its origins and effects is hinted at in their use of "US–Central American Sanctuary Movement" to refer to the movement in the article's title. The authors argue that the movement's structure and effects were transnational rather than national in character. In particular, the authors suggest that the sanctuary movement arose consonant with the broader activities of Central Americans that sought to encourage North Americans to support social justice activists, particularly in El Salvador. This rethinking of the movement's origins also reveals several significant unintended consequences of sanctuary practices that include legal and policy changes in the US, the increase of remittances to Central America, the growth of the Central American community in the US, and the emergence of new civil society networks in Central and North American countries. These consequences cast doubt on the efficacy of social movement theories that centre on instrumental (*i.e.*, intentional) action. Moreover, as is also exemplified in the recent Canadian context that is more closely tethered to refugee determination and immigration processes, these unanticipated consequences point to the need to accept the particularity of sanctuary activity.

Next, offering a rare glimpse of sanctuary activity in a European country with restrictive immigration policies is Miikka Pyykkönen's article, "Deportation vs. Sanctuary: The Rationalities, Technologies, and Subjects of Finnish Sanctuary Practices." In this article, sanctuary is shown to have been officially sanctioned in its "exposure" form by the Finnish Evangelist Lutheran Church, Finland's major Christian denomination, only in 2007. Drawing on theories of governmentality influenced by Michel Foucault's later writings and lectures and in particular his compelling concept of pastoral power, Pyykkönen considers the 2007 sanctuary incident involving Naze Aghai. Through this analysis, the author argues there are two "pastorates" brought to bear on Naze Aghai and the subjectivities of other immigrants and asylum seekers in Finland. One pastorate comprises state apparatuses aimed at ensuring the well-being of the Finnish population. Another comprises the Church, parish workers, secular activists, and communities, which seeks the vitality and well-being of a broader "flock" that reaches beyond Finland's territorial borders.

In "L'asile religieux, entre lecture libérale et républicaine: quels défis pour les sociétés démocratiques?" Caroline Patsias and Louis Vaillancourt consider sanctuary activity in Canada, France, and the US as a form of civil disobedience. The authors argue that civil disobedience of this sort possesses a complex relation with contemporary conceptions of democracy. Specifically, they contend that how one understands sanctuary's legitimacy partially hinges on whether one adopts a liberal or republican view of democracy.

Continuing with the theme of civil disobedience, Sean Rehaag's article, "Bordering on Legality: Canadian Church Sanctuary and the Rule of Law," argues that when faith-based communities develop formal screening mechanisms to decide who among those requesting sanctuary should receive it, they apply legal norms and procedures akin to those of Canada's official refugee determination process. The author asserts that although Canadian sanctuary practices are typically criticized as a form of civil disobedience that calls into question the rule of law, it is also possible to understand sanctuary practices as a means through which faith-based communities prevent the state from violating both Canadian and international refugee law, thereby actually upholding rule-of-law norms.

In the issue's final feature article, "Wither Sanctuary?," Randy Lippert asks whether sanctuary as an effective resistance strategy is fading away in the Canadian context. The author suggests that sanctuary's recent decline is evinced by a decrease in the number of new sanctuary incidents and an increase in the duration of incidents. He argues that this is not merely a consequence of a tougher stand by the federal Conservatives elected in 2006, arrests of sanctuary recipients, and less exposure via attention from mass media. Rather, sanctuary providers themselves appear to recognize the decreasing success of the tactic and may well be adopting other strategies that include a renewed push to implement the long-promised merit-based appeal for refugee claimants, as well as resorting to "concealment" sanctuary practices.

While the articles in this issue elicit several shared themes, two issues that are particularly evident in the contributions are visibility versus non-visibility and the interrelated question of migrants' agency. Reflected in the earliest sanctuary scholarship, the division between visible and non-visible sanctuary practices is seen in the analytical distinction between sanctuary as "exposure" and sanctuary as "concealment."[1] The former entails a strategy to provide protection to migrants by gaining the attention of mass media, the public, and state authorities by providing sanctuary to migrants in a particular church or religious building. The latter is the antithesis of this effort whereby the provision of sanctuary is purposely concealed from state authorities. This broad theme appears in varied and compelling ways in this issue. In Perla and Coutin's contribution it manifests in relation to questions of agency and whether Central American activists had to stay quiet and become invisible in order to foster North Americans' involvement in the sanctuary movement.

In other words, invisibility was maintained to hide not only from US authorities but also from other movement activists or would-be participants. In the article by Pyykkönen, it is evident that since 2007 sanctuary in Finland has moved from "concealment" to "exposure." In contrast, in Lippert's account, we see signs that sanctuary in Canada may be moving from "exposure" to "concealment," or perhaps that among current and would-be providers, sanctuary is increasingly obscured by its incorporation into a broader quest for the "Holy Grail": the long-sought merit-based legal appeal. Moreover, this self-limitation of social movement goals to advocacy for changes in refugee determination processes, as important as such developments may be for the well-being of asylum seekers, also highlights the significance of Rehaag's careful consideration of the legal justification for sanctuary in Canada: if sanctuary has a more sound legal basis than usually thought there may yet be greater support for those providing sanctuary through "exposure" rather than letting what has been a successful, highly symbolic, legal strategy continue to wither away.

The other theme concerns questions of migrants' agency. There is little doubt that those at the centre of the incidents play a role in the genesis and cessation of sanctuary activity. These migrants faced with immediate deportation sometimes defy sanctuary's paternalistic currents, whether by deciding to give up sanctuary after long periods or by challenging restrictions imposed by providers. However, it is also true that sanctuary recipients often—even if only temporarily—adopt passive, obedient roles in order to flow with these paternalistic currents or otherwise deem it necessary to "stay quiet." Furthermore, close study of efforts to mobilize the significant legal and financial resources required for gaining legal status through sanctuary and the reality of significant language barriers to mass media access plainly reveal that often migrants are not in a position to come to the forefront of the struggle. To expect otherwise is to deny the grim reality in which they find themselves and to overstate their opportunities for resistance, regardless of how much they are involved in initially requesting sanctuary, bringing it to a close, or escaping its confines altogether. Thus, while questions surrounding how persons at the centre of sanctuary exercise their agency are worthy of further academic exploration, the extent of such agency should not be uncritically overemphasized.

This question of agency also serves as a reminder of the challenges inherent in researching sanctuary. For instance, studying sanctuary as "concealment" is difficult by definition and the ethical and practical problems of studying those in the exceedingly vulnerable position of the sanctuary recipient not only while in sanctuary but afterward are paramount. In fact, few university ethics committees would currently allow these migrants to be included in Canadian federal-grant–funded studies or indeed allow close study of concealment sanctuary at all, due to its questionable legality. As well, it has become clear in work by Lippert as well as Perla and Coutin that even exposure incidents or social movements have elements that remain concealed and that may not become accessible to researchers through informants or other means until long after the fact. Indeed, study long after the fact may be the only means of revealing sanctuary's concealed aspects.

One further challenge for studying sanctuary that this issue highlights is the need for collaborative and comparative work. While most studies in this issue are implicitly comparative (US with Canada, Canada with US, Finland with Canada, and so on), what may be required at this juncture is more systematic comparative work. For example, it would be helpful to know whether the apparently similar (but thus far unelaborated) trajectories in sanctuary tactics in countries such as Canada and Germany can lend insight into why shifts from "exposure" to "concealment" more generally occur. It should be noted that, if Perla and Coutin are correct, comparative scholarship of this kind may well require comparing regional rather than national contexts, but it may also entail comparing different arms of sanctuary activities or comparing independent incidents within countries or regions.

Finally, with the recent advent of the New Sanctuary Movement in the US, the "don't ask, don't tell" effort in Canada, "cities of sanctuary" in the United Kingdom, and ongoing sanctuary incidents in Germany and Finland, and the continuing debates about how to best understand the role of civil disobedience and the rule of law in relation to sanctuary practices, the fruitfulness of sanctuary as a site to reflect on complex theoretical and socio-legal questions suggests further sanctuary scholarship is in order.

Notes

1. Paul Weller, "Sanctuary as Concealment and Exposure: The Practices of Sanctuary in Britain as Part of the Struggle for Refugee Rights" (paper presented at the conference "The Refugee Crisis: British and Canadian Responses," Keble College and Rhodes House, Oxford, England, 4–7 January 1989).

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Sean Rehaag is an assistant professor at the Osgoode Hall Law School at York University, Toronto, Ontario. He is also a resident faculty member at York University's Centre for Refugee Studies. He holds common law and civil law degrees from McGill University (2003) and an S.J.D. from the University of Toronto (2008). His main areas of research include immigration and refugee law, human rights, legal pluralism, and empirical analysis of adjudication. His doctoral dissertation, which received the Alan Marks Medal for best graduate thesis in 2008 at the University of Toronto's Faculty of Law, dealt with the legality of Canadian sanctuary practices.

Legacies and Origins of the 1980s US–Central American Sanctuary Movement

Hector Perla and Susan Bibler Coutin

Abstract

This article re-examines the US–Central American sanctuary movement of the 1980s. Our re-examination is motivated by two factors. First, with the passage of time it is possible to discern the movement's origins in ways that could not be fully articulated while it was ongoing. We are able to show how certain relationships between the movement's North and Central American activists were celebrated, while others were obscured due to fear for Salvadoran immigrant activists' safety and concern about inadvertently undermining the movement's legitimacy. Specifically, we draw attention to the movement's transnational *nature, noting that what made it so powerful was its origin as part of a broader effort by Salvadoran revolutionaries to mobilize North American society to oppose US support for the Salvadoran government. Ironically, to achieve this objective Salvadoran immigrant activists had to stay quiet, become invisible, and abstain from taking certain leadership roles, while embracing identities that may have implied weakness or passivity, such as "refugee" or "victim." Second, the US–Central American sanctuary movement provides powerful insight into future understandings of sanctuary as a concept and practice. The movement's legacies extend beyond participants' stated goals, while the movement's transnational political and organizational focus differentiates it from current sanctuary practices. Thus, re-examining its origins and legacies suggests that apparent similarities in the form of sanctuary incidents may hide underlying differences and that current sanctuary practices may also eventually have unanticipated consequences.*

Résumé

Cet article examine à nouveau le « sanctuary movement » *aux États-Unis et en Amérique centrale durant les années 1980. Deux facteurs expliquent ce réexamen. 1°, avec le passage du temps, il est possible de discerner les origines du mouvement qui ne pouvaient pas être entièrement articulées alors qu'il était en cours. Nous sommes en mesure de montrer comment certaines relations entre activistes nord-américains et leurs contreparties centre-américaines ont été fêtées, tandis que d'autres ont été occultées par crainte pour la sécurité des militants salvadoriens pro immigration et par peur d'accidentellement miner la légitimité du mouvement. Plus précisément, nous attirons l'attention sur la nature* transnationale *du mouvement, soulignant que ce qui l'a rendu si puissant sont ses origines dans le cadre d'un effort plus large par les révolutionnaires salvadoriens en vue de mobiliser la société nord-américaine en opposition à l'appui des États-Unis pour le pouvoir salvadorien. Ironie du sort, pour atteindre cet objectif les militants salvadoriens ont dû rester muets, devenir invisibles et s'abstenir de prendre certains rôles de leadership, tout en affichant des identités, comme « réfugié » ou « victime », qui pouvaient implicitement signifier la faiblesse ou la passivité. 2°, le* « sanctuary movement » *des États-Unis et de l'Amérique centrale donne un puissant aperçu de notre compréhension future de la notion de sanctuaire en tant que concept et pratique. Le legs du mouvement va au-delà des objectifs déclarés des participants, alors que son accent transnational, politique et organisationnel le différencie des pratiques actuelles. Ainsi, un réexamen des origines du mouvement*

et de son héritage suggère que des similitudes apparentes sous la forme de cas de sanctuaire peuvent masquer des différences sous-jacentes et que les pratiques actuelles du sanctuaire peuvent aussi avoir des conséquences éventuelles imprévues.

Given the proliferation of sanctuary activities internationally and the emergence of the new sanctuary movement in the United States,[1] it is worthwhile to re-examine what may be the best-known instance of sanctuary practices: the US–Central American sanctuary movement of the 1980s. Our re-examination of this movement is motivated by two factors. The first is our sense that, with the passage of time, it is possible to discern the movement's origins and influences in a way that could not be fully articulated (even by its protagonists) while it was ongoing, and also that, with hindsight, the legacies of the sanctuary movement may now be more apparent. In particular, we seek to draw attention to the *transnational* nature of the US–Central American sanctuary movement, in terms of both the movement's organizational structure and its impact. It is perhaps obvious that a movement that was dedicated to securing political asylum for Central American asylum seekers and that (in at least some quarters) opposed US military intervention in Central American was transnational. What may be less obvious, however, is the degree to which sanctuary activities emerged as part of Central Americans' broader effort to mobilize sectors of the North American population in support of organized civil society actors working for social justice in El Salvador. Furthermore, although it is beyond the scope of this paper to discuss those particular connections, Mexican and Canadian organizers and colleagues were part of the underground and above ground "railroad" along which Central Americans travelled, and Mexican movement participants were among those prosecuted in the 1985–1986 Tucson sanctuary trial.[2] This transnational political and organizational focus presents a clear difference between the 1980s US–Central American sanctuary movement, which was one part of a broader Central America peace and solidarity movement, and current sanctuary practices in Canada, the United States, and elsewhere, in which local communities seek primarily immigration remedies for individuals who are at immediate risk of deportation.[3]

Second, we believe that revisiting the US–Central American sanctuary movement offers valuable lessons that can give us powerful insight into future understandings of sanctuary as a concept and practice. The legacies of the US–Central American sanctuary movement are broad, extending beyond movement participants' stated goals of securing refuge, condemning human rights abuses, and preventing US military intervention abroad. Unintended consequences of sanctuary practices include complex legal changes in the United States, increased remittance flows to Central America, and the development of new networks of civil society organizations in both countries. Though not the sole cause of the changes that occurred, sanctuary activities were a necessary precondition for these developments. Thus, re-examining the movement's origins and legacies suggests that apparent resemblances in the form of sanctuary incidents may hide underlying differences. It also allows us to note that shifts in 'the bases for legitimacy lead some transnational connections and movement objectives to be celebrated while others are obscured. It also suggests that current sanctuary practices, like those of the 1980s US–Central American sanctuary movement, may eventually have unanticipated consequences as well.

In re-examining the US–Central American sanctuary movement, we bring together two different sorts of expertise. Hector Perla is a political scientist, specializing in US-Latin American relations, social and revolutionary movements, and Central American political engagement in the US. Perla's work is focused on highlighting the formal and contentious strategies that Central American activists, in their home countries and in the diaspora, use to challenge US foreign policy toward the region. The bulk of his interviews have been with Salvadoran solidarity activists and revolutionary militants in, or formerly based in, San Francisco and Los Angeles.[4] Susan Bibler Coutin, an anthropologist, did fieldwork within the San Francisco East Bay region and Tucson, Arizona, segments of the US–Central American sanctuary movement during the 1980s. As part of this fieldwork, she participated in sanctuary activities, interviewed one hundred movement participants, and collected documents and literature produced by and about the movement.[5] During the 1990s and the 2000s, she followed Central Americans' efforts to secure permanent legal status for their undocumented or only temporarily documented compatriots in the United States.[6] It is important to note that because our fieldwork focused on sanctuary communities in California and Arizona, there may be differences between the account derived from this research and the origins and advocacy work in other key movement sites, such as Chicago.

Bringing our expertise together allows us to focus on the agency of Central American collective actors (Frente Farabundo Marti de la Liberación Nacional, or FMLN, Farabundo Martin National Liberation Front, a coalition of five guerrilla organizations and its supporters) in the context of a strategic interaction (the Salvadoran Civil War, in which the US government was a central protagonist), without sacrificing a deep understanding of the on-the-ground dynamics of the sanctuary movement as it unfolded.

Moreover we contextualize our analysis of this movement in a transnational framework that does not force a dichotomous definition of sanctuary as either a purely foreign or completely domestic movement. This contextualization, in turn, allows us to describe the nuanced relationships existing between North and Central American activists in a way that was impossible during and immediately after the conflict due either to fear for Salvadoran immigrant activists' safety or to concern about inadvertently undermining the movement's legitimacy. Specifically, we are now able to show how certain relationships within the sanctuary movement were celebrated, while others were hidden. In other words, we argue that part of what made the US–Central American sanctuary movement so powerful was that it emerged as part of a broader effort by Central American revolutionaries to mobilize opposition to US support for the Salvadoran government. But also we point out that, to do so, Salvadoran immigrants had to be willing to strategically stay quiet, become invisible, or abstain from taking on certain leadership roles in the movement, while, for the sake of achieving their and the movement's objectives, embracing identities that, to some, implied weakness or passivity, such as "refugees" or "victims." In this way Salvadoran immigrant activists used their strategic invisibility as a form of power, along the lines of what political scientists Keck and Sikkink have called leverage and accountability politics.[7] Analyzing the movement's framing of Central Americans as refugees makes it possible to identify broader political and other legacies of sanctuary activities, legacies that may not have been intended or anticipated by movement organizers. In particular, we draw attention to the ways that the success of the "refugee" framing created legal benefits that, in the postwar context, allowed the many years that Central Americans had lived in the US to be recognized as grounds for granting legal permanent residency, a recognition that had implications for Central American economies and nongovernmental organizations.

First, we describe the origins of the sanctuary movement in the United States and provide background information on the causes of political upheaval and migration by Salvadorans to the United States. Second, we document the transnational nature of the movement, highlighting the role of Central American refugees and immigrants whose participation in the movement has not been fully described or theorized. Third, we explore the unintended positive and negative consequences that the sanctuary movement engendered, including the legalization and growth of the Central American community in the United States, as well as the astronomical rise of remittances to El Salvador. Finally, we discuss how the movement has come full circle. That is, we draw attention to the fact that unjust economic and political conditions in El Salvador, conditions to which US foreign policy contributed and that originally gave rise to the sanctuary movement, are still present in the country today. Consequently, we document ways that organizations and activists that are in El Salvador and that have roots in or links to sanctuary are now fighting for Salvadoran citizens' right not to become migrants in the face of economic disparities, insecurity, and the dangerous nature of the trek to the United States.

Historical Context of the US–Central American Sanctuary Movement

From 1932 until the late 1970s El Salvador was ruled by a series of military dictators who came into office through either uncompetitive elections or coups. Starting in the late 1960s this system of governance began to be challenged by a growing collection of social movements. By 1972 this challenge had evolved to include a coalition of political parties of the centre and left (National Opposition Union, or UNO) with the support of many important civil society actors, which fielded a strong presidential candidate, José Napoleón Duarte. While it is widely believed that the UNO coalition won these elections, its candidates were not allowed to take office. In fact its presidential candidate was arrested and tortured, and had to go into exile. This electoral challenge was repeated in 1977 with similar results, anointing another high-ranking military officer, Carlos Romero, winner of the presidential race.

As a result of government intransigence, these institutional political challenges were accompanied by an upswing in social movement mobilization among unions and student, peasant, and religious organizations. The Salvadoran government responded to this contentious political challenge in much the same way that it met the formal political challenges to its authority—with violence; but it went after the social movement with even greater and ever-increasing levels of brutality. This brutality fed support for the incipient but rapidly growing armed revolutionary organizations that began forming in the early 1970s and would come together in 1980 to form the FMLN.[8] At the same time, violence also caused many students, union members, and other activists to migrate to the United States in increasing numbers.

The rise of the US–Central American sanctuary movement was directly related to the dramatic increase in the numbers of undocumented Salvadorans fleeing political repression, social upheaval, and economic distress caused by the Salvadoran Civil War. Today, because of this exponential population growth, Salvadorans are the fourth-largest Latino-origin group in the United States behind only Mexicans, Puerto Ricans, and Cubans, numbering over two million and making up between 3 and 5 per cent of the

total Latino population of the US.[9] While Salvadorans have resided in parts of the United States since at least the end of World War II, they did not come in large numbers until the late 1970s and especially early 1980s.[10] As violence escalated, particularly from government security forces and allied clandestine death squads, Salvadorans began moving from the countryside to the cities and eventually abroad, especially to the United States. By 1984, according to Byrne, "within El Salvador there were 468,000 displaced people (9.75 percent of the population), 244,000 in Mexico and elsewhere in Central America, and 50,000 more in the United States, for a total of more than 1.2 million displaced and refugees (25 percent of the population)."[11] While the US census estimated that in 1970 there were only 15,717 Salvadorans in the country, by 1980 that figure had grown to 94,447 and by 1990 had skyrocketed to 465,433.[12] Other estimates during the mid and late1980s put the number significantly higher. For instance, a 1985 study by the Urban Institute estimated that there were between 554,000 and 903,000 Salvadorans living in the US at the time.[13] Likewise Montes and Garcia put the number of Salvadorans residing in the US at somewhere between 988,551 and 1,042,340.[14] Whatever the true number, the reality is that the massive influx of Salvadoran refugees arriving daily throughout the decade, some with papers but most without, quickly overburdened the capacity of established kinship and friendship social networks to provide adequate assistance to the new arrivals.[15]

Meanwhile it was becoming clear that US foreign policy toward the country would play a crucial role in determining the outcome of El Salvador's future governance. Despite its rhetorical commitment to human rights, throughout most of its tenure in office the Carter administration maintained support for the Salvadoran regime. When the Reagan administration came into office this support increased exponentially. Throughout the 1980s, US military and economic support for the Salvadoran government would total in excess of $6 billion. This support not only included extensive counter-insurgency training and provision of vast quantities of sophisticated armaments but, as was later acknowledged, also included active combat engagement against the FMLN by US military personnel.[16]

Transnational Nature of the Central American Sanctuary Movement

It was in this context of increased repression, immigration, and US involvement that the US–Central American sanctuary movement was born. The earliest organizational precursors to what would become the Central American solidarity movement, of which the US–Central American sanctuary movement was a key component, were several Salvadoran immigrant-based organizations.[17] These organizations were made up primarily of already established Salvadoran immigrant and US-born Salvadoran activists, who initially came together to denounce the lack of democratic freedoms in their home country, the Salvadoran military's human rights violations, and US aid to the Salvadoran government under these conditions. The first of these organizations was the Comité de Salvadoreños Progresistas (Committee of Progressive Salvadorans), which was founded in San Francisco in 1975 in response to the massacre of students from the University of El Salvador. The organization grew quickly and soon had the capacity to publish a weekly newspaper and even occupy the Salvadoran consulate. Shortly thereafter other Salvadoran immigrant-based organizations sprouted in others cities around the US with large Salvadoran communities. Among the most prominent of these organizations were Casa El Salvador (several cities), the Comité Farabundo Martí (also known as Casa El Salvador–Farabundo Martí), and the Movimiento Amplio en Solidaridad con El Pueblo Salvadoreño (MASPS). These immigrant-based groups often had ties to social movement organizations in El Salvador, which in turn were connected to different FMLN factions. These linkages usually originated in kinship or friendship ties, although some originated from immigrants' own previous activism in El Salvador. While the original initiatives of these organizations primarily sought to reach out to the Salvadoran and Latin American populations in the US, almost immediately progressive North Americans began gravitating toward their efforts.[18] In many instances, the North Americans brought with them prior experiences, such as involvement in anti-war activism during the Vietnam War, the freedom rides of the civil rights movement, and church-based refugee resettlement work. Therefore, sanctuary practices built on both North and Central Americans' rich experiences of social justice work.

During a 2000 interview, Don White, a Los Angeles–based organizer with the Committee in Solidarity with the People of El Salvador (CISPES), recalled how North Americans were brought into Central American solidarity work:

> Very early in the 80s, the different tendencies from El Salvador then began to develop their projects. And this is nothing that people were critical about. It was very natural for the political entities in El Salvador to come here and organize among their own compañeros, compañeras, their comrades they felt comfortable with. So certain agencies grew up [that were] identified with one of the five armies of the FMLN. We collaborated over ending U.S. military intervention, to end all military aid to El Salvador. All groups agreed on that point of unity. So it was easy to collaborate with all. The second [point] was direct political support to the FMLN and political and economic material support to the popular movement. And sending delegations and mobilizing U.S. citizens

> to oppose intervention, and those who were able to make the next step to declare their solidarity with the struggle in El Salvador. But many CISPES activists, many North Americans, were anti-interventionists, but never took the step toward solidarity. If we once took them to El Salvador and got them in El Salvador to meet the Salvadoreans, to see the struggle, especially during the war, when it was a very dramatic experience, often they would become solidarity activists, raise money for the popular movement.

In addition, these immigrant-based organizations' missions were originally focused on changing US foreign policy. However, it quickly became apparent to immigrant activists that they needed to do something to respond not only to the plight of their compatriots in their home country, but, with growing urgency, to the plight of an ever-increasing number of Salvadorans who were seeking refuge in the United States. At the same time, they also realized that these new arrivals' testimonies would serve as extremely compelling educational tools for North American audiences unfamiliar with US complicity in what was happening in El Salvador. As the then-director of the San Francisco Comité Farabundo Martí, Jose Artiga, explains,

> This is where I feel that the Salvadorans' role is very important, sometimes making the invitation, sometimes giving their blessing [through their testimonies]. The invitation was really important because people after a presentation or after becoming aware of the situation would have a really bad feeling and you'd say it's your tax dollars that are financing these human rights violations and the question they would ask is what can I do? And here is where with lots of creativity we had a menu of things that people could do … join CISPES, sanctuary, support refugees.

Consequently, Salvadoran activists moved quickly to establish organizations to meet the immediate survival needs of their community, and other groups to advocate for their legal needs. Toward this end both Salvadoreños Progresistas and Casa El Salvador Farabundo Martí created new organizations, which began providing housing and social as well as legal services for refugees in the late 1970s at Most Holy Redeemer's Catholic Church in San Francisco's Castro District where their offices were located. The first organization, started by Salvadoreños Progresistas, was called Amigos de El Salvador (Friends of El Salvador).[19] Casa Farabundo Martí soon followed suit, creating two organizations: the Centro de Refugiados Centroamericanos (CRECEN) and the Central American Resource Center (CARECEN).[20] This redundancy is illustrative of the infighting that became prevalent among Salvadoran immigrant-based organizations throughout the 1980s and, indicating the degree to which solidarity work was transnational, mirrored the divisions that existed among the social movements and FMLN in El Salvador. These divisions sometimes led to strife between organizations with different contacts in the Salvadoran social and revolutionary movement, as well as to the creation of parallel solidarity organizations. To again quote Don White, "certain agencies grew up [that were] identified with one of the five armies of the FMLN …. In the early days, they often did not visit each other's agencies, because they saw them as I suppose both competitive, but also to some degree a different line of the Salvadorean struggle, which they might not have agreed with." As a result of these fratricidal conflicts, organizations such as Salvadoreños Progresistas and Amigos de El Salvador, despite their early accomplishments, were effectively red-baited and evicted from their offices.[21] While neither of these organizations would play a direct role in the creation of the US–Central American sanctuary movement, it is important to note that Salvadoreños Progresistas pioneered the strategy of immigrants approaching members of religious organizations to collaborate with them in an effort to mobilize the religious community, which other Salvadoran immigrant organizations would use to launch the movement. In 1981, following this strategy, members of the Santana Chirino Amaya Refugee Committee and the Southern California Ecumenical Council came together in Los Angeles to create El Rescate. The organization's stated mission was "to respond with free legal and social services to the mass influx of refugees fleeing the war in El Salvador."[22]

CARECEN, CRECEN, and El Rescate would each go on to play a key role in the development of the national sanctuary movement. Through these organizations, Central American activists mobilized pastors and congregants by educating them about events in Central America, US foreign policy, and the imminent danger that persecution victims would be deported back to their place of persecution. In Los Angeles, these groups worked closely with SCITCA, the Southern California Interfaith Task Force on Central America, to offer sanctuary to Central American refugees.[23] In the San Francisco East Bay, where Susan Coutin did fieldwork in the late 1980s, a member of the Comité de Refugiados Centroamericanos (CRECE) sent a representative to monthly steering committee meetings of the East Bay Sanctuary Covenant (EBSC). CRECE also arranged for Central Americans to speak publicly about their experiences to US audiences.[24] Central Americans were also an active force in sanctuary communities in Tucson, Washington, D.C., Houston, New York, Milwaukee, and elsewhere. As Jose Artiga, the former director of the San Francisco Comité Farabundo Martí, recounts,

> Our goal was to create more organizations, to create more chapters (contacts) … not among the Salvadorans, if they were there we'd organize them, but more than anything the larger focus was the North Americans … so that they would be part of something [solidarity or peace organizations]. Then parallel to that was formed the sanctuary churches. That was a different group of people … who took that and gave it its own life … This menu of activities also included a range of political pressure, which included participating in a vigil to participating in civil disobedience … I remember that in Philadelphia, we asked the sanctuary churches to go to the house of Senator Specter after Sunday services … they would hold vigils directly in front of his house and even if they were not large, but with 10 people in front of his home they made him uncomfortable.

As can be gleaned from the above quotes, one of the things that solidarity activists recognized early on was the strategic framing of the "refugee identity." This framing was a particular way of talking about and presenting Salvadoran immigrants to North American audiences, especially to those with no previous knowledge of the conflict and without any political, ideological, or epistemic connection to the plight of the Salvadoran people. Salvadoran immigrant activists realized that it was not enough to educate North Americans about what was happening in El Salvador and US government complicity in the human rights violations. It was also essential to create empathy, to spark a sense of urgency and obligation or responsibility that would motivate North Americans to take a stand against their own government on behalf of an "other" with whom they were largely unfamiliar.[25] Central Americans' organizing practices also had to be adapted to dominant US norms, values, and perceptions of how North Americans saw themselves and saw Third World "others." (In essence, these practices had to appeal to liberal ideals.) The narrative construct of the "refugee" met these needs by simultaneously drawing on shared Judeo-Christian traditions regarding exile, oppression, and refuge while also directing political attention to human rights abuses in Central America and to Salvadoran and Guatemalan immigrants' need for safe haven. Sanctuary also had a spatial dimension in that declarations of sanctuary attempted to "bound" US law by creating "safe spaces," even as participants argued that the US territory ought to serve as a refuge for victims of persecution in Central America. Furthermore, the term "refugee" has a legal dimension that countered accusations of lawlessness and therefore was central to the movement's claim to legitimacy. In other words, activists suggested that since the US government was failing to live up to its moral and legal obligations to grant political asylum to those deserving it (*i.e.* Central American refugees), then it was the obligation of congregations to set the moral example by doing so (*i.e.* providing sanctuary under God's authority), in the process using their moral credibility to openly defy what they considered unjust legal practices until the injustice was formally recognized. Nevertheless at the same time that this identity allowed Salvadorans to reach out to broad US audiences, it also constrained their ability to act in those settings and, by reifying the asymmetric power relations between North and Central Americans, limited the relationships that could be developed. Such constraints were often fully overcome only by the most committed sanctuary activists who came to experience Salvadoran immigrants acting as empowered and strategic activists outside of the "refugee" identity.

The limitations imposed by the "refugee" identity are clear in two practices that were central to the US–Central American sanctuary movement: granting sanctuary and publicizing refugee testimonies. Sanctuary activists granted sanctuary by housing undocumented Central Americans in the churches, synagogues, or homes of congregation members. This arrangement provided Central Americans with material assistance, such as housing, food, access to medical care, job assistance, and other social services. At the same time, sanctuary was designed to bring congregation members into close contact with victims of persecution in Central America, and thus to raise congregants' and others' consciousnesses and spur them to action. As one Salvadoran who was living in sanctuary in Tucson during the 1980s explained, "The moral and spiritual support that they gave us was great. In return, we collaborate in the various churches, telling about the terrible experiences that we've had in El Salvador."[26] Refugee testimonies—public accounts of personal experiences of violence and persecution—were central to these consciousness-raising efforts, and were often accompanied by fundraising appeals or information about how to get involved. Sanctuary thus often exposed Central Americans to intensive scrutiny, and to well-meaning but nonetheless culturally laden offers to "help."[27] While they often wanted to educate the North American public about conditions in their home countries, Central Americans also sometimes chafed at the refugee role. One Salvadoran living in sanctuary in the San Francisco East Bay in the 1980s commented that he preferred relationships that were "person to person instead of person to refugee." He added, "I left my country due to the violence and due to the fear and danger of disappearing, not in order to become a refugee. To me, the word 'refugee' implies inferiority and superiority."[28] Such criticisms did not go unheard, and in fact, there were tensions between different segments of the sanctuary movement (in particular, between Tucson and Chicago participants) over the necessity of coupling sanctuary with testimonies and over which sorts of "stories" ought to be

publicized. The visibility, invisibility, and politicization of Central Americans were a major issue within these debates.

The "refugee" frame therefore largely presented Central Americans to sanctuary workers and to the broader US public as "innocent victims" in need of support and as representatives of the poor and the oppressed, on whose behalf religious communities were compelled to advocate. While refugee testimonies frequently described Central Americans' actions (such as leading a labour union or becoming a catechist) in pursuit of social justice in their homelands, the "refugee" frame also made it difficult to convey the organizational role that Central Americans played in mobilizing religious workers and the solidarity movement more generally. Thus, sanctuary activists spoke of hearing the Central Americans' call for solidarity and accompaniment, or of listening to the Central Americans and following their lead. However, the refugee framing necessarily positioned such responses as instances of materially better off North Americans acting strategically on behalf of the ostensibly innocent, authentic, or genuine (as opposed to strategic) Central Americans. As a result, this framing constrained Central American immigrant activists' ability to publicly identify as political protagonists or take credit for devising joint strategies for social and political change, although of course there was local and regional variation in the degree to which Central and North Americans achieved or were presented as equal partners within sanctuary practices.[29] Such framings were themselves, at times unconsciously, strategic, in that because the US government accused sanctuary workers of serving political rather than humanitarian and religious goals, the revelation that members of FMLN groups were involved in or the movement in some capacity, or behind the Central American organizations with which sanctuary workers collaborated, would have undermined sanctuary's legitimacy.

Legacies and Unintended Consequences

Just as the nature of transnational linkages becomes more clear with the passage of time, so too do the unintended consequences of US–Central American sanctuary practices. Significantly, the rights that Central Americans achieved through sanctuary and solidarity activities created grounds, in the postwar period, for claiming US residency, despite a changed political context. Furthermore, movement participants' organizing experiences created a basis for establishing a transnational network of immigrant rights NGOs. Although the US–Central American sanctuary movement was not the only cause of these developments, it was an important precursor whose long-term impact is felt in both the United States and El Salvador. Though this impact varied from individual to individual and community to community, sanctuary workers' stated goals included securing safe haven for Central American refugees, convincing US authorities to apply asylum law without regard for the politics of the regime from which refugees fled, drawing attention to human rights abuses in Central America, providing protection (via an international presence) to Central Americans who were at risk of persecution, and preventing further US military intervention in Central American nations. To some degree, these objectives were achieved, though not solely due to sanctuary activities. In the wake of FMLN final offensive and the assassination of six Jesuit priests in 1989, the US government began to pursue a negotiated settlement to the civil conflict; the 1990 Immigration Act created Temporary Protected Status and named Salvadorans as the first recipients; asylum procedures were reformed in the early 1990s; and in 1997, Salvadorans and Guatemalans who immigrated during the Civil War were given the right to apply for legal permanent residency. Sanctuary practices thus helped to set in motion a complex set of legal developments in the United States. At the same time, the movement contributed indirectly to the rise in remittances to El Salvador, the creation of new civil society organizations in El Salvador and the United States, and the continued circulation of US activists, students, scholars, and religious workers in Central America. These indirect effects of the movement have helped to maintain attention on social justice issues and on the needs of refugees and migrants.

In the United States, a key but not always acknowledged legacy of the sanctuary movement is the development of new law to address the needs of asylum seekers. Throughout the 1980s, sanctuary activists sought legislation, known as "Moakley-Deconcini" after its sponsors Joe Moakley and Dennis Deconcini, which would have granted Extended Voluntary Departure (EVD) status to Salvadorans and Guatemalans. This bill faced stiff opposition from the Reagan and Bush administrations, which argued that Salvadorans and Guatemalans were economic immigrants who fled poverty rather than violence. While efforts to pass Moakley-Deconcini were under way, sanctuary workers launched their own legal case against the US government. In 1985, eleven sanctuary activists were indicted on charges of conspiracy and alien-smuggling.[30] In response, sanctuary communities and refugee service organizations filed a civil suit, known as *American Baptist Churches v. Thornburgh* or *ABC,* seeking a halt to sanctuary prosecutions, a grant of safe haven to Salvadorans and Guatemalans, and reforms that would prevent US foreign policy considerations from influencing the outcome of asylum cases. The first two of these claims were dismissed on the grounds that US immigration law had changed since the earlier sanctuary prosecutions and that immigration laws were not self-executing.

Litigation on the third claim went forward, and the *ABC* case ceased to be *directly* about sanctuary *per se*. Then, in 1990, following the devastating events of the 1989 final offensive, in which six Jesuit priests, their housekeeper, and her daughter were murdered by the Salvadoran army, legislation creating a new legal form, Temporary Protected Status (TPS), was approved, and Salvadorans were designated as the first recipients.[31] During the same year, the US government agreed to settle the *ABC* case out of court, and in 1991, the settlement agreement gave some 300,000 Salvadorans and Guatemalans the right to apply or reapply for political asylum under rules designed to ensure fair consideration of their claims. It would seem that sanctuary activists' goal of at least gaining a fair hearing for Salvadoran and Guatemalan asylum seekers had been achieved, while at the same time, TPS put a halt to deportations. Sanctuary and Central American activists had cause to celebrate.

Despite these victories, in the 1990s, events conspired to thwart the promise that TPS and the *ABC* settlement held out. First, the US Immigration and Naturalization Service (INS) put *ABC* asylum applications on the back burner in order to focus on quickly deciding new asylum petitions. Peace accords were signed in El Salvador in 1992 and in Guatemala in 1996, but interviews on *ABC* class members' asylum claims were not scheduled until 1997. By then, it was more difficult for applicants to demonstrate a well-founded fear of persecution, given that the wars in their homelands were officially over. Second, in 1996, the US Congress approved the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made many forms of legalization more difficult. In particular, *ABC* applicants had hoped that if their asylum claims were denied, they could then apply for Suspension of Deportation, a form of legalization available to individuals who could demonstrate good moral character, seven years of continuous presence in the United States, and that deportation would be an extreme hardship. IIRIRA replaced Suspension of Deportation with Cancellation of Removal, for which applicants had to prove good moral character, ten years of continuous presence, and that deportation would pose extreme and exceptional hardship for the applicant's US citizen or legal permanent resident spouse, parent, or child. The heightened hardship standard, increased number of years of continuous presence, and introduction of the requirement of a qualifying relative meant that fewer *ABC* class members were likely to qualify. Furthermore, IIRIRA capped cancellation cases at 4,000 annually, making this an unlikely solution for the approximately 300,000 *ABC* class members with pending asylum claims.

In this changed legal scenario, Central American organizations and immigrant rights activists sought new legislation that would enable *ABC* class members to become legal permanent residents. By allying with Nicaraguans and with the support of the Clinton administration and the Central American governments, advocates obtained the passage of the Nicaraguan Adjustment and Central American Relief Act (NACARA) in 1997. NACARA basically restored *ABC* class members' suspension eligibility (renaming this "special rule cancellation") and exempted these cases from the 4,000 cap. The regulations that implemented NACARA also granted applicants a rebuttable presumption of hardship, virtually guaranteeing a grant in most cases, and took the unprecedented step of codifying the factors that went into the assessment of hardship. Through NACARA, some 83,340 Salvadorans and Guatemalans were able to become legal permanent residents.[32] These legal developments benefited not only Central Americans, but also nationals from other countries (including Burundi, Honduras, Nicaragua, Somalia, Sudan, Liberia, Sierra Leone, Bosnia, and Herzegovina) who have received TPS due to emergencies in their home countries, as well as establishing a precedent for other groups, such as Haitians, who benefited from passage of the Haitian Refugee Immigration Fairness Act (HRIFA) in 1998. Sanctuary and Central American advocates' original focus on asylum, El Salvador, and Guatemala changed the US legal landscape in ways that could not have been anticipated.

While not solely attributable to sanctuary activities, increased remittances to El Salvador are an indirect effect of these legal changes that the sanctuary movement helped bring about. As legal developments have increased the stability and job security of Salvadorans living in the United States they may also have improved these migrants' ability to remit to family members in El Salvador.[33] Specifically, remittances increased gradually throughout the 1980s, but grew more rapidly after 1990, when TPS was awarded. While in 1990 the country received less than $500 million, by 2007, Salvadorans living abroad sent almost $3.7 billion in remittances to family members living in El Salvador.[34] The quantity and importance of remittances to the country has not only risen in absolute terms; even more tellingly they have risen as a share of the country's total gross domestic product (GDP). Between 1990 and 2004, remittances more than doubled as a share of the country's overall economy, going from about 6 per cent to over 15 per cent of El Salvador's GDP.[35] At the same time, migrant remittances have had a huge impact on the economy of El Salvador, permitting the economy to stay afloat through economic readjustment programs of the postwar period.[36] This development in turn has made the legal status of Salvadorans in the US a matter of concern in El Salvador. Indeed, extending TPS, which was re-awarded to Salvadorans following the 2001 earthquakes

and which at the time of writing was scheduled to expire in September 2010, has been a high priority of the Salvadoran government.[37] In fact, during the 2004 presidential election in El Salvador, some US politicians suggested that the United States could cut off remittance flows by rescinding TPS, were the FMLN candidate to be elected.[38]

Networks of civil society organizations in both El Salvador and the United States are another legacy of the US–Central American sanctuary movement. During a 2001 interview, an attorney who represented one of the first successful Salvadoran asylum seekers at the beginning of the 1980s described how his work provided a model for other groups dedicated to immigrants' rights:

> I organized networks of lawyers in big law firms to provide assistance in political asylum cases, or pro bono cases. That's sort of the Lawyers Committee's mode of operation. They organize big law firms and their lawyers to do free work on big civil rights matters. Or small civil rights matters. It's a way of organizing networks …. And I, in addition to organizing legal work and volunteer representation also organized teams of policy people from different organizations to look at big policy questions …. Now, that work in the Lawyers Committee, in my own mind at least, accomplished a couple of things. In addition to the work we actually did, it became the model for lawyers committees and the rights offices around the country. So, Robert Rubin's operation in San Francisco, Public Counsel's immigration work in LA, the Immigrant Rights Projects of the Lawyers' Committees in Boston and Chicago all were kind of modeled on what I started here in Washington …. [And,] this political work I was doing at the Lawyersí Committee, as opposed to the legal work, was the foundation for the National Immigration Forum.

In addition to these networks of immigrant rights organizations, many of the Central American groups that mobilized sanctuary workers have become established institutions, providing much needed social services and advocacy work in their communities. For example, in Los Angeles, CARECEN purchased its own building during the 1990s, and, in September 2008, celebrated its twenty-fifth anniversary. Most recently, in Los Angeles, networks of attorneys and civil society organizations have been mobilized in response to workplace raids conducted by Immigration and Customs Enforcement. According to a recent *Los Angeles Times* article, "The effort has parallels to the sanctuary movement of the 1980s, when churches brought Central American refugees to the US to protect them from political violence."[39]

Likewise, in El Salvador, groups that focused on refugee rights during the 1980s have given rise to coalitions that now advocate for migrants' rights more generally. During the 1980s, the El Salvador offices of ACNUR (UNHCR, United Nations High Commission for Refugees), OIM (IOM, International Organization for Migration), Catholic Charities, and Catholic Relief Services provided support for refugees who were attempting to flee persecution, while groups such as CRIPDES (Comité Cristiano pro-Desplazados de El Salvador, Christian Committee for the Displaced of El Salvador) and Tutela Legal denounced and publicized human rights violations. During this period, sanctuary congregations in the United States sometimes also became sister parishes of congregations in El Salvador, through the SHARE Foundation, which also organized delegations of visitors to war-torn communities. During the postwar period, as border enforcement in Mexico and the United States became more stringent and as deportations from the United States mounted, Maria Victoria de Áviles, the then–human rights ombudsperson in El Salvador, founded the Mesa Permanente sobre Migrantes y Población Desarraigada (Permanent Board on Migrants and Uprooted Populations), which in turn developed into the Foro del Migrante (Migrant Forum), and most recently, into the Mesa Permanente de la Procuraduría para la Defensa de los Derechos Humanos para las Personas Migrantes (Permanent Board of the Ombudsry for the Defense of Human Rights for Migrant Peoples).[40] The composition of these coalitions has varied, but generally has included government, academic, religious, and community groups concerned about human rights and immigration. In addition, some solidarity organizations that were formed in the United States have founded their own counterparts in El Salvador. An example is CARECEN Internacional, located in San Salvador, which grew out of the network of CARECEN organizations in the United States. The opposite has also occurred, with the San Salvador office of the gang violence prevention group Homies Unidos giving rise to a Los Angeles office of the same group.[41]

These networks of civil society organizations in the United States and El Salvador have fostered the continued circulation of activists, scholars, students, and religious workers in El Salvador. Conferences, such as the Salvadoreños en el Mundo (Salvadorans in the World) or Semana del Migrante (immigrant week) events, or meetings or workshops organized around a particular theme, regularly bring together scholars, students, and NGO members who work on or in El Salvador. NGOs in El Salvador collaborate with US students and researchers to collect data and issue reports, and with other US and Salvadoran NGOs to exchange information and develop strategies. The Committee In Solidarity with the People of El Salvador (CISPES), CIS (Centro de Intercambio and Solidaridad, Center for Exchange and Solidarity), SHARE, and other groups continue to organize delegations to El Salvador. Hometown associations in

the United States are also key components of this continued circulation, as they direct resources and knowledge from the United States to El Salvador and *vice versa*.[42] This continued circulation has given rise to a transnational civil society circuit, not unlike the transnational linkages that mobilized solidarity and sanctuary work in the United States during the 1980s. By directing resources, knowledge, labour, and particular products (including reports, testimonies, and expertise) to organizations and individuals, this circuit is critical to the continued mobilization of social justice work in El Salvador and in the United States. Moreover, political parties on both the left and right have taken notice of these thick social networks and the resources to which they have access, and have sought to work with these organizations, while setting up their own support networks in the United States. For instance, during the buildup to the 2009 Salvadoran presidential campaign, the FMLN and ARENA candidates have both visited several major US cities where Salvadorans are most concentrated, vying for the community's political and financial support.[43]

Conclusion: Coming Full Circle

The US–Central American sanctuary movement originally began as an attempt to draw attention to the unjust conditions in El Salvador, conditions that US foreign policy greatly exacerbated. The movement has now come full circle as campaigns by immigrant rights organizations in El Salvador have gone from advocating for the rights of refugees, to immigrants' rights, to the right not to migrate. This most recent focus is designed to call attention to unjust conditions within El Salvador, the dangerous nature of the trek to the United States, and the lack of rights accorded to unauthorized immigrants upon arrival. In El Salvador, immigrants' rights organizations, such as CARECEN Internacional, publicize the risks of migration, such as losing limbs while attempting to board a moving train or dying of thirst or suffocation while crossing a desert or hiding in a locked compartment of a vehicle. These groups also present forums to Salvadoran youth, warning them of the dangers of the journey and urging them to develop their own leadership, entrepreneurial, and job skills in El Salvador. Finally, such groups urge Salvadoran authorities to address the root causes of emigration. For example, the opening section of the Mesa Permanente's 2007 minimum platform on migrants' rights states:

> Salvadoran migration, like that of so many other Latin American countries, is the ultimate choice of thousands of compatriots faced with a context of serious violations of their human rights, especially their economic, social, and cultural rights ….
>
> The current reality of the Salvadoran state, characterized by economic inequalities, lack of work, low salaries, constant increases in the cost of living, and the lack of educational opportunities, leads thousands of Salvadoran men and women to chose to migrate to a country that will allow them to find and satisfy those living conditions that El Salvador neither afforded them nor permitted them to achieve.[44]

In other words, the focus on the right not to migrate is intended to motivate individuals, communities, NGOs, and Salvadoran authorities to address the unjust underlying social, economic, and political conditions that give rise to emigration and thus prevent it, rather than focusing only on the human rights of migrants in transit or on migrants' legal rights in the United States. Such a move builds on earlier movement debates over the validity of the distinction between economic migrants and political refugees, debates that were muted by asylum law that focused on political persecution rather than economic need. The current refocusing, like solidarity and sanctuary work of the 1980s, is designed to promote peace and justice within El Salvador.

By revisiting the US–Central American sanctuary movement, we have sought to draw attention to the transnational nature of this movement and to the movement's long-term impact. Central Americans who were members of popular movements in El Salvador played key roles in mobilizing religious workers to develop sanctuary activities, yet, for strategic and cultural reasons, their role was not fully acknowledged during the 1980s. That is, Central Americans were publicly recognized as inspirations and examples to follow, but were not openly treated as political organizers of sanctuary activities within the United States. These framings of Central Americans as inspirations and examples emphasized the religious and humanitarian nature of the movement in contrast to US authorities' attempts to discredit sanctuary as a purely political activity. The framing of Central Americans as refugees, as innocent victims in need of aid, furthered the notion that Central Americans were beneficiaries rather than protagonists in the movement. In noting how Central American activists mobilized sanctuary and solidarity work as part of a broader effort to oppose the Salvadoran government during the civil conflict, we do not mean to suggest that movement members deliberately misled anyone, or that Central Americans themselves concealed their roles from North Americans. Rather, we draw attention to the ways that historical, political, and social contexts shape what can be said and known, and the fact that with hindsight, relationships and actions that were once concealed, perhaps even from their authors, become apparent.

Hindsight also makes it possible to assess the unintended consequences of social movements. Social movement theory

draws attention to the strategic goals that movements pursue, and to the factors, such as political opportunities, resources, and successful framing, that permit movement members to achieve these goals. Moreover, recent work by David Meyer has found that taking credit for achieving desirable outcomes is an important part of politics, especially for social movements. He argues that claiming credit is analogous to establishing a reputation and shows that some contextual factors allow some movement actors to be better positioned to promote a narrative of their own influence than others.[45] As we've shown in this study, Salvadoran activists were precluded from fully claiming credit for their roles in the sanctuary movement by the very refugee identity that the movement used to effectively frame the issue. Unfortunately, some of the scholarly work on the Central American sanctuary movement has also been analytically constrained by this refugee frame and thus inadvertently reinforced Central American immigrant activists' inability to claim credit for their roles in the movement.[46]

We have also sought to identify the unintended consequences of pursuing strategic goals. Sanctuary workers and Central American activists set out to oppose human rights abuses in El Salvador and Guatemala, curtail US intervention in Central America, obtain asylum for persecution victims who had fled to the United States, promote the legitimacy of the popular struggle (by countering Reagan and Bush administration claims that the insurgency was instigated by the Soviet Union or that it was a puppet of international communism) and provide protection to Salvadoran and Guatemalan communities that were at risk of military violence. Movement actors did not, at the time, envision that Central Americans would be filing suspension or cancellation claims (as provided by NACARA), that Congress would create Temporary Protected Status, that their work would contribute to remittance flows, that they would play a key role in creating a transnational network of civil society organizations, or that such organizations would foster the continued circulation of activists and others between the United States and El Salvador. Such outcomes were by-products of the movement, perhaps means to an end, rather than explicit goals and, of course, are not wholly attributable to the movement itself. Nonetheless, theory that treats social movements primarily as instrumental action, even while acknowledging the symbolic components (such as "framing") of such action, has a difficult time explaining movements' unintended consequences.

Finally, and perhaps most importantly for this special issue, we hope to stress the particularity of sanctuary activities. In some ways, in California and Arizona at least, the US–Central American sanctuary movement of the 1980s was not about immigration at all, but rather sought to address social injustice in Central American nations, US intervention in Central America, and the effects of political violence on individuals and communities. Although sanctuary, as currently carried out in Canada, Europe, and the United States, may bear formal similarity to US–Central American sanctuary practices of the 1980s, it might be wise to pay attention to the specificity of the particular immigration flows that give rise to sanctuary in particular social and historical contexts, whether these be local, national, or regional. Why are some individuals granted sanctuary while others are not? What particular laws or policies are sanctuary practices designed to address? And are sanctuary practices geared primarily toward a local or national context or do they also seek to intervene in transnational relationships and conditions? Addressing these questions will enrich scholarship on sanctuary in its many manifestations.

NOTES

1. Pierrette Hondagneu-Sotelo, *God's Heart Has No Borders: How Religious Activists Are Working for Immigrant Rights* (Berkeley: University of California Press, 2008); Randy K. Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2005); Miriam Ticktin, "Between Justice and Compassion: 'Les Sans Papiers' and the Political Economy of Health, Human Rights and Humanitarianism in France" (Ph.D. dissertation in cultural and social anthropology, Stanford University, 2002).
2. Lippert, *Sanctuary, Sovereignty, Sacrifice;* also Randy K. Lippert, "Rethinking Sanctuary: The Canadian Context, 1983–2003," *International Migration Review* 39, no. 2 (2005): 381–406.
3. Lippert, *Sanctuary, Sovereignty, Sacrifice;* Lippert, "Rethinking Sanctuary."
4. Hector Perla, "Revolutionary Deterrence: The Sandinista Response to Reagan's Coercive Policy against Nicaragua, Lessons toward a Theory of Asymmetric Conflict" (doctoral dissertation in political science, UCLA, 2005); Hector Perla, "Si Nicaragua Venció, El Salvador Vencerá: Central American Agency in the Creation of the U.S.-Central American Peace & Solidarity Movement," *Latin American Research Review* 43, no. 2 (2008): 136–158; Hector Perla, "Heirs of Sandino: The Nicaraguan Revolution and the U.S.-Nicaragua Solidarity Movement," *Latin American Perspectives* 36, no. 6 (2009); Hector Perla, "Explaining When the Public Supports the Use of Military Force Abroad: Reference Point Framing and Prospective Decision Making," *International Organization* (forthcoming).
5. Susan Bibler Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Boulder: Westview Press, 1993).
6. Susan Bibler Coutin, *Legalizing Moves: Salvadoran Immigrants' Struggle for U.S. Residency* (Ann Arbor:

University of Michigan Press, 2000); Susan Bibler Coutin, *Nations of Emigrants: Shifting Boundaries of Citizenship in El Salvador and the United States* (Ithaca: Cornell University Press, 2007).

7. "Leverage politics" refers to "the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence." "Accountability politics" refers to "the ability to hold powerful actors to their previously stated policies or principles." Margaret Keck and Kathryn Sikkink, *Activists beyond Borders* (Ithaca: Cornell University Press, 1998), 16.
8. Charles Brockett, *Political Movements and Violence in Central America* (New York: Cambridge University Press, 2005); Tommie Sue Montgomery, *Revolution in El Salvador: From Civil Strife to Civil Peace* (Boulder: Westview Press, 1995).
9. Michael Jones-Correa, Luis R. Fraga, John A. Garcia, Rodney E. Hero, Valerie Martinez-Ebers, and Gary M. Segura, "Redefining America: Findings from the 2006 Latino National Survey," 2006, <http://www.wilsoncenter.org/index.cfm?event_id=201793&fuseaction=events.event_summary> (accessed September 17, 2008). After peace accords were signed in 1992, putting an end to the Salvadoran Civil War, emigration decreased temporarily; however the desire for family reunification and the effects of neoliberal economic policies in El Salvador have also contributed to continued emigration. Estimates of the U.S. Salvadoran population in 2000 range from 655,165 to 1,117,960 to 2,510,000. See Katharine Andrade-Eekhoff, *Mitos y realidades: El impacto económico de la migración en los hogares rurales* (San Salvador: FLACSO Programa El Salvador, 2003), 9.
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14. Montes Mozo and García Vasquez, 8.
15. Menjívar.
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18. Perla, "Si Nicaragua venció."
19. Felix Kury, founder of Salvadoreños Progresistas, interview with Hector Perla, February 2007.
20. Jose Artiga, former director of Casa El Salvador–Farabundo Marti, interview with Hector Perla, February 2007. CARECEN was originally called the Central American Refugee Center (Centro de Refugiados Centroamericanos), but it changed its name following the end of the Civil War.
21. Felix Kury.
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23. Nora Hamilton and Norma Stoltz Chinchilla, *Seeking Community in a Global City: Guatemalans and Salvadorans in Los Angeles* (Philadelphia: Temple University Press, 2001).
24. Coutin, *Culture of Protest.*
25. *Ibid.,* and Hondagneu-Sotelo.
26. Coutin, *Culture of Protest,* 18.
27. See also Lippert, *Sanctuary, Sovereignty, Sacrifice*
28. Coutin, *Culture of Protest,* 120.
29. There were also other spaces among the most trusted sanctuary activists, or within the broader peace and solidarity movement, such as CISPES, Comite Farabundo Marti, Salvadoreños Progresistas, and MASPS meetings or events, where the refugee identity could be moved to the background by the Central Americans in favour of a more empowered or militant persona.
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Deportation vs. Sanctuary: The Rationalities, Technologies, and Subjects of Finnish Sanctuary Practices

Miikka Pyykkönen

Abstract

Evangelical Lutheran parishes and their representatives have provided sanctuaries for asylum seekers for forty years in Finland. Yet this activity became widely publicly recognized only after the Finnish Ecumenical Council released the "Church as Sanctuary" document in 2007. The parishes are assisted by many civic organizations (e.g. women's organizations, Free Movement Network, Amnesty International, and Finnish Refugee Council) in providing sanctuary. They share the same opponent: the state's strict asylum policy. The various parties involved in Finnish sanctuary incidents can be divided into two groups using the terminology of the Foucaldian analytics of pastoral power: a state pastorate and the civic/church pastorate. The former tries to secure the vitality of its "flock," the Finnish population, through strict control over asylum seekers. The latter pastorate challenges the state's sovereignty to define its accepted members by offering alternative ways for asylum seekers to stay in the country and an alternative understanding of who this "flock" should include. In this article I analyze how these parties construct their subjectivities and the asylum-seeker's subjectivity in the sanctuary incidents. Despite seeming opposition between the two pastorates, there are similarities in the ways by which they seek to clarify the inner soul-life of the asylum seekers and make them knowable and governable.

Résumé

Les paroisses évangéliques luthériennes de Finlande et leurs partenaires fournissent le sanctuaire aux demandeurs d'asile depuis quarante ans. Pourtant, cette activité n'a été largement reconnue publiquement qu'après la publication en 2007 du document Kirkko turvapaikkana *(L'église refuge) par le conseil œcuménique de Finlande. Les paroisses sont assistés par de nombreuses organisations civiques (p. ex., organisations féminines, réseau Libre circulation (*Vapaa liikkuvuus*), Amnistie internationale, conseil Finlandais pour les réfugiés) en fournissant l'asile. Elles partagent un même adversaire : la politique rigoureuse de l'État sur l'asile. Les parties impliquées dans des cas de sanctuaire en Finlande peuvent être divisés en deux groupes selon la terminologie de l'analyse foucaldienne du pouvoir pastoral : le pastorat étatique et le pastorat civique/chrétien. Le premier cherche à assurer la vitalité de son « troupeau », la population finlandaise, à travers un contrôle strict sur les demandeurs d'asile. En offrant aux demandeurs d'asile des solutions de rechange pour rester au pays et une autre compréhension de la composition de ce « troupeau », le second met en cause le droit souverain de l'État de définir ses membres acceptés. Dans cet article, j'analyse comment ces parties construisent leurs subjectivités et la subjectivité du demandeur d'asile dans les cas de sanctuaire. Malgré une opposition apparente entre les deux pastorats, il y a des similarités dans la manière par laquelle tous deux cherchent à purifier l'âme humaine des demandeurs d'asile et à rendre ceux-ci connaissables et gouvernables.*

> The question of the day is: can the church offer sanctuary for the asylum seeker? [1]

> Pay attention to the spiritual condition of the applicant and take care of her/his daily endurance. […] Start to clarify the situation of the applicant. Ask to see all the personal papers related to the application for asylum and to the situation of the applicant. […] Discuss with the experts, especially lawyers familiar with the refugee justice.[2]

Introduction

Finland is well known for its strict immigration and asylum policies. Two thousand people came to Finland as asylum seekers in 2006, but only 386 had their applications approved. Every year, most asylum seekers are turned away. Some are sent back to their countries of origin. Very recently there have been several publicized cases in which migrants, with the crucial aid of civic organizations and some parishes of the Evangelical Lutheran Church, have managed to stay in Finland and reverse deportation decisions in the end. Although with the forty years of history, truly, these kinds of cases, which I call "instances of sanctuary" following Randy Lippert[3] and Hilary Cunningham,[4] became public in Finland after the Finnish Ecumenical Council[5] released its terms of reference called "Church as Sanctuary" in the summer of 2007. In addition, the Free Movement Network (Vapaa liikkuvuus -verkosto), the immigration workers of the Evangelical Lutheran Church, the Finnish Ecumenical Council, and women's organizations have managed to raise public debate about asylum seekers' rights.

As noted above and in several previous studies, sanctuary for asylum seekers is provided by individual citizens and their associations, but mainly by churches and their parishes in Finland. This role of the church is not new. Since the late Middle Ages and the beginning of modern times all Christian churches have visibly claimed to function as a sanctuary for the persecuted and oppressed in Europe. Victor Hugo's novel *The Hunchback of Notre Dame* from 1831 is one of the most well-known historical tales about this topic. However, there is little historical evidence about the cases in which the churches and parishes have actually provided sanctuary for those threatened by the authorities, violence of other citizens, hunger, or disease. What is perhaps more important than the actual implementation of sanctuary is the central notion of care.

The key concept of this article is "pastoral power."[6] In brief, this refers to the ideas and practices of power that take place when some authorities, whether spiritual, secular, psychological, or social, seek to administer a group through the thorough knowledge of the souls and minds of its individual members. The term stems from pre-Christian and early Christian practices of soul-guiding in nomadic societies, where the pastorate was metaphorized as the "shepherd" and the group as the "flock." During 1950–2000, the Finnish state, municipalities, and recognized civic organizations were responsible for the "social-liberal pastorate of the souls" of the citizens and governance of the population in Finland. The flock in the welfare state has consisted of those with Finnish nationality, and very recently those with other kinds of permission to reside in Finnish territory on a relatively permanent basis. Those without nationality or other legal status have been external to the population, and thus to the official pastorate. However, as said, the civic organizations, several Lutheran parishes, and individual church activists have sometimes helped immigrants for Christian and humanitarian reasons by offering them accommodation, nutrition, and legal arrangements after the state's deportation decisions. The main issue at hand regarding "sanctuary politics" is the question of who is to receive official sanctuary in the form of a permanent residence permit and who is to receive unofficial sanctuary from the church or civic organizations? This Finnish case provides a new perspective on the Foucaldian concept of pastoral power as it shows how, in the case of particular kinds of non-citizen categories, the main responsibility of the pastorate is either given to or appropriated by forces other than the state. This befits the basic rationality of neo-liberalism concerning the lessening of direct governance of individuals by public forces, but at the same time problematically challenges the sovereignty of the state.

There are four major parties involved in Finnish sanctuary politics: (1) the immigrant, (2) the Finnish state, (3) the Finnish Ecumenical Council and some Evangelical Lutheran parishes, and (4) civic organizations (*e.g.* local women's organizations, the Free Movement Network, Amnesty International, and the Finnish Refugee Council). In this article, I observe how these parties construct their own subjectivities in power networks, and how they identify and either govern the migrating subject or enable her/his self-governance. I connect the analysis of these subject formations to the analysis of the rationalities and technologies of pastoral power by different actors. I identify the reasons behind sanctuary practices of the parishes and organizations, and how, for example, they intervene in the bodies, minds, and lives of subjects threatened by deportation. I seek answers to the question of how different technologies and rationalities intertwine and resonate with each other.

The empirical examples I use are from the study of Naze Aghai's 2007 sanctuary case but also other recent sanctuary cases. I use media data that include newspaper articles from *Helsingin Sanomat* about the Aghai case; an episode of the television program *The Human Factor;* and data that the Finnish Ecumenical Council, parishes of the Lutheran Church, and civic organizations such as the Free Movement Network have produced about the sanctuary cases. I also interviewed a key representative of the Evangelical Lutheran Church and an employer of Turun Naiskeskus-Yhdistys who volunteers in St. Michael's Parish, in which Naze Aghai was granted sanctuary.

Pastoral Power and the Government of the Population

> Pastoral power is, I think, entirely defined by its beneficence; its only raison d'être is doing good, and in order to do good. […] Pastoral power is a power of care.[7]

Modern governmentality has a background in pre-Christian and Christian forms of spiritual shepherding of the people based on knowing and continuous guidance. It has developed from the seventeenth century onwards. Foucault[8] states that the modern state arose when Christian pastoral governmentality became a calculated and reflected practice. The emergence of this new kind of governmentality intertwined with the ideas and practices of government of the population. The government of the modern state, in which the pastoral term of the "flock" is referred to as the "population," and the "member of the flock" as the "individual," is biopolitical in its nature. The ideas of pastoral power brought to the practices and ideas of biopolitical government of the population, the perspective of and focus on the individual as a central core element of the population. Here the health and happiness of the population is seen to come from the health and happiness of the individual and this arrangement does not work if the inner soul-life of the individuals is not known and their aspiration for truth not properly conducted. The alliance of pastorate and biopower is crystallized in governmentality—the form of governance in which the "social" is simultaneously the resource and target of governance.[9]

This modern pastorate can be evinced being applied differently in different societal contexts. The principles of the pastorate become apparent when the differences in rationalizing and formulating the relationship between individual and community are observed. Who is taking care of the individual and how must the individual direct care at her-/himself? In liberalism, the emphasis is on the individual, civil society, and the economy when it comes to the shepherding of souls, whereas in social liberalist welfare ideology, the state and its educational institutions—forms of what Foucault[10] relates to disciplinary power—are of great significance.

In the diagram of pastoral power, the truth is first of all a central mediator between the shepherd and a member of his flock. Secondly, "the truth enlightens the subject; the truth gives beatitude to the subject; the truth gives the subject tranquility of the soul."[11] What the pastorate means for the individual who belongs to the flock, then, is that one must make her-/himself as transparent and knowable as possible, seek the truth on this basis, and make this truth part of her/his ethos and the guideline of taking care of her-/himself. This can be done through meditation (in the ancient Greek sense of the word)[12] keeping a diary, ethical self-thinking, praying, drawing/painting, practicing physical exercise, and so on. One must also provide knowledge and tell the truth about her-/himself to others, the shepherds. This can happen through a variety of technologies: everyday conversation, formal or informal interviews, confession, sharing one's feelings in self-help groups, and talking to a mentor, teacher, psychologist, psychiatrist, or doctor. However, the pastorate does not require personal commitment and development from only the herded. The shepherd has to go through processes of stocktaking and human development as well.[13] In the following sections we shall see how the shepherds need to clarify their own essence for themselves and to others (media, other potential pastorates, the flocks, experts, researchers, and so on) before they can take actions to help others.

The pastorate directs itself especially to those "at risk"—namely the unemployed, young people, children, lonely elderly people, mental patients, people suffering from depression, victims of violence, and immigrants—and especially to those with no confirmed path to integration to the society. As Randy Lippert[14] shows, illegal immigration is a fruitful domain in which to analyze pastoral power today. In immigration policy and sanctuary practices—defined as "churches and communities harboring in a physical shelter individual migrants or migrant families faced with immanent arrest and deportation by immigration authorities and actively seeking to display the existence of their protection efforts"[15]—various forms and rationalities of power are in use at the same time, depending on the life situation and physical and mental condition of the immigrant. Although the coercive forms of power—that is, those understood as disciplinary and sovereign—are usually used by state authorities and non-coercive forms by church and civic organizations, the lines of demarcation of forms of power are not crystal clear in sanctuary cases. Instead, the analysis of sanctuary cases shows how different forms of power and various degrees of coercion intertwine in the modern pastorate.[16]

The Case of Naze Aghai

Finland is a country with a low immigration rate. At the end of 2007, the total number of people with foreign nationality in Finland was 132,632. Immigration into the country was approximately 22,000 people in 2006.[17] The immigration of refugees, in particular, has been small when compared to other Western European and Nordic countries. In 2006, Finland accepted only 1,093 refugees.

Quite recently Finland has faced an increase in the number of so-called illegal immigrants. Although most of the

asylum seekers whose applications for asylum are declined leave the country—some voluntarily and some non-voluntarily in a police cortege—there is a growing number who stay in Finland regardless of such rejections. Estimates of the number of these undocumented inhabitants vary from several hundreds to one thousand. Most of these people hide from the authorities and keep their place of residence secret through the help of relatives, friends, and other networks. However, some of those whose residence applications were rejected stay in the country with authorities' awareness. This development of Finnish sanctuary cases can be understood through Paul Weller's division of sanctuary into "concealment" and "exposure' forms."[18] Sanctuary as concealment was typical of the pre-2007 practices as their purpose was to hide the asylum seeker from mass media. The threat was that media attention would lead to more aggressive deportation actions by authorities. Sanctuary as exposure befits the recent sanctuary practices as the parish and church employees and civic actors think that publicity will obtain the goal of a residence permit for the asylum seeker.

According to the interviewed immigration worker of the Lutheran Church and the women's organization worker, altogether approximately fifty people have received sanctuary since the first asylum seekers after World War II came to Finland in the beginning of the 1970s through the help of local parishes, individual church employees, and in some cases civic organizations. The number of applicants for such sanctuary has been clearly larger, but the Evangelical Lutheran Church and its parishes select the suitable asylum seekers among the applicants. Selection is based mainly on "trust factors": parishes and church employees help those whose background stories are believable. However, selection is also based on "vulnerability criteria," which relate to publicity. The secretary of immigration affairs of the Evangelical Lutheran Church revealed in an interview that almost all those selected have been women, as their mistreatment by immigration authorities is seen as the most egregious. These people generate the most sympathy among the public, supporters, and the media, and it is thus easier to get public legitimacy and help for their sanctuary than in the case of, for example, politically active men.

In one-third of all cases, provision of sanctuary and related activities designed to resist deportation have been successful. Before the Finnish Ecumenical Council published its instructions, "Church as Sanctuary," in 2007, the cases involved mainly individuals without common working structures and networks, official status, and public attention. After the instructions—which already gained media publicity as a new kind of challenge to the state's sovereignty to decide who can inhabit its territory—the number of sanctuary applications have increased. Many have gained wide media attention and an increasing number of cases have ended with positive results. One of the best-known public cases occurred in 2007, right after the publication of the instructions. The asylum seeker was Naze Aghai, a forty-three-year-old Kurdish woman from Iran.

In the beginning of this decade, Naze worked as a courier for the leftist Komalah party in Iran. In 2004, the government of Iran commenced a massive raid against leftist and Kurdish organizations and some of Naze's party members were imprisoned. Police came to Naze's home to ask her mother where Naze was. If they had caught her, they would probably have tortured her to obtain from her the names of the other party cell members. Her comrades advised her to flee the country immediately and seek asylum in Europe. After a one-and-a-half month journey, Naze arrived in St. Petersburg, Russia, in the car of a human trafficker. After waiting two more weeks, she was transported to Finland in a truck container. In February 2005, she applied for asylum in Finland.

Naze spent the first eight months of her stay in Finland in two different reception centres and started a Finnish language course before she heard the negative asylum decision from the Directorate of Immigration (currently the Finnish Immigration Service) in October 2005. At this time her health significantly deteriorated. In fact, the psychologist at the Crisis Centre stated that Naze required long-term treatment in a safe environment. The same was pointed out by the psychiatrist who recommended that, because of her mental state, Naze needed care in a Finnish hospital. Naze and her lawyer used these statements to make pleas against the state's rejection of her asylum application. The decision was again negative and the high administration court denied permission for the plea. Following this, Naze went underground, only appearing in public after the Finnish Ecumenical Council published its instructions "Church as Sanctuary." Subsequently, Naze applied for sanctuary from the St. Michael's Parish in Turku. The parish organized an apartment and everyday provisions for Naze and also started to prepare a new application for asylum from the Directorate of Immigration.

Naze attended a new asylum interview at the Directorate of Immigration in August 2007. She felt comfortable after the interview and told her Finnish tutor (a member of the St. Michael's Parish) she thought they had listened to her this time. While travelling to visit Naze's lawyer, their car was stopped by the police. The police said that there was a warrant for Naze and she had to come to the police station to clarify the issue. Following this, Naze was again transported to a reception centre, this time in Helsinki. According to the chief police officer, there was a valid reason for Naze to be deported, and she had been taken into custody as a scurity

measure of security, because she had, on one occasion, failed to attend a deportation interview. The employees of the centre told her that she should remain there until she was deported or there was a new decision from the Directorate of Immigration.

After that, Naze's case went public, mainly because she was the first person who was granted sanctuary by the church after publication of the instructions. There was a continuous debate on the issue in the media, between leaders of St. Michael's Parish, Free Movement Network activists, psychologists, the police, and officials of the Directorate of Immigration. The authorities claimed there was no direct risk to Naze's health in taking her back to Iran. The activists and the parish employees cited humanitarian reasons, stating that deportation would mean torture and, possibly, death for Naze. Alongside the media, they accused the authorities and the Directorate of being incapable of making decisions in asylum cases because they could not recognize whether or not a person had a need for help through their methods. They also accused the authorities of being inhumane. The Free Movement Network organized several demonstrations to support Naze in front of the reception centre and the Directorate of Immigration and an internet petition signed by thousands of people in a few days.

Despite public debate, accusations against the authorities, and organized activities, the Directorate of Immigration gave a new negative decision at the beginning of September 2007. According to this decision, Naze's application for asylum was unwarranted and she could not come to Finland or any other Schengen country in the next two years. Naze's supporters and lawyers pleaded immediately to the administrative court of Helsinki, which—after just three days—prevented the execution of the deportation and started to process Naze's appeal. The court invalidated the Directorate's deportation decision and in May 2008, Naze was granted temporary residence permission. She is currently living in Turku.

What kind of pastoral governance does Naze's case represent? What were the rationalities and technologies of governance of the parties in this case of sanctuary politics? How did they define Naze's subjectivity as an immigrant in the process? Who were the experts and what positions were adopted in this case? These are the questions to which I now turn.

Two Pastorates of Finnish Sanctuary Politics

As already seen, parishes, individual church employees, and civic organizations act hand in hand in Finnish sanctuary cases, trying to secure their position as defenders of humanity, with the state and its immigration policy and authorities being their common opposition. Generally these parties can be divided into two groups according to how they conduct the subjectivity of asylum seeker and their basic reasoning for providing shelter to humans. The behavior and discourses of the state authorities represent the biopolitics of the nation, the security and well-being of the Finnish population being their main frame of reference, and they use sovereign (deportation) and disciplinary (imprisoning and education) technologies in governing immigrant subjects. Citing Foucault's[19] terminology, one may say that the administration of immigration affairs is an *apparatus* of security and that deportation is a *technology* of security. For the state pastorate the asylum seeker is a form of insecurity or disorder for the flock, *i.e.,* the population.

The church and organizations use technologies of care: mental, social and legal aid, and housing, to address and meet the basic needs of asylum seekers. The pastorate of the church and civic organizations is founded on the idea of promoting human well-being, the church doing so in line with the biblical principle of love for one's neighbour, women's organizations wanting to secure women's rights to their lives and bodies, and the civic approach of the Free Movement Network being in line with leftist critique of the unequal global distribution of wealth. For the church–civic pastorate the asylum seeker is a member of the flock as long as she or he stays truthful to supporters and follow the rules and procedures of the sanctuary process.

This division is largely congruous with the sanctuary politics of Britain, the United States, and Canada as Hilary Cunningham, Susan Coutin, Paul Weller, and Randy Lippert have shown.[20] The churches and other such nominally apolitical actors involved in the politics of migration through sanctuary have the state and its juridical-political discourses and practices as their main opponent. In reference to these studies it might be argued that the basic arrangement between the pastorates and the rationalities guiding their activities are relatively similar everywhere. So seems to be the subjectification and treatment of the asylum seeker by both pastorates.

Despite the above-mentioned distinct differences between the pastorates, there is a significant similarity between them and a factor common to the whole framework: both pastorates build on and work with reference to the neo-liberal rationality of governance and problematics of the subject and truth. I discuss this aspect in the next sections.

Sanctuary and Advanced Liberalism

According to Foucault,[21] traditional liberal governance—emerging after the more regulated and disciplinary regime of governance of the seventeenth and mid-eighteenth centuries—is based on the idea that the state must not intervene in the economy and life of the citizen too much, and that the

state is not the ultimate source of biopolitical values such as the well-being and happiness of the population. Instead of control, the state's role is to allow and manage the function of "the system of natural liberty,"[22] which is seen to be formulated in the spheres of the economy and civil society.[23]

When writing about the governance of the post-Reaganist and post-Thatcherist "advanced" liberal democracy, Nikolas Rose[24] says that the formula of a new rule is taking shape, leaning on the ideas of nineteenth-century liberalism and twentieth-century welfarism. It unites the governance of the individual through regulation of one's choices and aspirations—one's freedom, if you will—and through moral relations among persons. What is characteristic of this "advanced liberal" governance is the state's constant tendency to improve and develop the ways of governing through problematizations and critique coming from economics, civil society, and scientific experts, and extending the role of the communities in governance.[25]

The idea of a constant improvement of governance is a key principle of the Finnish migration policy,[26] and the tendency of constant evaluation, auditing, and improvement of governance is very much present in Finnish sanctuary politics. It is something that connects these two pastorates to each other. In accordance with the basic rationality of advanced liberal governance, the immigration authorities are committed to collect feedback from their interest groups and somehow implement it in their actions. According to the Evangelical Lutheran Church's secretary of immigration affairs, the immigration authorities and police have actively co-operated with the church workers in clarifying the backgrounds of the asylum seekers and discussing their destiny recently. The representatives of the Evangelical Lutheran Church, Migration Service, and Directorate of Immigration made an unofficial agreement about their co-operation in their joint seminar in September 2007. Since then there has been a representative of the Church in almost all national and local administrative seminars and occasions, and *vice versa*.

The increase of co-operation relates to the new monitoring roles granted to the Evangelical Lutheran Church and its parishes by the immigration authorities. First of all, the authorities have asked the local parish workers to monitor and give feedback on their own activities and monitor the development of health of individual asylum seekers. Secondly, the Evangelical Lutheran Church—because of their international social networks born of their missionary work—has been asked to monitor, evaluate, and report the destiny of the deported asylum seekers in their countries of origin and sometimes to report about the conditions of these countries, before a deportation decision is made.[27]

After Naze's case the Advisory Board of the Finnish Immigration Service with external members was created. Now the authorities have to negotiate custodial practices with the experts of the other public organizations dealing with immigration, several NGOs, and immigrant interest groups. This creates tensions in the processes of governance because the participants have different rationalities, intentions, and expectations. The goals imposed by administrations often shift, as in the case of Naze when she was finally given a residence permit instead of being deported. However, in Naze's case, the feedback of the church and communities was not taken directly into account by the authorities. Instead it became effective in the actions of the immigration authorities through the intervention of the Supreme Administrative Court—one of the juridical bodies evaluating and judging the work of authorities in Finland.

The mass media has an extremely significant position in this reflexive governance of immigration affairs since it is the forum in which activists from parishes and civic organizations can criticize the ideas and practices of the administration. The improvement of media relations was one of the key aspects of the work of parishes, spokesmen of Evangelical Lutheran Church, and the civic organizations in Naze's case, and they managed to win the media to their side in the very early phase of the publicity of the case. During the process, practically all the editors of the main Finnish newspapers and current affairs programs on the main TV channels criticized the migration administration.

The governmental rationality of advanced liberalism is also present in Finnish sanctuary politics in that both the pastorates aim at the well-being of the people and at minimizing their dependency on the state and direct public administration. Although the state interferes in the life of asylum seeker by using relatively harsh techniques such as imprisonment and deportation, its teleology is to ensure and secure the freedom of the recognized citizens of its territory, their communities and ways of life, including economic performance. In the high-level administrative rhetoric, this is sometimes connected to the prevention of crime and terrorism: "There are also people suspected of terrorism living in Finland, and their potential intentions cannot be taken slightly."[28] The hypothesis of the administration, here, states that if the authorities manage to keep the external risks and threats at a minimum, it does not have to interfere in the lives of the free citizen more than necessary.

Reducing direct state power is also part of the nature of church work and civic organizations in this context. Their existence, basic purpose, and work tend to—mostly unconsciously—increase the power of civility over state forces. By resisting the state authorities, members of the parishes and civic organizations perform their civility and

free citizenship. This touches upon the relationship between the immigrant and the authorities/state, too. By hiding the asylum seeker from the state authorities and by demonstrating on behalf of this person, they construct, maintain, and increase the distance between the state and the immigrant. In other words, they tend to secure people's freedom against repressive state power.

The Art of Being Free Equals the Art of Telling the Truth

> The person being guided has something to say. He has something to say and he has to say a truth. Only what is this truth that the person led to the truth has to say, what is this truth that the person directed, the person lead by another to the truth, has to say? It is the truth about himself […], indispensable for salvation.[29]

The second issue that both pastorates share is the problematic of the free subject and truth. The state and public authorities aim at fashioning free subject-citizens out of asylum seekers. This is done through different administrative procedures, such as interviews, background checking, and residence permission application and its acceptance or rejection. In the case of people not considered as eligible for being free within Finnish society, the technique of deportation is used to protect the position and rights of the "qualified free citizens." The truth-knowledge on the subject has a significant role in this process and the asylum seeker is made into an object and subject of knowing in various ways. Sometimes, this even takes slightly ridiculous forms: for example, the police and officials of the Institute for Migration asked Naze questions such as, "What is the difference between socialism and communism?" and "Who was Friedrich Engels?"

The asylum seeker must make her/-himself as transparent an object of knowing as possible for the authorities through telling her/his life-story in the asylum investigation and giving the authorities access to all documents that can prove her/his story. This is the first "test" in the process of becoming a visible and ethical subject who lets the authorities identify her/him in the necessary ways and is truthful in her/his self-identifications. For Naze the main problem was that she could not prove herself to the immigration authorities:

> The applicant [Naze Aghai] was neither intimidated, arrested, imprisoned, abused nor tortured in her country of origin because of the political activities. The applicant's story about the persecution targeted at her in the country of origin has been vague, superficial and discrete.[30]

However, this subjectification and objectification of knowing is the most important technique of the opposite pastorate, too. This was especially so in the case of the paid and voluntary parishioners who were responsible for organizing sanctuary for Naze. The claim was made that to help and care for her, these shepherds must know everything as truthfully as possible about Naze. The other strong justification for "knowing all" is the credibility of the parishes helping the deported: if they help people who seek asylum with false reasons, their recognition as a sanctuary provider will suffer in the eyes of the authorities and the "great public."[31]

One of the first things that an asylum seeker applying for sanctuary has to face is the discussion with the helpers from the parish. The purpose of this conversation is to give the whole picture of the life-story of the asylum seeker to the shepherd and give her or him the possibility of evaluating whether this story is true. If the story is not plausible or the parish sees the case as possibly harmful for itself, they can reject the sanctuary appeal of an asylum seeker. What helped Naze in her case was that she had already participated in the activities of the women's organization which co-operates with the St. Michael's Parish, and thus had made herself visible and knowable:

> I had known Naze Aghai for some time because she had participated normally the activities of the women's center. I knew her distress and believed her. And I also knew about the situation of the women in Iran, and especially the situation of the politically active women.[32]

This pastoral knowing is liberal in its nature. Through the knowing, the shepherds can empower asylum seekers to become free subjects who can take responsibility for and control over themselves. This means that if the asylum seeker is dependent on someone and someone else's knowledge, she/he can not be free in a true sense.

> I am happy when I am successful in my work. And then the empowering of the women … when they start to take their own lives into their own hands. In the case of asylum seeking in particular, it is certainly extremely stressful because you are constantly at someone else's mercy. If you constantly ask for help from others, you cannot control your own situation.[33]

In the case of the state pastorate, the liberal ethos of the autonomous and free subject touches upon recognized members of the population, not the deported asylum seekers. In the contexts of the pastorate of the church and communities, this ethos is the ultimate goal of the knowledge-action directed at the migrant in sanctuary. In both cases, this has an impact on the asylum-seeking subject's understanding, experience, and action upon her-/himself. For example, in the same episode of the TV program *Inhimillinen tekijä,* in

which the executive director of Turun Naiskeskus-Yhdistys, Raija Ala-Lipasti, talks about how and why she was involved in giving Naze sanctuary, a former refugee from Iran, Mahabad, tells her story about the long process of bringing her husband to Finland. She described her situation and marriage, not only to the immigration authorities, but also to the lawyer of the Finnish Refugee Council (an NGO helping refugees and asylum seekers), the activists of the parishes, and other experts from the civic organizations. In the TV show she describes how she thought about her situation and story over and over again, day and night, trying to make herself look plausible in the eyes of the shepherds. She says she felt that telling the truth was her obligation to herself, to the listeners, and to her husband.

Thus, whether the result is deportation, sanctuary, or legal asylum, the asylum seeker must learn how to be a free and truthful subject. One must know her-/himself, and then take care for her-/himself on the basis of this knowledge;[34] this is a process of becoming the object of particular knowledge and learning to think about oneself and acting upon oneself in communication with others on a particular basis. Although the fundamental motive of this kind of subjection by the church and communities is different from the governance of the immigration authorities, the technologies are the same: getting the refugee to expose everything about her-/himself through interviews, discussions, and document checks or the threat of checking. What separates these pastorates is that church and civic organizations require that a person come voluntarily to them and tell her/his story; in a kind of manifestation of a true liberal subjectification, whereas the state interferes in the situation of the person in question and checks her/his backgrounds and identifies her/him whether this is wanted or not.

The art of speaking has always been an extremely important part of the Christian pastorate. This primarily developed on the level of the pastor. In early Christianity, the master's speech referred to and was based on the Revelation and the Scripture. A good pastor taught the biblical truth and the pastor-and-pupil relationship was concealed by divinity.[35] In Finnish sanctuary politics, teaching the substantial truth is not as important for the pastors as teaching how to tell the truth and always be truthful in every situation, no matter what. Both parish employees and immigration authorities, as well as lawyers, remind the asylum seeker about this all the time. The question is not about indoctrination, but about giving the shepherds a chance to learn the truth about the new member of the flock. The art of telling the truth is a complex set of words, narrations, discourses, intonations, moments of silence, use of evidence such as photographs and personal documents, and so on. It consists not only of moments of learned and rehearsed telling practices, but also of more unpredictable and unrehearsed things such as feelings and emotions and their expressions (crying and laughter, for instance).

Especially the lawyers emphasize the art of telling the truth even more than others because they think the question of truth is in the very core of their work and in the question whether the asylum-seeker's story is plausible or not. They are the ones considered able to distinguish a genuine need for help and asylum from a false one through listening to the story of the asylum seeker again and again. As mentioned above, and as can be seen from the following, the art of telling the truth consists of unpredictable elements, and lawyers have to be sensitive in recognizing the significance of those elements in regards to truth telling. Sari Sirva, a lawyer for the Finnish Refugee Council, describes her work with the asylum seekers' plausibility when answering the editors' question about how she can distinguish the genuine refugee from the "phonies and even criminals" and why she finally believed Mahabad in the case of bringing her husband to Finland:

> Well, this question of plausibility is kind of a lifetime question, which every lawyer has to deal with. But if a person is honest, truthful and tells her/his story in detail, even though she/he does not have documents with her/him—which is very common—and if one gives a reliable description, which is in line with the things known from her/his country of origin, then we start to be aware [of whether the story is true or not]. […] After we managed to go through all the documents and the official side of the interview, I listened to Mahabad and there was funny little coincidence. Mahabad was about to phone her husband, and was with her own thoughts. Then, she suddenly said that "it is a pity that my eyebrows are not that decent because my husband is not here to pluck them." I smiled quietly and thought that if this is not a close marital relationship then nothing is. These kinds of beautiful stories came through from Mahabad's speech.[36]

Why is this question of truthful identification so essential for pastoral power taking place in sanctuary politics? This problematic can be approached through application of the ideas presented by Foucault in his essay "The Dangerous Individual."[37] For individualizing governance, it is necessary that the subject give enough "supplementary material" for the others to conduct her/him by "confession, self-examination, explanation on oneself, revelation of what one is."[38] Without it, the administrators cannot conduct, monitor, and discipline the individual in the required way and, thus, one may become a "dangerous individual." If one does not play the game along these rules, s/he is pushed to do so. In the Finnish sanctuary cases, the threat of deportation pushes the asylum seeker to "play the game by the official

rules." The police, immigration authorities, NGO lawyers, and members of the parishes all use this as rhetorical means to encourage or enforce the asylum seeker to reveal everything about her-/himself. If one does not let oneself be identified and known thoroughly, she/he will most probably be deported. According to the logic of this "pastoral help," if one does not identify her-/himself, it is most probably also dangerous to that person because deportation would risk her/his life. For the asylum seeker, there is no real choice if one wants to avoid such sovereign techniques of governance such as deportation. There is also the risk of a contrary result: sometimes this complete self-identification still leads to imprisonment in reception centres and finally deportation, as was the case with Naze and her interaction with the authorities; her application for asylum was rejected even though the authorities and her helpers knew everything about her.

Asylum seekers have many ways of practicing their share of this identification process. Common for the guidance of these manifold identifications is that the individuals have to think of themselves along the lines of "what is my past like" and "who am I now?" After this phase of "know yourself,"[39] one has to share this self-knowledge with the shepherds. Often, either the asylum seeker personally or her/his shepherds introduce this self-knowledge to the public through media, too. In the modern context of pastoral power, the shepherd has an important role in "giving voice" to the asylum seeker, introducing her/him possibilities to state her/his opinions and versions of the migration story in public and in interviews conducted by the immigration authorities.[40] This public revelation often happens because of the personal need for "healing" of the individual in question and "making oneself whole again." Mahabad, who fought for many years to get her husband (an asylum seeker) to Finland, published a book of her experiences after several years. Her answer to the interviewer's question of what the making of this book meant for her was:

> It has meant very much. First of all, it has been very therapeutic that I have been able to go through my whole life. I have been able to get familiar with my life in a completely different way. […] It has been a really giving and positive experience.[41]

Forms and Technologies of Expertise in Sanctuary Politics

As noted by Mitchell Dean and by Peter Miller and Nikolas Rose,[42] amongst others, emergence of the events in the history of the government intertwine with the problematizations brought about by the formation of new forms and positions of expertise. This is the case with Finnish immigration policy, too. Tightening and inter-European unification of the regulation of asylum seekers, in addition to the increased demands for the reflexive forms of government, made way for the non-public actors to also get involved in the immigration politics more than before.[43] The position of the state authorities, their knowledge and ways of formulating knowledge, has been questioned and recognition of the citizen-driven and grassroots expertise has become a central question in sanctuary politics. "The question of the day," thus, is also: who can be the shepherd expert and which forms of expertise are recognized in the field of asylum seeking?

According to Foucault,[44] the pastoral power, or pastorship, is exercised well when the conduct of the soul and self-knowledge of the others with the goal of saving them in this or the next life is linked to the conduct of the pastor's own inner life. Not just anyone can be a shepherd or pastor; instead it is the one who has proved her/his ability to care for others and keep watch over them. How can this be done? First of all, through the spiritual growth that can be achieved through meditation and other such techniques of deepening self-knowledge and self-care following this knowledge. This is the only way that one can become the pastor of others and take responsibility for and care for their overall well-being. Indeed, as the booklet entitled "The Church as Sanctuary"[45] guides the employee of the parish: "Take care of your own endurance." After having proven this, the pastor does not direct her/his care only towards him-/herself, but toward others, too. "The bad shepherd only thinks about a good pasture for his own profit, for fattening the flock that he will be able to sell and scatter, whereas the good shepherd thinks only of his flock and of nothing else."[46]

Secondly, the position of the pastor can be achieved through good and charitable acts. A person can become a pastor in a particular context after demonstrating her/his ability to keep watch on and do good for others in unrelated or related contexts. Thus, the pastor is someone who has proven to be a good-willed person, someone who untiringly collects knowledge on his flock, does good and cares for them, and keeps watch over them so that they do not fall into temptations or be attacked by external and evil forces.

A way to implement this is through "sacrifice" of him-/herself for the flock or shepherded.[47] The church and community members organize accommodation for asylum seekers, feed them, collect information on them, look for public support for them, and participate in the official hearings of the asylum seekers. One important technology used in becoming a pastor through sacrifice is to regularly visit people living in sanctuary. These visits serve the function of acquainting oneself with the asylum seeker, collecting information about her/him, exploring the risks of deportation, and guiding and improving the immigrant's

"citizen-subject skills." In referring to the Canadian cases, Lippert states that:

> In sanctuary, shepherds literally kept watch. This involved constant surveillance of their own and yet who were still considered to be members of the flock; that is members of the congregation or parish or the broader community. In almost every instance of sanctuary studied, one or more shepherds accompanied the migrant(s) during waking hours within the church, and sometimes twenty-four-hour rotating watch was established.[48]

In Finland, the position of the pastor is achieved either by formal expertise and a position in a legitimate organization or through an informal process in which the person is recognized within the peer group(s)/flock as having proved her-/himself to be responsible, well-meaning, and vigilant. The former category consists of the immigration and border authorities, police, vicars, and the experts of the Finnish Refugee Council. Immigration authorities—mainly the staff of Finnish Immigration Service and its reception centres—get their pastorship through applicable education, work experience, and their work assignment. They must be experts in knowing the immigration legislation and in being able to distinguish cases in which there is a true need for help from the false asylum applications. This knowledge is achieved through careful reading of personal travel documents and listening to life-stories.

As shepherds, the immigration authorities' task is to keep watch over the flock of the Finnish population, including those without nationality but with official permission to inhabit the territory. For them, the asylum seekers appear as potential threats to this flock. However, they are also potential new members of the flock, and thus authorities have to be very sensitive in implementing their pastorship. Employees of the reception centres and Immigration Service have complained in the media how hard this actually. This has been the case especially after the tough critique of the Directorate of Immigration during and after Naze's case in 2007. In 2008, the newly named Finnish Immigration Service was instigated and the organization started to develop itself towards becoming a "more helpful, open and active societal actor."[49] One part of the renewal was the aforementioned creation of the Advisory Board of the Finnish Immigration Service and the attempt to let the interest groups influence the processes and practices of the organization through it. The Immigration Service has also promised to improve its feedback procedures and create standards with which to measure customer satisfaction and, furthermore, placed itself under external auditing. One part of the development process is to improve the customer service attitudes of the employees. Thus, the shepherd of the immigration authority does not just have to be an expert in immigration affairs and legislation today, but an expert in customer service, too.

Those who gain the pastorship informally are the employees of the parishes, community volunteers, and voluntary activists of civic organizations and movements. They represent something that can be called an "open expertise,"[50] and which is common for the governance of advanced liberal societies.[51] They are "the experts of everyday life" who form the basis of the moral authority of communities and dissemination of the morality. These experts guide people at risk in the "soft ways."

Lippert[52] describes the work of the Canadian church and community shepherds, and the ways in which they tend to be present in every moment in the life of the members of their flock; the same can be said for their Finnish colleagues. It might even be said that kind of self-sacrifice is an important part of the continuous initiation ritual in which one becomes a shepherd and strengthens her/his subjectivity as such. The executive director of Turun Naiskeskus-Yhdistys, Raija Ala-Lipasti, describes in her interview in *Inhimillinen tekijä* how she was, or at least aimed at being, present at every juncture that Naze had to face in her sanctuary process. She was seemingly sorry that she could not go to the asylum interview due to the fact that it is supposed to be attended exclusively by the authority, the asylum seeker, and her/his lawyer. Nonetheless, she was present when Naze went to apply for sanctuary from the parish leader, when she moved to her sanctuary apartment, and when the police stopped Naze after her second asylum interview.

> We walked at the altar and the vicar was standing there. And then there were a couple of parish employees. And he [the vicar] welcomed the woman [Naze]. Naze asked, in Finnish—she rehearsed how to say it in Finnish—"I ask for sanctuary here." And the vicar replied that "we are ready to provide sanctuary for everyone who needs it." […] Naze really got an apartment from the parish. Then there were so many people willing to help that there were almost too many supplies and the like. So much that it almost did not fit into the apartment. Then, we kept a list of things that were still missing. Very soon we managed to collect all the furniture, lamps, sheets, a bed and so on. Money for food came from the parish. […] I was not able to attend [the asylum interview]. The lawyer was there with Naze, and when she came out she was really happy. She said that for the first time she felt that she was really listened to and understood. But when we left there to go to the see the lawyer and then to Turku, the police arrested us. There was a warrant for her and we went to the police station [foreign police of Malmi, Helsinki] to clarify that the matter. And I took … first of all the police officer was very aggressive when he asked us to enter his room. When I came, he asked "what are you here for?" I said that, well, I am her mentor. And then I took Naze by the hand when

> she started to breakdown there. […] And then the police officer said—I have never experienced such treatment—"take your hands off, step back!."[53]

The expertise of the church and movement activists is not only professional or experience-driven expertise, but expertise of the heart, too. In the same way as it was for the good Christian shepherd of ancient times, for the church shepherd, the will to help and empower comes from the love for one's neighbour in the modern-day sanctuary cases. For the civic-organization shepherds, these things come from general humanity and solidarity. For both parties of this pastorate, the sanctuary work is like a vocation. The executive director of Turun Naiskeskus-Yhdistys answered the interviewer's question about what encouraged her to continue to provide sanctuary to the deported asylum seekers:

> Well, I did not know how I could have stopped doing this … Generally I see it in the way that we are here in the world for each other. I have been helped. […] And I give it back. I think that the people who I have supported will help others, and I have already seen it happen. […] My life is such that I know that I live for what I'm doing in the moment. I have all pieces together in my life.[54]

In the same way as the shepherd of the sheep flock was an example for the ancient pastorate, the good pastor in sanctuary cases becomes especially attentive when the health of a member of the flock is at risk.[55] Thus, one can notice that the biopolitical rationality also functions under this pastorate formed by church and civic actors, and not only under the state or public administration as they control the movements of the population. Naze's case is again one example of how the health, happiness, and wealth of the individual, population, and communities are not only taken care of by the public administration, but more and more by the individuals, communities, and their organizations themselves. This is especially the case with people that the state and its forces reject from its sphere of care, such as deported asylum seekers.[56]

Conclusion

As shown, there are different forces, practices, rationalities, and discourses, technologies of governance, interest groups, and experts trying to shape the subjectivity of the asylum seeker and trying to act upon her/him for a particular end. From these, I have formulated two pastorates: one targets the Finnish population, which is constituted by recognized citizens and inhabitants. In the case of deported asylum seekers, the pastorate takes care of this flock, trying to keep suspicious elements out of its sphere. Here, the immigration administration aims at securing the normality and the balance of the population in the territory of Finland. The second pastorate consists of the church and parish workers, activist movement, and communities in favour of providing sanctuary to the deported. Its basic rationalities are Christian love for one's neighbour and humanitarian and global social equity. Although these pastorates are contradictory to some extent, there are (bio)political rationalities that unite them. Both aim at protecting the vitality and well-being of the flock. This is despite the fact that the understanding of what this flock is varies. For the state pastorate, the deported asylum seekers do not belong to the flock, for the church and civil pastorate, they do.

Although the state pastorate leans partly on sovereign and disciplinary rationalities of power and uses technologies of governance familiar to these regimes,[57] it also consists of features of advanced liberal governance: the subject-concerning rationality in state governance is that people forming the population and communities must be able and capable to practice their freedom correctly. This means that the ideal constitution of the society consists of self-regulating and responsible subjects, the lives of whom the state does not need to actively interfere in—this rationality is also mirrored in the present government's immigration policy program.[58]

The action of the aforementioned social movements and the church are the embodiment of the "advanced" liberal rule, according to which interference on behalf of the state in affairs of civil society and citizens must be kept to a minimum.[59] In this sense, the church, social movements, communities, and NGOs are one technology for governing the asylum seekers. This is not necessarily the kind of means the immigration authorities or legislation would suggest, however.

What also unites these two pastorates is their request for "the true identification" of the asylum seeker. This recurs in the statements of the immigration authorities, state and NGO lawyers, and parish activists again and again. They urge the immigrant to identify her-/himself for their own good and for the good of the asylum application process. This is done through encouraging the migrant to think about her/his story, and through interviews, more informal discussions, and checking documents and other evidence supporting one's migration story. "We cannot help you if you do not help us by telling the truth about yourself" seems to be the leading slogan in the work of all these parties. Immigrants concentrate on thinking about themselves and their life history, and then trying to "translate" this thinking into a guideline for their behaviour as asylum seekers. Although their own views and speech rarely end up as such in the media, through this meditation they are then more prepared to reveal their inner life to all the pastors.

Notes

1. Lasse Kerkelä, "Kirkkoherra: Käännytyspäätös merkitsisi Naze Aghaille kuolemaa," *Helsingin Sanomat,* August 31, 2007. Translations of all quotations originally in Finnish are by the author.
2. Suomen ekumeeninen neuvosto, *Kirkko turvapaikkana.* (Helsinki: Suomen ekumeeninen neuvosto, 2007), 4–5.
3. Randy Lippert, "Practices, Rationalities, and Sovereignties," *Alternatives* 5 (2004): 335–355; Randy Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2006).
4. Hilary Cunningham, *God and Caesar at the Rio Grande: Sanctuary and the Politics of Religion* (Minneapolis: University of Minnesota Press, 1995).
5. The Finnish Ecumenical Council (FEC) is a national ecumenical organization for the churches, Christian communities, and parishes in Finland. FEC has eight member churches, with the Evangelical Lutheran Church being the largest. Some 80 per cent of the Finnish population belongs to it.
6. Michel Foucault, "The Subject and Power," in *Michel Foucault: Beyond Structuralism and Hermeneutics,* ed. H.L. Dreyfus and P. Rabinow (New York: Harvester Wheatsheaf, 1982); Michel Foucault, *Security, Territory, Population: Lectures at the College De France 1977–78* (New York: Palgrave Macmillan, 2007).
7. *Ibid.*, 126–127.
8. *Ibid.*, 165.
9. Graham Burchell, "Peculiar Interests: Civil Society and Governing 'The System of Natural Liberty,'" in *The Foucault Effect: Studies in Governmentality,* ed. G. Burchell et al. (London: Harvester Wheatsheaf, 1991); Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality;* Foucault, "Subject and Power;" Foucault, *Security, Territory, Population,* 87–114; Lippert, "Practices, Rationalities, and Sovereignties."
10. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1977).
11. Michel Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France 1981–1982* (New York: Picador, 2005), 16.
12. *Ibid.,* 357.
13. Foucault, "Subject and Power;" Foucault, *Hermeneutics of the Subject,* 366; Foucault, *Security, Territory, Population,* 163–185; Lippert, "Practices, Rationalities, and Sovereignties."
14. Lippert, "Practices, Rationalities, and Sovereignties;" Lippert, *Sanctuary, Sovereignty, Sacrifice.*
15. Lippert, "Practices, Rationalities, and Sovereignties," 536.
16. *Ibid.*
17. Finnish Immigration Service, *Glossary* (Helsinki: Finnish Immigration Service), <http://www.maahanmuuttovirasto.fi/netcomm/content.asp?article=1998&language=EN> (accessed March 14, 2009); Statistics Finland, *Immigration to Finland in 2006,* Helsinki: Statistics Finland, <http://www.stat.fi> (accessed November 1, 2007).
18. Paul Weller, "Sanctuary as Concealment and Exposure: The Practices of Sanctuary in Britain as Part of the Struggle for Refugee Rights" (paper presented at the conference The Refugee Crisis: British and Canadian Responses, Keble College and Rhodes House, Oxford, England, 4–7 January 1989).
19. Foucault, *Security, Territory, Population.*
20. Cunningham, *God and Caesar at the Rio Grande;* Susan Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Boulder, CO: Westview Press, 1993); Weller, "Sanctuary as Concealment and Exposure;" Lippert, *Sanctuary, Sovereignty, Sacrifice.*
21. Foucault, *Security, Territory, Population,* 346.
22. Burchell, "Peculiar Interests."
23. Foucault, *Security, Territory, Population,* 351–357.
24. Nikolas Rose, "Governing 'Advanced' Liberal Democracies," in *Foucault and Political Reason,* ed. A. Barry *et al.* (London: UCL Press, 1996), 50–61.
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L'asile religieux, entre lecture libérale et républicaine : quels défis pour les sociétés démocratiques?

Caroline Patsias et Louis Vaillancourt

Résumé

L'article réinscrit les analyses sur l'asile religieux au sein d'une réflexion sur la démocratie. L'asile religieux comme forme particulière de désobéissance civile ouvre à une interrogation sur la légitimité de celle-ci dans un contexte démocratique. Nous considérons d'abord les contradictions que soulève la désobéissance civile par rapport aux conceptions libérales et républicaines de l'obligation politique dans les démocraties. Nous nous penchons ensuite sur l'asile religieux, pour enfin examiner la façon dont chacune des précédentes conceptions de la démocratie peut légitimer ou, au contraire, restreindre cette forme de désobéissance civile.

Abstract

This article resituates analyses on religious asylum in a reflection on democracy. Religious asylum as a special form of civil disobedience opens an inquiry into the legitimacy of the latter in a democratic context. We first examine the contradictions raised by civil disobedience in relation to the liberal and republican conceptions of political obligation in a democracy. We then focus on religious asylum, and finally examine how each of the previous conceptions of democracy can justify or, conversely, restrict this form of civil disobedience.

Le durcissement des politiques migratoires européennes et nord-américaines depuis le milieu des années 1980 jusqu'au début des années 1990 a entraîné une recrudescence de l'asile religieux, tradition qui remonterait à l'Antiquité — on songe, par exemple, au Mouvement des sans-papiers de Saint-Bernard, en France, au Sanctuary Movement, aux États-Unis, ou encore à l'asile dans l'église de la Nativité, à Bethléem, en 2002[1]. Pour beaucoup de sans-papiers ou de candidats à l'asile politique déboutés, l'église devient le dernier recours avant l'expulsion. Outre le report de la décision des autorités, les réfugiés espèrent une réouverture de leur dossier en gagnant, grâce à l'attention des médias, la sympathie du public. Cette pratique des églises en faveur de l'asile religieux n'a pas manqué d'offusquer les autorités étatiques, qui y voient une remise en cause de leur pouvoir et, surtout, une difficulté supplémentaire dans la gestion et la mise en œuvre des politiques publiques migratoires[2]. La réaction hostile de la ministre canadienne Judy Sgro face à l'asile religieux[3], l'entrée des policiers, en 2004, dans l'Église unie Saint-Pierre pour procéder à l'arrestation de Mohamed Cherfi, en situation illégale au Canada par suite du refus de sa demande de statut de réfugié[4], ou encore les discussions aux États-Unis sur une possible criminalisation de toute personne aidant les immigrants illégaux, témoignent sans équivoque de ce point de vue[5]. Ces réactions étatiques rappellent que l'asile religieux pose implicitement la question de l'obéissance civile et donc celle de son contraire « la désobéissance civile ».

Originellement attribuée aux comportements de l'Américain Thoreau[6], qui refusa de payer ses impôts pour protester contre les lois esclavagistes et la guerre au Mexique, la désobéissance civile demeure associée à la figure emblématique de Gandhi et à sa lutte pacifique pour l'indépendance de l'Inde. Dans l'histoire des États-Unis, elle rappelle encore les campagnes massives de désobéissance contre la guerre du Vietnam ou le mouvement pour les droits civiques. La désobéissance civile est une infraction consciente et intentionnelle, au nom de principes supérieurs. Publique, elle s'inscrit dans un mouvement collectif[7]. Cette définition succincte a le mérite de ne pas préciser les conditions ni les limites de la désobéissance civile. Ces dernières présupposent en effet une lecture de la démocratie et de ses engagements. Or, c'est tout l'enjeu de notre réflexion que de se pencher sur les dilemmes que posent au projet démocratique contemporain

la désobéissance civile et l'une de ses formes particulières, l'asile religieux. Plutôt que de postuler une définition de la désobéissance civile, nous entendons souligner le lien entre conception de la désobéissance civile et vision de la démocratie. Fixer par avance les limites de la désobéissance civile serait étouffer le débat. Ouvrir celui-ci nécessite, à l'instar de Perrouty[8], de signaler que le terme « désobéissance civile » est le fruit d'une traduction malencontreuse ; « civique » eut été mieux choisi[9]. Le vocable « civil » ne doit pas faire oublier que si la désobéissance en question émane de la société civile, elle comporte, dans son opposition à la loi, une dimension politique déclarée. La désobéissance civile est bien une forme « moderne » — et le terme n'est pas ici sans ambiguïté[10] — de résistance à l'autorité et au pouvoir.

Réfléchir sur la désobéissance civile justifie donc de revenir sur les fondements de l'obligation politique. À cet égard, le débat autour de l'asile religieux conduit à reformuler des questions récurrentes — pour ne pas dire fort anciennes — de la philosophie et de la science politique concernant les limites de l'autorité et du pouvoir politique, et le respect du droit. En reprenant une longue tradition de la réflexion politique, l'analyse qui suit entend saisir les assises théoriques du débat et ainsi mieux définir les interrogations que suscite l'asile religieux au sein de la démocratie moderne. Celle-ci induit en effet une inflexion des enjeux du débat puisque, dans les régimes démocratiques, le peuple n'est soumis qu'à sa propre loi — loi qui, de plus, dans les démocraties modernes, est fidèle aux principes des droits de la personne. Comment dès lors concevoir la légitimité de la désobéissance civile?

Un autre élément, propre à la nature même de l'asile religieux, vient infléchir cette réflexion. L'asile religieux repose sur un très ancien principe de protection des persécutés. Certains font même remonter cette tradition de sanctuaire aux directives qu'aurait données Dieu à Moïses, d'établir six cités refuges pour les juifs ou pour quiconque aurait tué sans intention de donner la mort[11]. Dans le cas de l'État moderne, c'est ce dernier qui offre l'asile aux « fugitifs » et c'est à lui que revient la tâche de déterminer qui mérite sa protection. Désormais, le statut de réfugié relève de la loi et donc de critères établis par l'État. C'est l'acquisition de ce statut qui différencie « l'étranger dans l'illégalité » ou « l'immigrant sans papiers » du réfugié au sens juridique du terme. La délivrance de ce statut revient d'ailleurs au ministère de l'Immigration, l'instance même qui déclare l'appartenance objective à un État. Ce statut juridique fluctue, selon les époques et les contextes géographiques, et de même, la sociologie des requérants varie grandement au rythme des conflits politiques. Au XIX^{e} siècle, le candidat type à l'asile politique au Canada était le leader d'un mouvement nationaliste défait. Au XX^{e} siècle, la construction de frontières plus hermétiques[12] va changer la donne et rendra le statut de réfugiés plus dépendant des normes étatiques. Le Canada a longtemps été considéré comme une terre d'asile (du moins après la fin des politiques racistes des années 1930) en raison de ses politiques migratoires qui favorisaient l'installation de refugiés sélectionnés selon les critères de l'immigration. Durant la guerre du Vietnam, nombre de soldats américains ont aussi trouvé « refuge » au Canada, sans pour autant acquérir le statut de réfugié. À partir des années 1980, l'augmentation du nombre de réfugiés a obligé le Canada à se doter d'une politique et d'instances plus spécifiques, (création du bureau des réfugiés et de l'immigration et de différentes procédures). Reprenant la Convention de Genève, est alors défini comme « réfugié » toute personne qui :

> […] craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques, se trouve hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays ; ou qui, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle à la suite de tels événements, ne peut ou, en raison de ladite crainte, ne veut y retourner.

Depuis l'adoption de la Loi sur l'immigration et la protection des réfugiés de 2002, les demandeurs d'asile peuvent aussi être acceptés s'il est trouvé qu'ils risquent, dans leur pays, d'être torturés ou tués, ou de subir des peines ou des traitements cruels et inusités. Cependant, contrairement au projet initial, la Loi mise en vigueur exclut la possibilité d'appel. Dès le départ, des voix se font entendre pour dénoncer le manque de recours possibles et la nature politique des décisions prises par le bureau. Cette législation canadienne s'inscrit dans un contexte de restriction du droit d'asile[13]. À cet égard, s'il faut souligner que les demandeurs du statut de refugié ne sont pas des immigrants comme les autres — c'est du moins ce que consacre l'existence de procédures et d'un statut spécifique — les politiques relatives au droit d'asile demeurent liées au contexte des migrations et des politiques migratoires. Or ces dernières sont de plus en plus restrictives (en Europe) ou assorties de critères de sélection qui excluent les populations les plus démunies (en Amérique du Nord). À cela s'ajoutent, depuis 2001, des politiques qui tendent à privilégier la sécurité aux dépens des droits humains. Certes, ces différentes lois ne concernent pas directement la législation sur les réfugiés, mais celle-ci n'échappe pas au contexte social général par rapport aux migrants et à « l'autre ». Et force est de constater que ce contexte penche plutôt vers la criminalisation des migrants[14]. Les États craignent que le statut de réfugiés politiques ne soit dévoyé et qu'il ne profite à une immigration « économique » issue des pays pauvres.

En outre, la complexification de certaines situations politiques rend plus ardu de trancher entre situation politique et situation économique, car certains pays font face à des problématiques humanitaires difficiles ou encore sont dirigés par des régimes autoritaires sans pour autant être soumis à une dictature.

Bien qu'ayant pour même fondement la protection des persécutés, les situations d'asile religieux peuvent varier selon les pays et leurs cadres normatifs. Si, au Canada, les exemples récents d'asile religieux concernaient des requérants au statut de réfugiés politiques qui s'étaient vus déboutés en Europe, et c'est notamment le cas de l'église Saint-Bernard, il s'agit essentiellement de sans-papiers. Cette différence a-t-elle une incidence quant à la légitimité de l'asile religieux au sein des systèmes démocratiques contemporains?

Notre réflexion comprendra trois étapes. La première partie, consacrée au cheminement de l'obligation politique, permettra, dans la deuxième partie, de montrer en quoi la modernité politique et la démocratie refondent les termes de l'obéissance politique et de cerner les enjeux que constitue, dans ce contexte, la désobéissance civile. Enfin, dans la troisième partie, nous reviendrons sur le cas particulier de l'asile religieux, en jugeant celui-ci à l'aune des précédentes théories.

1. Obligation politique : quelques jalons théoriques

Si la référence à une injustice (à savoir l'invocation d'un principe éthique supérieur) est au fondement des justifications de la désobéissance civile, elle est loin pour autant d'être consubstantielle à cette forme particulière de désobéissance puisqu'elle traverse le débat et les réflexions sur l'obéissance politique dès les origines. L'idée d'un droit naturel, expression d'une justice fondamentale ou divine qui peut autoriser la désobéissance à la loi des hommes i. e la loi de la cité, est déjà au cœur de l'*Antigone* de Sophocle. Elle teintera également les réflexions des théoriciens du Moyen-Âge sur les rapports entre Église et État, ou entre autorité divine et autorité politique ou, dans la même veine, sur la nécessité de limiter l'autorité absolue. Saint Thomas d'Aquin[15] ouvre ainsi une brèche en enseignant que la loi humaine cesse d'être obligatoire en conscience lorsqu'elle contredit les commandements divins ou qu'elle opprime injustement ses sujets, car la puissance déléguée de Dieu ne saurait l'autoriser[16]. Les théoriciens de la souveraineté politique seront les premiers à élaborer la notion d'un pouvoir absolu et permanent d'imposer des lois aux sujets sans leur consentement et sans que ce pouvoir ne soit limité par aucune loi. Le souverain sera cependant soumis au droit divin ou naturel, qui lui interdira d'opprimer ses sujets[17]. Le droit divin ou naturel demeure donc la barrière à l'absolutisme du pouvoir. Il reste néanmoins que tant que la loi ne vient pas contrarier ce droit, elle doit être obéie, sans remise en question possible. La modernité, après Descartes, va introduire un déplacement de la légitimité politique de Dieu vers la Raison et l'individu en tant qu'être rationnel[18]. Ce déplacement ne conduit pourtant pas à un assouplissement de l'obligation d'obéissance. Comme le note Perrouty[19] à la suite de Ferry[20], désobéir à la loi revient à s'opposer à la raison, à la rationalité du monde. Fonder le devoir d'obéissance dans la raison[21] plutôt que dans la religion n'équivaut donc pas à saper l'autorité du droit, loin s'en faut. Les théories du contrat, bien qu'offrant des différences substantielles, illustrent ce glissement vers la raison comme instance légitimatrice.

Pour Hobbes[22], le pouvoir auquel il faut obéir est absolu. C'est le besoin de protection qui explique la nécessité d'un tel pouvoir et qui est à l'origine du contrat entre les individus et l'État. Au sein de la pensée hobbesienne, l'obéissance est bien entendu dans l'intérêt de l'individu, qui échappe ainsi aux dangers de « l'état de nature ». Aussi le pouvoir protecteur est-il fatalement accompagné du pouvoir d'oppression. La liberté de l'état de nature entraîne l'insécurité et la lutte, l'assujettissement de la vie politique produit la sécurité et la paix. Les individus aliènent volontairement et irrévocablement leur souveraineté en échange de la protection de l'État. Selon Hobbes, le contrat originel est un contrat sans rétractation possible[23]. Certes, l'auteur du *Léviathan* prévoit une limite à l'obligation d'obéir si le souverain échoue à assumer sa partie du contrat — la protection des individus —, mais sa pensée rejette tout droit de résistance à l'oppression. L'intérêt de la protection rend caduque toute velléité d'un fondement externe, par des contenus, à l'autorité. L'ordre juridique ne repose que sur le monopole de l'État et de la force. Dans le système lockéen, au contraire, les individus ne font plus abandon de souveraineté au gouvernement. L'obéissance résulte du consentement des membres d'une communauté politique. Ces derniers s'engagent à respecter les normes juridiques établies par les autorités auxquelles ils ont volontairement confié le pouvoir. Les membres d'une communauté politique contractent de leur plein gré avec les autorités politiques, et ce contrat est révocable. Ainsi, Locke est parmi les premiers à esquisser un droit collectif de résistance à l'oppression[24]. Si Rousseau reste attaché à la métaphore contractuelle, il reformule le consentement à travers la notion de « volonté générale », seule expression de la souveraineté du peuple, conçue comme inaliénable et indivisible. Le peuple, seul dépositaire de la souveraineté, n'accepte de se soumettre aux lois que parce qu'il en est l'auteur. Rousseau est donc encore loin d'évoquer la désobéissance civile au sens moderne du terme. Sa conception même de la liberté politique fait davantage référence à la liberté des Anciens qu'à celle des Modernes[25]. Fait significatif, les révolutionnaires qui s'inspireront des « théories

du contrat » affirmeront avec force l'autorité de l'État et le respect de la loi, rejoignant ainsi les théoriciens allemands, dont Kant, qui souligneront le caractère inconditionnel du devoir d'obéissance du peuple[26].

2. Désobéissance civile et démocratie

La Modernité introduit un premier déplacement de la problématique des réflexions sur l'obéissance. Au Moyen-Âge, ces réflexions concernent les origines divines ou séculières des fondements de l'obéissance. C'est à l'aune de ces origines et de ces modalités que sont circonscrites les limites de la désobéissance. Avec la Modernité, le problème revient à justifier l'obéissance de l'homme « raisonnable » non plus selon les exigences d'une autorité extérieure et supra-humaine, mais selon celles de la raison, nouvel étalon des comportements humains. Sans conduire à un amoindrissement de la légitimité du droit, bien au contraire, celui-ci ouvre cependant la voie à « l'horizon démocratique » en s'attaquant aux fondements supra-humains de l'autorité. Aussi n'est-il pas étonnant que les théoriciens du contrat préfigurent déjà les principaux dilemmes que la désobéissance civile posera à l'État démocratique. D'abord, et comme le soulignait déjà théoriquement Hobbes, la construction de l'État moderne s'effectue à travers la conquête du monopole de la violence légitime[27]. Dans cette perspective, désobéir à la loi revient à saper l'autorité, voire les fondements de l'État. Ensuite, si la loi est l'expression de la volonté générale ou, pour le dire autrement, si le peuple n'est soumis qu'à sa propre loi, comment ce dernier peut-il y déroger sans revenir sur les fondements de sa propre autorité? La reconnaissance des droits opérée par la démocratie moderne va cependant conduire à une reformulation des questions précédentes. Désormais, la réflexion sur la désobéissance civile s'inscrit au sein du débat récurrent de la modernité démocratique entre défense des droits et souveraineté populaire, ou entre affirmation du juste et revendication du bien. Et la place accordée à la désobéissance civile et à ses manifestations est étroitement liée à la vision de la démocratie et aux éléments qui, en son sein, sont jugés prépondérants.

Démocratie libérale et désobéissance civile

Pour les libéraux, la souveraineté est dissociée de la loi. En d'autres termes, la loi doit relever du juste et non en priorité de l'expression de la volonté populaire. La souveraineté ne s'incarne pas dans la capacité à énoncer le droit. Il est plus important que la loi demeure l'expression de la raison et de la liberté que celle d'une volonté populaire qui pourrait être tyrannique. Cette conception explique le refus de la souveraineté comme principe hégémonique. Il s'agit, selon la vision libérale, de limiter le pouvoir, tous les pouvoirs, quelle que soit leur origine, celle-ci fût-elle populaire. Les penseurs libéraux témoignent d'ailleurs souvent d'une méfiance envers le peuple, voire « la masse », dont on craint l'irrationalité, la violence et la menace potentielle que celle-ci représente pour l'individu et ses droits[28]. La liberté politique est envisagée comme un moyen de protéger la liberté et l'autonomie individuelle. C'est donc à juste titre que le libéralisme est traditionnellement associé à la liberté négative (à savoir le maximum de liberté que chacun peut avoir en vertu de la loi) et à la préservation de la sphère privée de la mainmise du pouvoir[29]. Cette volonté de préserver la liberté de l'individu justifie l'importance accordée à la défense des droits individuels et de la personne. Cette défense a deux conséquences, et la seconde, corollaire de la première, concerne plus directement notre propos. D'une part, l'accent est mis sur la dimension procédurale de la démocratie[30], au détriment de la dimension substantielle. D'autre part, le respect des droits peut autoriser la désobéissance à la loi et le recours à des actions illégales ou violentes, au-delà de la traditionnelle opposition des libéraux aux formes plus directes de participation populaire.

Un accord sur le bien étant impossible ou difficile au sein des sociétés modernes, marquées par un polythéisme des valeurs, seul le respect des procédures « démocratiques » garantira le respect des droits individuels et rendra la vie en commun possible. Les procédures permettent donc l'exercice de la démocratie en même temps qu'elles en assurent la pérennité. La décision collective qui s'effectue à travers la règle de la majorité est le résultat de l'agrégation des préférences des acteurs, elle n'est soumise à aucune vision du bien ou, autrement dit, à aucun critère substantiel ou normatif[31]. La seule contrainte extérieure qui vise le résultat de la décision (*substantially outcomes*) a trait au respect des droits de la personne. Selon les libéraux, la règle du jeu démocratique suppose que la minorité s'inclinera devant les décisions de la majorité à une double condition : 1) l'on « rejouera » la partie, et les perdants d'aujourd'hui pourront être les gagnants de demain ; 2) la majorité victorieuse n'opprimera pas les droits fondamentaux de la minorité[32].

C'est ce dernier élément, au cœur de la doctrine libérale, qui justifiera la désobéissance civile. Parce que le libéralisme impose des limites à l'autorité, même celle qui émane des gouvernements démocratiques, la désobéissance politique est légitime contre des lois démocratiques qui ne respecteraient pas les droits fondamentaux des individus. Aussi, d'un point de vue libéral, la désobéissance civile engage-t-elle directement la nature et les limites de la règle de la majorité. Ceux qui pratiquent la désobéissance réclament une exception à la règle de la majorité. Ces limites et exceptions à la règle de la majorité ont un rapport direct avec les droits fondamentaux — soit avec certains principes d'équité et de traitement égal — que le libéralisme considère comme

devant surseoir à la règle de la majorité. Les gouvernements démocratiques qui violent des droits fondamentaux outrepassent leur autorité. Lorsque « les violations sont assez graves », les personnes dont les droits sont violés, ou d'autres qui font cause commune avec elles, peuvent légitimement résister, y compris en désobéissant à la loi[33].

Le rapport aux droits non seulement justifie la désobéissance politique selon la vision libérale, mais prend naturellement un rôle de régulateur du bien — il détermine la légitimité et les limites d'une désobéissance libérale justifiée. La légitimité d'un acte de désobéissance, même passive, est alors d'autant plus fragilisée que non relative aux droits fondamentaux[34]. Première contrainte, forte, à la désobéissance civile, le respect des droits n'est pourtant pas la seule limite imposée par les libéraux à son sujet. Outre une réticence traditionnelle devant les manifestations collectives, les libéraux doivent en effet surmonter un défi de taille. Les droits de la personne comportent une reconnaissance de droits substantiels, mais ils sont aussi préservés par le respect d'une procédure. Dans la logique libérale, le respect de la procédure fait partie intégrante de l'équité des droits. Ainsi, si la désobéissance civile peut être un moyen pour rappeler des droits fondamentaux bafoués (et entre en ligne de compte toute l'étendue des interprétations possibles[35]), elle heurte en même temps la pierre angulaire de la pensée libérale. Il s'agit donc de déterminer « lorsque les violations sont assez graves » pour justifier la désobéissance civile[36]. Si les points de vue varient selon les auteurs, ces derniers demeurent cependant très prudents quant à l'espace de la désobéissance civile.

Pour Rawls[37], comme pour Habermas[38], la désobéissance civile ne peut être invoquée avant l'épuisement de tous les moyens légaux d'expression ; elle sous-entend également l'acceptation des sanctions par le contrevenant[39] et privilégie la non-violence. Rawls prône même, afin d'éviter une contestation générale qui pourrait saper les fondements du système démocratique, une coopération politique entre les minorités souffrant d'injustice[40]. D'autres sont cependant moins restrictifs. Dworkin rappelle que les organes de l'État sont faillibles et que, même dans les conditions de la légitimité procédurale, on ne peut exclure des injustices. Il est donc nécessaire que la « désobéissance civile soit acceptée comme composante de la culture politique d'une communauté démocratique développée »[41]. En autorisant le non-respect des conditions d'adoption de la norme ou des défaillances dans les procédures, la désobéissance permet d'approfondir le débat démocratique[42]. Il faut souligner ici que la contestation conformément aux principes libéraux porte sur la procédure et non sur la finalité de la décision.

Outre ce point, un rapide examen empirique souligne que, sitôt franchi le fossé de la théorie à la pratique, l'exercice de la désobéissance civile demeure difficile au vu des critères libéraux. La nécessité d'user, avant de recourir à la désobéissance civile, de tous les moyens légaux d'intervention est, dans bien des cas, impossible pour les acteurs sociaux. D'une part, la justice prend du temps, lequel manque souvent aux opposants. D'autre part, la situation des acteurs les empêche parfois d'avoir recours à ces moyens légaux. Au-delà de ces contraintes empiriques, une question fondamentale demeure : la désobéissance civile doit-elle être réduite à la défense des droits? À cette question, les visions républicaines de la démocratie répondent par la négative.

Démocratie républicaine et désobéissance civile

Pour les participationnistes[43], réduire la démocratie à des procédures est insuffisant. S'ils reconnaissent l'aspect fondamental du respect des droits et des procédures dans la démocratie, une « démocratie forte »[44] impose une participation effective des citoyens à la prise de décisions et à la gouvernance du pays — participation qui ne saurait se réduire au processus électoral et à l'établissement de préférence[45]. La souveraineté populaire ne s'exprime donc pas uniquement par défaut, à savoir dans le contrôle des gouvernants aux échéances électorales[46], mais positivement dans l'implication au sein des procédures de décision et d'élaboration des politiques[47]. Les penseurs républicains voient le lien entre État et démocratie à travers la notion de souveraineté populaire, garante de l'expression du peuple et du caractère démocratique de l'État. La démocratie réclame donc, outre le respect des droits, un principe d'autodétermination. La liberté des citoyens réside dans la capacité de participer à l'élaboration de la loi[48] et non pas simplement dans la possibilité d'échapper à l'emprise de l'État. La liberté civique est à la fois un moyen pour protéger la liberté individuelle ainsi que l'affirmation d'une identité, d'une appartenance à la collectivité en participant à l'édiction de la loi[49]. C'est la participation à la décision qui fonde la souveraineté populaire et démocratique plus que la nature de la décision elle-même.

Cette vision de la démocratie explique les traits communs à ces penseurs dans leur conception de la désobéissance civile. Cette dernière n'a plus pour seul objectif de s'opposer au non-respect des droits, elle doit aussi permettre de compenser un « déficit démocratique ou de souveraineté »[50]. Le terme désigne des cas où la souveraineté populaire n'a pu être engagée ou devrait être réengagée, par exemple lorsqu'une politique publique n'a pas été approuvée par les citoyens, lorsque des transformations au projet initial n'ont pas fait l'objet de consultations populaires, ou encore lorsque la situation originelle ayant présidé à la mise à l'agenda de la politique a changé. La vision de la démocratie des participationnistes, qui fonde la légitimité du régime démocratique sur le plein exercice de la souveraineté populaire, exige alors

que celle-ci s'exprime à nouveau. Cependant, les moyens légaux mis en place pour pallier lesdits « déficits démocratiques » peuvent parfois être inefficients en raison de l'inertie des institutions ou des contraintes de temps qu'impose une réforme du système[51]. Il est par ailleurs impossible, pour tout système politique, d'anticiper la totalité des déficits qu'il génère et de prévoir les moyens légaux pour y remédier. Dans cette perspective, la désobéissance civile s'avère une façon d'éviter l'amputation de la souveraineté du citoyen à cause de contraintes systémiques.

À l'opposé de la désobéissance selon les libéraux, qui vise en priorité un changement ou une remise en cause dans la nature de la politique au nom du respect des droits, l'objet premier de la désobéissance civile demeure le réengagement de la souveraineté[52]. Ainsi la vision républicaine élargit-elle le spectre des options politiques et celui de l'usage de la désobéissance civile : celle-ci est directement reliée à l'exercice de la souveraineté et n'est pas perçue comme un moyen de dernier ressort. Cependant, du même coup, la désobéissance civile se trouve intrinsèquement limitée[53]. Si son but premier est de restaurer un déficit démocratique, elle n'a pas pour objectif de répondre à des considérations concernant les résultats de la politique elle-même. À cette limite téléologique s'en ajoutent d'autres. Si la désobéissance civile contribue à un élargissement de la démocratie en permettant le prolongement de la souveraineté, elle constitue également une menace pour cette dernière. En remettant en question les lois du peuple, la désobéissance civile n'affaiblit-elle pas la souveraineté populaire qui l'a initiée? Un excès de désobéissance civile, en colonisant la sphère entière de l'activité politique, pourrait évincer toute autre forme légale d'action politique et minerait ainsi l'approfondissement de la démocratie que la désobéissance civile est censée défendre. Paradoxalement, les républicains se trouvent devant un écueil similaire à celui que rencontrent les libéraux : comment juger du déficit démocratique qui autorisera le recours à la désobéissance civile? Ces fondements théoriques, qui déterminent les cadres de politiques concrètes, permettent de mieux saisir les questions soulevées par l'asile religieux dans les démocraties modernes.

3. L'asile religieux : une double lecture, libérale et républicaine

L'asile religieux peut faire l'objet d'une double lecture, libérale et républicaine. Une telle lecture à la fois autorise une meilleure appréhension des dilemmes que ce type de désobéissance pose aux démocraties contemporaines et souligne dans quelle mesure ces deux courants de pensée ont encadré cette forme de contention. L'analyse impose cependant de distinguer entre les cas de demandeurs d'asile politique et ceux qui relèvent d'une contestation des politiques migratoires, les arguments pouvant sensiblement varier selon les situations.

Une lecture libérale de l'asile religieux

À bien des égards, la lecture libérale fait écho aux arguments soulevés par les acteurs. D'abord, la législation canadienne, qui ne permet pas le recours en appel des requérants à l'asile politique déboutés[54], heurte la philosophie libérale au sein de laquelle la procédure d'appel constitue une garantie supplémentaire des droits des individus. Le cas est d'autant plus problématique qu'au Canada, la décision est désormais rendue par un juge plutôt que deux, ce qui implique que le dossier de tout candidat n'est soumis qu'à un seul point de vue. Le sort d'un demandeur du statut de réfugié au Canada est donc décidé par une unique personne, sans aucune possibilité d'appel sur le fond. Or, comme le faisait remarquer le Conseil canadien pour les réfugiés en 2004[55], un Canadien qui conteste une simple contravention de stationnement a droit à l'appel, alors que le demandeur du statut de réfugié, dont la vie peut être en danger, en est privé. Ensuite, et toujours du point de vue du respect des droits, les défenseurs de l'asile religieux peuvent pointer que, outre l'examen de la situation du demandeur, les législations (notamment européenne et canadienne) invoquent le « droit à une vie normale » ou encore le « meilleur intérêt de l'enfant » et que, conséquemment, le verdict des autorités peut ne pas avoir assez tenu compte des liens que le réfugié a établi dans le pays d'accueil. Enfin, la crainte des libéraux qui voient dans la désobéissance civile une mesure de recours *in extremis* ne peut être opposée aux pratiques des congrégations, et particulièrement à celles de l'Église unie du Canada[56] qui insiste lourdement sur le caractère exceptionnel du recours.

Cependant, l'acceptation des sanctions qu'impose la définition libérale de la désobéissance civile est également problématique, du moins pour les personnes bénéficiant de l'asile[57]. Pour les demandeurs d'asile éconduits, accepter la sanction équivaut à se plier au retour dans leur pays d'origine, et c'est justement pour échapper à ce retour qu'on fera appel, en dernier ressort, à la désobéissance civile. Certes, le réfugié au sein du sanctuaire ne cache pas ses intentions aux autorités étatiques (le fondement de la désobéissance civile étant d'ailleurs la publicité de l'action entreprise) et rien n'empêche légalement celles-ci de briser la tradition de sanctuaire en pénétrant dans l'enceinte religieuse. Néanmoins, selon nous, cet argument n'est pas suffisant pour invalider totalement la précédente problématique. À travers l'asile, il y a bien tentative d'échapper à la sanction. Dans le cas particulier de l'asile religieux, du moins pour celui qui demande la protection du sanctuaire, les fins de la désobéissance civile (pour souligner l'injustice de la déportation et y échapper) sont confondues avec la sanction que l'État exercera sur le

réfugié si le ministre de l'Immigration, qui dispose d'un droit d'intervention, n'est pas convaincu par les arguments de l'intéressé. Il faut cependant remarquer que ce constat ne concerne pas uniquement l'asile religieux, mais aussi d'autres cas de désobéissance civile. De ce point de vue, l'asile religieux ne fait qu'illustrer certaines des ambiguïtés de la pensée libérale à l'endroit de la désobéissance civile.

La protection du sanctuaire envers des immigrants irréguliers est plus problématique pour la pensée libérale. Leurs défenseurs peuvent s'appuyer sur l'idée que l'étranger a les mêmes droits fondamentaux que le citoyen (hormis ceux de voter, d'être élu, de recevoir une éducation dans la langue de la minorité, et d'entrer et de rester sur le territoire canadien). Entre donc en jeu la concurrence entre les principes et l'interprétation des droits fondamentaux ou des situations politiques des pays d'où proviennent ceux qui réclament la protection du sanctuaire. En France, le mouvement d'appui aux sans-papiers de l'église Saint-Bernard conteste la teneur des « lois Pasqua », qui restreignent l'accès à la nationalité française et privent de nombreux étrangers résidant en France du droit de séjour. Ce mouvement s'appuie sur de grands principes humanitaires qui, sans se référer explicitement à ceux du droit international, engagent tout de même une vision large des droits de la personne et des libertés individuelles. Les défenseurs de la légitimité de l'action des réfugiés dans l'église dénoncent en outre une législation qui, de plus en plus contraignante, plonge dans l'illégalité des gens dont le statut juridique était jusqu'alors conforme à la loi. L'irrégularité de certains immigrants ne serait donc pas le fait de ceux-ci, mais plutôt attribuable à des modifications à la loi postérieures à une venue légale, modifications qui rendent le renouvellement de leur statut impossible.

Un dernier élément fragilise la légitimité de l'asile religieux des sans-papiers aux yeux des libéraux. Ces derniers ont une longue tradition de méfiance à l'endroit du désordre, et certains éléments de la protection offerte aux sans-papiers par les sanctuaires peuvent s'y rattacher, notamment la dimension collective plutôt qu'individuelle de l'action.

Une lecture républicaine de l'asile religieux

Pour les républicains, la distinction entre demandeurs d'asile et sans-papiers se révèle moins pertinente. Selon la perspective républicaine, il relève de la souveraineté de chaque État de se prononcer sur les critères de la citoyenneté et de l'appartenance nationale. La capacité à faire respecter les frontières géographiques et symboliques est un élément constitutif de la souveraineté étatique et populaire[58]. Cet argument peut justifier l'exceptionnalité de l'absence de recours au sein de la procédure. Au paradigme récent qui rend possible la désobéissance civile en raison d'un défaut dirimant, la vision républicaine oppose le paradigme traditionnel de la souveraineté territoriale.

Ce que ne peut soutenir en revanche la conception républicaine, c'est la non mise en vigueur d'un principe de recours inscrit dans la loi, comme c'est le cas au Canada. La non-application des lois existantes qui sont, selon la perspective républicaine, l'expression de la souveraineté du peuple non seulement est de nature non démocratique, mais elle s'oppose à la souveraineté.

Au Canada, l'Église accorde l'asile religieux si elle est convaincue que la personne risque la torture ou d'autres formes de persécution dans son pays d'origine et que ses droits fondamentaux n'ont pas été respectés. Or, dans une perspective républicaine, seul l'État peut se prononcer sur la question. Au Moyen-Âge, la pratique du sanctuaire correspondait à l'affirmation d'un ordre concurrentiel à celui de l'État et du droit civil. Si la modernité a consacré la victoire du séculier au sein des démocraties occidentales, la pratique a cependant perduré. L'asile religieux contemporain relève directement de cette mission et de ses fondements symboliques. Le terme même de sanctuaire souligne la dimension spirituelle de cette mission, qui est d'ailleurs clairement exprimée dans les discours des autorités ecclésiastiques qui invoquent une tradition universelle fondée sur la compassion, l'hospitalité, la solidarité et l'amour fraternel[59]. Selon les partisans de la république, l'Église vient ici empiéter sur des prérogatives qui ne sont pas de son ressort.

La vision républicaine n'est pas dénuée d'ambiguïté. Si sa conception de l'État et de la supériorité de la volonté populaire qu'il incarne a tendance à restreindre l'asile religieux, la vision participationniste qui met l'accent sur l'implication politique des citoyens en dehors des processus électoraux peut favoriser une définition plus large de la citoyenneté. Ainsi, aussi bien les sans-papiers que les réfugiés réclamant l'asile politique peuvent être économiquement et sociologiquement citoyens même s'ils demeurent juridiquement et politiquement des étrangers. La doctrine républicaine, ou du moins, la vision participationniste, peut être réceptive à cette conception de la citoyenneté. De même, la légitimité de la désobéissance civile des citoyens et des membres du sanctuaire qui vont rendre possible l'asile religieux peut profiter d'une perspective participationniste qui est traditionnellement en faveur de la participation et de l'action collective.

Cette dernière remarque rappelle que l'asile religieux en tant que forme particulière de désobéissance civile s'inscrit au sein de la problématique de l'action collective et de la façon dont la contestation et la résistance sont appréhendées au sein des sociétés. Un premier argument serait de signaler l'opposition entre action collective violente et non violente. Cette opposition est cependant moins évidente qu'il n'y paraît. La violence est aussi une notion subjective

reliée aux mœurs sociales et politiques d'une époque. Le droit, à certains égards, ne fait que sanctionner un état des mœurs (voire des rapports de force) qui a été influencé par les résistances citoyennes précédentes. Par exemple, le fait que la grève soit reconnue comme un droit fut l'objet de luttes et de nombreuses actions collectives. Si l'on revient à la désobéissance civile, celle-ci a grandement contribué à l'élargissement des droits de minorités, des opprimés. Comme le souligne Marcuse[60], la résistance, l'opposition sont toujours une violence faite à « l'ordre établi », à « la violence institutionnalisée » qui est celle de l'État, jusqu'à ce que l'opposition remporte la bataille de la légitimité. Dans une telle perspective, le recours à la violence « effective » ne peut être qu'une question de tactique. En renonçant à la violence, la désobéissance civile entend ne pas répondre à la force par la force ; cette stratégie peut aussi, surtout à l'ère contemporaine de la médiatisation, favoriser la sympathie du public. Elle souhaite conquérir l'intérêt général à travers la « justesse » de la cause défendue, cette dernière dépassant le cadre de la loi positive. La désobéissance civile et l'asile religieux puisent leurs racines dans une ancienne notion qu'il existe un droit supérieur ou une loi supérieure à la loi positive. Cette conception a été fondamentale au développement des libertés des individus et, plus généralement, à l'avancée de la démocratie. Dans le contexte contemporain de criminalisation de l'action collective[61], elle demeure un recours plus que jamais nécessaire.

Notes

1. Pour le mouvement des sans-papiers de l'église Saint-Bernard en 1996, se reporter notamment à l'ouvrage de T. Blin, *Les sans-papiers de l'église Saint-Bernard. Mouvement social et action organisée* (Paris : L'Harmattan, 2006). Le « Sanctuary Movement » aux États-Unis était un mouvement politique et religieux d'environ 500 congrégations qui ont aidé des réfugiés en provenance d'Amérique centrale en les mettant à l'abri du service de l'immigration et de la naturalisation. Le mouvement s'est épanoui entre 1982 et 1992. Pour plus de détails, voir le site du mouvement : <http://www.newsanctuarymovement.org/movement.html> (page consultée le 2 novembre 2009). Quant à la protection accordée par l'église de Bethléem, voir le site infocatho : <http://infocatho.cef.fr/fichiers_html/archives/deuxmilledeux/semaine14/22nx14mod.html>.
2. Difficulté d'autant plus grande que ces politiques sont, depuis les événements du 11 septembre, plus étroitement reliées aux enjeux sécuritaires et à la surveillance des frontières.
3. Voir son entrevue à la Canadian Press du 4 juillet 2004.
4. Voir la page de Radio-Canada : <http://www.radio-canada.ca/regions/Quebec/nouvelles/200403/05/006-cherfi_arrestation.shtml>.
5. Voir le *Sensenbrenner-King Bill* de 2006. Le but premier du projet de loi était de criminaliser les sans-papiers ; il comportait également des dispositions visant les personnes et les groupes offrant une aide humanitaire aux migrants irréguliers.
6. H. D. Thoreau, *On the Duty of Civil Disobedience* (New York : Holt, Rinehart and Winston, 1948).
7. H. A. Bedau, "On Civil Disobedience," *Journal of Philosophy* 58, nº 21 (1961): 653–661. Voir également J. Mellon et J. Sémelin, *La non-violence,* (Paris : PUF, 1994)
8. P-A. Perrouty, éd., *Obéir et désobéir : Le citoyen face à la loi* (Bruxelles : Éditions de l'Université de Bruxelles, 2000): 7.
9. J. Sémelin revient de façon très précise sur cette distinction dans un article de *l'Express* du 27/09/97 : <http://www.lexpress.fr/informations/la-desobeissance-civique-est-elle-legitime_621117.html> (page consultée le 2 novembre 2009).
10. C'est ici le terme, étroitement relié aux revendications et aux écrits de Thoreau, plus que le comportement qui est moderne. L'idée du refus d'obéir à la loi est un thème récurrent de la science politique et un tel comportement ne saurait, en outre, être réduit à la modernité ; il est au cœur de la tension dramatique antique. Il est cependant vrai que la question de la désobéissance se pose différemment dans un système démocratique moderne, c'est d'ailleurs tout l'enjeu de la présente réflexion.
11. C. Stasny et G. Tyrnauer, *Sanctuary for Refugees? A Guide for Congregations* (Toronto : The United Church of Canada, 2004).
12. Ainsi Stephen Zweig, dans *Le monde d'hier — Souvenirs d'un Européen,* évoque le temps où des passeports n'étaient pas nécessaires pour voyager.
13. Conseil des réfugiés, 2004. Voir la page : <http://www.ccrweb.ca/keyissuesfr.htm>.
14. Voir la note 5.
15. Thomas d'Aquin, *Somme théologique,* Ia-IIae, Q96. art. 4.
16. P-A. Perrouty, « Légitimité du droit et désobéissance » dans P-A. Perrouty, éd., *Obéir et désobéir : Le citoyen face à la loi,* Bruxelles, Éditions de l'université de Bruxelles (2000) : 62.
17. Q. Skinner, *Les fondements de la pensée politique moderne* (Paris : Albin Michel, 2005).
18. B. Frydman, *Les transformations du droit moderne* (Bruxelles: Story-Scientia, 1999).
19. Perrouty, *supra* note 7: 59–78.
20. J-M. Ferry, *Philosophie de la communication. Justice politique et démocratie procédurale* (Paris : Éditions du Cerf, 1994).
21. A. M. Bickel, *The Morality of Consent* (New Haven : Yale University Press, 1975).
22. T. Hobbes, *Léviathan* (Paris : Éditions Sirey, 1971).
23. H. Höffding, *Histoire de la philosophie moderne,* Tome I (Paris : Éditions Félix Alcan, 1906).
24. P. Gérard, *Droit et démocratie. Réflexions sur la légitimité du droit dans la société démocratique contemporaine* (Bruxelles : Éditions De l'Université de Bruxelles, 1995); P. Gérard, "Les

justifications de l'autorité du droit dans la société démocratique et la désobéissance civile," *in* Perrouty, *supra* note 7: 79–93.

25. J-F Spitz, *La liberté politique : essai de généalogie conceptuelle* (Paris : PUF, 1995)
26. P-A. Perrouty, éd., *Obéir et désobéir : Le citoyen face à la loi* (Bruxelles : Éditions de l'Université de Bruxelles, 2000).
27. M. Weber, *Économie et Société* (Paris : Plon, 1971); T. Skocpol, *States and Social Revolutions : A Comparative Analysis of France, Russia, and China* (Cambridge : Cambridge University Press, 1979). La fin du Moyen-âge correspond à l'émergence de l'individu qui, s'émancipant de sa communauté originelle, va contracter avec l'État au moyen du pacte sécuritaire. *Voir* B. Badie et G. Hermet, *Politique comparée* (Paris : Colin, 2001).
28. Y. Papadopoulos, *Démocratie directe* (Paris : Economica, 1998).
29. Ceci explique, comme le remarque pertinemment Justine Lacroix, que les libéraux tentent davantage de répondre à la question « Jusqu'où le gouvernement s'ingère-t-il dans mes affaires » plutôt qu'à « Qui gouverne? » *Voir* J. Lacroix, *Communautarisme versus libéralisme : quel modèle d'intégration politique ?* (Bruxelles : Éditions de l'Université libre de Bruxelles, 2003).
30. B. Manin, « L'idée de démocratie délibérative dans la science politique contemporaine. Introduction, généalogie et éléments critiques. Entretien avec Bernard Manin », *Politix* 15, nº 57 (2000) : 37–55. Évidemment, sont soulignés ici les grandes lignes de la pensée libérale qui peuvent aussi conduire à gommer quelques subtilités de cette pensée d'autant qu'elle est riche de plusieurs courants et de maints auteurs. Les libéraux n'ont pas complètement écartés la dimension substantielle, comme les participationnistes et les républicains se soucient également de la dimension procédurale. Il s'agit ici de souligner de nouveau les points les plus significatifs de ces courants de pensée.
31. P. Jones, "Political Equality and Majority Rule," *The Nature of Political Theory* (Oxford: Clarendon Press, 1983) : 155–182.
32. B. Manin, *Principes du gouvernement représentatif* (Paris : Calman-Lévy, 1995); G. Sartori, *Théorie de la démocratie* (Paris : Armand Colin, 1973).
33. J. Rawls, *Théorie de la justice* (Paris : Éditions Du seuil, 1987); J. Habermas, *Le droit et la force. Écrits politiques* (Paris: Cerf, 1990); R. Dworkin, *Une question de principe* (Paris : PUF, 1996).
34. R. Dworkin, *Une question de principe* (Paris : PUF 1996).
35. Le respect des droits lui-même peut être interprété de diverses façons, et plusieurs droits peuvent entrer en concurrence.
36. Idéalement, selon l'esprit libéral, désobéissance civile et processus juridique servent tous deux la défense des droits et devraient donc opérer de concert.
37. J. Rawls, *supra* note 23.
38. J. Habermas, *Le droit et la force. Écrits politique*s (Paris : Cerf, 1990).
39. Cette dimension est importante pour les libéraux, car elle exprime la fidélité à la loi (et donc aux fondements du système démocratique) et prouve que l'acte est en réalité « politiquement responsable et sincère » et qu'il est conçu pour toucher le sens de la justice du public. *Voir* J. Rawls, *supra* note 23.
40. J. Habermas, *Débats sur la justice* (Paris : Cerf, 1997).
41. R. Dworkin, *Une question de principe* (Paris : PUF, 1996): 133 et suivantes.
42. J. Habermas, *supra* note 30 ;
43. C'est certes prendre quelques libertés que d'associer républicains et participationnistes, néanmoins les positions sur la désobéissance civile se recoupant, nous avons choisi de réunir les deux courants de pensée.
44. B. Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press, 1984).
45. C. Mouffe, *The Democratic Paradox* (Londres/New York : Verso, 2000).
46. Voir, entre autres, J. Schumpeter, *Capitalisme, socialisme et démocratie* (Paris : Petite bibliothèque Payot, 1946). Cette vision de la « préférence » de la démocratie nourrira les tenants du *Public Choice. Voir* J. Bohman et W. Rehg, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge : MIT Press, 1997).
47. Cette participation à l'élaboration des lois implique d'ailleurs pour certains la reconnaissance de l'activisme, laquelle favorise un approfondissement de la démocratie. *Voir* G. Baiocchi, "Participation, Activism and Politics," *in* A. Fung et E. Wright (dir.), *Deepening Democracy* (Londres : Verso, 2002).
48. On reconnaît ici l'héritage rousseauiste : l'homme est né libre et partout il est dans les fers. La liberté politique gît dans la capacité des citoyens de choisir leurs propres fers. « L'obéissance à la loi qu'on s'est prescrite est la liberté. » (1762, Livre I, Chapitre 8).
49. H. Arendt, « La désobéissance civile », in *Du mensonge à la violence* (Paris : Pocket, 1994); R. Putnam, *Bowling alone: The collapse and Revival of American Community* (New York : Simon and Schusters, 2000).
50. D. Markovits, "Democratic Disobedience," *The Yale Law Journal* 114, nº 8 (2005): 1897–1952.
51. P. Singer, *Democracy and Disobedience* (Oxford : Clarendon Press, 1973).
52. D. Markovits, *supra* note 40.
53. La désobéissance civile concerne le fait du réengagement démocratique et non les résultats ou les fins de celui-ci.
54. Notre propos concerne ici surtout l'exemple canadien.
55. Voir note 13.
56. C. Stasny et G. Tyrnauer, *Sanctuary for Refugees? A Guide for Congregations* (Toronto : The United Church of Canada, 2004).
57. Les églises, comme ceux qui soutiennent celui y ayant trouvé refuge, acceptent sans ambiguïtés le risque de

sanction et, fidèles encore aux préceptes libéraux, insistent sur le caractère pacifique des moyens d'action utilisés. Voir : L. Mackenzie Shepherd, "Foi et désobéissance civile," *Vivre Ensemble* 12, nº 41 (2004): 4–6.

58. M. Walzer, *Sphères de justice. Une défense du pluralisme et de l'égalité* (Paris : Seuil, 1997).
59. A. Jacob, "La violation d'un sanctuaire est un geste répréhensible," *Vivre Ensemble* 12, nº 41 (2004) : 7–9.
60. H. Marcuse, "The problem of Violence and the radical opposition." *Five Lectures.* (Boston : Beacon, 1970). Le texte se trouve aussi à la page : <http://www.marcuse.org/herbert/pubs/60spubs/67endutopia/67EndUtopiaProbViol.htm> (consultée le 3 novembre 2009).
61. D. Della Porta et O. Filieule, *Police et manifestants, Maintien de l'ordre et gestion des conflits* (Paris : Presses de Sc. Po, 2006).

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Bordering on Legality: Canadian Church Sanctuary and the Rule of Law

Sean Rehaag

Abstract

This paper examines church sanctuary incidents in Canada involving unsuccessful refugee claimants seeking to avoid deportation. The author contends that when faith-based communities develop formal screening mechanisms to determine who among the many that request it is accorded sanctuary, they apply similar norms and procedures as those found in Canada's official refugee determination process. The author argues that although sanctuary practices are often criticized as a form of civil disobedience that poses a threat to the rule of law, it is also possible to understand sanctuary practices as a means through which faith-based communities prevent the state from violating both Canadian and international refugee law, thereby upholding rule-of-law norms.

Résumé

Cet article examine les cas de sanctuaire survenus au Canada dans une église impliquant des demandeurs d'asile déboutés visant à éviter la déportation. Lorsque les communautés confessionnelles, soutient l'auteur, mettent au point des mécanismes de contrôle formels pour déterminer à qui, parmi les nombreux demandeurs, accorder le sanctuaire, elles appliquent des normes et des procédures similaires à celles qu'on trouve dans le processus officiel canadien de détermination de réfugiés. Bien que ces pratiques de sanctuaire soient souvent critiquées comme une forme de désobéissance civile qui constitue une menace pour la primauté du droit, l'auteur soutient qu'il est également possible de les comprendre comme moyen par lequel les communautés confessionnelles empêchent l'État de porter atteinte au droit tant canadien qu'international des réfugiés, confirmant ainsi les normes de la règle de droit.

Introduction

Sanctuary is an institution which, in the Christian tradition,[1] traces its roots to religious norms, ancient Greek and Roman law, medieval European law, and Catholic canon law.[2] In many Western states this institution was explicitly abolished as a matter of state law[3] by the early seventeenth century.[4] However, sanctuary appears to be undergoing something of a revival in recent years.[5]

In Canada, most contemporary sanctuary incidents involve unsuccessful refugee claimants who allege that their claims were wrongly denied. With the permission of faith-based communities, these unsuccessful refugee claimants take up residence in sacred buildings, usually Christian churches.[6] Canadian immigration officials are reluctant to enter churches for the purposes of enforcing immigration law. As a result, those taking sanctuary benefit from a *de facto* suspension of deportation while they remain within churches. In many cases, this suspension of deportation ultimately ends with migrants securing Canadian permanent residence through discretionary immigration procedures.[7]

In media accounts and popular discourse about Canadian sanctuary incidents, arguments about the legality of these practices play a central role. To date, however, few legal scholars have critically assessed the competing legal claims at stake. This article seeks to offer such an assessment, focusing on evaluating rule-of-law arguments deployed by the proponents and critics of sanctuary.

The article begins by outlining Canadian sanctuary practices. Next it examines the screening mechanisms that Canadian churches deploy to decide who, among the many that request it, is accorded sanctuary. Interestingly, these screening mechanisms mimic the official refugee determination system: lawyers get involved, alleged fears of persecution are scrutinized, supporting country condition documentation is considered, and various interpretations of

refugee law are propounded. The paper explores this curious phenomenon whereby sanctuary providers replicate the refugee determination process whose outcomes they reject. Then, through a close analysis of the relevant provisions of Canadian state law, the paper argues that, although sanctuary practices are frequently criticized on rule-of-law grounds as involving illegal acts of civil disobedience, it is not at all obvious that they should be considered as such. To the contrary, while there may be some rule-of law-arguments against Canadian sanctuary practices, it is also plausible to understand these practices as a means through which faith-based communities prevent the state from violating both Canadian and international refugee law.

Canadian Church Sanctuary Practices

The Lippert Study: Canadian Sanctuary Incidents

In *Sanctuary, Sovereignty, and Sacrifice,* Randy Lippert offers a comprehensive study of Canadian sanctuary practices.[8] Drawing on the work of Paul Weller, who studied sanctuary incidents in Britain,[9] Lippert suggests that sanctuary can involve either exposure or concealment strategies. When sanctuary providers employ exposure strategies they make sustained efforts to publicize the stories of those accorded sanctuary in the hopes that such publicity will make it politically difficult for state officials to undertake deportation activities. In contrast, when sanctuary providers resort to concealment strategies they actively hide those taking sanctuary so as to avoid their detection by state officials and the deportation that might follow from that detection.[10] In his study of Canadian sanctuary incidents, due in part to methodological considerations, Lippert concentrates on the former. For the purposes of his study, he defines sanctuary as "those incidents in which migrants actually entered and remained in … [a church] to avoid deportation and that entailed strategic efforts to expose this fact to mass media, communities, and political authorities."[11]

Based on this definition, Lippert identifies thirty-six sanctuary incidents in Canada during a twenty-year period beginning in 1983, when the first known instance of Canadian church sanctuary occurred.[12] These thirty-six incidents concerned 261 migrants of twenty-eight different nationalities.[13] All but two incidents involved non-citizens subject to deportation who had previously made unsuccessful refugee claims in Canada and who continued to allege that they faced serious risks of persecution abroad.[14]

Perhaps the most striking of Lippert's findings relates to the outcomes of sanctuary incidents. In all thirty-six cases, sanctuary successfully delayed deportation.[15] Moreover, during the twenty-year period of the study, the police and immigration officials refrained from entering churches to arrest migrants in sanctuary.[16] Similarly, no sanctuary providers were charged with violating Canadian law.[17] More surprisingly, in 58 per cent of the sanctuary incidents Lippert identifies, migrants in sanctuary ultimately secured the legal right to remain in Canada indefinitely, usually as Permanent Residents.[18] In the remaining cases, migrants either voluntarily left the church to go underground or to co-operate with their deportation (25 per cent), or the outcome was unclear or pending at the time of the study (14 per cent).[19]

Without wishing to downplay the hardship associated with spending several months physically confined to a church building that is not designed for human habitation,[20] it must be said that the success rate that Lippert identifies in sanctuary incidents is truly remarkable. To put this rate in context, consider that the success rate in judicial reviews of negative refugee determinations is less than 2 per cent.[21] Other means of delaying deportation are similarly ineffectual.[22] In other words, sanctuary is one of the most effective avenues currently available to unsuccessful refugee claimants seeking the right to remain in Canada.

Screening Procedures: Mimicking the Official Refugee Determination System

One of the likely reasons sanctuary is so successful in Canada is that churches carefully screen applicants to ensure that only those who have strong cases for refugee protection are accorded sanctuary.[23] As a result, far more migrants request sanctuary than are accorded it. Indeed, United Church pastor Darryl Gray, whose congregation offered sanctuary on two occasions, notes that he turns away requests for sanctuary on a weekly basis, "because they are often economic refugees who can't prove they face physical danger."[24]

To help congregations screen applicants for sanctuary, the United Church has prepared a detailed pamphlet entitled *Sanctuary for Refugees?: A Guide for Congregations*.[25] This 30-page pamphlet, in addition to reproducing the text of the refugee definition as established by the 1951 UN *Convention relating to the Status of Refugees,*[26] recommends steps that can be taken to determine whether those requesting sanctuary meet the refugee definition. Included among those recommendations is the following:

> A congregation … considering a request for sanctuary … must learn as much as possible about that person to determine whether or not this is a *bona fide* claim. Over two to three interviews … it is essential to learn as much as possible about the person's story. In the interest of clarity, no reasonable question should be ignored or considered impolite or irrelevant.

> Check the merits of the case with representatives of the United Nations High Commissioner for Refugees and Amnesty International … Find out whether the country has a history of gross and systemic human rights violations and tolerates the persecution of minority groups … Country Reports are also available through regional Documentation Centres of the Immigration and Refugee Board.[27]

What is interesting about these and other passages in the guide is that they tell United Church congregations to carefully screen applicants for sanctuary using essentially the same legal tests, the same means of evaluating testimony, and even the same documentary evidence regarding country conditions that are employed in the official Canadian refugee determination process. Moreover, the United Church is not the only denomination to develop formal screening practices that mimic the official refugee determination system in this manner. The Presbyterian Church, for example, has issued guidelines that offer essentially the same advice.[28]

Given the existence of such guidelines, it is likely that the small number of migrants who successfully pass through sanctuary screening procedures have highly persuasive cases. It is therefore understandable that, in combination with pressure brought to bear on political actors, sanctuary providers are frequently able to persuade immigration officials to exercise their discretion to grant exceptions on humanitarian and compassionate grounds to the regular rules regarding qualification for Canadian Permanent Residence.[29]

Policy Change and Sanctuary Incidents

In addition to the success of Canadian sanctuary incidents at the level of individual cases, there is also some indication that sanctuary practices in Canada may be effective at the level of policy change. According to Lippert's study, the frequency of Canadian sanctuary incidents is increasing. Indeed, 19 per cent of the sanctuary incidents Lippert identified from 1983 through 2003 occurred in 2003.[30] One of the reasons for this increase is a frustration that sanctuary providers display towards a feature of Canada's refugee determination system.[31] Canada's current immigration legislation, passed in 2001, sets out a procedure through which unsuccessful refugee claimants may have their initial refugee determinations reviewed on their merits by the Refugee Appeal Division (RAD) of the Immigration and Refugee Board.[32] The Canadian government, however, selectively implemented the provisions of the legislation, bringing the provisions of the legislation into force[33] except those pertaining to the RAD.[34] According to the United Church's pamphlet on sanctuary,

> until the appeal comes into force 'refugee determinations' will continue to be made without the benefit of a sober second opinion or an effective way to correct factual errors. This … has increased the chances of bona fide refugees being deported.[35]

Similarly, according to a declaration by the Interfaith Sanctuary Coalition:

> Any system of adjudication is open to error. That is why virtually every decision-making process involving rights of any significance gives rise to a right of appeal. Since the abolition of capital punishment in Canada, the decision to grant or refuse refugee determination status is the only judicial decision in Canada which can result in someone's death.
>
> Despite the extreme gravity of the refugee determination decision, there is no appeal on the merits available to refused refugee claimants … The lack of appeal [is] … the most important flaw in Canada's refugee determination system, since its inception in 1989.[36]

In 2006, in response to these and similar critiques,[37] Bloc Québécois MP Nicole Demers introduced a Private Member's Bill requiring the government to immediately proclaim the coming into force of the legislative provisions establishing the RAD.[38] At the time of writing, the Bill had passed the third reading in the House of Commons, and appeared likely to be passed in the Senate. However, the Bill was placed on hold by the decision of the Harper government to call an election in the fall of 2008. Nonetheless, it is worth noting that in Parliamentary debates regarding the RAD—including debates surrounding this Bill—the failure to implement the RAD is frequently and explicitly linked to the fact that unsuccessful refugee claimants who say that mistakes were made in their initial refugee determination resort to church sanctuary to avoid deportation.[39] It thus seems that sanctuary practices have been influential not just in assisting individual migrants, but also in contributing to the larger debates about Canadian refugee policy.

Recent Trends: Violations of Sanctuary

It must be acknowledged that two recent cases, at first glance, appear to suggest that sanctuary may be less successful today than it was during the period of Lippert's study (*i.e.* 1983–2003).

The first incident occurred on March 5, 2004, when police officers stormed the Saint-Pierre United Church in Quebec City. The police officers were searching for Mohamed Cherfi, an Algerian political activist who had made an unsuccessful refugee claim and who was subject to a deportation order.[40] To avoid his imminent deportation, Cherfi had publicly taken

sanctuary in the church after convincing the church community that he faced a serious risk of persecution should he be removed to Algeria. In the first known violation of sanctuary in Canada, Cherfi was arrested inside the church and taken to a police station, where he was immediately transferred to the custody of Canadian Border Service Agency (CBSA) officials. Several years prior, Cherfi had transited to Canada via the United States. Thus, to effect his deportation, CBSA officials drove him directly to the border, where he was turned over to US immigration authorities.[41]

The second incident occurred on February 17, 2007, when a police officer arrested Amir Kazemian inside an Anglican church in Vancouver. Kazemian, also an unsuccessful refugee claimant subject to a deportation order, had been in sanctuary in the church for almost three years. He alleged that his refugee claim had been wrongly denied, noting that his mother obtained refugee status in Canada (in a decision made by a different refugee adjudicator) on the basis of identical factual allegations. Curiously, there is no indication that the police set out to breach sanctuary in this case. In fact, it was Kazemian who called the police to the church to investigate a complaint about a client of an online business he ran from inside the church because the client had allegedly engaged in threatening behaviour. When the police officer arrived at the church and discovered the outstanding deportation order, however, she promptly arrested Kazemian. This move surprised Kazemian's supporters because other police officers had interacted with him at the church on prior occasions without incident.[42]

While the Cherfi and Kazemian cases might appear to suggest that sanctuary in Canada has become less successful than it was in the 1980s and 1990s, on closer inspection such a conclusion does not seem warranted. To appreciate why this is the case, it is important to understand that neither Cherfi nor Kazemian was ultimately returned to his country of origin.

In Kazemian's case, within two days of his arrest, which garnered national media attention, the Department of Citizenship and Immigration exercised its discretion to grant his prior request for Canadian Permanent Residence on humanitarian and compassionate grounds. Immigration officials, somewhat implausibly, claimed that the timing of the decision was not related to his arrest.[43]

In Cherfi's case, resolution was much longer in coming. When Cherfi was forcibly removed from sanctuary and deported to the United States he applied for US asylum based on risks of persecution he claimed to face in Algeria. US immigration officials initially denied his application.[44] He then appealed this decision to the Board of Immigration Appeals (BIA). Fifteen months after he was first deported from Canada to the United States, the BIA announced its decision: the initial decision was overturned and Cherfi was granted refugee status in the United States.[45] In other words, the BIA confirmed the legal argument made by the church that offered Cherfi sanctuary. That is to say, notwithstanding negative determinations within first instance refugee adjudication forums in both Canada and the United States, when given a meaningful opportunity to appeal these negative decisions, Cherfi was able to demonstrate that he did, in fact, meet the refugee definition.

Legality and Canadian Sanctuary Incidents

Though the Cherfi and Kazemian cases—the only two known instances where Canadian police have arrested migrants in sanctuary—do not necessarily indicate that sanctuary has become less successful in recent years, they do lead to the main issue that I would like to address regarding Canadian sanctuary practices, namely, that law plays a complex and contested role in these practices.

Cherfi's arrest and deportation generated significant public debate about sanctuary.[46] Judy Sgro, then Minister of Citizenship and Immigration, further fanned the flames of this controversy when, some months later, she called on churches to cease providing sanctuary to unsuccessful refugee claimants.[47] Sgro contended that sanctuary practices should be stopped because they violate Canadian law. As Sgro provocatively put it in the media, "Nobody is exempt from the law, no matter where you are."[48] Many Canadians, as shown by letters to the editor,[49] editorials,[50] and calls to national radio call-in shows,[51] concurred with Sgro's views.

Church groups, however, immediately responded to Sgro's comments by insisting that they would continue to offer sanctuary.[52] Moreover, many sanctuary supporters contested Sgro's simple characterization of sanctuary as unlawful, suggesting that the matter was more complicated. In particular, many noted that churches intervene only in cases where the Canadian government is itself in danger of breaching international law as a result of its failure to design a refugee determination system with adequate procedural safeguards to prevent refugees from being deported to face persecution.[53] As a spokesperson for the United Church of Canada noted in the national media: "The only time a church will ever put itself in the awkward place of offering sanctuary to someone who requests it is because we understand that Canada … is not living up to its international obligations."[54] Similarly, a press release prepared by an association of congregations providing sanctuary notes:

> "The real problem we want to address today is not sanctuary, but the flawed refugee determination system that fails to protect some refugees," said Archbishop Andrew Hutchison … [c]iting the lack of a merit-based appeal process in refugee determinations.[55]

Other supporters of sanctuary, however, suggested that it is precisely because of their distance from Canadian state law that sanctuary practices are valuable and should be maintained. For example, in an op-ed piece in the *National Post,* Father Raymond de Souza wrote:

> The custom of sanctuary is a vestige of an era when the absolute power of the state needed trimming. Our legal system today offers many protections and safeguards, but it is always good to be reminded there are places where the state does not go and where it does not assert its sovereignty.[56]

Or, as a caller to a national call-in radio show put it:

> [Sanctuary] is the earliest form … [of] civil disobedience … of communities, small groups religiously affiliated or otherwise … resist[ing] top-down applications of power … When peaceful people stand up and break the law … they almost always have very good reasons for doing so. And so the state should … look at its own processes to see what is causing this civil disobedience.[57]

Three Narratives about Law in Canadian Sanctuary Practices

Given the existence of these controversies over the legality of church sanctuary, it is not surprising that Randy Lippert, in his systemic study of Canadian sanctuary practices, concludes that law plays an important role for sanctuary providers.[58] To assess how Canadian sanctuary providers understand the relation between sanctuary and law, Lippert draws on the work of critical legal scholars Patricia Ewick and Susan Silbey, who identify three distinct narratives about how individuals interact with the law.[59] Lippert then examines how sanctuary providers draw on each of these narratives.[60]

In the first narrative, individuals are imagined to be "up against the law." That is to say, they experience the law as an oppressive force in their lives, a force that must be resisted through avoidance strategies because it is too powerful to be confronted directly.[61] According to Lippert, sanctuary providers frequently deploy this narrative. More precisely, they often present sanctuary as an extra-legal means through which marginalized migrants may avoid coercive deportation that flows from what they consider to be arbitrary and oppressive immigration laws. From this perspective, sanctuary is a form of civil disobedience to purportedly unjust laws.[62]

In the second narrative, individuals are understood to be "before the 'higher' law."[63] Here, "law" is not limited to officially declared state legal norms. Instead, law is understood to be a majestic and rational force that "stands outside and above social life."[64] According to Lippert, sanctuary providers resort to this narrative when they claim that the official refugee determination system produces results that not only are unjust, but also violate higher legal principles. Occasionally, the legal principles referred to are religious in nature—*i.e.* God's law, religious natural law, etc More frequently, however, the claim is that deportation to face human rights violations is a breach of international law. As a result, where the official refugee determination system fails to protect individuals who will be subject to human rights violations on deportation, churches may legitimately take measures to prevent deportation. In these circumstances, it is the state authorities—not the churches—who are at risk of violating the law.[65]

The third narrative involves individuals "(playing) with the law."[66] In this narrative, the law is imagined as a set of complex processes, each of which is fraught with error and subject to significant delays. Individuals encounter these processes and attempt to navigate them strategically. In other words, law is experienced as a kind of high-stakes game. According to Lippert, sanctuary providers demonstrate such an understanding of law when they assert that sanctuary aims not to undermine existing legal processes, but rather to delay deportation in order to provide migrants with extra time during which legal processes can run their course. The hope is that migrants will use this extra time to obtain more favourable outcomes.[67]

Sanctuary and Canadian State Law

While Lippert offers evidence to substantiate his claim that sanctuary providers deploy each of these three narratives,[68] his discussion of the role of law in sanctuary omits what one would think to be a critical consideration: he does not offer an extended analysis of the legality of sanctuary practices under state law. In fact, although he repeatedly asserts that sanctuary is illegal,[69] on only one occasion—in an endnote—does he briefly articulate the basis of its illegality. Here is that explanation in full:

> Sanctuary is illegal under Canada's Immigration Act and Criminal Code because it involves aiding and abetting as well as conspiracy. Since at least 1976, the Immigration Act has prohibited aiding and abetting migrants subjected to deportation orders and has stipulated fines of up to CDN$5,000 and two years imprisonment.[70]

Now, to be fair, journalists,[71] public officials,[72] and even sanctuary providers[73] do frequently contend, often without elaboration, that sanctuary practices violate Canadian state law. Moreover, Lippert's analysis of the role of law in sanctuary incidents aims primarily at understanding how sanctuary providers use and discuss law, rather than at inquiring into the validity—from the perspective of state law—of such

uses and discussions.[74] As a result, his decision not to offer an in-depth analysis of state law may be understandable. For our purposes, however, closer attention to the relevant provisions of state law that purport to render sanctuary illegal is warranted.

The Legality of Taking Sanctuary

There are two distinct questions to be asked regarding how state law may render sanctuary practices unlawful. The first relates to the lawfulness of taking sanctuary, and the second relates to the lawfulness of providing sanctuary.

With respect to the first question, whether it is lawful for migrants to *take* sanctuary, it must be recalled that migrants only enter sanctuary when they are vulnerable to removal from Canada.[75] In principle, then, migrants in sanctuary will usually be in violation of an enforceable removal order.[76] Section 48(2) of the *Immigration and Refugee Protection Act* [IRPA] states that: "If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately."[77] Moreover, the *IRPA*'s general offences provisions (s.124), makes the violation of s.48(2) an offence: "Every person commits an offence who … contravenes a provision of this Act."[78] The penalties for this offence include a possible fine of $50,000 and a term of imprisonment of up to two years.[79]

Of course, in order to commit an offence by remaining in Canada in breach of a removal order, the removal order in question must be legally valid. It is worth noting, however, that the validity of the removal order will frequently be contested in sanctuary incidents. As we have seen, most migrants in sanctuary are unsuccessful refugee claimants who contend that an error was made in their initial refugee determination. Indeed, the standard argument is not only that there was an error committed during the initial refugee claim, but also that, due to systemic procedural flaws in the refugee determination system—most notably the lack of an appeal—the error cannot be corrected through official channels.[80] In such circumstances a removal order might be invalid under state law for a variety of reasons, including breaches of international law[81] that has become part of Canadian law,[82] breaches of constitutional law,[83] or breaches of administrative law norms of procedural fairness.[84]

Lippert hints at such a possibility when he notes that sanctuary providers adopting the "before the (higher) law" narrative frequently make reference to international human rights law.[85] It is important to keep in mind, however, that assertions about the invalidity of a removal order need not take the form of a "higher" law argument. That is to say, the contention is not necessarily that when a removal order complies with state-based immigration law but breaches international law, the latter (representing higher law) should trump the former. That would be a scenario of conflict of law between two distinct legal orders. Rather, the argument may simply be that the removal order is invalid under domestic law—possibly, but not necessarily, by virtue of the incorporation of international law into domestic law. This is not a conflict of law scenario, but rather a straightforward question of legal validity from the perspective of a single (state-based) legal order.

Of course, while migrants in sanctuary may contend that their removal orders are invalid due to breaches of Canadian state law, and thus that they themselves are not breaching Canadian state law by remaining in Canada, it is unlikely that such arguments would be persuasive in court. Indeed, those in sanctuary have usually already exhausted all avenues for judicially reviewing their negative refugee determinations as well as the subsequent immigration procedures culminating in their removal orders.[86] Any available arguments regarding the legal invalidity of those procedures have, therefore, presumably already been rejected by courts by the time migrants enter sanctuary.[87]

To say that courts are unlikely to accept arguments regarding the invalidity of removal orders pertaining to migrants in sanctuary, however, does not mean that such arguments are unimportant to sanctuary practices. To the contrary, it is precisely in order to ensure that migrants can reasonably make such arguments that the church guidelines suggest that congregations provide sanctuary only to migrants who demonstrate that they qualify for refugee protection under Canadian state law, notwithstanding contrary findings in the official refugee determination system.[88] In other words, one of the reasons congregations resort to sophisticated screening mechanisms is to ensure that sanctuary can be justified on the basis that the state has misapplied and misinterpreted state law in particular cases. Indeed, this helps to explain why sanctuary providers place so much focus on systemic procedural flaws in the refugee determination system, and, in particular, on the argument that misinterpretations and misapplications of state law in particular cases cannot currently be corrected because of the lack of an effective appeal mechanism.[89] What this shows is that sanctuary is partly about individuals insisting that state institutions, including courts, do not have the final word on the interpretation of state law. Sanctuary practices are, to put this point in slightly different terms, premised on the notion that even the highest and most authoritative state institutions can—and sometimes do—get the law wrong.

In my view, then, in the event that migrants in sanctuary are charged with violating Canadian immigration law, and in particular with remaining in Canada in contravention of a removal order, courts are likely to dismiss arguments that

the underlying removal order is itself invalid under domestic law. However, arguments regarding the legal invalidity of removal orders (as well as the legal invalidity of negative refugee determinations that lead to removal orders) under domestic state law remain central to Canadian sanctuary practices.

The Legality of Offering Sanctuary

With regard to the second question that must be posed when assessing the legality of sanctuary—whether those who *provide* sanctuary violate Canadian state law—the matter is even more complex.

There is one provision of Canadian immigration law[90] that is most frequently cited as purportedly rendering sanctuary unlawful, s.131 of the *IRPA*. This section reads, in part:

> Every person who knowingly … *aid* or *abets* … a person to contravene section … 124, or who *counsels* a person to do so, commits an offence and is liable to the same penalty as that person.[91]

As we have seen, migrants in sanctuary arguably commit an offence under s.124 of the *IRPA* by remaining in Canada in violation of a removal order.[92] Thus, to the extent that sanctuary providers (1) counsel, (2) aid, or (3) abet the commission of that offence, the *IRPA* renders sanctuary providers liable to the same punishment as the migrants themselves: up to two years in jail and a $50,000 fine.[93]

Let us deal with counselling first. The Supreme Court has recently interpreted "counselling an offence" to mean "deliberate encouragement or active inducement of the commission of a[n] … offence."[94] The Court has also noted that the types of behaviour covered by counselling include: advising, recommending, procuring, bringing about, soliciting, asking repeatedly for, seeking, inviting, making a request, petitioning, urging, instigating, or persuading.[95] Now, it must be said that some sanctuary providers likely do counsel particular individuals to enter sanctuary and remain in Canada in violation of a removal order. Where they do so, they may be guilty of counselling the commission of an offence. Where, however, migrants take the initiative and decide to remain in Canada (whether in sanctuary or otherwise) in violation of a removal order without being deliberately encouraged or actively induced to do so, then sanctuary providers cannot be said to have counselled the commission of an offence. In other words, providing sanctuary does not necessarily entail counselling the commission of an offence. Rather, whether sanctuary providers engage in counselling the commission of an offence is a contingent, factually dependent matter.

Next, let us consider the immigration law provisions on aiding and abetting. Based on documents provided in response to an Access to Information Request, these provisions are at the heart of the legal theory according to which government officials apparently feel that sanctuary violates Canadian law. According to a document entitled "Avoiding Deportation by Claiming Sanctuary," prepared by the Department of Citizenship and Immigration (CIC):

> It is an offence pursuant to IRPA to aid and abet a person to contravene the Immigration and Refugee Protection Act. In practice prosecution is discretionary and therefore churches which actively assist persons in evading removal have, to date not faced charges.[96]

Similarly, a second document entitled "Sanctuary in Churches," also prepared by CIC, states: "Its [*sic*] is an offence pursuant to IRPA … to aid and abet a person to contravene the Immigration and Refugee Protection Act."[97]

In what sense, then, might providing sanctuary constitute aiding and abetting the offence of remaining in Canada in violation of a removal order? Because no sanctuary providers in Canada have ever been charged under these provisions, there is no case law to assist us in interpreting the provisions in this specific context. However, even setting aside the arguments regarding the validity of the underlying removal orders in sanctuary cases, it is not obvious that Canadian sanctuary providers in fact aid and abet the commission of an offence.

In examining whether sanctuary providers engage in aiding and abetting, the first step is to notice that while the terms are often used in tandem, they do, in fact, represent distinct offences. As Justice Cory put it in *R. v. Greyeyes:*

> The terms "aiding" and "abetting" are often used together in the context of determining whether persons are parties to an offence. Although the meanings of these terms are similar, they are separate concepts … To aid … means to assist or help the actor … To abet … includes encouraging, instigating, promoting or procuring the crime to be committed.[98]

Let us, therefore, consider "aiding" and "abetting" in turn.

With respect to "aiding," it is important to recall the distinction between "concealment" and "exposure" strategies in sanctuary practices.[99] Where a church conceals a person who is subject to a valid removal order so as to avoid detection by authorities, it seems clear that they are engaged in the offence of "aiding." However, where churches publicly declare that they have provided sanctuary to a particular migrant, adding that they will not take any steps to resist official enforcement activities, then it is not clear how they

are "aiding" the migrant to commit the offence of remaining in Canada in violation of a removal order. This is significant because many churches take active steps not only to inform state officials about their decision to accord sanctuary, but also to indicate that they have no intention of interfering with enforcement measures. The following comments by a sanctuary provider are typical in this regard:

> The decision was made right from the outset that this church would never be locked so that the authorities could never say that they were stopped from coming into the church. And we went on public record … that the church was always open and we were not going to stand in the way of the law.[100]

Other sanctuary providers echoed such an approach:

> We called the immigration people and said, "If you want to come in at any time, we will show you around …" If Immigration decided that they wanted to come pick [the person in sanctuary] up, they [can] just tell us. We'll hold the door [open] … We aren't going to stand in the way of an actual apprehension, but we are also going to grant her sanctuary."[101]

It is, moreover, important to note that, by virtue of legislation repealing all recognition of sanctuary as a matter of state law in the seventeenth century,[102] the fact that migrants may be located inside churches in no way diminishes the legal authority of Canadian police or immigration officials to enforce removal orders against them. If authorities choose not to enforce removal orders against migrants they know to be taking sanctuary inside churches, that decision is purely political (*i.e.* the government wishes to avoid the negative political reaction that media accounts of the use of police force inside a church inevitably engenders). Merely increasing the political cost of enforcing state law should not be interpreted to constitute "aiding"; otherwise anyone who seeks to bring public attention to unpopular enforcement measures would be guilty of "aiding" the commission of an offence.

It is worth noting one other sense in which sanctuary providers might be said to commit the offence of "aiding," namely by sheltering, feeding, and providing other services to individuals in sanctuary. This reasoning would run as follows: when people knowingly assist migrants subject to removal orders by providing them with food, shelter, or other services, they facilitate those migrants' ongoing violations of the removal orders.

There are, however, two problems with such reasoning. The first is that Canadian legislation does not explicitly prohibit "harbouring" individuals who are unlawfully present in Canada.[103] The equivalent US legislation, in contrast, prohibits not only "aiding"[104] but also "harboring"[105] aliens not lawfully entitled to enter or remain in the country. Indeed, in the 1980s several sanctuary providers were convicted of harbouring aliens unlawfully present in the US.[106] Moreover, as in the US, harbouring is recognized as distinct from "aiding" in Canadian law. For example, although the Canadian Criminal Code contains general provisions on "aiding,"[107] it also explicitly criminalizes "harbouring" those who commit specific crimes.[108]

There is, therefore, a distinction between "aiding" and "harbouring" under Canadian law. Because Canadian law does not explicitly prohibit harbouring migrants who are unlawfully present in the country, in my view, merely providing shelter, food, and other services to such migrants should not be considered "aiding" the commission of an offence.

The second reason why "aiding" should not be interpreted to cover providing food, shelter, and other services to migrants subject to a removal order is that such an interpretation would cast the net far too widely. Indeed, this interpretation would criminalize the work of organizations that run shelters for women without legal immigration status who are victims of domestic violence, legal clinics that offer services to undocumented migrants, schools that educate children who are not lawfully in the country, hospitals that provide emergency medical treatment to individuals without status, and even police services with "don't ask, don't tell" policies regarding immigration status. By providing services to migrants unlawfully present in Canada, such organizations arguably "aid" migrants to remain in Canada unlawfully, and thus could, in principle, be covered by the broadest possible reading of the "aiding" provisions. However, if Parliament intended to criminalize all humanitarian assistance provided to migrants who are in the country unlawfully, surely they would have done so explicitly.[109]

Rather than adopting an overly broad understanding of "aiding," a more reasonable approach would be to restrict "aiding" in this context to scenarios where the accused materially assists migrants to avoid detection or otherwise evade the enforcement of a valid removal order. In applying this restricted understanding of "aiding," it is important to recall that when churches offering sanctuary engage solely in exposure strategies, they, by definition, do not assist migrants avoid detection. Moreover, while they may increase the political cost of enforcing removal orders, they often nonetheless assert in advance that they will not physically interfere with the enforcement of removal orders. In my view, then, to the extent that sanctuary providers engage solely in exposure strategies,[110] they should not be understood to be "aiding" the commission of the offence com-

mitted by migrants who remain in Canada in violation of a valid removal order.

So much for "aiding," but what about the third possible grounds for the purported illegality of providing sanctuary, namely the immigration law provisions on "abetting"? Abetting in Canadian law is similar to the criminal law provisions on counselling an offence, in that abetting involves encouraging someone to commit an offence. As Justice Cory noted in *R. v. Greyeyes,* the Criminal Code provides that

> any person who abets any person in committing an offence is a party to that offence. In order to secure a conviction, the Crown must prove not only that the accused encouraged the principal with his or her words or acts, but also that the accused intended to do so.[111]

Similarly, in a frequently cited passage, the Alberta Supreme Court explains that, to secure a conviction on the charge of abetting, the accused

> must intend that the words or acts will encourage the principal. The criminal law is concerned with acts or words that are done or uttered with the *intent or for the purpose of counselling, encouraging, instigating or promoting the commission of the acts by the principal actor.* Accordingly before an accused person can be convicted the Crown must prove, beyond a reasonable doubt, both the words of encouragement and the intention of the appellant to so encourage.[112]

In other words, whether sanctuary providers engage in abetting rests on whether they encourage or instigate the commission of the principal offence (*i.e.* the migrant remaining in Canada in violation of a valid removal order).

As with my discussion of the offence of counselling above, whether sanctuary providers engage in abetting is a factually contingent matter. Some sanctuary providers likely do encourage migrants to remain in Canada in violation of a valid removal order. In other cases, however, migrants requesting sanctuary fully intend to remain in the country regardless of whether they succeed in obtaining sanctuary. If they are unable to obtain sanctuary, they will remain underground and try to avoid detection by immigration authorities. If, on the other hand, they succeed in obtaining sanctuary they will publicly move into the church and hope that the state chooses not to enforce the removal order against them. In such circumstances, it is unclear in what sense church communities that accede to requests for sanctuary can be said to "encourage" the commission of the principal offence of remaining in Canada in violation of a removal order.

Moreover, as with a broad interpretation of "aiding," there is a serious danger in adopting an expansive reading of "abetting" that would cover the kind of moral and political support that church communities offer migrants in sanctuary. Merely offering moral and political support to people who violate a valid law—rather than encouraging them to break the law—should not constitute "abetting" lest the net be too widely cast. In fact, an expansive interpretation of "abetting" would catch a significant number of influential public officials and community leaders, who regularly provide political assistance to migrants who are in Canada in violation of removal orders. Indeed, several sitting members of Parliament have offered political support to migrants in sanctuary, and would thus be vulnerable to prosecution under an excessively expansive understanding of "abetting."[113]

In my view, the best interpretation of "abetting" in the context of church sanctuary incidents is a restricted reading that would cover only circumstances where sanctuary providers actively encourage migrants to remain in Canada in violation of a valid removal order. Whether particular sanctuary providers in fact do so is a factually contingent matter; the mere accession to a request for sanctuary by a migrant should not, on its own, be understood to constitute "abetting."

The Final Word on Legality and Canadian Sanctuary Practices

All of this is to say, then, that those asserting that Canadian sanctuary practices are clearly illegal have not accorded sufficient attention to the relevant provisions of state law. A close assessment reveals that individuals taking sanctuary may appear to be in violation of a removal order, but churches providing sanctuary take measures to ensure that they can at least plausibly argue that these removal orders are legally invalid under state law—even if the state refuses to recognize this legal invalidity. Moreover, even if the removal orders in question are legally valid, and it is thus unlawful for individual migrants to remain in the country by *taking* sanctuary, it is still not at all obvious that faith-based communities publicly *providing* sanctuary necessarily violate state law.

In the end, while there is admittedly room for disagreement regarding the legality of Canadian sanctuary practices under state law, what is certain is that such practices involve a fascinating set of legal claims. In particular, sanctuary practices raise competing jurisdictional claims between multiple, partly overlapping, legal systems (*i.e.* domestic law, international law, ecclesiastic law). They also involve differing interpretations about how those multiple legal systems intersect, and what to do in the event of conflict—although

I hasten to add that one should not be too quick to presume that there are necessarily conflicts. Sanctuary practices also raise questions about who has the final word on interpreting norms within state-based legal systems, whether state institutions or those who are subject to them.

What I want to emphasize in all of this is that assessing the claims and questions raised by sanctuary practices requires close attention not just to broad political arguments, not just, that is to say, to how sanctuary is discussed and debated. Rather, close attention must also be paid to the precise legal norms that inhere in the legal systems at play in sanctuary incidents. Such close attention offers an intriguing picture of legal systems not only conflicting, but also interacting, and, at times, even mimicking one another in order to publicly highlight the internal inconsistencies in the opposing legal decision-making process.

Conclusion

Despite its formal abolishment as a matter of state law in the sixteenth and seventeenth centuries, church sanctuary continues to be practiced in Canada to this day. These practices have been surprisingly effective, not just in terms of preventing the *de facto* deportation of individual migrants who allege a fear of persecution (and in securing legal immigration status for such individuals), but also in terms of placing significant pressure on government actors to introduce policy changes that would bring the official refugee determination system into compliance with both domestic and international law.

Law plays a complex and controversial role in contemporary Canadian sanctuary practices. While public debates about the legitimacy of church sanctuary frequently turn on the issue of whether sanctuary is a justifiable form of civil disobedience to purportedly unjust laws, framing sanctuary in such terms is problematic on several levels. In particular, many of those involved in church sanctuary practices do not accept that these practices in fact violate state law, and thus that they can accurately be characterized as civil disobedience.

There are two distinct senses in which we can understand these arguments. The first, which relates to whether the state is acting lawfully in seeking to deport particular migrants, is especially relevant when those seeking sanctuary claim they face a risk of persecution abroad, notwithstanding a contrary finding in the official refugee determination system. Advocates of church sanctuary in such circumstances frequently suggest that deporting these individuals is unlawful, and that when faith-based communities take measures to prevent such unlawful deportations they are actually enhancing respect for the rule of law. Interestingly, these arguments usually involve procedural rather than substantive complaints about the refugee determination system. That is to say, sanctuary advocates suggest that, due to systemic procedural flaws in the Canadian refugee determination system, including the lack of an effective appeal mechanism to correct false negative determinations, some who do in fact qualify for refugee protection under state law are not recognized as such. Churches then suggest that it is only because of these procedural flaws that they must step in to prevent the unlawful deportation of such "genuine" refugees. In order to be in a position to plausibly make such assertions, churches are placed in the curious position of mimicking the decision-making processes mandated by state law in order to determine whether those seeking sanctuary do, in principle, qualify for refugee protection.

The second sense in which sanctuary providers may claim that they do not breach state law concedes that migrants in sanctuary themselves violate immigration law. They may go on to argue, however, that *publicly* providing sanctuary to such individuals is not unlawful because, so long as sanctuary providers do not conceal migrants from authorities and do not resist enforcement activities, they do not legally interfere with the enforcement of state immigration law. On this view, although the state may choose not to undertake deportation measures against individuals known to be inside churches because it wishes to avoid the political consequences that such measures would bring, churches offering sanctuary do not impede these deportation measures in a manner cognizable by state law. Of course, where sanctuary practices involve concealing migrants from detection by immigration officials, such reasoning would not apply.

Taken together, the argument that Canadian government officials offered in response to the incident involving Mohamed Cherfi (*i.e.* that churches should cease providing sanctuary because "no one is above the law") is based on an excessively narrow view of the legal claims involved. To be sure, there are rule-of-law arguments in favour of the notion that churches should not be allowed to exempt themselves from the application of Canadian immigration law. Moreover, it must be acknowledged that some Canadian sanctuary providers insist that sanctuary practices are effective precisely because they involve a deliberate and politically charged breach of purportedly unjust Canadian laws (*i.e.* civil disobedience). However, there are also plausible rule-of-law arguments in favour of sanctuary practices. Firstly, it is not clear that faith-based communities actually breach state law when they provide sanctuary to those who request it. Secondly, and in my view more importantly, sanctuary practices may actually uphold both Canadian and international law by establishing a *de facto* appeal mechanism to catch errors in the procedurally flawed official refugee determination system, thereby preventing Canada from

unlawfully deporting refugees to countries where they face persecution.

Notes

1. There are also sanctuary traditions in several non-Christian religions. For discussions of sanctuary in Islamic law, for example, see Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition* (Geneva: UNHCR, 1987); Khadija Elmadmad, *Asile et réfugiés dans les pays afro-arabes* (Casablanca: EDDIF, 2002).
2. For discussions of the history of sanctuary, see Kent Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Vancouver: University of British Columbia Press, 1996); Jan Hallebeek, "Church Asylum in Late Antiquity: Concession by the Emperor or Competence of the Church?" in E.C. Coppens, ed., *Secundum Ius: Opstellen aangeboden aan prof. mr. P.L. Nève* (Nijmegen, 2005) at 163–182, online: <http://dare.ubvu.vu.nl/bitstream/1871/9006/1/church+asylum.pdf>; J. Charles Cox, *The Sanctuaries & Sanctuary Seekers of Mediaeval England* (London: George Allen & Sons, 1911); Jorge Carro, "Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?" (1986) 54 U. Cin. L. Rev. 747; Matthew Price, "Politics or Humanitarianism? Recovering the Political Roots of Asylum" (2005) 19 Geo. Immigr. L.J. 277.
3. I use the term "state law" throughout this article to refer to official law emanating from state-based legal orders. Some readers may find this unusual, given that "law" is usually used without a qualifier to refer to official law emanating from state-based legal orders. However, the qualifier is necessary because this article deals in part with norms emanating from non-state institutions that seem to share certain legal properties (*i.e.* canon law). Nonetheless, for the limited purposes of this article, little turns on whether non-state norms can properly be termed "law," and readers who are uncomfortable with the concept of non-state law should feel free to adopt some other term. For a general discussion of when non-state institutions may produce what some scholars view as legal norms, see Boaventura de Sousa Santos, *Toward a New Legal Common Sense,* 2nd ed. (London: Butterworths, 2002) (see especially at 89–98).
4. For example, sanctuary was abolished in France as a matter of state law in 1515. Price, *supra* note 2 at 291. In the UK, sanctuary was abolished in 1623. *Statute 21,* James I, Ch. 28 s.7 (1623), cited in Kathleen Villarruel, "The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values" (1987) 60 Southern Calif. L. Rev. 1429 at 1433. See also Carro, *supra* note 2 at 766.
5. Susan Coutin, "Smugglers or Samaritans in Tuscon, Arizona: Producing and Contesting Legal Truth" (1995) 22 American Ethnologist 549 [Coutin, "Samaritans"]; Phillippe Ségur, "L'asile religieux dans la modernité" (1997) 53 Migrations Société 61; Verena Mittermaier, *Church Asylum in Germany* (Berlin: German Ecumenical Committee on Church Asylum, 2007), online: <http://www.kirchenasyl.de/1_start/English/Church%20asylum%20in%20Germany.pdf>.
6. Only two reported sanctuary incidents in Canada, both of which occurred within the last two years, have involved non-Christian faith-based communities. The first incident involved a Montreal mosque, and the second involved a Hindu temple in Vancouver. Lisa-Marie Gervais, "L'imam Jaziri s'enfermera dans sa mosquée pour éviter d'être expulsé" *Le Devoir* (16 December 2006) A4; Jane Armstrong, "Refugee seeks asylum in Sikh temple" *The Globe and Mail* (9 July 2007) S1.
7. For a review of Canadian sanctuary practices see Randy Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2005) [Lippert, *Sanctuary*]; David Matas, "Canadian Sanctuary" (1988) 8:2 Refuge 14; Charles Stastny & Gabrielle Tyrnauer, "Sanctuary in Canada" in Vaughan Robinson, ed., *The International Refugee Crisis: British and Canadian Responses* (London: Macmillan, 1993).
8. Lippert, *Sanctuary, supra* note 7.).
9. *Ibid.* at 15.
10. *Ibid.*
11. *Ibid.*
12. *Ibid.* at 1.
13. *Ibid.* at 35–37.
14. *Ibid.* at 37.
15. *Ibid.* at 38.
16. *Ibid.* at 40. In one case, however, the police arrested migrants taking sanctuary in a self-declared "church" that lacked official recognition. *Ibid.* at 40, n96.
17. *Ibid.* at 40.
18. *Ibid.* at 40–41. The authority to make exceptions from the regular immigration procedures flows from *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 [*IRPA*], s.25.
19. Lippert, *Sanctuary, supra* note 7 at 40–41.
20. The average duration of sanctuary incidents was five months, but a significant minority lasted over a year. *Ibid.* at 27.
21. According to information obtained from the IRB through an Access to Information Request, there were 8,015 applications for leave to judicially review IRB refugee determinations in 2003. Leave was granted in 449 (5.6 per cent) of these applications, and judicial review was ultimately successful in only 142 cases (1.8 per cent). IRB, Letter in Response to an Access to Information Request by the Author (2 May 2008) IRB File# A-2008-00001 (on file with author). For similar figures for 2001, see John Frecker, *Immigration and Refugee Legal Aid Cost Drivers: Final Report* (Ottawa: Department of Justice, 2002) at 84.
22. For example, Pre-Removal Risk Assessments, a final opportunity immediately prior to deportation to present new evidence that one faces a risk in one's home country, have a

success rate of 3 per cent in recent years. Benjamin Dolin & Margaret Young, *Background Paper: Canada's Immigration Program* (Ottawa: Parliamentary Information and Research Service, 2004) BP190E, at 16.

23. See generally Lippert, *Sanctuary*, *supra* note 7 at 68–75.
24. Michelle MacAfee, "Canadian churches follow Old Testament tradition in giving haven to refugees" (10 August 2003) *Canadian Press Newswire* (LEXIS).
25. United Church of Canada, *Sanctuary for Refugees?: A Guide for Congregations* (Toronto: United Church of Canada, 2004).
26. 189 U.N.T.S. 137 (adopted 28 July 1951; entered into force 22 April 1954).
27. United Church of Canada, *supra* note 25 at 7.
28. See, for example, Presbyterian Church in Canada, *Sanctuary: A Statement and Guidelines for Congregations* (2006) Report Presented to the 132nd General Assembly, online: <http://www.presbyterian.ca/justice/reports/0506-overture14-sanctuary.pdf> at 12.
29. See text accompanying notes 17 and 18.
30. Lippert, *Sanctuary*, *supra* note 7 at 27.
31. See *e.g.* Steve Lambert, "Churches protect refugee claimants" *The Toronto Star* (27 November 2006) C11 ("'There are probably eight to 10 different ways of (appealing) a decision once it's made,' said Mary Jo Leddy of the Ontario Sanctuary Coalition. 'But the sum of all of them doesn't equal a really serious appeal on the merits'"); Ingrid Peritz, "Deportation orders stayed in two sanctuary cases" *The Globe and Mail* (15 December 2004) A15 ("'If there were an actual appeal mechanism, most of these cases wouldn't have to consider sanctuary,' said Montreal lawyer Rick Goldman"); Maria Jiménez, "Historic crypt becomes sanctuary for failed refugee claimant" *The Globe and Mail* (25 September 2004) A6 ("Mary Corkery, executive director of KAIROS, an ecumenical social justice organization representing 11 Canadian churches and church organizations, [said] … 'there is … an urgent issue at stake: the lack of merit-based appeals for refugees'").
32. *IRPA, supra* note 18, ss.110–111 & 171.
33. Among the provisions that were brought into force was one that reduced the number of adjudicators at refugee hearings. The prior practice was for two adjudicators to hear refugee claims, only one of whom needed to be persuaded in order for the claimant to receive refugee protection. The current legislation, however, makes single-adjudicator hearings the standard practice. *Ibid.,* s.63.
34. Order Fixing June 28, 2002 as the Date of the Coming into Force of Certain Provisions of the Act, SI/2002-97, C. Gaz. 1997.II.1637.
35. United Church of Canada, *supra* note 25 at 5.
36. Interfaith Sanctuary Coalition, "Why do People Turn to Sanctuary?" (9 October 2003), online: <http://www.ccrweb.ca/whysanctuary.htm>.
37. See *e.g.* Inter-American Commission on Human Rights, "Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System" (28 Feb 2000) OEA/Ser.L/V/II.106; Canadian Council for Refugees, "Refugee Appeal Division Backgrounder" (December 2006), online: <http://www.ccrweb.ca/RADbackgrounder.pdf>; Amnesty International Canada, "Canada: Refugees—No Recourse to Fair Appeal," online: <http://www.amnesty.ca/take_action/actions/canada_fair_appeal.php>.
38. *Bill C-280, An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)*, 1st Sess., 39th Parl., 2007 (as passed by the House of Commons 30 May 2007).
39. See *e.g. House of Commons Debates,* 39th Parliament, 1st Session, No.098 (29 January 2007) at 1105 (Nicole Demers); *House of Commons Debates,* 39th Parliament, 1st Session, no. 098 (29 January 2007) at 1140–1150 (Bill Siksay); *House of Commons Debates,* 39th Parliament, 1st Session, No.122 (2 March 2007) at 1355 (Paul Dewar); *House of Commons Debates,* 38th Parliament, 1st Session, no. 010 (18 October 2004) at 1420 (Meili Faille); *House of Commons Debates,* 37th Parliament, 3rd Session, no. 014 (19 February 2004) at 1450 (Madeleine Dalphon-Guiral).
40. Cherfi was also subject to an outstanding warrant for allegedly violating bail conditions imposed in relation to a minor altercation at a public demonstration. Donna Sinclair, "The Cherfi arrest: Sanctuary violated" in *The United Church Observer*, online ed. (April 2004), online: <http://www.ucobserver.org/archives/apr04_nation.shtml>.
41. Sinclair, *supra* note 40; Lippert, *Sanctuary*, *supra* note 7 at 166ff; Isabelle Porter, "Le Canada expulse le militant algérien Mohamed Cherfi" *Le Devoir* (6 March 2004) A5.
42. Petti Fong, "Iranian refugee granted asylum" *The Globe and Mail* (20 February 2007) A12. See also "Iranian refugee Amir Kazemian to be allowed to remain in Canada" *Diocese of New Westminster News* (14 March 2007), online: <http://www.vancouver.anglican.ca/News/tabid/27/ctl/ViewArticle/ArticleId/450/mid/486/Default.aspx>.
43. *Ibid.*
44. Ingrid Peritz, "Algerian arrested in church denied asylum in U.S." *The Globe and Mail* (23 October 2004) A24.
45. Isabelle Porter, "Les États-Unis donnent raison à Cherfi" *Le Devoir* (3 June 2004) A4 [Porter, "Cherfi"].
46. See *e.g.* Louise Boivin, "100 demonstrate for deported man" *The Montreal Gazette* (7 March 2004) A5; Louise-Maude Soucy, "Le mouvement d'appui à Cherfi prend de l'ampleur" *Le Devoir* (10 March 2004) A5; "Refugee claimant's supporters demand his return from U.S." *The Toronto Star* (10 March 2004) A7; Bill Power, "Quebec eviction worries Halifax woman" *The [Halifax] Chronicle-Herald* (11 March 2004) B1; Maxime Bergeron, "Les défenseurs de Cherfi exigent une enquête publique" *La Presse* (11 March 2004) A6; Michel Vastel, "Ça s'est passé au Canada … et à Québec" *Le Soleil* (11 March 2004) A17; Peter McKnight, "Yes, the violation of sanctuary is a big deal" *The Vancouver Sun* (22 March 2004) A8.

47. Jim Bronskill, "Sgro to urge churches to stop practice of harbouring refugee claimants" *The Globe and Mail* (26 July 2004) A4.
48. *Ibid*.
49. See *e.g.* Allan Perry, "Churches should butt out," Letter to the Editor, *The Montreal Gazette* (3 August 2004) A14; Steven Taylor, "Scrap sanctuary," Letter to the Editor, *The Globe and Mail* (11 August 2004) A12.
50. See *e.g.* Editorial Board, "Churches no place for refugee appeals" *The Edmonton Journal* (27 July 2004) A12; James Bissett, "Forget churches: Reform the refugee system" *The National Post* (28 July 2004) A19 ("The Minister is right, of course: Churches have no business meddling in areas where they have no expertise or jurisdiction").
51. "Is Church Sanctuary Outdated," *Cross Country Checkup,* CBC Radio 1 (1 August 2004), online: <http://www.cbc.ca/checkup/archives04.html> [*Cross Country Checkup*]:

    David: "Church sanctuary is … flat out illegal … I'm outraged that my church … is looking at sanctuary."

    John: "Religious groups should not be above the law."

    Ian: "[Sanctuary] fundamentally attacks two of our basic concepts of how we govern ourselves. One is the rule of law, and the other is the separation of church and state."
52. Jennifer Chen, "Churches will give refugees sanctuary until 'flawed' system fixed, leaders say" *The Ottawa Citizen* (27 July 2004) D3; Nicholas Kohler, "Churches want dialogue with Sgro: Will continue to offer sanctuary to refugees" *The Montreal Gazette* (27 July 2004).
53. See *e.g.* Robert Fleury, "Le droit d'asile des réfugiés" *Le Soleil* (29 July 2004) A15; Sean Rehaag, "No one is above the law on refugees" *The Toronto Star* (30 July 2004) A19; Catherine Dauvergne, "Why Judy Sgro is just plain wrong" *The Globe and Mail* (2 August 2004) A11; Mitchell Goldberg, "Why Sanctuary is Necessary" *The Montreal Gazette* (20 August 2004) A21.
54. Cited in Editorial Board, "Fix the system, leave churches alone" *The Toronto Star* (3 August 2004) A14.
55. KAIROS, "Refugees and Sanctuary in Canada: The Churches Respond," News Release (4 August 2004), online: <http://www.kairoscanada.org/e/media/press/prRefugees-Sanctuary040804.asp>.
56. Father Raymond de Souza, "No place left to hide: With the end of sanctuary, the state will be everywhere" *The National Post* (27 July 2004).
57. *Cross Country Checkup*, *supra* note 51 (Craig).
58. Lippert, *Sanctuary*, *supra* note 7 at 141–164.
59. Patricia Ewick & Susan Silbey, *Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), cited in Lippert, *Sanctuary, supra* note 7 at 141.
60. Lippert, *Sanctuary, supra* note 7 at 141.
61. *Ibid.*
62. *Ibid*. at 143–150.
63. *Ibid.* at 150.
64. *Ibid.* at 141.
65. *Ibid.* at 150–154.
66. *Ibid*. at 141.
67. *Ibid*. at 154–162.
68. *Ibid*. at 143–162.
69. *Ibid.* at 146, 150. See also Randy Lippert, "Sanctuary Practices, Rationalities, and Sovereignties" (2004) 29 *Alternatives* 535 at 548; Randy Lippert, "Rethinking Sanctuary: The Canadian Context, 1983–2003" (2005) 39 International Migration Review 381 at 398.
70. Lippert, *Sanctuary, supra* note 7 at 146, n.24.
71. Block, "Sanctuary and the defiant churches" *Maclean's* (30 January 1984) 43, cited in *Ibid.* at 146, n.24.
72. Jim Bronskill, "Sanctuary is 'breaking the law': Government memo says churches wrong to harbour refugees facing deportation" *The Toronto Star* (7 March 2005) A13.
73. Lippert, *Sanctuary, supra* note 7 at 146, n.24 & 149. See also, United Church of Canada, *supra* note 25 at 6, 12 & 20–24; Presbyterian Church in Canada, *supra* note 26 at 8.
74. This is a consequence of the "discourse analysis" methodology that Lippert adopts. Lippert, *Sanctuary, supra* note 7 at 10.
75. This is built into Lippert's definition of sanctuary. See text accompanying note 10.
76. For details regarding when removal orders come into force, see *IRPA*, *supra* note 18, s.49.
77. *Ibid.*, s.48(2).
78. *Ibid.*, s.124(1).
79. *Ibid.*, s.125.
80. See text accompanying notes 52–54.
81. Under international refugee law, the prohibition on deportation to face persecution applies to all those who meet the refugee definition, not just to individuals whom states recognize as meeting the refugee definition. James Hathaway, *The Rights of Refugees under International law* (Cambridge: Cambridge University Press, 2005) at 158 (see especially n.17). As a result, it breaches international refugee law to deport a person who meets the refugee definition, but who was not recognized as such because of errors during the refugee determination process.
82. Canada's immigration legislation contains an interpretive clause that requires the legislation to be applied and interpreted in compliance with Canada's international legal obligations. *IRPA, supra* note 18, s.3(3)f.
83. Deportation in circumstance where a person may face a risk of persecution implicates the constitutional right to life, liberty, and the security of the person. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.
84. Administrative decisions that have serious impacts on people's lives are subject to heightened norms of procedural fairness. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
85. See text accompanying notes 65 & 66.
86. Indeed, guidelines prepared by several denominations suggest that congregations should verify that all administrative and legal recourses have been exhausted prior to granting

sanctuary. United Church of Canada, *supra* note 25 at 7; Presbyterian Church in Canada, *supra* note 28 at 12.

87. The rules regarding judicial review, however, complicate the matter. On the one hand, it is possible to apply to the Federal Court for leave to judicially review virtually any decision made by immigration officials. *IRPA, supra* note 18, s.72–74. In other words, in principle, migrants facing removal have legal forums in which to contest the legal validity of both their refugee determinations and their removal orders. On the other hand, however, the opportunities to challenge the legal validity of decisions made in the immigration and refugee law setting are more restricted than in other areas of law. For example, Federal Court first-instance decisions relating to judicial review in this setting cannot be appealed unless the judge at first instance certifies that a "serious question of general importance" is raised in the case. *IRPA, supra* note 18, s.74(d).
88. See text accompanying notes 25–28.
89. See text accompanying notes 35–36.
90. In addition to immigration law, there are criminal law provisions which might be relevant. Most notably, the Canadian Criminal Code prohibits wilful obstruction (*i.e.* interfering with a police officer in the course of his or her duties). *Criminal Code*, R.S.C. 1985, c. C-46, s.129. However, as we will see below, because there is no legal impediment to police officers entering a church it is not clear in what way a church offering sanctuary actually interferes with a police officer unless some additional steps are taken (*e.g.* concealing the individual in sanctuary or physically preventing police officers from entering the church). See notes 99–109 (and accompanying text).
91. *IRPA, supra* note 18, s.131 (emphasis added).
92. See text accompanying notes 75–89.
93. *IRPA, supra* note 18, s.124(1)(a).
94. *R. v. Hamilton,* 2005 SCC 47, [2005] 2 S.C.R. 432 at ¶29.
95. *Ibid.* at ¶21–23
96. Citizenship and Immigration Canada, Letter in response to an Access to Information Request by the author (8 June 2005) CIC File#: A-2004-02972/aa (on file with author) at 41.
97. *Ibid.* at 114.
98. [1997] 2 S.C.R. 825 at ¶ 26 (per Cory J).
99. See text accompanying notes 9–10.
100. Lippert, *Sanctuary, supra* note 7 at 146.
101. *Ibid.* (emphasis added).
102. See note 4 (and accompanying text).
103. The only Canadian immigration law provision explicitly addressing "harbouring" is found in the section of the *IRPA* dealing with human trafficking, a context that is not generally relevant to sanctuary incidents. *IRPA, supra* note 18, s.118.
104. 18 USCS § 2.
105. 8 U.S.C. §1324.
106. *United States v. Aguilar,* 883 F.2d 662 (9th Cir. 1989) at 667.
107. *Criminal Code, supra* note 89, s.21(1)(b) & (c).
108. *Ibid.*, s.83.23.
109. In doing so they would be following in the footsteps of the US House of Representatives, which recently tried—and failed—to criminalize humanitarian assistance provided to unlawfully present aliens. U.S., Bill H.R.4437, *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,* 109th Congress, 2005, s.202. This Bill was subsequently defeated in the Senate.
110. It is worth noting that according to Lippert, sanctuary providers sometimes resort initially to concealment strategies, and only later to exposure strategies. Lippert, *Sanctuary, supra* note 7 at 15–16. In such circumstances they are more likely to violate Canadian law.
111. *R. v. Greyeyes*, *supra* note 97 at ¶38.
112. *R. v. Curran*, [1978] 1 W.W.R. 255 at ¶ 23 (Alta. S.C. (A.D.)) (emphasis added).
113. Bruce Campion-Smith, "Refugees 'freed' from church havens" *The Toronto Star* (15 December 2004) A2; Eva Salinas, "His church—another version of prison" *The Globe and Mail* (17 June 2006) S1; "Rallies held to protest man's deportation to India" *The Globe and Mail* (18 August 2007) S2; Jane Armstrong, "Ottawa grants refugee claimant 60-days" *The Globe and Mail* (20 August 2007) A5.

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Wither Sanctuary?

Randy K. Lippert

Abstract

Features of all fifty sanctuary incidents occurring in Canada from 1983 to early 2009 are described and recent trends identified. The duration of sanctuary incidents has increased dramatically, the success rate has declined, and no new incidents have commenced in more than one and a half years. Sanctuary's apparent decline in its "exposure" form as an effective resistance strategy is likely related to several factors, including less interest among mass media, the federal government's adoption of a more authoritarian approach toward immigration and refugee policy, and the rise of support for a merit-based legal appeal for failed refugee claimants evident in sanctuary discourse.

Résumé

Les caractéristiques des cinquante cas de sanctuaire survenus au Canada de 1983 au début 2009 sont décrites et les tendances récentes identifiées. La durée des cas de sanctuaire a augmenté de façon spectaculaire, leur taux de réussite a diminué, et aucune nouvelle demande d'asile n'est survenue depuis plus d'un an et demi. La baisse apparente de l'efficacité du refuge dans sa forme « médiatisée » comme stratégie de résistance est probablement liée à plusieurs facteurs, dont une baisse de d'intérêt parmi les médias de masse, l'adoption par le gouvernement fédéral d'une approche plus autoritaire à l'égard de politiques sur l'immigration et les réfugiés ainsi qu'une augmentation, évidente dans le discours entourant la notion du sanctuaire, de l'appui pour le recours juridique fondé sur le mérite pour les demandeurs d'asile déboutés.

Introduction

Emerging in the early 1980s across the West, sanctuary has entailed providing protection in church buildings to migrants facing imminent arrest and deportation, often for extended periods, and making migrants' plight known to the public and state authorities. By the early 2000s in Canada, this "exposure" form of sanctuary had become a *de facto* last court of appeal for some failed refugee claimants facing deportation. Yet, despite its relative success in securing status or reprieves for migrants in peril, more recently this form of sanctuary is showing signs of withering.[1] One aspect cohering with this development, and revealing both of how sanctuary is changing and its possible future, is the rise of the merit-based appeal as an emergent goal in the discourse of sanctuary providers.

This article has two purposes. First, it seeks to update a comprehensive 2005 study of Canadian sanctuary that explored all thirty-six sanctuary "exposure" incidents from 1983 to 2003.[2] Another fourteen sanctuary incidents have commenced since and remain unexamined in relation to this earlier study's findings. The aim in the first section of the paper, then, is to provide a brief but up-to-date sketch of twenty-six years of sanctuary in Canada and discern if and how this phenomenon is changing. Thus, I describe basic features and trends of the Canadian sanctuary phenomenon to April 30, 2009. While many features of sanctuary incidents remain largely unchanged after 2003, I argue the sanctuary phenomenon is nonetheless mutating in several ways and most significantly—in its "exposure" form at least—is showing signs of withering away as a resistance strategy. Thus, despite increased awareness of sanctuary as a possible resort and its past success in securing positive legal outcomes, in recent years the duration of sanctuary incidents has increased dramatically; the success rate has noticeably declined from previous levels; and no new incidents have occurred in more than a year and a half. The final part of the article, consistent with these findings, aims to further explore how and why sanctuary is changing. Thus, the second purpose of this article is to consider possible

reasons for identified trends and their implications for sanctuary's possible future. I argue that sanctuary's apparent decline in its "exposure" form is likely due to several factors, including less interest among mass media and the federal Conservative party's rise to power in 2006, accompanied by a more authoritarian approach to managing immigration and refugee policy than its Liberal government predecessor. However, the rise of support for a merit-based legal appeal for failed refugee claimants in sanctuary discourse is also significant in suggesting where sanctuary might be leading and is therefore paid special attention in this section. To accomplish both purposes, I draw on extensive empirical research on sanctuary occurrences in Canada from 1983 to early 2009.

Previous Sanctuary Research

Contemporary sanctuary activities were manifest in the United Kingdom as early as the late 1970s.[3] Through the 1980s, 1990s, and 2000s mass media reported sanctuary activity across Western Europe, including in France, Germany, Belgium, the Netherlands, Norway, Switzerland, and Finland, events that have yielded surprisingly little scholarship (but see this issue). In contrast, following its ascendancy beginning in the early 1980s in the US, sanctuary received extensive study.[4] Yet, despite the large corpus of US work stemming from several disciplines, much remains unknown about aspects of this phenomenon, including *how* and *why* sanctuary in a specific form mutates or withers over time. In Canada, prior to the early 2000s, scholarship on sanctuary was limited to several brief, obscure articles.[5] The only two extended accounts of singular Canadian sanctuary occurrences in the early 1990s were authored by religious authorities.[6] Due in part to this dearth of research, in late 2005 a comprehensive study of sanctuary incidents was published.[7] Overall, sanctuary activity was found to consist mostly of local efforts separated socially and geographically from one another,[8] rather than a discernible and integrated religious movement spanning regions or the nation.

This 2005 study and other previous scholarship distinguish between sanctuary as "exposure" and as "concealment."[9] Exposure entails purposively gaining attention of mass media, the public, and political authorities at local, regional, and/or national levels; concealment is essentially about avoiding such attention. Sanctuary as exposure is the main focus here; the full extent and features of instances of concealed sanctuary—though worthy of study—remain unknown, a point to which I return in the conclusion.[10] That said, in Canada the basic distinction has proven permeable. The 2005 study showed that incidents in Montreal, Toronto, Edmonton, and other Canadian cities entailed concealing practices within exposure strategies. Nonetheless, for this article's purposes a "sanctuary incident" is defined as an occurrence involving at least one migrant entering physical protection for at least one day to avoid deportation coupled with a strategic effort to concurrently expose this fact to mass media, broader publics, and political authorities. This definition throws into relief the kinds of practices *not* considered to be "sanctuary incidents" here. Occasionally publicized promises to grant sanctuary by church officials have not been followed by action,[11] in which case migrants have avoided having to enter the physical protection of sanctuary but nonetheless have achieved a governmental reprieve or received legal status seemingly as a consequence. As well, since 1983 two instances of concealed sanctuary have been "exposed" after the fact, which is to say that exposure was not a strategy to aid those threatened with expulsion at the moment or in the immediate aftermath of granting sanctuary.[12] Several churches have also assisted migrants to fight deportation using tactics closely associated with sanctuary efforts, for example, protesting, publicly proclaiming support, or paying legal fees,[13] but without providing physical protection from authorities. These three sets of circumstances—threatened sanctuary, concealed sanctuary lacking purposeful exposure, and anti-deportation efforts of churches not entailing physical protection—are presently either unknowable or comparatively rare and are therefore excluded from consideration as incidents in this article.

Research Procedures

Research procedures necessarily overlap with those in the 2005 study. No organization or group collects and publishes comprehensive information about sanctuary incidents as defined above. Therefore, Internet search engines covering news and refugee-advocacy-related websites and indexes covering major newspapers and national popular and church periodicals from the mid-1970s to early 2009 were exhaustively searched. Providing the most comprehensive, up-to-date portrait of sanctuary possible therefore required sifting through a large volume of material to discern texts documenting sanctuary events. Beginning in the late 1990s, temporary websites had been erected that exposed migrants' predicament and instructed virtual visitors on how to support the sanctuary effort. These served as a further abundant data source. As well, forty-eight open-focused interviews with supporters intimately involved in sanctuary efforts were conducted from 2001 to 2007. These persons included clergy, retirees, small business owners, labour union officials, lawyers, and medical professionals who were members of churches or local communities in which the incidents occurred.[14] These interviews entailed questions on incidents' origins, organization, and outcomes; provided detail unavailable elsewhere; and facilitated access

to unpublished documents assembled by sanctuary providers from twelve incidents, including four of longer duration. Providers' documents included correspondence, leaflets, press releases, chronologies, petitions, texts of relevant legal decisions, and minutes of support group meeting. For this article, new data pertaining to incidents occurring from 2004 to April 30, 2009, were integrated and compared with existing data from 1983 to 2003.

Part One: A Brief Portrait of Twenty-Six Years of Sanctuary in Canada

In what follows I briefly update several basic features of sanctuary in Canada documented in the 2005 study: religious denomination, church location, recipients' characteristics (*i.e.,* age, sex, number, and nationality), legal outcome, duration, and prevalence (*i.e.,* year of commencement). I also identify key trends regarding several of these aspects since 2003.

Religious Denominations and Church Locations

To date, sanctuary has involved Christian denominations almost exclusively. Of the fifty incidents, eight (13 per cent) involved Anglican churches, twelve (24 per cent) United, fourteen (30 per cent) Catholic, and fifteen (30 per cent) involved other Christian denominations. This was expected given these three denominations' dominance, and that of Christian churches generally, within Canadian communities. The remaining sanctuary incident involved a Sikh and a Hindu temple.[15] Several cities have experienced a disproportionate number of sanctuary incidents, including ten in Montreal (20 per cent), nine in Vancouver (18 per cent), five in each of Winnipeg (10 per cent) and Ottawa (10 per cent), and three in each of Calgary (6 per cent) and Toronto (6 per cent). Not surprisingly, these are cities where refugee determination hearings take place,[16] where refugee claims are consistently rejected, and therefore where persons most likely to be later granted sanctuary reside. The remaining fifteen incidents have occurred in smaller centres across Canada (no incidents have occurred in Saskatchewan, Prince Edward Island, or northern jurisdictions).

Recipients

A total of 288 migrants now have been granted sanctuary across fifty incidents. The overall average age of adult migrants at the centre of incidents and for which information is available is 37.1 (N=61). This means migrants' age has increased markedly, from 34.7 (N = 47) before 2003, to 45.1 (N = 14) afterward. This is tantamount to a shift from young adult to middle-aged adult migrants receiving sanctuary. In terms of sex, twenty-five incidents (50 per cent) involved migrants of both sexes, eighteen (36 per cent) involved males only, and seven (14 per cent) females only. Almost half the incidents (twenty-three) involved only one migrant. The remaining incidents involved two (6 per cent), three (6 per cent), four (6 per cent), five (10 per cent), and greater than five (14 per cent) migrants. Together these findings reveal, as noted in the 2005 study, that the most typical incident involves a single adult male. This is evinced in seventeen incidents (34 per cent). Significantly, almost half this total (eight, or 16 per cent of all incidents) has occurred since 2003, and although there remains some variability across the occurrences, this kind of incident has become decidedly more typical. Thus, while variability in the sex and number of sanctuary recipients continues, it has declined since 2003. Extreme variability remains evident, however, in the nationality of those granted sanctuary, whereby thirty-two nationalities are represented in the fifty incidents, with Salvadoran (four) being the most prevalent. This statistic remains consistent with the 2005 study and thus with the localized, contingent character of sanctuary provision in Canada. It remains largely incongruous with conceiving sanctuary as an organized social movement reacting to failed refugee claimants from specific regions or nations.

Legal Outcomes and Duration

In all fifty incidents, arrest[17] and deportation of the migrants concerned was effectively delayed for at least several days. This time permitted church, community, and political support to grow through carefully managed public exposure of migrants' plight; funds to be raised through donations and other activities to retain superior legal representation and pay for private sponsorship applications, "humanitarian and compassionate" claims, and additional Federal Court appeals; and often some level of negotiation with immigration authorities and the Minister to commence. As well, as shown in Table 1, a majority of the fifty sanctuary incidents manifesting in Canadian communities over the past twenty-six years have yielded favourable legal outcomes for migrants, eventually leading to immigrant status or comparable legal arrangements (*e.g.,* a long-term permit to remain in Canada). Excluding the five incidents involving mixed, undecided, and unknown outcomes, 73.3 per cent (thirty-three of forty-five) yielded legal status for the migrants involved.

TABLE 1: Legal status outcome of migrants granted sanctuary, 1983–(Apr. 30) 2009

Outcome	N	%
Permanent/long-term legal status expected/gained	33	66.0
Deported/went underground	12	24.0
Undecided/unknown	4	8.0
Some gained status/some deported	1	2.0
	50	100.0

The thorny path to securing permanent legal status or long-term permission to remain in Canada varied significantly across the incidents too. In almost one-third of the incidents sanctuary recipients were required to temporarily and "voluntarily" exit sanctuary (and Canada), legally enter nations such as the US and then reapply for immigrant status there, or re-enter the refugee determination process after a designated period consistent with Canada's immigration regulations at the time. In these instances this was accomplished usually through Department of Immigration's promises of special or expedited consideration of applications. Such promises remained unofficial and verbal to allow immigration and relevant political authorities to avoid declaring a general amnesty or establishing precedent affecting other migrants in similar dire situations. Other sanctuary cases ended with the granting of a Minister's Permit or a Federal Court ruling. The remaining incidents have concluded with migrants exiting to "go underground" and live "illegally"; surrendering to immigration officials; undergoing police arrest and deportation; or several of these outcomes.

Recent Trends

There is an overall average of two incidents commencing per year (N = 50). Yet, suggestive of sanctuary's decline as a resistance strategy, as of April 30, 2009, no new incidents have appeared for twenty-two months (the Singh incident involving a Sikh and a Hindu temple began on July 1, 2007) and none commencing in Christian churches for more than two years. More significant is the recent trend in incident duration. The average duration of all[18] sanctuary incidents is 314.6 days (N = 49). However, in the 1980s (N = 2) it was only 19 days. During 1990–1994 (N = 5)[19] the duration was 113.5 days. For 1995–1999 (N = 16) it reached 182.3 days; for 2000–2004, (N = 14), 313.6 days; and for 2005–early 2009, (N = 11), the average duration was an astonishing 686.6 *days*. This last statistic is remarkable because it is more than double the average incident duration in the preceding five-year period and almost four times the average duration of the late 1990s. In short, incident duration has increased dramatically since 2005. This means a decidedly more arduous two-year sanctuary experience for providers entailing provision of continuous material and moral support, and for migrants entailing efforts to garner support and survive in the spatial confines of a church building for a protracted period. At the same time, only five of eleven incidents (46 per cent) since January 1, 2005, have yielded legal status for the migrants involved. This is markedly lower than the overall success rate of 70 per cent (N = 30), noted in the 2005 study for the period ending 2003.

Part Two: Considering Trends, the Merit-based Appeal, and Sanctuary's Future

What follows is not the last word but rather an effort to further stimulate thinking about how and why sanctuary activity may be changing and to contemplate its future in Canada. One aspect that should be noted at the outset in this regard is that the recent trends, described above, are likely intertwined. That is, the lack of new incidents of late may well be due in part to would-be providers and recipients recognizing increasing duration and to a lesser extent fewer successes of other recent incidents. It may well be that potential and previous providers (and migrants) recognize the daunting sacrifices required over a much longer period to maintain sanctuary and the greater uncertainty about whether sanctuary would lead to legal status. As well, duration may be a direct reflection of greater difficulty in negotiating and otherwise securing legal status for the migrants involved that is reflected in the lower success rate. Nevertheless, the increased duration and the dearth of new incidents are also possibly due to other factors. These include less attention from mass media as well as the federal government's adoption of a tougher stance toward sanctuary recipients. Both would render sanctuary as "exposure" less feasible and more difficult to undertake. I discuss these two factors before turning to the merit-based appeal.

Sanctuary as "exposure" and its success are highly dependent on whether and how the incident is depicted in mass media. Sanctuary decisions elicit an exceptional quality.[20] Stemming from this exceptional aspect, sanctuary has garnered mass media attention since 1983. This process placed migrants' experiences in the refugee determination process (including inadequate legal representation, translation errors, and general neglect of new evidence in support of claims) in the public spotlight along with claims about the ignored worth of migrant families and individuals to the nation—and, typically, to a specific local church and community. However, the dwindling rarity of sanctuary (the fact that there now have been fifty incidents) may well be making this form less extraordinary and newsworthy over the past few years.[21] With each new occurrence, subsequent exposure and potential support may decline. It may also be more difficult to generate compassion and sympathy in mass media and/or among would-be supporters and providers from the local church and community due to the trend noted above toward not only more single adult male migrants entering sanctuary, but also toward older (middle-aged) male migrants compared, for example, to nuclear families with children. A sanctuary provider in Edmonton noted this was a factor in the support generated for a migrant family:

> If it was just him … 'Okay you're a big boy … look after yourself' … but when you see little children and a woman that through no fault of her own … [is] in a foreign country with no way of getting back, no way of communicating … The congregation … had a great deal of empathy for them which they may not have had for just M had he been single. (Interview 14, 2001)

Another factor leading to a lower success rate may well be a harder line among Ministers of Immigration and officials. While it remains unclear whether the arrest of Mohammed Cherfi in a Quebec City church in 2004 by police on a bail-related rather than an immigration offence was encouraged by the Immigration Minister or officials,[22] the extensive mass media coverage that followed undoubtedly suggested that a harder line in the form of physical arrest and detention of sanctuary recipients by immigration officials was now a real possibility. This harder line is also seen in the Immigration Minister's and officials' public refusals to negotiate with sanctuary recipients and supporters. This is especially evident in statements by Ministers of Immigration since the departure of Judy Sgro in 2004 and the Liberal government's subsequent failure to secure a majority of seats in Parliament in the following election, but especially since the subsequent rise to power of the Conservative party in 2006 and its more authoritarian approach to immigration and refugee policy. Emblematic of their new approach is the recent decision to grant more power over immigrant selection to the Minister of Immigration, an historical change from past immigration policy.[23]

Whatever the effect of these factors on sanctuary practices, as significant may be a gradual mutation in sanctuary discourse, one which may also shed light on sanctuary's future. While its absence from the formal refugee determination process continues, even after enabling legislation, the merit-based legal appeal has been gradually more present in sanctuary discourse. It is this less obvious discursive mutation to which I now turn.

Refugee Determination and the Merit-based Appeal

The twists and turns of ever-mutating Canadian refugee determination and related deportation policies and practices are too complex to recount here.[24] Nevertheless, some background is required. Refugee determination adopted in the 1980s what has been termed an "advanced liberal" character evident in the movement of responsibility away from the whims of federal political authorities and Department of Immigration officials and into the hands of an arms-length Immigration and Refugee Board (IRB). Cohering with this shift toward governing refugee determination "at a distance" was the march of administrative law into determination—as seen in establishment of the oral hearings held before this tribunal—that effectively created a legal domain never seen before. Put another way, the inherently political question of "who is a refugee?" underwent juridification in Canada. As well, knowledge generated for refugee determination purposes had been deemed politically tainted since formalization of the process in the early 1980s and for this reason in 1989 the documentation centre was implemented to overcome this situation, its openness to public scrutiny being a key element of the new program's design.[25] It is this ongoing effort to ensure distance between determination decisions and the whims of Canadian political authorities that serves as a condition of possibility for the later ascendancy of the merit-based appeal.

Absent in determination policy from the 1970s onward, and still omitted from formal determination practices, is a merit-based appeal of a rejected refugee claim that would allow, for example, introduction of new evidence supportive of a claim during a formal hearing in the event of a negative status decision. Nonetheless, three "appeals"[26] have become available during the determination domain's formative period. The first is an appeal at the Federal Court of Canada on points of law if an error is deemed to have occurred. The second is a risk assessment for failed refugee claimants facing deportation whereby a Department of Immigration official examines a failed claimant's file to determine if an immediate threat to the claimant's life will result from deportation. If a risk of return and Federal Court review are rejected, a claimant can request humanitarian and compassionate intervention by the Minister of Immigration to stay. The vast majority of all three "appeals" by refugee claimants, however, tend to be rejected.

Two other developments require brief mention for the discussion that follows. First, during this formative period the formal introduction of private sponsor resettlement programs—many of which were church affiliated—also occurred.[27] Resettlement from then on would have a decidedly more private character. Second, another heretofore unrecognized aspect of this general shift consistent with the onset of advanced liberalism[28] occurring in the 1990s was the drastic reduction in Ontario and other provincial jurisdictions of public funding for legal aid provision. Thus, it became more difficult for refugee claimants to secure adequate publicly funded legal representation for determination hearings, requiring them to rely on private sources for adequate representation more than previously. It is from this context that sanctuary emerged, the factors encouraging its emergence therefore including a movement of responsibility for adequate determination and resettlement toward private spheres.

The Rise of the Merit-based Appeal in Sanctuary Discourse

What goes unrecognized in recent public and mass media discourse is that calls from refugee advocates for introduction of a merit-based appeal[29] have been around for at least a quarter of a century in Canada whereas a clear link between this call and sanctuary activity is evident only later in 1993 in relation to one incident involving the Southern Ontario Sanctuary Coalition (SOSC). As a Coalition member stated: "We didn't take on more cases … while we were carrying on the struggle with the government over our demand for a fair appeal system, which was the focus of our demands, our actions, the legal focus" (Interview 4, 2001). A Coalition member further remarked:

> The government was restricting appeals and the legislation from [19]89 decisively restricted it. Not absolutely, but almost absolutely. You can't get an appeal on the merits of the case, only on the procedure. If the judge really fell asleep during the trial, you'd get an appeal. (Interview 3, 2001)

Yet, the Coalition's focus on the appeal was anomalous among sanctuary efforts and not taken up by other sanctuary providers across Canada until long after 1993. What is significant, however, in contemplating the future of sanctuary in its "exposure" form is that this Coalition was not involved in granting this form of sanctuary to additional migrants after 1993. Thus, SOSC's advocacy for the merit-based appeal as a *bona fide* alternative to sanctuary and recognizing the two on the same plane seems to cohere with their avoidance of instigating this form of sanctuary in their later efforts.

The call for the appeal stemmed mostly from elsewhere and, in particular, those well-versed in determination practices:

> There were a lot of groups—including the CCR—[the Canadian Council for Refugees which raised the issue of] just the lack of meaningful appeal, that there could be new information that was directly relevant [to the claimant's case], and there was no place for it to go. And I think what happened in 93 [when the Sanctuary Coalition granted sanctuary to twenty-three claimants] … was just maybe the tip of a very large iceberg that we had surfaced. And it was like there had to be a *way of appealing or more of this [sanctuary] was going to happen* … and it didn't come from the government, it came from the refugee board people [*i.e.,* IRB members]. Like they knew that there were times when a document would arrive, after [the case had been rejected], that was directly relevant. (Interview 5, 2001; emphasis added)

After a few sanctuary incidents had occurred across Canada in preceding years, in 1994 the now defunct Interchurch Committee on Refugees (ICCR) comprising representatives from Canada's mainline churches launched a pilot project called "Keeping Faith."[30] Housing migrants in churches plainly came with challenges and risks and this proposal was an explicit attempt to create a more organized, less risky version of sanctuary (that was not unlike the SOSC's effort, in that no one would know migrants' locations while in sanctuary). A provider noted in 2001:

> I think we were getting discouraged that certain cases were falling through the cracks that we felt were strong cases and they were not being accepted. *And of course we don't have an appeal, so what can you do?* So what we thought was …, maybe this would be a way of getting groups of churches across the country to participate and what we proposed was that, for instance, if we found a refugee or a refugee family that we felt had a strong legitimate case that—for whatever reason—had failed all the layers of hearings … like what we had discovered is a number of them actually who were quote, unquote, going underground anyway and so we thought what about if we made this project where … they would go underground but there would be a contact person who knew them [and] who would be our contact? (Interview 2, 2001; emphasis added)

Significantly, while referred to in this 2001 interview excerpt, texts associated with this "Keeping Faith" initiative from 1994 avoid mention of a merit-based appeal as an aim. Its emphasis came later and was not a key justification at the time.

That the expressed need for a merit-based appeal in refugee policy did not stem from local sanctuary providers is further evinced by the fact that interviews from 2001 and 2002 reveal providers rarely refer to an "appeal." When they do, "appeal" tends to be used loosely to refer to one or more of the three means of gaining permission to remain in Canada described earlier in relation to the specific migrant(s) to whom sanctuary was granted, rather than a formal and extensive legal procedure conducted before a specialized judicial board. For example, a provider acknowledged "various means of appeal" (Interview 17, 2001); another noted "a number of different other appeals I guess that they go through" (Interview 2, 2001). Yet another remarked:

> They went to a lawyer I recommended and their case is now going … into the humanitarian appeals [*sic*]. So, generally you will, if you get the right lawyer and the right stage of appeal, if all being well, usually you can work it through … (Interview 13, 2001)

Early on, then, the merit-based appeal was promoted by refugee advocates in the legal know, not by local sanctuary providers, most of whom were non-experts drawn from the local church and community and unfamiliar with existing refugee policy, especially in the early going of their sanctuary provision effort.[31] It is after 2002 that the need for a merit-based appeal became a central claim of sanctuary providers, a nascent "Holy Grail," as it were. This was undoubtedly sparked at least in part by the appeal's appearance in new immigration and refugee legislation the year prior.

Following a comprehensive review of Canada's immigration and refugee policy the Immigration and Refugee Protection Act (IRPA) was passed in 2001 and came into force in June 2002. This Act set out provisions for a Refugee Appeal Division (RAD) that would for the first time consider appeals of rejected cases based on the merits of the refugee claim.[32] Beginning in 1989 two IRB officials had become responsible for deciding whether a claim for refugee status met criteria outlined in the international Refugee Convention. Under IRPA, refugee claimants would now appear before only one IRB official. It was acknowledged, however, that there was a potential risk of arbitrary and erroneous decision-making under this new arrangement due to a single board member making decisions that could profoundly affect a claimant's future, a concern fed by several public scandals that occurred since 1989 centring on bribery of appointed IRB members and their biased decision making. This shift from two board members to one was central to the RAD's justification and placing the appeal in draft legislation was a key political maneuver to overcome refugee advocate resistance (but not necessarily to overcome sanctuary *per se*–providers were not invited to participate in the formal legislative review as sanctuary providers, unlike what was to transpire beginning in 2004, as described below). On the eve of the new legislation's promised implementation a key member of SOSC, who is also a refugee advocate, noted that "the new legislation does allow for an appeal at the refugee board and that's a major step forward. It's in writing, it's not in person, but it's still a big step" (Interview 5, 2001). This sentiment was to be short-lived. Implementation of RAD never happened. From then on the appeal's absence became increasingly publicly touted as an alternative to sanctuary as "exposure."

In June 2004, then–Immigration Minister Judy Sgro made an unusual public call for mainline Christian churches to stop granting sanctuary, claiming churches were serving as a "back door" for failed refugee claimants seeking legal status in Canada. Church representatives were then invited to meet with the Immigration Minister and her staff. In September 2004, a meeting with representatives from Roman Catholic, Presbyterian, Lutheran, Mennonite, Quaker, and United denominations was held. The Minister made an offer to churches that would permit their regular submission of names of exceptional cases for independent review with a ten-day turnaround.[33] The Minister argued the other "appeals" protected failed claimants at risk. She nonetheless proposed to church representatives they could submit about twelve cases to the Minister to review annually,[34] not unlike existing practices entailing recommendations made within the private sponsor resettlement programs noted earlier. This is significant because it assumed a small number of exceptions would be required and it would be the Minister who would ultimately decide their exceptional status. This new arrangement would displace the stated need for sanctuary and the merit-based appeal system (the assumed cost of which was deemed to contrast sharply with existing "advanced liberal" demands for efficiency) enshrined in the new Act. Yet, it is difficult for sanctuary to be incorporated into existing refugee determination (and selection) processes due in part to differences between "the values of the agencies of civil society and norms of public accountability."[35] The issue it raises is analogous to the conflict-ridden plan of the former US Bush administration to publicly fund faith-based groups to dispense services to the poor. For their part, church leaders argued publicly there would be fewer sanctuary incidents if IRPA's RAD had been implemented. When details of this offer became public, due to its secret and exclusive nature, a rash of criticism ensued. In early November 2004, the Minister responded with a revised arrangement that would give other (secular) civil society groups formal authority to bring a few cases forward annually. A meeting with church representatives followed in mid-November. Yet, church representatives subsequently refused to become part of this process. One church representative from the United Church, the denomination involved in the second-greatest number of incidents (*i.e.,* twelve), stated that sanctuary would continue with or without approval of this new process.[36]

Nevertheless, since 2004 the explicit link between the two mechanisms has been increasing. By September 2004, a regional Interfaith Sanctuary Coalition had formed and was already claiming the need to implement the appeal. In 2006 the first Presbyterian Church statement on sanctuary was published and made a similar recommendation.[37] As a Catholic bishop remarked at a 2007 rally: "The problem is not recourse to sanctuary, but the flawed Canadian refugee determination system that leaves too many refugees without protection."[38] As with so much refugee politics, international bodies also provided a source of domestic articulation of the issue as seen when an Inter-American Commission on Human Rights report from the late 1990s that assessed Canada's treatment of asylum seekers in

Canada's refugee determination system was invoked during this period. The Commission recommended an appeal process on the merits of a claim for refugee status. In the fall of 2004, KAIROS, an ecumenical group, launched a public campaign calling for implementation of the RAD. More than twenty-five thousand persons signed petitions submitted to Parliament in April and June of 2005. More recently, a May 2007 report by the House of Commons Standing Committee on Citizenship and Immigration recommended that officials respect the right of churches and other religious organizations to provide sanctuary to those believed to need protection. This had followed an invitation in 2006 to not only church representatives, but also local sanctuary providers, to represent their thoughts on sanctuary to parliamentarians at Committee hearings. Front and centre in their testimony to the Committee was the link between the absence of the appeal and the granting of sanctuary. One noted: "Canada is obligated to provide sanctuary to those in need, and there are times like the present, given the lack of appeal, when as citizens and human beings we have a fundamental and moral obligation to provide sanctuary within Canada."[39] The SOSC held their first national consultation in November 2007 (see this issue), bringing together sanctuary providers from beyond the local Ontario region to discuss sanctuary experiences and strategy. Though there have been meetings amongst sanctuary providers from different regions before, this was the first of national scope. The outcome included a call to implement the merit-based appeal. It is intriguing that no new sanctuary as "exposure" incidents[40] have occurred since this consultation was held. Through a growing embrace of the merit-based appeal, the aim of sanctuary providers is becoming less parochial and local, and more national and policy-oriented.

Another way that sanctuary is changing consonant with the foregoing requires mention. The 2005 study argued that sanctuary has a complex relationship with law. Sanctuary discourse was shown to comprise at least three legal narratives, including a "with the law" narrative,[41] in which law is assumed to be neither majestic nor oppressive (the other two narratives), but rather as a strategy to pursue personal interests in a pragmatic game. This connection is seen in the following typical excerpt from interviews with sanctuary providers in which an "appeal" is seen to be necessarily carried out by lawyers:

> So anyway they came home and that was the point at which they believed that they were going to be deported. And again, the attorney said, well listen, *we are filing one more appeal and filing an appeal to stay the deportation, I am filing an appeal to have the original decision by immigration reviewed. I am filing all of these appeals.* (Interview 36, 2001; emphasis added)

The appeal is evinced as tightly tethered to the purchase of lawyers' services: "And then it was only when we decided okay let's try to fight this, let's try to file an appeal to the Division of Immigration. It was only then that we decided to consult a lawyer" (Interview 7, 2001). These are pragmatic concerns and therefore one consequence of accepting the realization of the merit-based appeal as one of sanctuary's central goals is to begin to limit horizons to legal games, to the "with the law" legal narrative to the neglect of other narratives that have helped render sanctuary possible. To the extent this occurs, sanctuary activity is likely to continue to dwindle in the Canadian context,[42] the signs of which are found in the trends identified above.

Conclusion

The foregoing allows some conclusions to be drawn about sanctuary activity in Canada. It remains almost exclusively a Christian phenomenon occurring in major urban centres in which refugee determination processes take place. Key trends that are likely interrelated are the increasing duration of incidents, the decreasing success, and the lack of new incidents. While probably not the end of sanctuary in its "exposure" form (there will likely be isolated future incidents), these are nonetheless signs of its decline as an effective strategy of securing legal status for migrants facing imminent deportation. It is possible the same factors leading to its decline have been fuelling an increase in sanctuary as "concealment" in recent years, but this remains difficult—by definition—to know and, barring research involving key informants, might only become known long after the fact.

While factors such as "compassion fatigue" and less interest among the public and mass media, coupled with a harder federal government line, may be related to these trends, the claims and discourse of sanctuary providers operating outside these dominant institutions matters too. While not implemented, and therefore present only in discourse, the merit-based appeal is real in its enabling effects. This is evinced in the way it has been binding local sanctuary providers together in common pragmatic cause. The appeal may yet turn out to be a means to seamlessly merge concerns of sanctuary providers, refugee advocates, and immigration authorities. If those who would grant sanctuary are effective in generating greater support for implementation of the merit-based appeal they will have made a significant difference. This also means that sanctuary's effects, as noted in the 2005 study,[43] will have reached well beyond the lives of migrants who find themselves at the centre of incidents.

A final note about sanctuary research is in order. While most Western countries have experienced sanctuary activity in recent decades, it has taken dissimilar trajectories and adopted varied forms. The sanctuary movement in the

US effectively expired in the early 1990s but recently several cities in California have announced they will serve as public sanctuaries, thus suggesting resurgence (see also this issue). The reasons for changes in sanctuary activity and its manifestations such as this would benefit from more systematic comparative research between countries, especially since each is oriented to specific federal policy regimes with little or no international co-operation currently evident (though Canadians played a key role in the US Sanctuary Movement[44]). Mirroring the Canadian context, sanctuary in Germany also commenced in 1983, has been similarly organized as incidents, and has shown a remarkably similar overall rate of success.[45] Rather than looking to the US for insight into sanctuary, due to more analogous characteristics and likely available data, comparison of sanctuary in Canada with Germany could permit making further sense of mutations in sanctuary activity evident in the Canadian trends above as well as beyond the Canadian context.

Notes

1. Sanctuary as "exposure" has all but ceased in some European countries due to the brute force of the state in the form of the "storming" of sanctuaries. This is especially evident in the UK and France. To Paul Weller's early question about sanctuary's prospects in the UK subtitled "Beginning of a Movement?," time has answered "no." See Paul Weller, *Sanctuary: The Beginning of a Movement?* (London: Runnymede Trust, 1987).
2. Randy Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2006).
3. Paul Weller, "Sanctuary as Concealment and Exposure: The Practices of Sanctuary in Britain as Part of the Struggle for Refugee Rights" (paper presented at conference "The Refugee Crisis: British and Canadian Responses," Keble College and Rhodes House, Oxford, England, 4–7 January 1989).
4. For example, Gregory Wiltfang and John Cochran, "The Sanctuary Movement and the Smuggling of Undocumented Central Americans into the United States: Crime, Deviance, or Defiance?" *Sociological Spectrum* 14 (1994): 101–28; Gregory Wiltfang and Doug McAdam, "The Costs and Risks of Social Activism: A Study of Sanctuary Movement Activism," *Social Forces* 69 (1991): 987–1010; David Kowalewski, "The Historical Structuring of a Dissident Movement," *Research in Social Movements, Conflict and Change* 12 (1990): 89–110; Jeffrey Nelson and Mary Ann Flannery, "The Sanctuary Movement: A Study in Religious Confrontation," *Southern Communication Journal* 55 (1990): 372–87; Martha Gibson, "Public Goods, Alienation, and Political Protest: The Sanctuary Movement as a Test of the Public Goods Model of Collective Rebellious Behavior," *Political Psychology* 12 (1991): 623–51; Robin Lorentzen, *Women in the Sanctuary Movement* (Philadelphia: Temple University Press, 1991); Miriam Davidson, *Convictions of the Heart: Jim Corbett and the Sanctuary Movement* (Tucson: University of Arizona Press, 1988); Colleen Greer, "Ideology as Response: Cultural and Political Process in the Sanctuary Movement," *Social Thought and Research* 20 (1997): 109–28; Anne Hildreth, "The Importance of Purposes in 'Purposive Groups': Incentives and Participation in the Sanctuary Movement," *American Journal of Political Science* 38 (1994): 447–63; Susan Coutin, *The Culture of Protest: Religious Activism and the U.S. Sanctuary Movement* (Boulder: Westview Press, 1993); Susan Coutin, "Enacting Law through Social Practice," in *Contested States: Law, Hegemony and Resistance,* ed. Mindie Lazarus-Black and Susan Hirsch (New York: Routledge, 1994), 282–303; Susan Coutin, "Smugglers or Samaritans in Tuscon, Arizona: Producing and Contesting Legal Truth," *American Ethnologist* 22 (1995): 549–71; Susan Coutin and Susan Hirsch, "Naming Resistance: Ethnographers, Dissidents, and States," *Anthropological Quarterly* 71 (1998): 1–17; Hilary Cunningham, "Crossing Boundaries in a Gated Globe: Transnational Politics at the Edges of Sovereignty," *Global Networks* 1 (2001): 369–87; Hilary Cunningham, "The Ethnology of Transnational Social Activism: Understanding the Global as Local Practice," *American Ethnologist* 26 (2000): 583–604; Hilary Cunningham, *God and Caesar at the Rio Grande* (Minneapolis: University of Minnesota Press, 1995); Hilary Cunningham, "Sanctuary and Sovereignty: Church and State along the U.S.-Mexico Border," *Journal of Church and State* 40 (1998): 371–87; Hilary Cunningham, "Transnational Social Movements and Sovereignties in Transition: Charting New Interfaces of Power at the U.S.-Mexico Border," *Anthropologica* 44 (2002): 185–96; Kristin Park, "The Religious Construction of Sanctuary Provisions in Two Congregations," *Sociological Spectrum* 18 (1998): 393–421; Kristin Park, "The Sacrifice Theory of Value: Explaining Activism in Two Sanctuary Congregations," *Sociological Viewpoints* 12 (1996): 35–50.
5. David Matas, "Canadian Sanctuary," *Refuge* 18 (1988): 14–17; see also David Matas, *The Sanctuary Trial* (Winnipeg: Legal Research Institute of the University of Manitoba, 1989), 147–51; W. G. Plaut, *Asylum: A Moral Dilemma* (Westport, Conn.: Praeger, 1995), 129–37; Charles Stastny and Gabrielle Tyrnauer, "Sanctuary in Canada," in *The International Refugee Crisis: British and Canadian Responses,* ed. V. Robinson (London: Macmillan, 1993), 175–95.
6. Paul Reynolds, *Faith Subdues Kingdoms: A Pastor's Challenge to Immigration* (New Westminster, B.C.: Conexions Publishing, 1992); Mary Leddy, *At the Border Called Hope: Where Refugees Are Neighbours* (Toronto: Harper Collins, 1997).
7. Lippert, *Sanctuary, Sovereignty, Sacrifice.*
8. *Ibid.*

9. *Ibid.*; Weller, "Sanctuary as Concealment and Exposure."
10. Lippert, *Sanctuary, Sovereignty, Sacrifice.*
11. Interview 31. See also Marian Scott, "Minister Offers Church Refuge for Ghanaians," *Montreal Gazette,* 26 March 1988, A3; Fred Serre, "Church Intervenes for Refugee," *Canadian Baptist,* July/August (1992): 47–8; Southern Ontario Sanctuary Coalition, "A Declaration: A Civil Initiative to Protect Refugees," press release, Toronto, 7 October 2002.
12. Michael Farber, "Saving Refugee Was Bold Act," *Montreal Gazette,* 22 January 1985, A3; Interview 47.
13. See "Refugees Desperate for Safe Haven Get Help from Churches" *Ottawa Citizen, 7* December 1996, C7; Bob Bettson, "Suffering under New System," *United Church Observer* 55 (1992): 18.
14. Persons granted sanctuary were not formally interviewed due to university research ethics guidelines concerning vulnerable populations and due to language barriers. Regarding the former, these persons were in an exceedingly vulnerable situation due to being without legal status in relation to state authorities. There was a risk they would agree to an interview thinking it would improve their chances of achieving status through legal proceedings or humanitarian applications, and a risk that authorities might acquire interview data and later somehow identify these persons—to their detriment—due to a unique element of the incident in which they were involved.
15. An Islamic religious leader threatened to enter the sanctuary of a mosque in Montreal when facing deportation recently. Yet, there is currently only very limited evidence that sanctuary actually occurred.
16. The continued presence of the SOSC and their tactics in Toronto that differ from other incidents are a partial explanation for the surprising under-representation in sanctuary.
17. Until 1998 neither Immigration officials nor police had entered a legitimate church to arrest those granted sanctuary on immigration charges or to charge their providers with an offence. In contrast to the Canadian context, in the "Viraj Mendis" incident in Britain, after a long period British authorities entered a church to arrest the migrant in question. See Weller, "Sanctuary as Concealment and Exposure." Similar actions have occurred in Germany and France in the 1990s. See Yojana Sharma, *Religion-Germany: Church, State Clash over Sanctuary for Refugees.* 1998, 11/26/00, <http://www.oneworld.org/ips2/jul98/03_34_002.html>; Charles Trueheart and Anne Swardson, "Thousands Denounce Detention of Migrants," *Ottawa Citizen,* 24 August 1990, A6. The "sanctuary trials" resulted in prosecution of eight "U.S. Sanctuary Movement" members in the 1980s. See Matas, *The Sanctuary Trial.* Police entered a "church" lacking a city permit to arrest several Chileans in Montreal in 1998. In March 2004, Quebec City police entered a Catholic church to arrest and detain Mohammed Cherfi. See Donna Sinclair, "The Cherfi Arrest: Sanctuary Violated," *United Church Observer,* April (2004), online: <http://www.ucobserver.org/justice/2004/04/the_cherfi_arrest/>.
18. Other than the SOSC incident which occurred in 1993.
19. Other than the SOSC incident.
20. Lippert, *Sanctuary, Sovereignty, Sacrifice.*
21. It is possible, however, that if more time passes, a new sanctuary incident might again begin to appear "exceptional" and thus become capable of generating mass media attention.
22. Contrary to mass media coverage, it was not the first arrest of sanctuary recipients in Canada, See note 17.
23. Bruce Cheadle, "Conservatives Survive Confidence Vote," *Globe and Mail,* 9 June 2008, <http://www.theglobeandmail.com/servlet/story/RTGAM.20080609.wimmigration0609/BNStory/National>.
24. See Randy Lippert, "Canadian Refugee Determination and Advanced Liberal Government," *Canadian Journal of Law and Society* 13 (1998): 177–207.
25. See Randy Lippert, "Canadian Refugee Determination and Advanced Liberal Government."
26. I acknowledge that my use of "appeal" to refer to the humanitarian and compassionate and risk assessment procedures is controversial in this context since they do not involve reconsideration of matters addressed at refugee hearings.
27. See Randy Lippert, "Rationalities and Refugee Resettlement," *Economy and Society* 27 (1998): 380–406.
28. G. Park and Randy Lippert, "Legal Aid's Logics," *Studies in Law, Politics, and Society* 45 (2008): 177–201.
29. "No Secret Sanctuary," *Ottawa Citizen,* 16 November 2004.
30. ICCR, *Keeping Faith: A Guide for Church Group Participation in the Pilot Project* (Toronto: Inter-Church Committee for Refugees, 1994).
31. Lippert, *Sanctuary, Sovereignty, Sacrifice.*
32. The avoidance of a blanket amnesty in Canada has entailed deployment of all manner of temporary processes through the 1980s and 1990s to stave off full commitment, including the PDRCC, DROC, and the Administrative Review. See Lippert, "Canadian Refugee Determination and Advanced Liberal Government."
33. E. Thompson, "Churches Refuse to Play 'Immigration Department': Deal Would Have Given Religious Groups Right to Select Failed Refugee Claimants for Reconsideration by Minister," *Ottawa Citizen,* 3 November 2004.
34. *Ibid.*
35. M. Dean, *Governing Societies* (New York: Open University Press, 2007).
36. E. Thompson, "Churches Refuse to Play 'Immigration Department.'"
37. Presbyterian Church, *Sanctuary: A Statement and Guidelines for Congregations.* (Toronto: Presbyterian Church, 2006).
38. First Unitarian Congregation in Ottawa, "Second National Rally on Refuge Rights and Sanctuary," <http://www.uuottawa.com/sanctuary/rally.shtml> (accessed July 30, 2008).
39. Canada, *Meetings with Standing Committee on Citizenship and Immigration,* 39th Parliament, 1st Session, Standing

Committee on Citizenship and Immigration, Evidence Contents. 2 November 2006.

40. Whether sanctuary as "concealment" or a new form more consistent with SOSC's past practices has increasingly occurred as a result of this consultation or otherwise is unknown.
41. Lippert, *Sanctuary, Sovereignty, Sacrifice;* see also Patricia Ewick and Susan Silbey, *Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).
42. Future research may yet reveal a trend toward sanctuary themes being appropriated by secular groups in secular contexts. Such a theme can be seen in the experimental "Don't Ask, Don't Tell" campaign in Toronto, Canada whereby persons without legal status continue to receive social benefits from the (Toronto) municipal government without being identified, thus representing a unique configuration of "exposure" and "concealment" strategies and "before the law" and "with the law" narratives. I am indebted to an anonymous reviewer for this point.
43. See Lippert, *Sanctuary, Sovereignty, Sacrifice.*
44. *Ibid.*
45. *Sanctuary* (Berlin: German Ecumenical Committee on Church Asylum, 2007).

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Refuge in Europe? Church Asylum as Human Rights Work in Fortress Europe

Verena Mittermaier

More Than Twenty-five Years of Church Asylum in Germany

On August 30, 1983, Cemal Altun, a twenty-three-year-old Turkish asylum seeker, jumped out of a window of a Berlin court building, ending his life. His imminent deportation to a state where he feared political persecution led him to this drastic step. For the Protestant parish of Heiligkreuz (Holy Cross) in Berlin this was a decisive moment. The parish had supported Cemal Altun in his asylum application, and his death had a dramatic effect. Within months, the parish took in three Palestinian families facing deportation to Lebanon. This was the first church asylum incident to occur in Germany.[1]

It is now over twenty-five years later and a great deal has changed, including the general context of asylum policy in Europe, the number of asylum seekers in Germany, and the mechanisms both to get rid of them and to prevent others from arriving.

Despite these changes, parishes still often face difficult decisions, like those confronting Heiligkreuz when it decided to accord church asylum. When making such a decision, offering immediate and tangible protection—a room, a flat in the parish—is still often the first and most pressing step in protecting people from wrongful deportation and exposure to a dangerous situation. The next steps involve legal assistance, dealing with authorities, and organizing daily life, including shopping, school attendance, and medical care. Later, public relations and networking need to be managed, information must be provided, fundraising must be engaged in, and religious services and silent vigils must be orchestrated. All of this requires the enthusiasm of many—mostly volunteer—supporters.[2]

In 1994, the German Ecumenical Committee on Church Asylum was founded. Since that time, regular evaluations conclude that church asylum remains a crucial means of ensuring refugee protection. Over 80 per cent of the thirty to sixty cases of church asylum that take place annually in Germany achieve a positive result.[3] The year 2007 saw forty-three cases of church asylum. Of these, twenty-one were ongoing cases, three began that year, eighteen were resolved positively, and one was resolved negatively. Church asylum was offered in 2007 by at least twenty-seven Protestant churches, four Catholic parishes, one monastery, and four ecumenical networks. Protection was provided to at least 133 persons, with 74 children among them. Apart from these public cases of church asylum many parishes housed undocumented persons in guest apartments. In addition, there are cases of unpublicized church asylum that are hard to document.[4] What these figures show is that again and again various parishes, sometimes in an ecumenical network, offer church asylum in Germany.

"Fortress Europe": Shielding Policies against Refugees

To give refugees who turn to parishes or monasteries a new perspective became for the most part more difficult and requires persistence. Frequently it is unavoidable to go through several official channels. In many federal states the right to stay is attached with unrealizable conditions. Moreover, the Federal Office for Migration and Refugees often cancels asylum status which it has already granted (the so-called "recall proceedings" or "cancellation proceedings").

These examples illustrate the tendency towards rejecting and expelling refugees. In this respect, Germany shares the asylum policies of neighbouring countries. "Fortress Europe" tries with all its might to seal its borders against migrants (except for highly qualified professionals). Asylum policy participates in this more general exclusionary policy of preventing migration.

To give effect to its exclusionary asylum policies, the proponents of "Fortress Europe" adopt three strategies:[5]

1. The living conditions faced by refugees already residing in Europe are made as difficult as possible in order to deter further asylum seeking. In Germany, these difficult living conditions include camp housing, prohibitions against working, limitations on free movement, reduced and restricted welfare benefits in comparison to those received by local people, and restriction of health care services to the treatment of acute disease and severe pain only. Taken together, it is hoped that word of harsh living conditions will reach countries of origin and thereby discourage further asylum seeking by nationals of these countries.
2. Asylum law in Western Europe is given increasingly exclusionary interpretations. For example, the term "political persecution" has been interpreted in an excessively narrow manner. As a result, the number of those granted asylum on this basis tends to zero. Similarly, the notion of "safe" countries has been interpreted and applied expansively to block access of many asylum seekers to the regular asylum procedures. This includes, for example, the so-called "safe third country regulation" and the concept of "safe countries of origin." Particularly troubling is that if refugees enter Germany via a "safe third country" they don't get the opportunity to present their *reasons* for seeking asylum. Rather, they are only asked about the *route of escape* and are then deported to countries where they are presumed to have been safe, regardless of whether they would actually be safe in those countries.
3. The external borders of Europe are being closed off with increased vigour in the fight against so-called "illegal immigration." This fight is being waged with real fences, armed border patrols, aircraft, warships, satellite-controlled air reconnaissance, etc. Through FRONTEX, the European Agency for the Management of Operational Co-operation at the External Borders, the EU states have embarked upon even more intense co-operation in their bids to sea external borders through air and sea reconnaissance.

Dying at the Outer European Borders

The Church Asylum Movement in its solidarity work with refugees should not be content with accomplishing positive outcomes for a small number of asylum seekers who have reached Western countries and who face particularly acute risks. In addition to working with individual asylum seekers, all the larger exclusionary strategies must be kept in view and must be fought politically in association with other refugee protection organizations.

In 2007, the German Ecumenical Committee on Church Asylum organized two conferences that, under the slogan "SOS—Refugees in Emergency—Stop the Dying at the Borders," carefully examined the policies directed at turning away refugees at the outer EU borders. These conferences highlighted the large number of fatalities that result when refugees try desperately to reach Europe by sea.

The International Center on Migration Policy Development estimates that annually 100,000 to 120,000 persons try to reach Europe over the Mediterranean Sea. Within the last ten years these attempts ended fatally for around 10,000 people.[6] This, of course, is not the only route to Europe. Near the Canary Islands and at mainland borders many people regularly die as they try to reach the EU. FRONTEX is mandated to ensure that as few people as possible reach the territorial waters of the EU. The FRONTEX control and defence activities force asylum seekers and other migrants into smaller boats and onto more dangerous routes. Accordingly, there is continuous increase in fatalities.

In May of 2007 the German Ecumenical Committee on Church Asylum proposed, under the slogan "Let not the deep swallow me up … ," memorial services for drowned refugees—a suggestion that has since been adopted in many places.[7]

Along similar lines, PRO ASYL, the main German refugee protection organization with which we are linked, has waged a major campaign on this issue, called "Stop the Deathtrap."[8] The main demands of the campaign are that FRONTEX cease engaging in human rights violations, that shipwrecked people be rescued unconditionally, and that refugees be offered access to a fair asylum procedure.

Conclusion

Effective political mobilization requires networking and alliances. This was a lesson learned by parishes—including the Heiligkreuz in Berlin—that have provided church asylum to individual refugees. It is a lesson that applies equally to groups in Germany, across Europe, and worldwide, seeking to challenge exclusionary asylum policies in general and the dying that is ongoing at the EUs external borders in particular.

Notes

1. Ökumenische Bundesarbeitsgemeinschaft Asyl in der Kirche e.V. (ed.), *Asyl in der Kirche. Eine Dokumentation* (Karlsruhe, 2004), 18.
2. Ökumenische Bundesarbeitsgemeinschaft Asyl in der Kirche e.V. (ed.), "Erstinformation Kirchenasyl. Handreichung

für Gemeinden und ihre Gremien," Nachdruck (Berlin, October 2006); German Ecumenical Committee on Church Asylum (ed.), "Basic information on Church Asylum" (Berlin, 2007).

3. See, for example, Wolf Dieter Just and Beate Sträter, "*Unter dem Schatten deiner Flügel...": Eine empirische Untersuchung über Erfolg und Misserfolg von Kirchenasyl* (Bonn, 2001).
4. See Über Kirchenasyl/Zahlen, <http://www.kirchenasyl.de>, (accessed October 24, 2008).
5. *Cf.* Wolf-Dieter Just, "Flüchtlingsdramen an den Außengrenzen und Europäische Menschenrechtsrhetorik," in *SOS – Flüchtlinge in Not! Das Sterben an den Grenzen stoppen*, Konferenzdokumentation, Ökumenische Bundesarbeitsgemeinschaft Asyl in der Kirche (ed.) (Berlin, 2008).
6. *Cf.* <http://www.proasyl.de/fileadmin/proasyl/fm_edakteure/syl_in_Europa/Frontex/Zusammenfassung_Gutachten.pdf> (accessed October 28, 2008).
7. Ökumenische Bundesarbeitsgemeinschaft Asyl in der Kirche e.V. (ed.), "Lass die Tiefe mich nicht verschlingen … Anregungen für einen Gottesdienst zum Gedenken an ertrunkene Flüchtlinge" (Berlin, 2007); also in Fanny Dethloff/ and Verena Mittermaier, eds., *Zähle die Tage meiner Flucht... Gottesdienstmaterialien zum Thema Flucht und Asyl* (Karlsruhe 2008), 26ff.
8. See, in German and English, <http://www.stoppt-das-sterben.eu>.

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What Is Entailed in Offering Sanctuary? *Findings from a Consultation held at Romero House Toronto, November 2007*

Michael Creal

On November 20–21, at Romero House in Toronto, close to fifty people from across Canada came together to compare their experiences in offering sanctuary to refugees facing deportation to places where their lives would be in danger.

What follows is a summary of some of the more important findings/conclusions.

Sanctuary has been offered in Canada in a variety of settings: churches, religious communities, and homes, in each of these cases with a significant number of successful outcomes. It is only offered when all legal options have been exhausted though if legal representation has been seriously deficient, a change of lawyers may be the appropriate step before moving to sanctuary. Sometimes, however, even after sanctuary is in process, a successful outcome for a person or family in sanctuary has been the result of a freshly formulated Humanitarian and Compassionate application or even a new risk assessment where compelling new evidence is presented. On other occasions, success was achieved through Ministerial intervention.

Congregations that offer sanctuary have to be confident that they are supporting a valid refugee claim and therefore that claim has to be thoroughly scrutinized (and it is a fact that far more requests for sanctuary have to be rejected than are accepted). It is important to understand that in the process of reaching a positive decision, members of the congregation have time to come to know the person/family more completely than immigration officials or IRB judges. It is not a matter of the sanctuary providers being "better" than immigration authorities but of their being in a position to see and hear the desperation of the refugee claimants and getting to know their stories more fully. This is simply a fact though it may not fit well within the perspective of government officials. Nonetheless, it is a point that deserves recognition. Having sufficient time with a refugee claimant clearly affects the capacity to assess the *credibility* of a complicated refugee claim, and establishing credibility is obviously a central point in the refugee determination process.

Since there are many people of good will within the refugee system, it makes sense to reach out and try to work with them, and in a number of cases this has led to a successful outcome. But it is also the case that government officials tend to be intolerant of sanctuary and often the bureaucracy seems impenetrable. Frequently the government strategy is to "wait out" cases, assuming that either the congregation or the refugees concerned will give in through sheer exhaustion. This is all the more evident because recently the length of time in sanctuary has been increasing. In other words, sanctuary is a huge undertaking for all concerned: it takes enormous perseverance and commitment from everyone involved. In the process, there are many dark and discouraging moments as well as well as quite profound moments of learning and growth. But sanctuary is never offered or undertaken lightly. And the experience is not an easy one.

Different social/political meanings of sanctuary were considered. Sanctuary could be seen as a power conflict or a challenge to "the powers that be," a challenge that arises out of a prophetic tradition that brings to light abuses in systems of power. Hilary Cunningham, a University of Toronto anthropologist who has written extensively on sanctuary, saw sanctuary "as a diagnostic site disrupting power relationships and creating new social geographies." This was exemplified in the US sanctuary movement, which had major political dimensions and ended up in the courts. Peter Showler, a former Chair of Canada's Immigration and Refugee Board (IRB), examined fundamental issues of law. He argued that a moral vision underlies law. Natural justice arises out of that vision and, ideally, that is what law rests on. Particular laws and particular applications of laws are always open to challenge and the Canadian Charter of Rights and Freedoms, the constitution, and international instruments can be used as a basis for a challenge. Most cases that end

in sanctuary do so because there is something wrong either with the law or the application of the law. In this connection the point was made repeatedly that the failure to implement a proper appeal system—called for in the Immigration and Refugee Protection Act (IRPA)—to deal with matters of substance in the refugee claim was a major reason for the existence of the sanctuary movement in Canada. On the other hand, it was pointed out that the effectiveness of an appeal system would depend entirely on how it was constituted and administered. A badly constructed appeal system would make little difference. Still, most participants believed that the sanctuary movement existed because of deficiencies in the Canadian refugee system, many of which could be remedied, and they looked forward to a day when sanctuary would no longer be needed. Whether that day would ever come was another question.

An important issue that recurred in the course of the discussions was whether sanctuary was a form of civil disobedience or represented a "civil initiative." Most participants thought in terms of a civil initiative that called upon the government to honour its commitments to the protection of refugees, specified in IRPA, and to various international instruments—like the Convention Against Torture—that the government had signed onto. Seen in this light, congregations offering sanctuary were upholding the law, not breaking it. Civil disobedience, on the other hand, was the repudiation of what was regarded as a bad law or a bad practice in the name of a "higher law" or in the name of those foundational moral principles upon which law is supposed to be based. In most arguments supporting sanctuary in the Canadian context, the principle of civil initiative is cited as the grounds for action.

One full session of the consultation was devoted to the religious/ethical basis of sanctuary and began with a presentation by Gregory Baum, a retired professor of religious studies at McGill University. Baum's presentation was wide-ranging and comprehensive and what follows are just some of the points in his presentation:

1. One needs to look at the conditions and imperial/political conflicts in the world that generate refugees and find ways of addressing the sources of the problem. In this connection, the definition of "refugee" needs to be widened to include, for example, environmental refugees. And we need to be aware of situations where our own country is complicit in practices that force people to become refugees.
2. Church teaching since the nineteenth century has argued that people have a *right* to move. While the state has a right to control migrants, there is an issue of justice for people on the move (migrants). Migrants are not just social problems: they are people seeking to escape oppression and build a new life.
3. Offering sanctuary is an act of charity—in the deepest and richest sense of that word. Helping an individual person is enormously important (here Baum described his own experience of being helped as a refugee at a personal level and how that help opened up a whole world of possibilities for him).
4. Besides being an act of charity, offering sanctuary is an act of resistance. It is saying, in effect, "We live out of a different kind of logic than that which appears to prevail in the existing power system." It is also an act of resistance to bureaucracy as Max Weber described it, *i.e.* bureaucracy as an expression of rationality where everything is governed by an extensive system of rules administered by officials who must obey these rules scrupulously. Bureaucrats may detach themselves from their feelings and be controlled by rules. Individual human beings can easily fall through the cracks in a bureaucratic system. This is the experience of many refugees.
5. Even though in our time we no longer have an overarching social vision of a political project that can solve our problems (*e.g.* the socialist dream), we can create micro alternatives that live out of a different logic than that which prevails in our culture. The sanctuary movement may be seen as part of this. The act of offering sanctuary is therefore not an isolated, arbitrary act but a model of other ways of being and acting. It is also an indication that relatively small groups can act effectively and create new forms and structures.

In the final analysis, it was agreed that an ethical imperative underlies the sanctuary movement. Meeting a refugee face to face is a call to action. John Juhl, a Franciscan priest, put it this way: when a refugee family facing deportation came to my door asking for help what could I do? If the Church does not stand up for people seeking refuge, what are we about? It's a moral responsibility. We are called to be prophetic, we are called to be a voice for the voiceless. Congregations that offer sanctuary act in this tradition. They seek to combine the prophetic with the pragmatic.

Michael Creal is a Professor of Humanities (Emeritus) at York University, a member of the Centre for Refugee Studies, and the Chair of the Southern Ontario Sanctuary Coalition.

Refugees, Persons of Concern, and People on the Move: The Broadening Boundaries of UNHCR

Jeff Crisp

Abstract

This article examines the way in which UNHCR has expanded its range of policy interests and operational activities since its establishment in 1951, focusing on the extension of the organization's mission from refugees to groups such as asylum seekers, returnees, stateless populations, internally displaced persons, and victims of natural disasters. The article identifies the different factors that have contributed to this expansionist process, examines its implications for UNHCR's core mandate, and asks whether the process is an irreversible one.

Résumé

L'auteur examine la façon dont le Haut Commissariat pour les réfugiés a élargi son éventail d'intérêts en matière de politiques et d'activités opérationnelles depuis sa création en 1951, mettant l'accent sur l'extension du mandat de l'organisation pour inclure des groupes tels les demandeurs d'asile, les rapatriés, les populations apatrides, les déplacés internes et les victimes de catastrophes naturelles. L'auteur identifie les différents facteurs qui ont contribué à cette expansion, examine ses implications pour le mandat principal du HCR et tente de déterminer s'il s'agit d'un processus irréversible.

Introduction

Since its establishment in 1951, the United Nations High Commissioner for Refugees (UNHCR) has continually broadened the boundaries of its operational activities and policy concerns. This article examines the process of UNHCR expansion, seeks to explain why it has occurred, and raises some questions with respect to its implications.

A Radical Proposal

In 2003, Dr. Susan Martin, director of the Institute for the Study of International Migration at Georgetown University, presented a paper to a forced migration conference in Chiang Mai, Thailand. In that paper, and in a subsequent book, Dr. Martin made a proposal for a radical reform of the UN's refugee protection and humanitarian architecture, namely,

> the replacement of UNHCR with a UN High Commissioner for Forced Migrants, responsible for assistance to and the protection of all forced migrants, including not only refugees … but also those migrants internally and externally displaced due to repression, conflict, natural disasters and environmental degradation."[1]

Responding in person to Dr. Martin's presentation, I rejected both the feasibility and desirability of her proposal. First, I pointed out, UNHCR did not have the organizational capacity to assume this extended role. While the organization had expanded very rapidly during the 1990s, it had nevertheless been seriously stretched by a spate of major emergencies and repatriation movements in developing countries, as well as the arrival of large numbers of asylum seekers in Europe and other industrialized regions.

Second, I suggested that UNHCR's key donors (the US, Japan, the states of Western Europe, and Canada) had little or no appetite for a further expansion of the organization's budget or range of responsibilities. Spurred on by a number of academic critiques, which argued that UNHCR had become too involved in large-scale relief operations and had lost sight of its core mandate for refugee protection and solutions, those governments, I said, would be very reluctant to support Dr. Martin's bold proposal.

Resting my case against that proposal, I advanced a third argument, based on the supposition that other UN agencies would oppose any initiative to expand UNHCR's mandate from "refugees" to "forced migrants." Indeed, a 1997 bid by

UNHCR to assume a general responsibility for the coordination of the UN's humanitarian activities had been jointly killed off by UNICEF and the World Food Programme, both of whom reacted very negatively to the idea of being coordinated by an agency which they considered to be a peer, rather than a superior.

Recent developments

In the six years that have passed since the Chiang Mai conference, I have been proved comprehensively wrong with respect to Dr. Martin's proposal. For in that relatively short space of time, UNHCR has indeed been transformed from the Office of the High Commissioner for Refugees into something which is beginning to resemble an Office of the High Commissioner for Forced Migrants.

And that transformation has been clearly reflected in the language employed by the organization to describe its beneficiaries. For most of its history, UNHCR had been happy to restrict itself to the words "refugees" and "asylum seekers." From the mid-1990s to the mid-2000s, however, the refugee concept was progressively replaced by the broader and vaguer notion of "persons of concern to UNHCR." Most recently, the organization has gone even further, referring to its constituency as "people on the move."[2]

But who exactly are these "people on the move" if they are not refugees or asylum seekers? To answer that question, let us look at the different groups of people who have been (or who are in the process of being) drawn into the ambit of UNHCR's policy concerns and operational activities.

Stateless People

In 1975, UNHCR was given a formal mandate in relation to stateless people, but for the next fifteen years, the organization devoted very little time, effort, or resources to this responsibility. Thus in 1988, an independent commission reported that "UNHCR has remained somewhat indifferent when it comes to the plight of the stateless."[3] That situation has changed radically in recent years, however, and the pursuit of protection and solutions for people without a nationality has become an increasingly central and well-resourced component of UNHCR's work.

Internally Displaced Populations

UNHCR has worked with internally displaced populations for many years, but its engagement with this group of people from the 1970s to the 1990s was an *ad hoc* affair. A 2005 UNHCR evaluation, for example, described the organization's approach to internal displacement as "uncertain, inconsistent and unpredictable." In less than a year, however, such uncertainty was brought to an effective end when, in the context of the UN's humanitarian reform process and the introduction of the "Cluster Approach," UNHCR agreed to assume a leading role in relation to IDP protection, emergency shelter, camp co-ordination, and management. Of the 42 million people supported by the organization, 26 million are now IDPs.

Irregular, Stranded, and Survival Migrants

UNHCR's role in relation to asylum seekers expanded significantly in the 1990s, when growing numbers of people sought refugee status in the industrialized states. More recently, as states struggled to respond to the phenomenon of "mixed migrations" in areas such as the Mediterranean, Aegean, Caribbean, the Gulf of Aden, and West Africa, the organization has become increasingly involved in the issues of irregular migration (people moving without the requisite documents and authorization), stranded migrants (people who are stuck in transit countries and who are vulnerable to human rights violations), and survival migrants (people who may not have a claim to refugee status but who are moving in response to situations of serious economic, social, and political stress).

Populations Affected by Climate Change

In the past two years, UNHCR has expressed a strong interest in the issue of climate change and human mobility. According to a 2008 policy statement, "Climate change is a humanitarian problem. As such, it is of direct interest to humanitarian agencies, including UNHCR." The statement goes on to say, "Some movements prompted by climate change could indeed fall within the traditional refugee law framework, bringing them within the ambit of international or regional refugee instruments, or complementary forms of protection, as well as within UNHCR's mandate."[4]

Natural Disaster Victims

In recent times, UNHCR has been involved in a number of humanitarian operations related to victims of natural disasters: the Asian tsunami, the Pakistan earthquake, and the Philippines floods, to give just three examples. Recognizing the vulnerability of the people affected by such disasters, as well as the inadequacy of the Cluster Approach in relation to these catastrophes, UNHCR has now signalled its willingness to assume a more prominent (and in some circumstances a leading) international role in the protection of natural disaster victims.

Urban displacement

UNHCR's operational activities since the 1970s have been largely concentrated in rural areas of developing countries, especially in refugee camps. Refugees who moved to urban areas were generally considered to be the exception rather

than the norm, and were assumed to present the organization with a range of unwanted financial, operational, and security problems. Their presence in cities and towns was therefore not to be encouraged.

That approach has now been reversed. In late 2009, UNHCR introduced a new urban refugee policy which seeks to legitimize the role of cities as "places of protection," and which commits the organization to a much more creative and constructive engagement with urban refugees. The December 2009 meeting of the High Commissioner's Dialogue focuses more broadly on the issue of "urban displacement," including refugees, IDPs, and returnees.

Palestinians

UNHCR has never engaged directly with the majority of Palestinian refugees, by virtue of the fact that they are supported by another UN agency, UNRWA (the United Nations Relief and Works Agency for Palestine Refugees in the Near East), which runs extensive programs for them in Jordan, Lebanon, Syria, Gaza, and the West Bank. While this remains UNHCR's firm position, the organization has become aware of the fact that a significant number of Palestinians find themselves out of UNRWA's reach (those in and displaced from Iraq, for example, and those who seek asylum in Europe) and are in some instances confronted with serious protection and solutions problems. Hence a recent UNHCR decision to clarify the status of such Palestinians in relation to the 1951 Refugee Convention.[5]

Explaining the Expansion

As the previous section of this article has sought to demonstrate, UNHCR has in recent times expanded its operational activities and policy concerns into a number of new areas. But why exactly has this process taken place? There would appear to be four principal reasons.

First, UNHCR has an expansionist history and has consequently developed an expansionist culture. Starting off in 1951 with just a handful of staff members, a minimal budget, and a remit that was restricted to Europe, the organization progressively extended the scope of its work: to Africa in the 1960s; to South Asia, Southeast Asia, and Latin America in the 1970s; to Central America and Southwest Asia in the 1980s; to the Balkans and the former Soviet Union in the 1990s; and to the Middle East since 2000. UNHCR now has more than 6,600 staff members in 118 countries around the world, with a 2009 budget of some $2.3 billion. In this respect, the recent extension of the organization's operational activities and policy concerns can be regarded as a counterpart to UNHCR's long-standing experience of geographical expansion.

Second, and more significantly, UNHCR's linguistic shift from "refugees," to "persons of concern," and then to "people on the move" can be attributed to a number of global megatrends, all of which have had important consequences for human security, human rights, human displacement, and human mobility. These include the restructuring of the international political economy following the end of the Cold War, the fallout from the 9/11 attacks and the subsequent launching of the "War on Terror," the accelerated pace of globalization, and changes in the natural environment.

Referring to such trends and to their dynamic and disruptive character, in 2007 UN High Commissioner Antonio Guterres observed that "the 21st century will be defined by the mass movement of people from one community, country and continent to another." "The world, he stated, "is witnessing new and more complex patterns of displacement and migration," prompted by a combination of "climate change, environmental degradation, natural disasters and armed conflicts, some of them initiated and fuelled by a growing competition for scarce resources such as water and grazing land."[6]

Almost a year later, the High Commissioner elaborated on these themes in an article in the journal *Foreign Affairs*. "At few times in history," he said, "have so many people been on the move. The extent of human mobility today is blurring the traditional distinctions between refugees, internally displaced people, and international immigrants. Yet attempts by the international community to devise policies to preempt, govern or direct these movements in a rational manner have been erratic." Concluding that "a fast-growing and increasingly mobile human population needs a new humanitarian-protection compact," the High Commissioner evidently envisages a substantive role for UNHCR in the establishment of such arrangements.[7]

Third, the expansion of UNHCR's role can be attributed to the growing international awareness of humanitarian disasters and humanitarian needs, a trend which is reflective of increasingly effective advocacy efforts as well as the growing influence of the media.

The IDP issue provides a good example of this trend. In the late 1980s, a small number of activists, led by Roberta Cohen and Francis Deng, set out to put the neglected issue of internal displacement on the global humanitarian agenda. By means of their assiduous advocacy efforts, this objective was steadily attained, supported by the substantial publicity given to a succession of IDP crises in countries such as Angola, Colombia, Liberia, Sierra Leone, Sri Lanka, and, most recently, the Darfur region of Sudan. In these and other situations, UNHCR was not only able to extend its activities beyond the traditional tasks of refugee protection and solutions, but was also expected to do so by the international community.

Finally, UNHCR's expansion must be seen in relation to its relationship with other actors. On one hand, the past two decades have witnessed the transformation of a refugee protection regime, supervised by UNHCR, to a more diffuse "humanitarian marketplace," in which a range of intergovernmental, international, and non-governmental agencies simultaneously co-operate and compete with each other, all of them seeking to enhance their visibility, their fundraising potential, and hence their operational presence and impact. UNHCR has not been immune to this trend, and the organization's continued expansion is in some senses a testament to its effective participation in this marketplace.

On the other hand, many of the dozen or so key states that provide the bulk of UNHCR's funding have expressed persistent wariness with regard to the organization's expansion, often expressing the opinion that the organization should return to its "core mandate," which they consider to be that of providing refugees with protection in developing regions.

For reasons that warrant further research, however, donor states have not used the power of the purse to curtail UNHCR's activities. Indeed, they have funded and thereby facilitated it. Perhaps we can conclude from these developments that donor state anxiety surrounding UNHCR's expansion into areas beyond the realm of refugee protection is in practice outweighed by their recognition of the very real humanitarian needs which the organization is helping to meet.

Notes

1. Susan F. Martin *et al., The Uprooted* (Lanham, MD: Lexington Books, 2005).
2. The title of an article published in numerous newspapers by High Commissioner Antonio Guterres in November and December 2007.
3. Independent Commission on International Humanitarian Issues, *Winning the Human Race* (London: Zed Books, 1988), 112.
4. "Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective" (Geneva: UNHCR, October 2008).
5. "Revised note on the applicability of Article 1D of the 1951 Convention to Palestinian Refugees," UNHCR, October 2009, online: http://www.unhcr.org/refworld/pdfid/4add77d42.pdf.
6. Antonio Guterres, "People on the Move" (see note 2 above).
7. Antonio Guterres, "Millions Uprooted: Saving Refugees and the Displaced," *Foreign Affairs,* September–October 2008, 90.

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This article examines the way in which UNHCR has expanded its range of policy interests and operational activities since its establishment in 1951, focusing on the extension of the organization's mission from refugees to groups such as asylum seekers, returnees, stateless populations, internally displaced persons, and victims of natural disasters. The article identifies the different factors that have contributed to this expansionist process, examines its implications for UNHCR's core mandate, and asks whether the process is an irreversible one.

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L'auteur examine la façon dont le Haut Commissariat pour les réfugiés a élargi son éventail d'intérêts en matière de politiques et d'activités opérationnelles depuis sa création en 1951, mettant l'accent sur l'extension du mandat de l'organisation pour inclure des groupes tels les demandeurs d'asile, les rapatriés, les populations apatrides, les déplacés internes et les victimes de catastrophes naturelles. L'auteur identifie les différents facteurs qui ont contribué à cette expansion, examine ses implications pour le mandat principal du HCR et tente de déterminer s'il s'agit d'un processus irréversible.

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Responding in person to Dr. Martin's presentation, I rejected both the feasibility and desirability of her proposal. First, I pointed out, UNHCR did not have the organizational capacity to assume this extended role. While the organization had expanded very rapidly during the 1990s, it had nevertheless been seriously stretched by a spate of major emergencies and repatriation movements in developing countries, as well as the arrival of large numbers of asylum seekers in Europe and other industrialized regions.

Second, I suggested that UNHCR's key donors (the US, Japan, the states of Western Europe, and Canada) had little or no appetite for a further expansion of the organization's budget or range of responsibilities. Spurred on by a number of academic critiques, which argued that UNHCR had become too involved in large-scale relief operations and had lost sight of its core mandate for refugee protection and solutions, those governments, I said, would be very reluctant to support Dr. Martin's bold proposal.

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But who exactly are these "people on the move" if they are not refugees or asylum seekers? To answer that question, let us look at the different groups of people who have been (or who are in the process of being) drawn into the ambit of UNHCR's policy concerns and operational activities.

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UNHCR's role in relation to asylum seekers expanded significantly in the 1990s, when growing numbers of people sought refugee status in the industrialized states. More recently, as states struggled to respond to the phenomenon of "mixed migrations" in areas such as the Mediterranean, Aegean, Caribbean, the Gulf of Aden, and West Africa, the organization has become increasingly involved in the issues of irregular migration (people moving without the requisite documents and authorization), stranded migrants (people who are stuck in transit countries and who are vulnerable to human rights violations), and survival migrants (people who may not have a claim to refugee status but who are moving in response to situations of serious economic, social, and political stress).

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Second, and more significantly, UNHCR's linguistic shift from "refugees," to "persons of concern," and then to "people on the move" can be attributed to a number of global megatrends, all of which have had important consequences for human security, human rights, human displacement, and human mobility. These include the restructuring of the international political economy following the end of the Cold War, the fallout from the 9/11 attacks and the subsequent launching of the "War on Terror," the accelerated pace of globalization, and changes in the natural environment.

Referring to such trends and to their dynamic and disruptive character, in 2007 UN High Commissioner Antonio Guterres observed that "the 21st century will be defined by the mass movement of people from one community, country and continent to another." "The world, he stated, "is witnessing new and more complex patterns of displacement and migration," prompted by a combination of "climate change, environmental degradation, natural disasters and armed conflicts, some of them initiated and fuelled by a growing competition for scarce resources such as water and grazing land."[6]

Almost a year later, the High Commissioner elaborated on these themes in an article in the journal *Foreign Affairs*. "At few times in history," he said, "have so many people been on the move. The extent of human mobility today is blurring the traditional distinctions between refugees, internally displaced people, and international immigrants. Yet attempts by the international community to devise policies to preempt, govern or direct these movements in a rational manner have been erratic." Concluding that "a fast-growing and increasingly mobile human population needs a new humanitarian-protection compact," the High Commissioner evidently envisages a substantive role for UNHCR in the establishment of such arrangements.[7]

Third, the expansion of UNHCR's role can be attributed to the growing international awareness of humanitarian disasters and humanitarian needs, a trend which is reflective of increasingly effective advocacy efforts as well as the growing influence of the media.

The IDP issue provides a good example of this trend. In the late 1980s, a small number of activists, led by Roberta Cohen and Francis Deng, set out to put the neglected issue of internal displacement on the global humanitarian agenda. By means of their assiduous advocacy efforts, this objective was steadily attained, supported by the substantial publicity given to a succession of IDP crises in countries such as Angola, Colombia, Liberia, Sierra Leone, Sri Lanka, and, most recently, the Darfur region of Sudan. In these and other situations, UNHCR was not only able to extend its activities beyond the traditional tasks of refugee protection and solutions, but was also expected to do so by the international community.

Finally, UNHCR's expansion must be seen in relation to its relationship with other actors. On one hand, the past two decades have witnessed the transformation of a refugee protection regime, supervised by UNHCR, to a more diffuse "humanitarian marketplace," in which a range of intergovernmental, international, and non-governmental agencies simultaneously co-operate and compete with each other, all of them seeking to enhance their visibility, their fundraising potential, and hence their operational presence and impact. UNHCR has not been immune to this trend, and the organization's continued expansion is in some senses a testament to its effective participation in this marketplace.

On the other hand, many of the dozen or so key states that provide the bulk of UNHCR's funding have expressed persistent wariness with regard to the organization's expansion, often expressing the opinion that the organization should return to its "core mandate," which they consider to be that of providing refugees with protection in developing regions.

For reasons that warrant further research, however, donor states have not used the power of the purse to curtail UNHCR's activities. Indeed, they have funded and thereby facilitated it. Perhaps we can conclude from these developments that donor state anxiety surrounding UNHCR's expansion into areas beyond the realm of refugee protection is in practice outweighed by their recognition of the very real humanitarian needs which the organization is helping to meet.

Notes

1. Susan F. Martin *et al., The Uprooted* (Lanham, MD: Lexington Books, 2005).
2. The title of an article published in numerous newspapers by High Commissioner Antonio Guterres in November and December 2007.
3. Independent Commission on International Humanitarian Issues, *Winning the Human Race* (London: Zed Books, 1988), 112.
4. "Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective" (Geneva: UNHCR, October 2008).
5. "Revised note on the applicability of Article 1D of the 1951 Convention to Palestinian Refugees," UNHCR, October 2009, online: http://www.unhcr.org/refworld/pdfid/4add77d42.pdf.
6. Antonio Guterres, "People on the Move" (see note 2 above).
7. Antonio Guterres, "Millions Uprooted: Saving Refugees and the Displaced," *Foreign Affairs,* September–October 2008, 90.

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Unwelcome Guests: The Detention of Refugees in Turkey's "Foreigners' Guesthouses"

Rachel Levitan, Esra Kaytaz, and Oktay Durukan

Abstract

As European countries bordering the Mediterranean have introduced increasingly harsh measures to stem the flow of irregular migration across their frontiers, Turkey has become one of the main crossroads for flows of migration from Africa, Asia, and the Middle East into Europe. At the same time, as part of Turkey's accession process, the European Union has stepped up pressure on Turkey to prevent the movement of migrants, asylum seekers, and refugees into Europe. As a result of Turkey's efforts to limit irregular migration flows, thousands of foreign nationals without travel documents, refugees among them, are detained while attempting to either enter or exit the country illegally. They are primarily held in detention centres, which are officially referred to as "foreigners' guesthouses." Turkey's Ministry of Interior (MOI) severely limits access to detainees in these facilities by international and domestic NGOs and advocates. Helsinki Citizens' Assembly Turkey (HCA), a leading human rights NGO based in Istanbul, has provided legal aid to refugees since 2004 through its Refugee Advocacy and Support Program. Based on interviews conducted by HCA with forty refugees from seventeen countries, this report examines refugees' access to procedural rights in detention, as well as conditions in "foreigners' guesthouses." It identifies gaps between reported practice and standards of treatment set forth in Turkish legislation and international guidelines on detention.

Résumé

Alors que les pays européens riverains de la Méditerranée mettent en place des mesures de plus en plus sévères pour endiguer les flux de la migration irrégulière à travers leurs frontières, la Turquie devient l'un des principaux carrefours des flux migratoires vers l'Europe en provenance d'Afrique, d'Asie et du Moyen-Orient. Dans un même temps, dans le cadre du processus d'adhésion de la Turquie à l'Union européenne, cette dernière a intensifié la pression sur les autorités turques pour empêcher la circulation de migrants, demandeurs d'asile et réfugiés vers l'Europe. Suite aux efforts de la Turquie à limiter les flux migratoires irréguliers, des milliers de ressortissants étrangers sans papiers, réfugiés parmi eux, sont détenus soit en tentant de pénétrer ou de quitter le pays illégalement. Ils sont pour la majorité placés dans des centres de détention, officiellement désignés « centre d'hébergement pour étrangers ». Le ministère de l'Intérieur turc limite sévèrement l'accès des ONG nationales et internationales et des défenseurs des réfugiés aux détenus dans ces établissements. La Helsinki Citizens' Assembly - Turkey (HCA), chef de file des ONG des droits humains basée à Istanbul, fournit une aide juridique aux réfugiés depuis 2004 grâce à son programme de défense et de soutien des réfugiés. Appuyé par des entretiens qu'a menés la HCA avec une quarantaine de réfugiés provenant de dix-sept pays, cet article étudie le droit procédural des réfugiés en détention, ainsi que les conditions dans les « centres d'hébergement. » L'auteur identifie des lacunes entre les pratiques déclarées et les normes de traitement énoncées à la fois dans le droit turc et les directives internationales sur la détention.

Introduction: The Report and Its Impact

This report, originally released by Helsinki Citizens' Assembly Turkey (HCA) in April 2008, was the first published evaluation of the conditions and practices in Turkey's migrant detention centres, known as "foreigners' guesthouses." For a number of years, HCA had been receiving requests for legal assistance from individuals held in these facilities. Many complained of difficulties applying for

asylum, not understanding why they were detained or when they would be released, and of unhealthy detention conditions. HCA chose to compile the data gathered from these detainees and conduct a series of detailed interviews in order to get a more complete picture of the detention of migrants and refugees in Turkey. Since Turkey's Ministry of Interior (MOI) denied HCA access to the facilities—and still does—the respondents were interviewed either over the phone, or in person, after they had been released. The resulting report was conceived as an advocacy tool to raise public awareness both domestically and internationally about the protection gaps in Turkey's "foreigners' guesthouses."

Before the report's publication, and as a means of supporting dialogue with the Turkish government, HCA sent it to MOI for comments. Almost three months later, MOI provided an "informal" email response to the report, essentially repudiating its methodology and findings. MOI's central objection was that since the facilities in question did not house "refugees," but "illegal migrants," the report's findings regarding the treatment of refugees were inaccurate. MOI also questioned the reliability of the anonymous testimony on which the report's findings were based. HCA published a summary of MOI's arguments as well as a detailed response along with the report.

In its reply to the government, HCA noted that the report's use of the term "refugee" is consistent with international norms, and includes all individuals who express a fear of persecution and intend to apply for, have applied for, or have been granted "refugee status." HCA also countered that the broad use of the term "illegal migrant" fails to take account of the fact that many refugees fleeing persecution travel without proper documentation. Moreover, HCA argued, domestic and international detention standards apply to all detainees regardless of their legal status. In response to MOI's objections regarding the reliability of the testimony used in the report, HCA noted that stringent ethical criteria were applied when carrying out the interviews and that the use of anonymous quotes in acknowledgement of the respondents' confidentiality concerns was entirely consistent with established practices of other human rights reporting organizations.

MOI's reaction to the publication of the report was initially very negative. It cut off all communication with HCA by, among other things, refusing to allow local Foreigners' Police officials to attend capacity building seminars held by HCA for local NGOs and government officials. It also refused to invite HCA to a series of government-NGO consultations regarding the development of EU-funded refugee "reception centres." Significantly, MOI also placed further limitations on UNHCR's access to refugees in detention. In departure from previous practice, MOI denied UNHCR's access to detainees whose requests for asylum had not already been processed by MOI authorities in Ankara. This limitation, which remains in effect, is exacerbated by the fact that local Foreigners' Police regularly refuse to accept asylum applications from anyone who did not apply for asylum before being detained. In some cases, the limitation on UNHCR's access has also provided MOI with a window of time to deport detainees before they are able to access asylum procedures.

But almost a year after its publication, the positive impact of the report is beginning to come to light. It has given HCA an important platform from which to continue to advocate for the rights of detainees in "foreigners' guesthouses" and raise awareness about barriers to domestic asylum procedures. Following a series of riots at guesthouses in Istanbul, Kirklareli, and Edirne (cities near the Turkish-Greek border) domestic media sought commentary from HCA on the detention of migrants in Turkey and some of the media coverage specifically referred to HCA's report. The publication of the report has also led to several meetings between HCA and European delegations to Turkey investigating the treatment of migrants and refugees. HCA has also been invited to discuss the conditions and legality of Turkey's migrant detention places at several international meetings, including at hearings in the European Parliament.

Government bodies in Turkey have also taken important steps to address issues raised in HCA's report. A parliamentary human rights commission has taken a strong interest in investigating the conditions in "foreigners' guesthouses." Similarly, provincial human rights boards in Istanbul and Edirne have taken pragmatic steps to improve facility conditions.

Despite these positive steps, much work needs to be done to improve migrant detainees' access to asylum procedures and detention conditions. MOI continues to engage in acts of *refoulement*[1] and detain refugees for indefinite periods in "foreigners' guesthouses." Individuals apprehended in airport "transit zones" are still prohibited from making asylum claims and barred from accessing the UNHCR, NGOs, or legal assistance providers. Detention conditions in most "foreigners' guesthouses" are still well below standard and those detained continue to have difficulty applying for asylum and accessing legal assistance.

Building on the positive impact of the report, HCA has expanded its assistance to refugees in detention and those facing deportation. In the months following the publication of the report, HCA secured a breakthrough decision from a Turkish administrative court which held that indefinite detention in a "foreigners' guesthouse" violated domestic law. Over the course of 2008, HCA has also successfully used the urgent "interim measure" procedure of

the European Court of Human Rights (ECtHR)[2] to prevent numerous illegal deportations of refugees. HCA is pursuing two cases in the ECtHR challenging Turkey's refusal to accept or examine asylum applications in airport "transit zones."

Methodology

In the absence of other research regarding the detention of refugees in Turkey, HCA conducted interviews with forty refugees from seventeen countries who either were in detention at the time of the interviews or had been in detention before. The interviewees are not representative demographically of the population of refugees and asylum seekers in Turkey. In terms of their asylum status, they either were already in process within the asylum procedure or expressed their intentions to apply for asylum while in detention. The report uses the data from these interviews, as well as information received from detainees during the course of telephone counselling sessions with HCA legal advisors.

Interviewees were given a standard questionnaire relating to the conditions of their arrest and detention. The questionnaire is divided into nine subsections: basic information, physical conditions in detention, information provided in detention, interactions with the police, health care, visits, differential treatment of detainees, asylum applications and social relations among detainees. These categories of analysis reflect minimum standards of protection for refugees in detention set out both in the 1999 UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (UNHCR Detention Guidelines) and the 2003 European Council Directive laying down minimum standards for the reception of asylum seekers. In this way, the information collected by the questionnaires facilitates an analysis of the degree to which the Turkish authorities are complying with international standards on detention practices.

Interviewees came from diverse countries and were primarily male. The largest number of interviewees came from the Democratic Republic of Congo, followed by Ethiopia and Ivory Coast. Other countries of origin included Afghanistan, Burundi, Eritrea, Guinea Bissau, Iran, Iraq, Liberia, Mauritania, Nigeria, Palestinian Territories, Philippines, Somalia, Sudan, and Uganda.

Interviewees provided information about each separate instance they were detained (with the exception of one man who gave information only about two of his ten arrests). In total, forty-six instances of detention were recorded, since five of the detainees were arrested more than once. The questionnaires were filled out in 2006 and 2007 and cover incidences of detention that go back to the year 2004. Thirteen interviews involved arrests in 2007; twenty-five in 2006; five in 2005; and three in 2004.

In total, guesthouses and other detention facilities in seven cities were surveyed. Most interviewees discussed their experiences in facilities in Istanbul (twenty-seven), followed by Kirklareli (seven), Edirne (four), Izmir (four), Ankara (two), Hatay (one), and Van (one).

The majority of the respondents were held in Istanbul. This bias is largely based on the fact that HCA is located in Istanbul. Interviewees provided information about all three of the Istanbul guesthouses. The guesthouse located in Istanbul Security Directorate buildings on Vatan Avenue was open until the spring of 2006, when the guesthouse was moved to the Zeytinburnu Security Directorate. In March 2007, a new guesthouse was opened in the Kumkapı district of Istanbul. In addition to facilities in Istanbul, the report also surveys guesthouses in Izmir, Ankara, Van, Hatay, both guesthouses in Edirne (the Tunca Camp and the guesthouse in the centre of the city) and the Kırklareli guesthouse. Interviewees also provided information about detention facilities other than guesthouses, such as police stations in Istanbul, gendarmerie posts in Izmir and Van, and minors' detention facilities in Istanbul, as well as the transit zone in the Istanbul Ataturk Airport.

The interviews were conducted in consideration of the ethics of interviewing vulnerable individuals. The interviewees were guaranteed full anonymity. Any information that would render individual interviewees identifiable has been removed from the report. Every effort was made to ensure that the interviews were conducted in a manner that did not cause the interviewees additional stress. Interviewees were also compensated for travel costs.

Legal Context for the Protection of Refugees in Turkey

Although one of the original signatories to the 1951 *Refugee Convention* and the 1967 Protocol, Turkey adopted the 1951 *Convention relating to the Status of Refugees* (*Refugee Convention*) with the so-called "geographical limitation" clause.[3] That clause provided State Parties the option of restricting their 1951 protection obligations to individuals who became refugees "as a result of events occurring in Europe." To date, Turkey remains one of the few State Parties to the *Refugee Conv*ention to retain the geographical limitation and considers itself bound by its 1951 obligations only with respect to nationals of so-called "European countries of origin."[4]

Notwithstanding this legal limitation, in reality, the current profile of people seeking international protection in Turkey almost exclusively consists of individuals originating from "non-European" countries—most significantly

Iraq, Iran, Afghanistan, Somalia, Sudan, and other states in Africa and Asia.[5] For these non-Europeans, Turkey assumes a limited responsibility, offering the prospect of what is termed "temporary asylum." Turkey's temporary asylum regime for non-European refugee applicants involves parallel procedures, one administered by the Turkish MOI and the other by UNHCR Branch Office Ankara (which operates under a Memorandum of Understanding with the Turkish government).

Non-European refugee claimants in Turkey are required to file two separate applications, one with the UNHCR and one with the MOI. The UNHCR conducts refugee status determination (RSD) to adjudicate individual refugee claims. Those who are found to meet the definition of a refugee as defined by the *Refugee Convention* are "recognized" as such and subsequently resettled in a third country. The main resettlement countries for Turkey are the US, Canada, and Australia.

Alongside the UNHCR procedure, refugee claimants are required to file a separate "temporary asylum" application with the Turkish government. The purpose of the government procedure is to determine—independently from the UNHCR assessment—whether the applicant has a legitimate need for temporary asylum in Turkey as specified by Turkey's national legislation. The government department in charge of administering Turkey's temporary asylum regime is the Foreigners' Borders and Asylum Division of the General Directorate of Security under the MOI. Turkey understands temporary asylum for non-Europeans as a unilateral commitment that does not directly flow from its core obligations under the *Refugee Convention* beyond a general undertaking to "cooperate with UNHCR … in the exercise of its functions."[6]

The backbone of Turkey's asylum legislation, the 1994 Asylum Regulation, was enacted in November 1994 and subsequently amended in 1999 and 2006. It essentially replicates the refugee definition set forth in the *Refugee Convention* in establishing who can benefit from temporary asylum protection.[7] However it allows significant room for administrative discretion in the processing of applications for temporary asylum. It was not until June 2006 that the Turkish government formally defined the procedure in a circular (2006 Circular) outlining the specific rights, benefits, and obligations of temporary asylum applicants. Other legislation that informs the asylum procedure includes the Passport Law (No. 5683), the Law on Sojourn and Movement of Aliens (No. 5687), the Law on Settlement (No. 2050), and the Citizenship Law (No. 5682).

The main feature of Turkey's temporary asylum system is a policy of dispersal. Under MOI and UNHCR coordination, temporary asylum claimants are referred to one of twenty-eight so-called "satellite cities"—the term informally used to describe the provinces designated by the MOI where asylum seekers are required to reside.[8] These satellite cities are mostly located in interior regions of the country. Refugee applicants are required to pursue their temporary asylum applications with the "Foreigners' Police" in the province to which they are assigned and must reside there until the final determination on their applications are made. According to the 1994 Regulation, asylum seekers who arrived in Turkey legally must register with the police in the city where they currently reside, while those who entered illegally must register in the province they first entered in Turkey.

There is no specific time limit to register, but refugee applicants are expected to approach the authorities "without delay." Those who fail to apply "within the shortest time span possible" are obliged to explain their reasons for the delay and must co-operate with competent authorities.[9] The 2006 Circular, however, expressly stipulates that even where an applicant "failed to apply within a reasonable time period" and "cannot provide any reasonable excuse," asylum authorities are required to accept their applications "without prejudice."[10]

Typically, refugee applicants first approach the UNHCR. Following their registration, they are informed by the UNHCR of the province to which they must report in order to file their "temporary asylum" application with the Turkish government. Refugee applicants generally have no input on the province to which they will be assigned, but they may be assigned to live in a province where family members reside. Once registered as "temporary asylum applicants," they are required to regularly report to local police to document their continued residence in the city. Refugee applicants may apply to local police authorities to receive written permission to temporarily leave their assigned province. Leaving one's assigned city without permission may result in criminal charges.

Refugee applicants must pay a "residence" fee for each family member every six months, which is often prohibitively high. Once this is paid, a residence permit is issued, which usually is a prerequisite to the receipt of medical care and education. Refugee applicants are almost always required to cover the cost of their accommodation and health care. Although refugee applicants have been granted a nominal right to employment, this right is rarely exercised due to legal barriers associated with receiving work permits, language barriers and strains on the labour market.

UNHCR offers very modest financial assistance to "recognized" refugees and "one-time special" assistance to vulnerable refugee applicants in emergency situations. Under the 2006 Circular regime, the Turkish government does not undertake any commitment to assist refugee applicants in

need of shelter, health care, and subsistence assistance other than a non-binding reference to the role of Social Solidarity and Assistance Foundations organized under provincial governorates. These government agencies are mandated to attend to the social assistance needs of "all residents of the province" including, by definition, refugees.[11] In practice, however, the support provided by these agencies to refugees in satellite cities is far from adequate.

The direction of Turkish asylum policy is largely influenced by Turkey's agenda for EU accession. Turkey is expected to adopt the EU *acquis* in the area of asylum and migration in accordance with the Accession Partnership Strategy of March 2003 and the National Program for the Adoption of the EU *Acquis* of July 2004. In January 2005, the Turkish government adopted a "National Action Plan for Asylum and Migration" (NAP) and pledged to undertake a series of measures to align asylum policy and practice with EU standards, including administrative and technical capacity development, training of specialized staff, and changes in legislation. On the critical issue of lifting the "geographical limitation," the NAP stipulates that "a proposal for lifting the geographical limitation may be expected to be submitted to the Parliament in 2012 in line with the completion of Turkey's negotiations for accession," and on the condition that necessary changes in legislation and infrastructure have been completed to "prevent the direct influx of refugees to Turkey during the accession phase" and "EU Member States' demonstrated sensitivity in burden sharing."[12]

Legal Framework for the Detention of Refugees in Turkey

What Is a "Foreigners' Guesthouse"?

Foreign nationals are detained in Turkey for a variety of reasons, whether as a result of alleged criminal activity, illegal entry or exit from the country, or failure to comply with requirements of the temporary asylum system. After the conclusion of criminal court procedures relating to these charges, foreign nationals are denied their freedom of movement. The justification for their detention is that it is the most effective means of carrying out relevant administrative procedures, such as deportation or assignment and transfer to a satellite city. Foreign nationals are detained without a court order; they are held based only on an administrative ruling from the Ministry of Interior. Detainees are never informed and are rarely aware that they are no longer being held pursuant to a judicial process but according to administrative regulations. This is exacerbated by the fact that they generally are in contact with the same police personnel during their stay in detention.

Most detainees are held in "foreigners' guesthouses," though a minority are detained in police stations and airport transit zones. Despite the name, these "guesthouses" are effectively detention centres in which detainees are held involuntarily. Detention facilities have been defined as "custodial settings ranging from holding facilities at points of entry, to police stations, prisons and specialized detention centers."[13] Although guesthouses in Turkey are not officially referred to as "detention facilities," they clearly fall within this definition.[14]

A proportion of foreign nationals detained in guesthouses are refugees. In the refugee context, UNHCR has defined detention as "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave this limited area is to leave the territory."[15] Refugees, like other foreign nationals detained in guesthouses, are not allowed to leave freely, and as such, are under detention. Guesthouses should be distinguished from "accommodation centers," which are locations used only "for collective housing of applicants for asylum and their accompanying family members."[16]

In Turkey, guesthouses are administered by the Tracing and Control Police Section of the Foreigners' Department of each City Security Directorate. The Tracing and Control Police are responsible for foreign nationals who have entered or attempted to exit Turkey illegally, are found in violation of visa regulations, or have allegedly committed illegal activities.[17]

The rights of detainees, including refugees, are derived from the substantial curtailment of their freedom of movement—regardless of the justification given for the detention (*i.e.,* whether for criminal or administrative purposes). Despite this, states commonly abrogate their legal obligations to refugees in detention, who may be confined for indefinite lengths of time in substandard conditions, with limited or no recourse to judicial review.[18] Refugees in Turkey face similar experiences in detention. While there are explicit safeguards for criminal detainees in Turkey, there are few such safeguards for those in administrative detention, and no explicit standards relating to the detention of foreign nationals.[19]

This section lays out domestic and international standards relating to the procedural rights of detained foreign nationals, including refugees, and the minimum standards for detention conditions.

Procedural Rights and Practice

Grounds for the detention of refugees

Domestic law. The provisions of Turkish law most relevant to the apprehension and detention of refugees relate to irregular movement. In particular, domestic law provides that

foreign nationals in violation of their residence status may be detained, and criminally charged, for the following violations: illegal entry,[20] illegal exit,[21] and leaving the designated city of residence without permission.[22]

Refugees, like other foreign nationals apprehended by police in Turkey with irregular status, are generally detained in guesthouses. Upon being detained, they are usually charged with a criminal violation (*i.e.,* for illegal entry or exit and residence violations). However, typically, for the majority of their time in detention, refugees are held for administrative purposes, including: to have their asylum application processed, to be assigned a satellite city, or to be processed for deportation.

No domestic law provides a legal basis for the detention of foreign nationals in guesthouses. Article 23 of the Law on Residence of Foreign Citizens is relevant in that it provides that foreigners who have been issued a deportation order but cannot be immediately expelled "shall reside in a location assigned to them by the Ministry of Interior."[23] However, neither that provision nor any other in domestic law provides a framework for the duration or conditions of detention in guesthouses.[24]

International law and guidelines. Liberty is a fundamental human right. Multiple international instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights provide that no one should be arbitrarily deprived of his or her liberty. Refugees, clearly, are also entitled to this right.

However, since many refugees are forced to enter a country illegally to escape persecution, they may find themselves in violation of local law in their country of asylum. As a result, Article 31 of the *Refugee Convention* prohibits the punishment of refugees for illegal entry if they present themselves to authorities and show good cause for their illegal entry or presence.

International law and standards also specify that, as a rule, refugees should not be detained.[25] If they are, the detention "should not be automatic [or] unduly prolonged"[26] and must only take place for these exceptional reasons:[27]

- to verify identity;
- to determine the elements on which the claim for refugee status or asylum is based;
- in cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or
- to protect national security and public order.

The right to access asylum procedures

Consistent with rights enshrined in the *Refugee Convention,* Turkish legislation recognizes the right of foreign nationals who enter Turkey illegally to apply for asylum.[28] The law provides that asylum applications will not be prejudiced so as long as the applicant approaches the police for registration in the shortest time possible after entering the country and can account for any delay.[29]

The UNHCR Detention Guidelines specifically state that "detention should not constitute an obstacle to asylum seekers' possibilities to pursue their asylum application."[30]

However, as discussed earlier, foreign nationals detained in guesthouses are often denied the right to apply for asylum in detention, whether because they are not informed of the asylum procedure, have no access to an interpreter, or are prohibited from submitting an asylum application. Of particular concern is the fact that those held in transit zones in Turkish airports are flatly prohibited from applying for asylum, as discussed below under "Airport Transit Zones."

A troubling outcome of the denial of access to asylum procedures is the risk of *refoulement*—that is, return to the frontiers of territories where one's life or freedom would be threatened on account of one's race, religion, nationality, membership of a particular social group, or political opinion.[31] As discussed under *Refoulement,* below, a number of cases of the forcible return of refugees have been reported to HCA this year. Unless asylum procedures are made universally available to foreign nationals, legitimate refugees will continue to be *refouled* before being able to apply for asylum.

Procedural Safeguards for Detained Refugees

Domestic safeguards

Since guesthouses are generally viewed as a form of administrative detention, refugees detained therein are accorded certain procedural rights, though many fewer than criminal detainees.[32] Article 19 of the Turkish Constitution guarantees that persons deprived of their liberty for whatever reason:

- have the right to a speedy conclusion of their case;
- may apply to a judicial body to challenge the lawfulness of his/her detention; and
- should be released if the detention is found to be unlawful.[33]

These rights are consistent with those articulated in the ECHR and ICCPR.[34] However, as discussed below and set out under "The Right to Access Asylum Procedures," in practice, refugee detainees have no access to judicial review, or to the legal counsel necessary to carry out an effective proceeding to do so. As a result, they are unable to challenge

the legality or length of their detention. This significant lack of domestic procedural safeguards for detainees in guesthouses in Turkey has been clearly articulated by the UN Working Group on Arbitrary Detention.[35]

International safeguards

In contrast to the minimal protections for administrative detainees in the Turkish Constitution, international guidelines delineate substantially more rights for refugees held in detention. The UN Working Group on Arbitrary Detention (UNWGAD) and the UNHCR Detention Guidelines set forth specific prerequisites for the legal detention of refugees. As an overarching principle, they hold that the illegal deprivation of liberty constitutes "arbitrary detention."[36] The rights articulated in these instruments, which are discussed below, include:

- communication of the reasons for and length of detention;[37]
- the right to judicial review of the reasons for and length of detention;[38] and
- the right to legal counsel, including the right to contact a lawyer, local UNHCR offices, other agencies, or non-governmental organizations.[39]

Communication of reasons for and length of detention. International guidelines are unambiguous with regard to the right of refugees to be informed of the reasons for their detention and their rights while detained. UNHCR's Detention Guidelines provide that, if detained, asylum seekers: "receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand."[40]

Similarly, the UNWGAD holds that: "Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure …"[41]

Under international law, authorities are also required to provide information about the length of the detention.[42]

As discussed under grounds for the detention of refugees, none of the interviewees were informed of the reasons for their arrest, the expected length of detention, or their rights in detention. Many faced indifference or aggression from the police when they asked for this information. Similarly, none were given information about the expected length of their detention, leading to feelings of hopelessness and depression.

Judicial review. One of the central rights of detainees, delineated under both international and domestic law, is the right to challenge the lawfulness of one's detention in court.[43] The UNCHR Detention Guidelines provide that refugees in detention have the right:

> to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend.[44]

In a similar vein, the UNWGAD establishes the right to "apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned."[45] Article 19 of the Turkish Constitution also guarantees the right to apply to a judicial body to challenge the lawfulness of one's detention.[46]

As the findings of this report indicate, however, refugees held in guesthouses in Turkey have no recourse to judicial review to challenge the legality or the length of their detention. This is clearly linked to the fact that they also have no substantial access to legal counsel. It also is connected to the fact, as discussed below, that detainees are rarely informed of the status of their asylum applications, which prevents them from being able to determine whether the proceedings are being carried with "due diligence."

The right to legal counsel. Refugees in detention have the right to legal counsel,[47] and should be notified of this right upon being detained.[48] International guidelines clearly set out refugees' right to communicate with legal counsel, as well as other agencies and advocates.[49] The UNHCR Detention Guidelines require that refugees have access to free legal aid.[50]

Moreover, in order for detainees to receive effective legal counselling, they should be provided with adequate time and privacy during the visits from lawyers and advocates. Article 18(3) of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, for instance, states that: "The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances …"

Although Article 19 of the Turkish Constitution does not explicitly set out the right of administrative detainees to legal counsel, clearly the articulated right to judicial review would not be effective if carried out without the benefit of legal counsel. This is certainly the case for refugees, the vast majority of whom speak no Turkish. Other than an implied right to legal counsel, refugees are not guaranteed the right to access other advocates or agencies.

In practice, as already discussed, foreign nationals in guesthouses are provided only sporadic access to lawyers. Those interested in applying for refugee status are often given access to visiting UNHCR representatives, but this is

certainly not the case in all guesthouses in Turkey. Visits by other international agencies, NGOs or advocates are strictly prohibited. Neither lawyers, UNHCR representatives nor any other advocates are provided access to asylum seeker held in airport transit zones.

Length of detention

International law and guidelines hold that the detention of refugees should be limited, and that any procedures carried out during a refugee's detention be carried out with "due diligence." Lengths of detention deemed lawful vary according to the specifics of each case, but will be found "excessive" if the procedures are carried out without due diligence.[51] The European Court of Human Rights and the United Nations Human Rights Committee emphasize that expulsion procedures, for instance, be carried out with "due diligence" rather than specifying a maximum length of time for detention.[52] UNWGAD states that a maximum period of detention "should be set by law and the custody may in no case be unlimited or of excessive length."[53]

Turkish regulations are silent on the appropriate length of detention in guesthouses. As a starting point, Turkey's 1983 Directive on Refugee Guesthouses (1983 Directive) emphasizes that a refugee's stay in a guesthouse is "temporary."[54] Pursuant to that directive, refugees can only be kept in detention until they have obtained visas to leave the country or obtained permission from the MOI to reside in a satellite city.[55]

The only reference to a specific time frame to process the asylum applications of detainees is set forth in Section 13 of the 2006 Circular. That provision holds that, pursuant to an expedited procedure, authorities must process the asylum applications of foreign nationals who have been detained for illegal exit or entry within five working days.[56] In practice, as already discussed, the asylum application process generally takes several months.

Findings Based on Interviews with Detained Refugees

> I was arrested with a Senegalese friend when I was selling bottles of perfume and watches in a bazaar. I was trying to earn the money I needed to go to Kayseri to register with the police there. I had my UNHCR document with me and my Senegalese friend had a passport with him. The police took us to the police station in Cebeci.
>
> In Cebeci, we spent three days without anything to eat. We slept on a foam mattress on the floor. The bed covers were filthy. There wasn't a toilet in the room. We also had to drink water from the bathroom. There was a nice police officer who took us to the bathroom but the other one never listened to us. I started to get sick there. It was very cold. When I was arrested I was feeling dizzy. I asked for medicine but the police refused to give it to me.
>
> Three days after arriving in Cebeci, my Senegalese friend was deported and the police took me to the Zeytinburnu Foreigner's Department. We were given soup with bread twice a day, but I was still hungry afterward. On the weekends, I only got small slices of bread with olives once a day. The room and the water in the bathroom were so cold I couldn't wash myself. The tap water from the bathroom made me feel sick. I slept on the carpet and found some covers. The room was very cold. I couldn't sleep because of the insects on the floor. When we all lay down on the floor to sleep our feet would touch somebody else. It was so crowded that we couldn't turn. Everybody was so tense that when someone touched them when they were asleep they jumped or got upset.
>
> When I was in Zeytinburnu I thought back to the time I was arrested in Mauritania. I was feeling very sick, so I kept to myself. The police wouldn't listen to anyone. I wanted to complain about my kidney and stomach problems, but they just slapped people and made them go away if they complained.
>
> I called ICMC (the International Catholic Migration Commission) from detention. I think they spoke with the police. I was meant to go to Kayseri but the police said that I had to go to Konya with three other Africans. The police said that the men had to each pay $100 to cover the transportation to Konya. The police took one of us outside to collect money. In the end, there were collections from the community so we were able to pay the police. When we arrived in Konya, there was nowhere to stay and we had no money.
>
> Now I am very afraid. I have no money because I am afraid to sell watches. I had to come back to Istanbul because there was nowhere for me to stay in Konya. I am scared of the police so I sometimes don't leave the house for a couple of days in a row. I can't afford to see the doctor for the kidney problem I got in Zeytinburnu.[57]

The experience of this Mauritanian refugee in detention is representative of many aspects of the experience of people interviewed for this report. Like many other interviewees, he states that he was kept in substandard conditions, was intimidated by the police, and was unable to get medical attention. He also describes being required to pay an inflated amount for his transfer to a satellite city.

This section discusses the results of surveys conducted with the forty detained or formerly detained refugees interviewed for this report. The findings of the surveys are discussed in the context of procedural rights (including the right to access asylum procedures, procedural safeguards, and the length of detention), a range of conditions in detention, and the treatment of minor refugees in detention.

Access to Asylum Procedures

The interviewees held in guesthouses reported significant barriers to accessing the asylum procedure in Turkey. Primarily, the reported reasons for this included a lack of information about asylum procedures and refusal by police to take asylum applications.

Notably, the interviewees held in airport transit zones reported that they were completely barred from applying for asylum. As discussed below, the failure by refugees to access the asylum procedure has led to numerous instances of *refoulement*—the return to the frontiers of territories where one's life or freedom would be threatened.

Out of the forty interviewees, eighteen had not applied for asylum when they were arrested. Of these, eleven reported applying for asylum in detention. HCA counselled nine of eleven interviewees regarding their asylum applications when they were in detention. These refugees all reported extreme difficulty in submitting their asylum applications either in writing or orally. Three reported that the police took their applications, while the other six reported being released with deportation orders despite numerous attempts to submit asylum applications.

Of the three interviewees whose asylum applications were received by police:

- one interviewee was released to her satellite city after four months of detention with her three minor children;
- another stated that he was detained for six months before he applied for asylum due to a lack of information about the process, and remained in detention for another five months after he applied; and
- a third interviewee reported that his attempts to submit both written and oral asylum applications were denied by the police for four months; as of November 2007, seven months after his application was finally received, he is still in detention.

Of the six interviewees released with deportation orders:

- two were told by the police in the Kumkapı guesthouse that the Turkish state does not take asylum applications and were referred to the UNHCR. When they contacted UNHCR, they were informed that the UNHCR could only take their asylum applications if they submitted an asylum petition to the police. They alleged that the police never accepted their petitions for asylum. They were later released with deportation orders.
- four detained in the Kırklareli Gazi Osman Pasa guesthouses stated that, prior to being released with deportation orders, police forced them to write a letter withdrawing their asylum applications from the Turkish state and stating their intention never to seek asylum again. The interviewees claimed that the police had intimidated them by alleging that anyone who applies for asylum will be detained for at least two years without receiving any assistance.

Lack of information

The interviewees who made their asylum applications in detention generally claimed that they were not counselled on the asylum procedure in Turkey. Even after submitting their asylum applications, the police did not offer any advice or information on the asylum procedure. Interviewees also reported being faced with hostile or indifferent attitudes from the police when they inquired about placing an asylum application or requested information about the status of their case. The lack of interpreters was identified by interviewees as a further impediment to their ability both to obtain relevant information and generally access the asylum system.

Interviewees who had registered with the UNHCR said that they were unaware of the requirement to present oneself at the designated satellite city to register with the police. The interviewees held the incorrect assumption that once they had been issued a UNHCR Asylum Seeker Certificate, they could not be deported.[58] In recent months, however, an increased awareness of the obligation to reside in satellite cities has been noted among refugees in detention.

Although the MOI has printed information brochures about the domestic asylum procedures in a range of refugee languages, these brochures were not reported to be distributed to refugees in detention.

Police refusal to take asylum applications

> I had an interview with the police officer. I told him that my passport was not a fake passport. The interpreter wasn't good. The officer told me that I must pay to get a ticket to get home. I said that I don't have money to get a ticket and I cannot return home because I am a refugee. He told me to call UNHCR because they can't do anything for me. But UNHCR told me I should tell the police. I told the police many times that I wanted to give my petition to claim asylum but the police said no. In the end, I was released with an order of deportation so the police never took my asylum application.[59]

Like this refugee, interviewees often reported that the police refused to accept their written asylum applications. In some instances, interviewees said that police provided misleading or false information about the asylum procedures. Despite interventions by HCA and the UNHCR, many refugees held in guesthouses across Turkey, including in Ankara, Edirne, and Hatay, have unsuccessfully attempted to apply for asylum with the police.

In the summer of 2007, for instance, fifty-one Afghan refugees were reported to have been detained for two months in a makeshift detention facility on the Aegean Coast near Ayvalık. They claimed that police refused to process their asylum applications. In particular, they alleged that when they submitted written asylum applications, the police claimed that they were going to fax the asylum petitions to MOI. Instead, the following day, the Afghan men were distributed paperwork from the Afghan Consulate to process their deportation from Turkey. The police, they claim, ordered them to sign the letters. Upon their refusal, the detainees received a visit from a local state official who told them to sign the papers. After a day and a half of refusing to sign, the detainees reported that the police beat some of them. They also reported being denied food and water for twenty-four hours. Despite efforts by HCA and Amnesty International–Turkey to intervene to prevent the deportation, contact was lost with these detainees.

Airport transit zones

Based on HCA's attempts to assist refugees held in detention facilities in airports in Turkey, it is apparent that MOI will not accept asylum applications from transit zones. As discussed below, MOI also refuses to allow lawyers, UNHCR representatives, or other advocates to visit these areas to counsel detainees. HCA receives several calls a year from detention facilities in airports, in particular Istanbul Ataturk Airport. All detainees report being denied their right to apply for asylum and are immediately deported.

In December 2006, for instance, a Nigerian refugee traveling with false documentation from Nigeria to the United Kingdom was detained in the Istanbul Ataturk Airport during a stop over. He informed the police both orally and in writing that he wanted to apply for asylum on the basis of his membership in a political group. If returned to Nigeria, he said, he would face torture and death. The police refused to accept his application for asylum. Despite attempts by HCA to stop his deportation, and although an application was submitted to the European Court of Human Rights and contact was made with the UNHCR, he was deported to Nigeria. For more details about his case, please see Appendix 2.

Refoulement

When in detention, refugees appear to incur a greater risk of deportation than when residing outside detention facilities. The instances of *refoulement*[60] reported to HCA in 2007 include:

- two Iranians and three Sri Lankans deported from the Istanbul Ataturk Airport without being allowed to apply for asylum;
- a recognized Iranian refugee deported while awaiting resettlement after being detained for failing to register with Turkish police;
- an Iranian refugee deported from the Aliens' Guesthouse in Ankara despite having an open file with UNHCR;
- as discussed above, fifty-one Afghan refugees threatened with deportation from Ayvalık after police refused to accept their asylum applications and both verbally and physically abused them (the whereabouts of these refugees is unknown and the likelihood is that they have been deported); and
- three Baha'i Iranian refugees deported despite verbally communicating their wish to claim asylum and instructions from UNHCR that the police accept their applications (they were part of a group of 60 Iranians which may also have included other refugees);

These examples point to consistent disregard by Turkish authorities of the right of detainees to access the domestic asylum process. It is hoped that the European Court of Human Rights order of July 20, 2007 to stay the deportation of an Afghan refugee will act as a catalyst for the Turkish authorities to act according to its commitment to the principle of *non-refoulement*. In the aforementioned case, although the refugee had submitted his asylum application to the UNHCR and MOI, MOI initiated deportation proceedings. At the initiation of Amnesty International—Turkey, his legal representatives successfully applied to the European Court of Human Rights to prevent his deportation.

Procedural Safeguards

Despite procedural rights guaranteed by both international standards and domestic legislation, interviewees reported being denied:

- communication of the reasons for and length of for detention;[61]
- the right to judicial review of the reasons for and/or length of detention;[62] and
- the right to legal counsel, including the right to contact a lawyer, local UNHCR offices, other agencies or non-governmental organizations.[63]

Communication of the reasons for and length of detention

> *We always asked why we were arrested. We knew that we shouldn't be there more than two weeks or a month. So we asked why. The police said we were arrested because an African shot a gun in the air and killed a woman and they did not know which one of us had done it. Some of the policemen spoke English. Most said that they knew nothing, they were there just to guard us.*[64]

International guidelines provide that, if detained, refugees should receive prompt and full communication of the order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand.[65] Authorities are also required to inform detainees of the length of the detention.[66]

None of the interviewees reported being informed of the reasons for their arrest or their rights in detention. Generally, when the interviewees asked the police for the reason for their arrest and detention, they stated that the police responded aggressively or were indifferent. Interviewees claimed that they were not provided with any information regarding the status of their application for asylum throughout their detention. Nor were they brought to court to be informed that they had been found in violation of the Passport Law for attempting to enter or exit the country illegally.[67]

Similarly, according to the detainees surveyed, police rarely provided information about the length of time that they were to be detained. As discussed below, not knowing when they might be released often leads to feelings of hopelessness and depression among the detainees.

Judicial review

Both domestic and international standards guarantee refugees the right to apply to a judicial body to challenge the lawfulness and length of their detention.[68]

In practice, no system of judicial review exists in Turkey for detainees in guesthouses, and as a result, refugees have no means to challenge the legality or length of their detention.

The right to legal counsel

As discussed under "Procedural Safeguards for Detained Refugees," refugees in detention have the right to retain legal counsel[69] and to communicate with other agencies and advocates,[70] and should be notified of this right upon being detained.[71] They also should be provided with adequate time and privacy during visits from lawyers and advocates.

In Turkey, detained refugees' access to advocates appears to fall well below international standards. Interviewees reported having only very sporadic access to lawyers. They also said that they were unable to receive visits from any NGO advocates. Most troubling is that refugees held in airport transit zones in Turkey reported having no access at all to lawyers, the UNHCR or other agencies, or advocates. This is linked to the fact that they are prevented from accessing asylum procedures altogether.

Length of Detention

International law and guidelines hold that the detention of refugees should be limited. If procedures implemented during a refugee's detention are not carried out with "due diligence,"[72] the detention will be considered "excessive."[73] The 1983 Directive provides that a refugee's stay in a guesthouse should be "temporary."[74]

As a fundamental matter, since interviewees alleged that they are not provided consistent access to legal counsel, and are not informed of the status of their asylum applications, they are unable to determine whether their detention is being carried out with "due diligence." As a result, they cannot challenge the length of detention as "excessive," and as discussed above, are effectively denied the right to judicial review.

Based on information provided by the interviewees, the duration of detention periods increased over the course of 2007. This is particularly the case for refugees who first apply for asylum when in detention, who tend to be detained for at least six months. The interviewees who were detained between three months and one year applied for asylum in detention either at the end of 2006 or at the beginning of 2007. Interviewees who were found to be in violation of their residence requirements, but who had registered with UNHCR, were detained for longer periods in 2007 than in 2006, when most refugees were detained for, on average, between a month and three months.

Of those interviewed, detention periods ranged from less than a week to more than a year. The largest number (twenty-three) were detained for between one week and one month. Seven were detained between one and three months; nine between three and six months; two between six months and a year; and one for more than a year. Only four were detained for less than a week.

Interviewees reported that their detention was often prolonged while they collected the money necessary to travel, along with a police officer, to their satellite cities. Detainees reported paying varying, apparently arbitrary amounts for this transportation. They typically reported being charged from $100 to $150 per person, which is significantly higher than the actual cost of travel to any satellite city, even factoring in the cost of an accompanying police officer. Since the interviewees were never provided with official receipts upon payment of the travel fee, they were uncertain how this transaction was administered. No official regulation concerning this required fee has come to the attention of HCA.

In November 2006, for example, an interviewee detained in the Zeytinburnu guesthouse was taken out of the guesthouse, accompanied by two police officers, reportedly to find $300 to cover the cost of transportation to a satellite city for himself and two friends. He was brought to the HCA office handcuffed asking for money. Members of his community eventually provided the full amount required. The interviewee later learned that two refugee women,

who accompanied him on the bus to the same satellite city, were only charged 50 Turkish lira (YTL) each for the transportation.

Addendum

In September 2009, the European Court of Human Rights issued a watershed decision holding that Turkey's system for detaining foreign nationals in detention centres (called "foreigners' guesthouses" at the time) had no legal basis, and that as a result, the applicants had been arbitrarily detained in violation of Article 5 of the European Convention on Human Rights (*Abdolkhani and Karimnia v. Turkey,* Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009). Some seven months later, the Court also ruled that conditions in two Turkish detention facilities amounted to inhuman or degrading treatment or punishment in violation of Article 3 of the Convention (*Tehrani and Others v. Turkey,* Appl. Nos. 32940/08, 41626/08, 43616/08, Council of Europe: European Court of Human Rights, 13 April 2010; *Charahili v. Turkey,* Appl. No. 46605/07, Council of Europe: European Court of Human Rights, 13 April 2010).

Since then, Turkish authorities have redrafted the domestic provision relating to the administrative detention of foreign nationals—Article 23 of the Law on Sojourn and Travel of Aliens in Turkey (Law No. 5683)—but the content of the new article has not been made public. In May 2010, a platform of domestic human rights NGOs (the Turkey Coordination for Refugee Rights) requested a copy of the draft article to provide feedback, and at the time of publication of this paper, was awaiting a response from the government. As part of a related initiative, Turkey issued a directive in March 2010, changing the name of "foreigners' guesthouses" to "removal centres." The directive calls for the construction of many new removal centres across the country, and sets out minimum standards for facility conditions, including access to sufficient food, adequate health care, bedding, sunlight, and outdoor recreation. At the time of publication of this paper, it was too early to tell whether any of these conditions had been implemented. Thus, while Turkish authorities have recently taken steps to respond to the recent ECtHR decisions, they have significant work to do to ensure that asylum seekers and refugees are not arbitrarily detained and that best practices are implemented to protect their basic human rights while their liberty is restricted.

Notes

1. The practice of returning a person to a country where his or her life or liberty would be threatened.
2. Under Rule 39 of the Rules of Court.
3. *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 150 (*Refugee Convention*) p. 37, Article 1b(1), online: UNHCR Refworld, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b01b964>.
4. Turkey interprets the term "European" to include nationals of Council of Europe member states.
5. According to UNHCR Branch Office Ankara figures, as of 31 December 2009, there were 16,337 refugees and asylum seekers registered with UNHCR Turkey, 7,834 of whom applied in 2009. The leading four countries of origin were Iraq (42 per cent), Iran (26 per cent), Afghanistan (18 per cent), and Somalia (7 per cent).
6. *Refugee Convention,* Article 35.
7. *Regulation on the Procedures and the Principles Related to Mass Influx and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum from a Third Country,* 1994, Article 3.
8. The number of these cities is in flux.
9. *Regulation on the Procedures and the Principles Related to Mass Influx and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum from a Third Country,* 1994, Article 4.
10. See 2006 Circular, Section 2, on Duties of Application Authorities.
11. See 2006 Circular, Section 19 on Facilities to be Provided for Asylum Applicants and Beneficiaries.
12. See *Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration* (NAP), Section 4.13 on Lifting of the Geographical Limitation.
13. UN High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (UNHCR Detention Guidelines), 26 February 1999, Guideline 1.
14. See UN Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006, Entitled "Human Rights Council," Addendum, Mission to Turkey, A/HRC/4/40/Add.5, 7 February 2007, paragraphs 86–90.
15. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Standards, Extract from the 7th General Report [CPT/Inf (97) 10], "Substantive" sections of the CPT's General Reports, CPT/Inf/E (2002) 1—Rev. 2003, English.
16. EU Commission Proposal for a Council Directive Laying Down Minimum Standards on Reception of Applicants for Asylum in Member States, COM (2001) 181 final.
17. See *e.g.* <http://www.iem.gov.tr/iem/?m=1&s=31&idno=91>.
18. *E.g.* JRS-EUROPE (2005) *Detention in Europe: Administrative Detention of Asylum Seekers and Irregular Migrants;* FRONTIERS (2006) *Legality vs. Legitimacy: Detention of Refugees and asylum seekers in Lebanon.*
19. Turkish Constitution, Article 19; see also UN Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled

"Human Rights Council," Addendum, Mission to Turkey, A/HRC/4/40/Add.5, 7 February 2007, paragraphs 86–90.

20. Passport Law, Article 34.
21. Passport Law, Article 34.
22. The Law on the Sojourn and Movement of Aliens, Article 25.
23. The Law on Residence of Foreign Citizens, Article 23.
24. UN Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled "Human Rights Council," Addendum, Mission to Turkey, A/HRC/4/40/Add.5, 7 February 2007, paragraphs 86–90.
25. UNHCR Detention Guidelines; see also UNHCR Comments on the 2005 Immigration and Nationality Bill, October 2005, London, UK ("UNHCR's view is that the detention of asylum seekers is inherently undesirable, and that there must be a presumption against its use"); online: <http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/Comments2005IANbilldetention.htm>.
26. UNHCR Detention Guidelines, Introduction (para. 3).
27. EXCOM Conclusion No. 44 (XXXVII); UNHCR Detention Guidelines, Guideline 3(iii).
28. 1994 Asylum Regulation, Article 4.
29. *Ibid.*
30. UNHCR Detention Guidelines, Guideline 5.
31. *Refugee Convention,* Article 33; 1984 United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution/ adopted by General Assembly* (CAT), 10 December 1984. A/RES/39/46, Article 3, online: UNHCR Refworld, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b00f2224>; see also, *Chahal v. UK* (app 22414/93), Judgment of November 1996 (1997); *Gorki Tapia Paez v. Sweden* Communication 83/1997, CAT/C/20/D/83/97.
32. Those charged with criminal offences are guaranteed the right to: be notified promptly for the reasons for the arrest and the charges brought; be brought before a court within forty-eight hours of arrest; have next of kin informed immediately of the arrest or detention; be brought to trial in a reasonable period of time; and be compensated if any of these provisions are violated. See Turkish Constitution, Article 19. Refugees who are arrested for criminal violations of the Passport Law, by, for instance, entering Turkey without documentation, are entitled to these rights. Lawyers who have worked in collaboration with HCA state that in practice, refugees, unless charged with a violation of the Turkish Criminal Code, are rarely criminally charged, or accorded the procedural rights of criminal detainees.
33. *Ibid.*
34. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), 4 Nov 1950, ETS 5, online: UNHCR Refworld, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3b04>, Article 5(4), provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"; see *International Covenant on Civil and Political Rights* (ICCPR), 19 December 1966, 999 U.N.T.S. 171, Article 9(4), UNHCR Refworld, online: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3aa0>.
35. UN Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council," Addendum, Mission to Turkey, A/HRC/4/40/Add.5, 7 February 2007, paragraphs 86–90.
36. UN Working Group on Arbitrary Detention (UNWGAD), *Civil and Political Rights, Including Questions of Torture and Detention Report,* E/CN.4/2000/4, 28 December 1999, *passim.*
37. UNHCR Detention Guidelines, Guideline 5(i); UNWGAD, Annex 2, Principle 8.
38. UNHCR Detention Guidelines, Guideline 5 (iii); UNWGAD, Annex 2, Principle 8.
39. UNHCR Detention Guidelines, Article 5(ii), UNWGAD, Annex 2, Principle 2.
40. UNHCR Detention Guidelines, Guideline 5(ii).
41. UNWGAD, Annex 2, Principle 8.
42. *E.g.* ECHR, Article 5.
43. Turkish Constitution, Article 19; ICCPR, Article 9(4); ECHR, Article 5(4).
44. UNHCR Detention Guidelines, Guideline 5(iii).
45. UNWGAD, Annex 2, Principle 8.
46. Turkish Constitution, Article 19.
47. UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* Principle 17(1), 9 December 1988, online: UNHCR Refworld, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b38b34>.
48. UNHCR Detention Guidelines, Guideline 5(ii), UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17(2).
49. UNHCR Detention Guidelines, Guideline 5(v); UNWGAD, Annex 2, Principle 2; UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 16 & 18.
50. UNHCR Detention Guidelines, Guideline 5(ii); UNWGAD, Annex 2, Principle 10.
51. UN Doc. CCPR/C/79/Add.70 (1996) (holding that the Swiss practice of three-month-long detention of foreign nationals for the preparation of temporary residence permit and waiting times ranging from nine months to a year for the preparation for expulsion as excessive and discriminatory).
52. *Chahal v. UK* (app 22414/93), Judgment of n/d November 1996; *Kolompar v. Belgium,* Judgment of 24 September 1992.
53. UNWGAD, Annex 2, Principle 7.

54. 1983 Directive, Article 16.
55. *Ibid.*
56. While HCA does not support the use of an expedited process for the determination of asylum applications, this provision is included to illustrate the fact that the Ministry of Interior, in issuing this regulation, expressed an intention to detain refugees for a limited period of time.
57. Mauritanian refugee, December 2006.
58. The Asylum Seeker Certificate is issued by the UNHCR after registration with that agency is complete, and includes the refugee applicant's name, country of origin, and the satellite city to which he or she has been assigned.
59. Congolese refugee held in the Kumkapı guesthouse.
60. Article 33 of the CAT defines *refoulement* as return to the frontiers of territories where one's life or freedom would be threatened on account of one's race, religion, nationality, membership of a particular social group, or political opinion.
61. UNHCR Detention Guidelines, Guideline 5(i); UNWGAD, Annex 2, Principle 8.
62. UNHCR Detention Guidelines, Guideline 5 (iii); UNWGAD, Annex 2, Principle 8.
63. UNHCR Detention Guidelines, Article 5(ii); UNWGAD, Annex 2, Principle 2.
64. Guinean refugee who was detained in the Zeytinburnu guesthouse. He was arrested in a series of house raids initiated following the alleged shooting of a woman in the Tarlabası district of Istanbul, August 2006. Interviewees reported that about three hundred African nationals were arrested during these house raids.
65. UNHCR Detention Guidelines, Guideline 5(i); UNWGAD, Annex 2, Principle 8.
66. *E.g.* ECHR, Article 5.
67. As discussed in the first section, refugees who enter or exit Turkey without documentation may face criminal charges for the violation of the Passport Law. Lawyers working in the field note that the Prosecutor often reviews the cases of foreigners found in violation of the Passport Law in their absence.
68. Turkish Constitution, Article 19; UNHCR Detention Guidelines, Guideline 5(iii); UNWGAD, Annex 2, Principle 8.
69. UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17; UNHCR Detention Guidelines, Guideline 5(ii).
70. UNWGAD, Annex 2, Principle 10.
71. UNHCR Detention Guidelines, Guideline 5(ii).
72. *Chahal v. UK* (App. 22414/93), Judgment of n/d November 1996; *Kolompar v. Belgium,* Judgment of 24 September 1992.
73. UNWGAD, Annex 2, Principle 7.
74. 1983 Directive, Article 16.

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From Political Instrument to Protection Tool? Resettlement of Refugees and North-South Relations

Thais Bessa

Abstract

Lacking a clear legal definition, the conceptualization and application of durable solutions have been highly influenced by states' interests that were often at odds with humanitarian concerns on refugee protection. During the Cold War resettlement was perceived as the preferred durable solution, although it was selectively applied to different refugee crises in the South. With the asylum crisis in the 1980s and the end of the Cold War, a new agenda of containment emerged as Northern countries' interest in receiving refugees declined. During the 1990s voluntary repatriation emerged as a new preferred solution and there was an effort to redefine and adapt resettlement to a new context. This process focused on detaching resettlement from its previous political and immigration character and redefining it as an exclusive protection tool and instrument of international co-operation. Hence, resettlement in the post-Cold War era is characterized by depoliticization, a smaller number of beneficiaries, and geographic expansion. However, it is important to critically question whether such depoliticization has happened in fact, the reasons behind it, and its relation to North-South politics and containment strategies.

Résumé

Faute d'une définition juridique claire, la conceptualisation et l'application de solutions durables à la réinstallation ont été fortement influencées par des intérêts étatiques souvent en contradiction avec les préoccupations humanitaires sur la protection des réfugiés. Durant la guerre froide, la réinstallation paraissait la solution durable la plus souhaitable, bien qu'appliquée de façon ponctuelle aux différentes crises de réfugiés dans le Sud. Un nouveau programme de confinement apparaît lors de la crise de l'asile des années 1980 et la fin de la guerre froide quand diminue la volonté des pays du Nord à accueillir les demandeurs d'asile. Le rapatriement volontaire apparaît au cours des années 1990 comme nouvelle solution de préférence. On tente alors de redéfinir la réinstallation et de l'adapter au nouveau contexte. Ce processus est axé sur une rupture de la réinstallation avec ses aspects politique et migratoire précédents et sa redéfinition en tant qu'outil exclusif de protection et instrument de la coopération internationale. Ainsi, la réinstallation à l'ère de l'après-guerre froide se caractérise par la dépolitisation, la réduction du nombre de bénéficiaires et l'expansion géographique. Toutefois, il est essentiel de déterminer de façon critique si cette dépolitisation s'est réellement faite, les raisons qui la sous-tendent et sa relation à la politique Nord-Sud et aux stratégies de confinement.

Introduction

Research and policy making in forced migration commonly refer to the concept of durable solutions and its three options: local integration, resettlement, and voluntary repatriation. However, these concepts find loose support from legal instruments and are mainly derived from the regular practice of states and international organizations. Consequently, they are embedded in a complex set of political, economic, and strategic interests that often go far beyond humanitarian concerns on refugees' protection. In that sense, the use of resettlement, especially in North-South relations, has changed from the Cold War period to the present, allegedly evolving from a political instrument to a protection tool. The present paper will examine the question that although the very concept of "refugee" is intimately linked to political upheavals and interests, the way refuges have been dealt with (*i.e.* the durable solutions offered) has been influenced by different explicit and implicit interests that have varied over time in speech and practice.

As the present refugee regime was initially designed in the early days of the Cold War, the lack of a precise definition of durable solutions and the relationship between them enabled states to manipulate their use according to political, economic, and ideological interests. Hence, during the early 1950s, resettlement was praised as not only the preferred durable solution, but the only viable one, and it played an important role in transferring refugee populations from communist countries.

In the following decades forced displacement increased dramatically in the global South, and the responses provided to refugee influxes continued to be highly embedded in Cold War political and strategic interests, so that different refugee crises received differing "solutions." With the end of the Cold War and the asylum crisis initiated in the late 1970s and early 1980s, Northern states had a declining interest in receiving refugees. Consequently, containment strategies gained importance and during the late 1980s and 1990s there was a process to redefine durable solutions available to refugees.

In this process, voluntary repatriation replaced resettlement as the preferred durable solution and there were consistent efforts to detach resettlement from its previous feature of a political and migration instrument and (re)define it as a protection tool. Under this approach resettlement would serve a smaller number of refugees, but would obey strict protection criteria that uphold the safety and welfare of refugees.

If resettlement lost space in a containment context, why was it never abandoned by states and international organizations? First of all, even though the United Nations High Commissioner for Refugees (UNHCR) had a crucial role in advocating for voluntary repatriation as the preferred durable solution, it also attempted to maintain resettlement as an option available through a process to redefine it and adapt it to new circumstances. An important consequence of this process was the focus on protection and international co-operation, culminating in an expansion of resettlement to the global South.

Second, even in a containment context, Northern countries still receive refugees due to different reasons, including political and foreign policy interests, domestic pressure, economic interests, and humanitarian concern. More important, amidst accusations of uncontrolled immigrants' and asylum-seekers' entry, resettlement enables states to regain control over refugee admission.

It can be argued that redefining resettlement exclusively as a protection tool was exactly what enabled its continued use, geographically expanded yet numerically reduced. However, one can critically analyze the motivations behind it, whether such depoliticization actually happened, and how it impacted refugee issues in North-South relations. In that sense, the UNHCR-led process to redefine resettlement was an effort to reposition durable solutions in line with changing interests of states. Moreover, resettlement is still applied according interests that are not purely humanitarian or protection, as different refugee populations receive different solutions. Finally, although emerging resettlement programs in the South are praised as the best example of resettlement as a protection tool, it is important to situate them in broader North-South relations and containment strategies.

The paper has six sections. The first examines how the resettlement concept, in the absence of legal instruments, was forged and promoted as the most desirable solution in the early days of the Cold War. The following section will show how the political use of resettlement evolved along with the Cold War and how it was selectively applied to distinct situations. The third part briefly explains the asylum crisis experienced in the late 1970s and 1980s and how it affected the conceptualization of durable solutions and resettlement. Section four will analyze the effort to redefine durable solutions and the relationship between them, focusing on the process of depoliticizing resettlement. The next part will examine the characteristics of resettlement in the post–Cold War era and how they differ from previous years. The final section will analyze the complex set of factors that explain why Northern countries continue to use resettlement even in a context of containment and decreasing interest in international co-operation. The paper will conclude with some final critical remarks and challenges for the future.

Defining Resettlement during the Early Cold War: The Preferred Solution

The *International Thesaurus of Refugee Terminology* (ITRT)[1] defines "resettlement" as "the durable settlement of refugees in a country other than the country of refuge." However, it should be noted that such definition is derived from the practice of states and UNHCR guidelines rather than an international legal instrument. The milestone of refugee protection, the 1951 *Convention relating to the Status of Refugees,* is silent on a precise definition not only of resettlement, but of the three-fold durable solutions concept as a whole. Resettlement is mentioned only in Article 30, claiming that states should facilitate the transfer of assets of resettled refugees.

A precise definition of resettlement is also lacking in the UNHCR 1950 Statute. As per its Article 1, the agency is mandated to seek permanent solutions for refugees, such as "the voluntary repatriation of such refugees, or their assimilation within new national communities." However, it is open to interpretation whether the last part refers to both

local integration in the first country of asylum and resettlement in a third country.

Lacking a clear definition, resettlement has been manipulated as a major tool for states to apply discretionary policies, according to interests that are often at odds with the concern with refugees' protection. Specific political and economic interests in a given time shaped the concepts and solutions provided to refugees, which proved to be very flexible regarding different populations and different periods.

As the refugee regime was tailored at the beginning of the Cold War with a strong Eurocentric character,[2] repatriation was obviously not an option. Resettlement was then the perfect durable solution for refugees due to the combination of strategic interests (recovery and regional stability in Europe), economic interests (immigrant workforce), and ideological interests (supporting defection from Communist states).[3] Moreover, the US leadership had an important role in this system, as it was willing and able to bear the bulk of costs related to the reception of refugees, offering large resettlement quotas and promoting a similar welcoming position from other Western governments.

During the 1950s and early 1960s resettlement had two main characteristics. First, it bypassed UNHCR because at the beginning it was perceived that the agency's clients were only the refugees displaced by the war who still remained in Europe. The US had a great interest in closely managing the resettlement of refugees from communist countries, and it did so through two different agencies: the Intergovernmental Committee for European Migration (ICEM, created in 1951) and the United States Escapee Program (USEP, officially established in 1952, although it had operated since 1949). Differently from UNHCR in its early days, those agencies received full funding from the US.[4]

Second, resettlement activities were totally concentrated in Europe. During the Berlin crisis in 1953 and throughout the decade until the Berlin Wall was built in 1961, some 3.5 million people fled from East to West Germany and some were resettled farther away. The largest refugee crisis of this period and the first massive resettlement operation occurred after the Soviet invasion of Hungary in 1956. Although the US was initially reluctant to resettle refugees from Yugoslavia, a communist country of first asylum, a total of some 180,000 Hungarian were resettled in thirty-seven countries.[5] The receptiveness was explained both by Cold War political and ideological interests and economic interests, since the Hungarians were a "model immigration group" composed of skilled workers.[6]

It is important to note that during the Hungarian crisis UNHCR played an important role and began to be recognized by the US as a relevant actor in the bipolar context. Since then the US government started to contribute financially to UNHCR, becoming its major donor and enabling the agency to expand its personnel and capacity in the following decades.

Resettlement and Cold War Politics in the Global South

During the late 1960s and the 1970s the decolonization process caused conflicts and massive displacement in the global South, especially in Africa and Asia, which ultimately altered the focus of refugee protection. According to Loescher, "by 73, the US began to refocus its refugee programs from Europe to the rest of the world, following the global expansion of its foreign policy and security commitments."[7]

As refugee influxes and global responses to them started to shift into the South, resettlement remained an important solution. However, its use in specific refugee crises was shaped by economic and principally by political interests of Northern states. This can be exemplified by the analysis of three major refugee crises during the 1970s: in Uganda, the Southern Cone of Latin America, and Indochina.

In 1972 the Ugandan president Idi Amin decided to expel all people of Asian derivation. As a consequence, more than 40,000 people fled the country, including some 7,000 made stateless. UNHCR's appeal for resettlement quotas received a quick and welcoming response from the international community and by the end of 1974 all expelled persons were resettled in twenty-five different countries.[8]

In the same period a refugee crisis erupted in the Southern Cone of Latin America as almost all countries in the region were under authoritarian military governments. More than 200,000 refugees fled Chile after the military coup in 1973, including refugees who were living there after escaping from similar coups in neighbouring countries.[9] As military regimes in different countries were allied, refugees were targeted in the whole region and there was no safe haven. Therefore, the solution sought for those refugees was predominantly resettlement outside South America, and the UNHCR's appeals were generously answered by European countries.[10]

Nevertheless, the same attitude was not observed from the US, since those refugees were fleeing Washington-supported regimes, under accusations of Communist affiliation. "The US virtually ignored appeals for resettlement and it even refused to provide anything to support ICEM programs to finance resettlement."[11] In mid-1975 the US government agreed to receive 400 refugees from the Southern Cone, but the strict screening procedures delayed the resettlement process and limited the number of refugees actually admitted to US soil.[12] As a consequence of the US policy, most refugees relocated themselves within the

region and external resettlement was an option for few of them. By the end of the 1970s some 15,000 South American refugees were resettled in forty-four countries, mostly in Western Europe.[13]

The third refugee crisis during the late 1970s and the 1980s, in Indochina, turned out to be the largest and most expensive resettlement operation in history. Due to struggles between Communist revolutionaries and US-supported counter-revolutionaries, millions of Vietnamese, Laotians, and Cambodians were caught amidst fire and displaced. Neighbouring countries such as Thailand and Malaysia were overwhelmed with the so-called "boat people" and urged Northern support to address the situation, mainly through resettlement. The US was the leading country to support the assistance and resettlement of Indochinese refugees, since such an operation was perceived as emblematic in the context of the "new Cold War" in the early 1980s.[14] Furthermore, American society was particularly sensitive to the issue of Vietnamese refugees, a position increasingly voiced by rising transnational human rights networks.

Initially other Northern countries, especially in Europe, believed that the crisis was a "US problem"[15] and the US struggled to convince them that resettlement was the best solution for Indochinese refugees. Even though it initially sustained the idea that repatriation would be the most adequate solution for refugees in the region, UNHCR ultimately supported this policy, promoting two international conferences in Geneva and the Comprehensive Plan of Action for Indochinese Refugees.[16] As a result of this effort, by the mid-1990s some 1.3 million Indochinese refugees were resettled.[17] The US was obviously the most generous country, and from just 1975 to 1985 it received some 750,000 resettled refugees.[18]

The three cases exemplify how resettlement of refugees was an important political instrument within Cold War politics. In the Ugandan case, resettlement countries were eager to offer support to persecuted populations as part of their effort to contain Communist expansion in Africa. In the Latin American case, resettlement was offered as a much more limited possibility, since most refugees were fleeing Western-allied regimes. Finally, receiving Indochinese refugees through resettlement was perceived as an inexorable part of Cold War politics in the region and the resettlement response was the widest possible. However, it is important to note that despite its political manipulation, conferring different levels of usage in different situation (or even within the same situation), resettlement in this period was the preferred and in some cases the only durable solution considered by major powers.

The Asylum Crisis and Its Impact on Durable Solutions

From the late 1970s and early 1980s on, Northern states' willingness to receive refugees decreased dramatically due to economic, social, and political transformations in the international scenario and domestic politics. The so-called asylum crisis brought about containment policies and a redefinition of the concepts of durable solutions and the role of resettlement.

With global economic recession, refugees and migrants in general were no longer a welcome workforce, but rather a threat to the shrinking labour market and welfare system.[19] The globalization process facilitated communications and transport and also increased—and made more visible—the gap between North and South, fostering the desire of Southern citizens to migrate.[20] Refugees and asylum seekers started to arrive directly in Northern territory in mixed movements along with other migrants. Unprecedented numbers of arrivals triggered popular discontent, causing electoral pressure for restrictive measures.[21] Finally, the end of the Cold War altered one of the most important foundations of the refugee regime. Without the geostrategic motivation of promoting defection from communism, governments had little interest in receiving refugees into their territories[22] and lost their main argument for gathering internal consensus and acceptance.

The asylum crisis led to new approaches to refugee issues centred on containment. There was a proliferation of measures to restrict the granting of asylum and access to territory,[23] as well as an effort to contain refugee influxes in the global South as much as possible. Such new approaches affected the conceptualization and application of durable solutions in three manners. First, there was a renewed focus on in-country operations, including maintaining refugees within their regions of origin and emphasizing repatriation.

Second, international co-operation on refugee issues became increasingly problematic as Southern states were overwhelmed with the bulk of refugee flows and Northern countries had fewer incentives to offer resettlement quotas and financial resources. As asserted by Gibney, "Western states claim that refugees in the South were too numerous to be assisted through resettlement schemes and, in any respect were not fleeing persecution (…)."[24]

Finally, as the numbers of asylum seekers increased, there was a general perception that Northern states lost control over refugee arrivals, especially in comparison with resettlement programs implemented in preceding years.[25] The arrival of asylumseekers is spontaneous and unpredictable, in opposition to organized and predictable resettlement programs, through which governments may literally

chose which refugees they want to receive, how many, and when.[26] In theory resettlement could be an opportunity for states to regain their lost control over refugee issues, but in light of decreasing external incentives and domestic pressure, resettlement needed to be re-shaped as a more precise and explicitly protection-oriented tool in order to maintain its role as a durable solution.

(Re)defining Durable Solutions and Resettlement: A Protection Tool?

A major consequence of the asylum crisis was a redefinition of the concept of durable solutions and the relationship between them. It was not a formal process but rather an almost natural outcome of states' policies and practices. In the post–Cold War order with low incentives for North-South co-operation resettlement was no longer the preferred durable solution for refugees. In that sense, since the late 1980s voluntary repatriation emerged as the natural and most adequate solution for most situations of displacement. Such a position was actively promoted by UNHCR, in line with the political agenda of major powers who wanted to maintain refugees in their regions of origin. Former High Commissioner Sadako Ogata had a crucial role in this approach and UNHCR established an explicit hierarchy of durable solutions[27] and went as far as to declare the 1990s as "the decade of voluntary repatriation." Indeed, from 1991 to 1996 some 9 million refugees were repatriated, compared to only 1.2 million during the period 1985–1990.[28] However, this approach received extensive criticism, including the criticism that UNHCR was drifting away from its original protection mandate[29] and that the levels of voluntariness could be highly debated in several repatriation operations.[30]

While in-country operations and repatriation gained greater relevance, the discourse around the use of resettlement became somewhat conservative. In the process of redefining durable solutions, resettlement was increasingly seen as costly in terms of resources and cultural adaptation, which in technical terms is true, although such concern was never an issue during the precedent "resettlement period."[31] During its 42nd Session in 1991, the UNHCR's Executive Committee (ExCom) approved its first conclusion on international protection dealing solely with resettlement, which established a hierarchy between durable solutions: "UNHCR pursues resettlement only as a *last resort,* when neither voluntary repatriation nor local integration is possible, when it is in the best interests of the refugees and where appropriate."[32]

Moreover, it was explicitly recognized that in preceding decades resettlement was more a migration program than a protection tool. This was made clear during the same ExCom meeting in 1991, when High Commissioner Ogata affirmed that differently from massive resettlement operations experienced during the 1980s and the previous decades, resettlement operations in the 1990s were "likely to be more protection oriented and could often involve smaller numbers."[33]. Therefore, in response to the decrease in immigration-driven resettlement, UNHCR started to apply its own protection-related criteria for a more diverse, although numerically limited, group of refugees.[34] Compared with voluntary repatriation, from 1997 to 2006, for each refugee resettled, fourteen were repatriated.[35]

However, aware that such strong statements could create an idea that resettlement was a less important or effective solution and jeopardize its very existence, ExCom members and UNHCR toned down their approach. Later declarations emphasized that for some refugees at high risk in the country of first asylum and where repatriation is not a possibility, resettlement can in fact provide the most adequate form of protection. UNHCR publicly declared that the reduction in the number of refugees resettled during the early 1990s was mainly due to the conclusion of its operations in Southeast Asia and did not "reflect any fundamental change in the criteria which UNHCR uses to identify candidates for resettlement."[36]

The emergence of new refugee crises in different parts of the world during the 1990s revealed that resettlement could still have an important role in the post–Cold War order. However, in a scenario where Northern countries had few incentives to receive refugees and to cooperate with overwhelmed Southern countries of first asylum, resettlement had to be reshaped and adapted to these new circumstances if it were to maintain its relevance. This effort was primarily led by UNHCR and focused on reinvigorating resettlement in a new context, emphasizing its protection role over political usage and offering incentives for states' co-operation.

Therefore, the concept was developed that resettlement would serve a three-fold purpose: durable solution, protection tool, and instrument of international solidarity. First, resettlement as a durable solution means that in some cases when there is continued cross-border persecution, extreme impediments to local integration, and impossibility of repatriation, resettlement is the best or even the only viable solution for refugees. Thus, resettlement should be an integral part of the comprehensive set of responses applied to each refugee situation, along with the other durable solutions. Such an approach relates to the strategic use of resettlement, which refers to its ability to benefit other refugees beyond those being resettled, as well as the host and neighbouring states. As large refugee populations challenge socio-economic structures and regional stability, resettlement can be an important means to alleviate the pressure on countries of first asylum.

Second, resettlement as a protection tool implied a greater focus on the individual needs of refugees rather than states' political and economic interests. To that end, resettlement should be based on well-defined criteria and required important changes in procedures. Precise criteria to assess refugees' need for resettlement were established, namely: legal and physical protection needs (including threat of *refoulement*), lack of integration prospects, survivors of violence and torture, women at risk, children and adolescents (especially unaccompanied minors), older refugees, medical needs, and family reunification. As the establishment of such criteria consolidated the transformation of resettlement from immigration to protection-driven, resettlement procedures also changed, evolving from mechanical group processing to case-by-case assessments.

Finally, resettlement is an instrument of international solidarity and burden/responsibility-sharing, as it offers support to overwhelmed first countries of asylum, especially in situations of protracted displacement. Since the mid-1990s UNHCR has led initiatives to encourage tripartite co-operation between the agency, states, and civil society organizations. As a result, a Working Group on Resettlement and a formal process of consultation with governments and NGOs were established in 1995. Such consultations were held on a yearly base and in 2001 it was renamed Annual Tripartite Consultations on Resettlement (ATC).

A major initiative aiming at promoting incentives for international co-operation, especially North-South, was the Convention Plus process, lead by UNHCR between 2001 and 2005. The strategic use of resettlement was one of the three topics in which multilateral agreements were sought. A Core Group was established in Geneva under the leadership of the government of Canada, which gathered states, concerned international organizations, and civil society entities. Although the initiative did not reach the intended "generic agreements," the resettlement strand was considered the most successful one, because it provided a Multilateral Framework of Understandings, even though this concrete outcome was considered a "modest and uncontroversial statement."[37]

A New Paradigm? Resettlement in the Post–Cold War Era

Although it has undergone some changes in its concept and positioning *vis-à-vis* the other durable solutions available to refugees, it is unquestionable that resettlement remains an important and integral part of the refugee protection regime. It continues to benefit a large number of refugees yearly and to be the subject of discussion in different international fora and academic circles. However, how does resettlement in the post–Cold War order differ from resettlement in previous years?

Resettlement in this new context can be said to have three main characteristics. The first one refers to its concept. Throughout the 1990s and 2000s resettlement has been precisely defined in international instruments which, although non-binding, enabled a more harmonized and predictable use. Resettlement now has precise criteria, procedures, and definition of the roles of actors involved. However, maybe the most significant change in the conceptualization of resettlement has been its depoliticization. While defining its threefold purpose, resettlement has been detached from its previous political and immigration-driven use and redefined in exclusive terms of protection instrument.

Second, compared with previous decades, resettlement has in fact numerically decreased. In 1979, resettlement was the solution for one in every twenty refugees but by 1996, the proportion was one in every four hundred.[38] This trend can still be observed as the total number of resettled refugees in 2006 was 11 per cent lower than in the previous year. As previously discussed, defining resettlement as a protection tool essentially means serving smaller numbers of refugees, since criteria and procedures are refined. Better screening procedures have also become an increased concern because of fraud and misuse,[39] especially after the 1999 resettlement scandal in Kenya.

However, other factors also explain the reduced numbers of resettlement in the present context. Confronted by large numbers of asylum seekers arriving directly in their territories, Northern states have offered fewer resettlement places, in an attempt to "balance" the total number of refugees. This often implicit correlation between resettlement and asylum policies can be exemplified by the fact that adding resettlement and direct arrivals, the US and Western Europe admit roughly the same number of refugees, even though the US has a stronger resettlement program.[40]

Following 9/11 and the Global War on Terror, refugee policies are increasingly in line with security concerns, which has also affected the number of refugees admitted through resettlement. For instance, the US government has applied tighter screening procedures in its resettlement programs and therefore it has struggled to fulfill its annual resettlement quotas. This is the case especially for refugees from the Middle East and refugees that allegedly support Washington-determined "terrorist organizations" such as Colombian or Sri Lankan refugees. For instance, for fiscal year 2008 the US has established a ceiling (quota) of 70,000 refugees, but had only received 48,282 (68.9 per cent).[41]

Finally, the third characteristic of resettlement in the post–Cold War order is its geographic expansion beyond the traditional resettlement countries. Traditionally there were ten resettlement countries which offered annual resettlement quotas[42] and other countries offered resettlement

places answering *ad hoc* UNHCR appeals. Expanding and diversifying resettlement opportunities were a crucial part of the 1990s Alexander Betts (2008) 'Towards a "Soft Law" Framework for the Protection of Vulnerable Migrants,' *New Issues in Refugee Research,* Working Paper 162, UNHCR, Geneva effort to redefine resettlement as a protection tool and instrument of international co-operation.

Following UNHCR consultations, since 1996 seven new countries have established resettlement programs, although only five remain operative. Although two countries are from the global North (Iceland and Ireland), the main innovation is the emergence of Southern countries of resettlement. Between 1998 and 2001 Benin and Burkina Faso received 226 refugees, mainly from other African countries. However, a 2003 evaluation found overall "disappointing results"[43] and the program in both countries was discontinued.

Despite the unsuccessful pilot project in Africa, UNHCR further promoted other resettlement initiatives in the global South, focusing on Latin America. Since 2002 and until the end of 2007, Brazil, Chile, and Argentina have received some 1,000 resettled refugees.[44] The program in such countries remains operative and it has already expanded beyond its initial scope: although the main beneficiaries of the resettlement program in Latin America are Colombian refugees, some 100 Palestinian refugees have also been admitted.

Explaining the Continued Use of Resettlement

It has been argued that despite its reduced numbers and a new façade, resettlement is still an important part of the protection regime. However, an important question should be asked regarding its continued use: if the Cold War interests no longer exist and Northern states are increasingly unwilling to receive refugees, why do they keep resettling?

First of all, UNHCR's catalytic role must be recognized. Although the agency has followed states' political interest in replacing voluntary repatriation as the preferred durable solution, it has also remained aware of the importance resettlement has in several refugee situations. As new refugee crises erupt worldwide and in a context of increasing containment, it is important that resettlement remains an option of safe haven to refugees. Nevertheless, aware that incentives for international co-operation and provision of resettlement have changed since the end of the Cold War, UNHCR has attempted to offer alternative incentives, mostly by detaching resettlement from its previous clear political and immigration nature and redefining it as an exclusive political tool. This official depoliticization of resettlement would ensure that states remain committed to it.

Second, as mentioned before, with the asylum crisis there was a generalized perception that Northern states have lost control over the entry of immigrants and refugees. For these governments, resettlement is a means to uphold their international commitments towards refugee protection while maintaining their control over which refugees are admitted, how many, and when. Hence, the offer of resettlement has been used to justify stricter policies regarding admission and the granting of asylum. Furthermore, resettlement is useful to reinforce to the domestic public the idea that resettlement and asylum are totally different areas of refugee protection. For instance, the US maintains two strictly different concepts that embody distinct normative and institutional frameworks. "Refugee" refers to a resettled refugee and "asylee" or "asylum-seeker" to a person claiming protection directly on US soil.[45] Similarly, in Western Europe, resettlement has been used to clarify and legitimize the distinction between "true" and "bogus" refugees.[46]

Finally, although the asylum crisis reduced Northern states' willingness to receive refugees and immigrants in general, no country so far has applied a strict no-entry policy. Continued refugee admissions can be explained by a complex combination of several interests, such as humanitarian concerns and domestic pressure, as well as economic, political, and foreign policy interests.

States have a humanitarian interest in admitting refugees according to their international commitments as signatories of international instruments such as the 1951 Refugee Convention. In most cases, such commitments have been internalized by domestic legislation and compliance with them is overseen by national and regional courts. Nevertheless, this humanitarian concern has a limited role, since states often circumvent their international obligations by preventing access to territory or creating new categories and concepts.[47] The inconsistent offer of resettlement to different refugee populations also reveals that humanitarian concerns have only marginally influenced resettlement programs.

Pressure from domestic groups and economic interests have also influenced states' refugee policies.[48] Resettlement admissions can be influenced by lobby groups from refugee populations already present in the country or by economic groups interested in attracting or avoiding specific skills. In a broader sense, the domestic public also influences immigration and refugee policies through electoral pressures.

Finally, although resettlement has been redefined as a protection tool disentangled from political interests, they still play a crucial role in determining whether resettlement will be applied, to which populations, and to what extent. In that sense, little has changed from Cold War period. For instance, the main category of refugees admitted for resettlement in the US is comprised of those falling within certain ethnic groups and/or country of first asylum.[49] Although in consultation with other actors, the Department of State is

responsible for deciding which groups are included in the annual resettlement quota, which demonstrates the highly political character of such decisions.

Critical Analysis and Final Remarks

Beyond debates on manipulation of resettlement policies, it is fundamental to recognize the generosity of Northern states. It is undeniable that resettlement has been a life-changing or even life-saving instrument for many refugees throughout history. Since the late 1970s, more than 250,000 refugees have been admitted in Western Europe through UNHCR-led resettlement operations[50] and the US alone has resettled over two million refugees, more than all other resettlement countries together.[51]

Resettlement depoliticization during the 1990s and 2000s enabled it to remain relevant in the refugee protection regime. Its redefinition had positive effects, especially bringing more transparency to the process with the establishment of precise criteria and procedures. The focus on solidarity and responsibility-sharing may offer an opportunity to enhance international co-operation (especially North-South) in other areas of refugee protection.

However, if this depoliticization had positive impacts, some critical observations must be made. First of all, it is important to bear in mind the motives behind the redefinition of resettlement from a political instrument to a protection tool. As UNHCR led this effort, it was responding to new interests and political relations between states, adapting resettlement to a political context characterized by containment and decreased incentives for international co-operation. It can be said then that the depoliticization process was essentially politically motivated.

Furthermore, the extent to which this depoliticization is real is also debatable. As demonstrated before, despite the exclusive protection facade adopted after the end of the Cold War, resettlement programs are still discretionary and respond to a set of concerns and interests that go far beyond their strict use as a protection tool. This is corroborated by the inconsistent application of resettlement policies towards different refugee policies and states' difficulties in fulfilling annual resettlement quotas. For instance, in 2006 some 29,600 refugees were resettled through UNHCR programs and a further 71,700 were resettled outside the agency,[52] which demonstrates that traditional resettlement countries still keep a largely discretionary policy regarding resettlement and prefer to maintain their own channels and agencies, using UNHCR only to some extent.

Another important question refers to how the new approach to resettlement fits into North-South politics. Despite the non-political discourse, resettlement is deeply entangled in containment policies. The concept of strategic use of resettlement may conceal the interest in maintaining refugees in their regions ,not to facilitate future repatriation, but rather to avoid their further movement to Northern countries. Besides, according to van Selm, especially in Europe several actors have tried to "sell" resettlement as a tool to reduce the arrival of asylum-seekers,[53] which represents a great risk not only of resettlement misuse, but to the integrity of the protection regime.

The emerging resettlement programs in the global South also deserve a critical analysis. Southern countries already host the majority of refugees in the world, but under an international solidarity discourse they are assuming yet another obligation through resettlement. Although Southern resettlement countries receive a much smaller number of refugees, the initiative reveals that the level of responsibility sharing and international co-operation in refugee issues is still unfair and needs to be further developed.

It is interesting then to argue why Southern countries join such initiatives. Their incentives include increased international visibility and prestige, promoted by the catalytic role of UNHCR. The financial cost to these governments is very limited, as the programs are almost fully funded by UNHCR and Northern countries, which imposes challenges regarding ownership and long-term sustainability. The countries with most successful programs are those with medium levels of economic development and small numbers of refugees in general, which also raises the questions of feasibility and sustainability of resettlement in Southern countries lacking adequate levels of economic development and resources. Furthermore, an external and comprehensive evaluation of the resettlement programme in Latin America has not yet been conducted and its accurate level of success is still unknown.

The real interests of Northern countries in supporting resettlement in developing countries can also be questioned. As mentioned, promoting intra-regional resettlement may corroborate broader containment strategies to avoid further refugee movements heading North. As Southern resettlement programs are financially and conceptually supported by UNHCR and Northern states, it is important that this is not perceived as an excuse to decrease international co-operation or as Northern countries "paying" to resettle refugees away from their territories in order to avoid domestic pressures.

In conclusion, some fundamental challenges are still to be addressed by resettlement in the present context. In a general environment of containment, the number of official refugees is declining as the number of Internally Displaced People (IDPs) and others in need of international protection increases. Given the current legal and institutional frameworks, resettlement is not a viable option for most of these

populations, even though it could be the best or only solution in several cases.

Finally, resettlement is still not an effective protection tool for protracted displacement situations. Even when a displacement crisis initially received support from Northern countries through resettlement places, this willingness tends to decline over time and large populations remain in a deteriorating situation. Those refugee groups that have little political leverage or that have long been forgotten by the media and donors are likely to remain in a situation of limbo, as resettlement remains a forgone option.

Notes

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Forced Migrants in Serbia: Refugees and Internally Displaced Persons—Facts and Figures, Coping Strategies, Future

Mirjana Bobic

Abstract

The paper deals with refugees and internally displaced persons (IDPs). Considering their numbers, Serbia is the first in Europe and fourteenth on the globe. Their destiny is not only a tragic epilogue to the political dissolution of the former Yugoslavia, but also to the breakdown of the common dream of "Yugoslav" nationality (which was meant to be a "melting pot" of various nations, ethnic groups, and religions). Unfortunately, due to the specific strategy of nation-state building based on ethnic cleansing, refugees were one of the direct objectives of civil wars taking place in the 1990s. At the same time, massive floods of IDPs were instigated by the bombing campaign of Kosovo and Metohija conducted by the NATO alliance in 1999.

Having come to Serbia, the majority of both refugees and IDPs who are ethnic Serbs have attained all the features of minority groups. The reasons for their social exclusion must be discussed in terms of their exceptionally low social position, high levels of unemployment and poverty, and lack of social inclusion. Moreover, it must be taken into account that contemporary Serbia faced many unresolved political challenges, delayed accession to the EU, secession of Kosovo and Metohija in 2008, hardships in establishing a market economy and liberal democracy since 2000, and economic deprivation, all of which were accompanied by poor social services.

Serbian authorities adopted four major action plans targeted at forced migrants.

However, the main challenges to their applicability stem from lack of institutional capacities, ineffective implementation of development strategies, and limited resources.

Résumé

La Serbie occupe le premier rang en Europe et le quatorzième rang sur terre parmi les pays ayant le plus de réfugiés et de déplacés internes. Leur destin n'est pas seulement l'épilogue tragique de la dissolution politique de l'ex-Yougoslavie, mais aussi de la fin du rêve commun d'une nationalité « yougoslave » (censée être un « melting pot » de différentes nations, groupes ethniques et religions). Malheureusement, en raison d'une stratégie de construction d'État-nation fondée sur le nettoyage ethnique, les réfugiés ont été l'un des objectifs directs des guerres civiles se déroulant dans les années 1990. En même temps, un massif afflux de personnes déplacées a été suscité par la campagne de bombardement menée par l'OTAN au Kosovo-et-Métochie en 1999.

Venue en Serbie, la majorité des réfugiés et des déplacés internes Serbes ethniques ont pourtant atteint toutes les caractéristiques des groupes minoritaires. Les raisons de leur exclusion sociale doivent être examinées en fonction de leur rang social exceptionnellement bas, de taux de chômage et de pauvreté élevés et d'une absence d'inclusion sociale. En outre, il faut prendre en considération les nombreux défis politiques non résolus qui confrontent la Serbie contemporaine, le retardement de son adhésion à l'Union européenne, la sécession du Kosovo-et-Métochie en 2008, les difficultés à établir une économie de marché et instaurer la démocratie libérale depuis 2000 et, enfin, des privations économiques, le tout accompagné par des services sociaux inadéquats.

Les autorités serbes ont adopté quatre importants plans d'action destinés aux migrants forcés. Toutefois, les principaux défis à leur applicabilité proviennent d'un manque de capacité institutionnelle, d'une mise en œuvre inefficace de stratégies de développement et d'un manque de ressources.

Introduction

According to a report in 2009 by the United Nations High Commissioner on Refugees (UNHCR), contemporary Serbia hosts the largest number of refugees and internally displaced persons in Europe (and is ranked fourteenth on the globe). Besides them, there are a great number of victims of transit trafficking and smuggling across the borders, consisting predominantly of women, children, and young adults. Furthermore, the greatest portions of asylum seekers in the EU come from Serbia, together with returnees, who had fled to the EU (mostly Germany) during the nineties and are at the moment in the process of readmission. Many young, educated people, among whom there is a growing number of females, strive to move to the West, in search of better living conditions and employment opportunities. One of the greatest obstacles to the management of migration flows derives from the fact that Serbia lacks a common, harmonized visa regime which would establish stable relations with other states (unrestricted mobility of people, goods, and capital).

Refugees from ex-Yugoslavia and internally displaced persons from Kosovo and Metohija are the focus of this paper. They have been arriving in Serbia ever since 1992 (in the case of refugees)[1] and since the bombing campaign of NATO forces in 1999 and terrorist attacks of ethnic Albanians against Serbs and other non-Albanians at Kosovo in 2004 up to nowadays (in the case of IDPs).

Refugees are the tragic epilogue to the collapse not only of the political and socio-economic system, but to the dream of the unifying Yugoslav nation. Disintegration of the ex-Yugoslavia occurred as a concomitant of the fall of Berlin Wall and thus the breakdown of the Soviet Union in the last decade of the twentieth century. While the countries of central and Eastern Europe experienced peaceful social transition and state disintegration, the former Yugoslavia had undergone a process of enormous breakdown or "social explosion" that was reflected in the sanguinary civil war drama of 1992–1995. Disintegration of the former federal state resulted in the creation of new, autonomous states and entities, with concomitant enormous flows of forced migrants.[2] Political elites were pursuing their dream of national states based on "blood and soil" by, *inter alia,* instigating large migrational flows and assimilation of the rest of the population. The civil wars that broke out in Croatia and Bosnia and Hercegovina were inspired by a romantic ideology of "pure nation" (the so-called "eastern model of nation building,"[3] and, therefore, ethnic cleansing was one of the means to meet that end. In other words, these circumstances explain why the flood of refugees was one of the direct political and war objectives in the 1990s in the Balkans.

Consequently, refugees of Serb origin flooded to the region of the Republic of Serbia. Not only did they represent forced migrants, who fled from surrounding war zones, but they were the cruel testimony to the failed war adventures of the previous authoritarian political regime of Milosevic as well. However, regardless of what country would receive them, they would end up being marginalized, having to share the destiny of other minority groups (the poor, the elderly, minor ethnic groups, Roma, the disabled, etc.). Over time, the quality of their lives has been improving gradually. However, the pace of improvement has been very slow, because Serbia is experiencing painful and stalled socio-economic transformation, along with coping with a huge army of impoverished, unemployed, and socially disadvantaged individuals. Thus, the refugees are bound to pay the double price of social exclusion: the part of the general price of social transition burdening all members of society plus their own specific price.[4]

This paper is based on some general theoretical considerations of (forced) migrations. The main foundation consists of the theory of "push and pull" factors, created by Donald Bogue as well as on relevant considerations of the multiple factors, which are intertwined and act as determinant factors.[5] The study of migratory flows is necessarily interdisciplinary, thus integrating various scientific standpoints of sociology, psychology, geography, law, political science, and economy.

Methodology is tailored for the specific purpose of this article. Its main goals are: (1) general description of refugees and IDPs; (2) some basic socio-economic analysis of these groups, and (3) review of current political solutions. Main sources consist of: demographics, secondary analysis of empirical findings on refugees and IDPs, and an overview of political solutions.

Main Concepts and Definitions

As David J. Whittaker states,[6] there are more and more people moving around the globe than ever before in recorded history. Some estimates say that since 1945 some 50 to 60 million people have left their homes either voluntarily or involuntarily. Europe in the 1950s, Africa in the 1960s, Asia in the 1970s and 1980s, and once more Europe, especially since the 1990s, were the so-called "zones of anguish," from which people have flooded. Those are the victims of *persecution and conflict,* who have been seeking safety and opportunities out of their country of origin. These groups are so-called genuine refugees. However, they may also be the victims of environmental degradation, while some are displaced within their own land (so-called internally displaced persons). Other groups of forced migrants are victims of wars and ethnic cleansing. Many people are unable to escape, and

are therefore holed up in temporary camps, while still others flee abroad, becoming illegal immigrants.

It is a fact that an ongoing process of globalization is making the world a smaller place while at the same time squeezing time and space due to faster and cheaper transportation and movement from one country to another, from one continent to another.

According to the same author, there are at least 17 million people in transit nowadays, seeking some form of asylum—over 6 million in Asia, 4.2 million in Africa, and 4.2 million in Europe. It is very likely that half of these unfortunates are women and children.

The existence of numerously diverse moves of forced migrants opens up a discussion on various definitions and relevant notions. The UN *Convention relating to the Status of Refugees* in 1951 defined the term "refugee" with the meaning that is still being used today:

> A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.[7]

The term "persecution" itself is not legally defined, but is generally based on persistent and consistent patterns of abuse, intervention, and intolerance.

Internally displaced persons are:

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[8]

Setting the Stage: Some Basic Demographic Features

The first census on refugees and war-affected population in Serbia was conducted in 1996 by UNHCR. According to it, there were 617,728 individuals registered in Serbia. After a while, a vast majority have either obtained citizenship of the Republic of Serbia (143,200) or returned to their countries of origin (144,000). A total of 22,400 have resettled to third countries.

If we pay attention to the period 1996–2007, the evidence clearly documents the decreasing trend of refugees (Table 1). In particular, the last UNHCR report from 2007 demonstrates that their volume is 6.3 times lower than that registered in 1996. It is, however, an unresolved dilemma whether the data conceal the empirical reality. In other words, is the reduction in their overall number the outcome of the cancellation of their humanitarian status instead of their full integration into the local society? Refugees were offered three options for a permanent solution of their legal status: (1) return to the countries they were forced to leave; (2) integration into the local community (Serbia); and (3) emigration. As we shall show later, many of those who decided to return were denied their civil rights in Croatia and Bosnia and Hercegovina, due to the hostility of the local population, unresolved tenancy and property rights, and so forth. The second group, who was willing to integrate in the host society, applied for and in many cases received Serbian citizenship. Unfortunately, this did not automatically result in the improvement of their overall conditions. Many of them joined the pool of unemployed citizens (the unemployment rate in the country is nearly 30 per cent), thus lacking social security and other social services (health, education, public transportation, etc.).

Table 1. Refugees, Serbia, 1996–2007

Year	Refugees and war affected persons	Total population	Share of refugees and war affected persons (in %)
1996	617728	9778991*	6,3
2002	379135	7498001	5,1
2005	139195	7440769	1,9
2007	97700	7397651	1,3

Note: *in 1996 Serbia included the territory of Kosovo and Metohija

Source: UNHCR census and statistics for 1996, 2005, and 2007, respectively; Census of Serbian population Beograd: SZS, 2002; Izbeglički korpus u Srbiji, prema podacima popisa stanovništva 2002, (Refugee Corpus in Serbia) Ministarstvo za ljudska i manjinska prava Srbije i Crne Gore i Republički zavod za statistiku i informatiku Srbije, 2004; <http://webrzs.statserb.sr.gov.yu/axd/god.htm>

Gender and Age Distributions

According to the last figures (2007) one may conclude that females outnumber males. The workforce contingent (age 18–59) prevails, but among them, males are more represented. One-third of the total are the elderly, mostly females, and the share of babies and the youth (age 0–17) is 11.3 per cent.

Table 2. Refugees in Serbia – age and gender breakdown, 2007

age	M	%	F	%	Total	%
0–4	195	0.2	196	0.2	391	0.4
5–11	2057	2.1	1964	2.0	4021	4.1
12–17	3416	3.5	3199	3.3	6615	6.8
18–59	31605	32.4	27204	27.9	58809	60.2
60+	10202	10.4	17634	18.1	27836	28.5
Total	47475	48.6	50197	51.4	97672	100

Source: <http://www.unhcr.org.yu/utils/File.aspx?id=237> (accessed October 2009).

Cultural, Social end Economic Capital

The last census data[9] indicates that human/cultural capital of refugees is more favourable in comparison to the general Serbian population, in terms of their completed secondary and higher education.[10]

Regarding socio-economic status of the total refugee population, the employed are dominant (47 per cent), followed by the dependant (37.9 per cent) and those with a personal income—the retired (14.7 per cent).[11] Slightly less than half of the non-self-supporting persons are women (47.3 per cent). Compared to the general population, refugees have slightly higher rates of employment, a fact that could be explained by their higher subsistence risks and their need to rapidly accommodate to new environments.

The share of refugees with a personal income is, however, lower compared to the general population, due to the problems of pension transfers from the ex-Yugoslav republics. This explains the higher ratio of non-self-supporting persons in the refugee population. To the contrary, refugees have a less advantageous employment structure compared to the general population. Among the active population in Serbia, the employed (78.53 per cent) largely outnumber the unemployed (21.47 per cent). In the refugee population, the respective ratios are 64.2 per cent and 35.8 per cent. This fact could be explained as a result of the great difficulties in finding a job and by a so-called "fluctuating pattern of the working career" (frequent changing of jobs, moonlighting, and losses of jobs). It is also the argument for their social exclusion. As for the professional structure, the majority of refugees work in the service industry and trade (16.2 per cent); followed by skilled workers and technicians (15.1 per cent) and then those performing simple, unqualified work (12.2 per cent). And last, but not least, although the majority of refugees come from the villages, most of them settled in Serbian urban zones. This means that forced migration imposed a forced deruralization of the immigrants.[12]

One recent non-representative survey conducted among the working-age population of refugees (age 15–64)[13] showed higher activity and employment rates among them compared to the general Serbian population in the same age group. It also demonstrated that the unemployment rate among forced migrants is ten percentage points higher (30.6 per cent compared to 20.8 per cent in the general Serbian work force). The refugees not only have higher proactive strategies in terms of their crude employment rate, but they also outnumber in the shares of entrepreneurs and self-employed. But, at the same time, some one-third are engaged in informal activities. They are compelled to start small businesses on their own, for they lack assistance of the state and its National Employment Agency. Income generating projects, implemented by both government and nongovernmental sectors, are neither transparent nor available to them, so refugees can hardly opt for resources as well as for application. That also makes the doors wide open to corruption and delivering grants to those who have already established their firms.

Other results point to the fact that despite their greater human capital, many refugees work below their qualifications: one out of four with a university diploma works as a highly skilled or skilled worker in the informal economy.

They are also under pressure of combining several jobs, with every third refugee taking an additional job on a regular basis. They mostly work in construction, catering, taking care of the elderly, and housekeeping.

Beside demonstrated willingness to work, refugees are shown to be more flexible in the labour market, in terms of readiness to take part in activities beyond usual working hours, without a contract, or in the private sector. They are willing to perform any paid job regardless of their educational level as well as to moonlight. However, they are reluctant to change their place of residency in case of another job offer. Women also demonstrated strong proactive orientations.

Thus, we can conclude, while the human and social capital are either relatively high or are increasing over time, the economic capital, conversely, remains rather low. The main reason is the very fact that the refugees' properties were left behind them in their former places of residence (Croatia and Bosnia). Only 20 per cent of them managed to preserve or repossess their property. Moreover, the overall household expenditure (food, clothing, hygiene items, etc.) is some 50 per cent higher compared to the general population. The composite index of wealth (constructed as the aggregation of assets, expenditure, and income) clearly demonstrates that 10 per cent of these households are definitely poor, some 49

per cent have a low wealth score (with a high poverty risk), while 27 per cent have medium, 11 per cent high, and 3 per cent very high scores.

According to the research on social capital, it should be stated that inquiries conducted in 1990s in Serbia[14] have shown a low level of informal social networks both within the refugee group and with the host population. Moreover, analyses of the social position of refugees and the general quality of their life have clearly shown their *social system inhibition, i.e.* their withdrawal to the margins of social life or to the bottom of the social scale, by political and legal means, media, and everyday behaviour of the domestic population. The empirical findings report that refugees suffer feelings of resignation, depression, and isolation[15] Social capital was, thus, very sporadic, restricted to their fellow friends and acquaintances. The ties were based on a common dwelling, leisure time, nurturing children, and the elderly. They either dreamed of returning to homelands or finding ways to permanently reside in Serbia.[16] But, as time went by, during the last fourteen years, these individuals have been compelled to surpass various obstacles in their everyday life, which resulted in enhancing their social capital.

The most important occasions when a person utilizes assets of social capital are when searching either for a job or for health treatment. Informal networks of reciprocity consist mainly of friends and relatives ("bonding social capital").[17] The same applies to refugees. However, they are often under pressure to perform direct contacts to employers because they rarely use services of the National Employment Agency. They either have little information about rights and options that the state agency is offering or they hesitate to register. This is particularly the case when they have not yet obtained citizenship, although citizenship is not a prerequisite for entering the informal labour market. In addition, they also lack information on their beneficiary rights when registered at the Agency (*i.e.* concerning health care, social protection, subsidies in transportation, etc).

The latest empirical research[18] showed strengthening of their informal ties to the local population, particularly when searching a job, as well as their willingness to broaden relations to domiciles (some 36 per cent have opened up ties to both fellow friends and local citizens). At the same time, surveys no longer demonstrated statements showing intolerance toward them on the part of the local population. This appears to prove that the process of their final integration is under way.

In conclusion, we can say that refugees face great obstacles in transforming their cultural capital (high level of education and professional skills) into economic capital, which is the main cause of their getting along poorly, weak social connectedness, and still low social capital (informal networks to local citizens). The main reasons are immense difficulties in accessing the labour market and structural challenges (delayed post-socialistic transformation, high overall unemployment rate, etc.).

Refugee Emigrations: Mixture of Economic and Humanitarian Incentives

A certain number of other empirical studies have shown that emigration to the developed West (the EU, Canada, Australia, and the US) was one of the prevalent "coping strategies" for forced migrants. It was somewhat easier for these people to apply for entry during the Balkan crisis in the nineties. However, not only were the younger generations prone to the strategy of "escapism," but so were those who had already established ties to foreign countries and those who found themselves in foreign countries at the onset of the war in the former Yugoslavia (descendants of older economic emigrants, those already having established business contacts, etc.).

Another qualitative—case study of former Yugoslav refugees in England was carried out comparatively on two sub-samples: persons who got asylum in Oxford, UK, and those who fled to Serbia.[19] In-depth analysis indicates the clear economic "pull" factors of emigration—better chances for improving living conditions in comparison to those who went to Serbia. However, the refugees, residing in the UK claimed that although their quality of life was improved owing to the welfare state,[20] they were also generally socially excluded. Due to inability to attain employment that would match their qualifications, they were confronted with additional difficulties, such as inaccessibility of a variety of beneficial services (medical care, education, culture, and informal ties to the domestic population).

Furthermore, refugees staying in England also had low social capital. They were rarely getting along with either previous generations of economic migrants or the host English population. Even their contacts with relatives in Serbia were rare. Thus, social ties were reduced to an extremely narrow circle of close people and fellow friends. Nevertheless, such a situation leads to social exclusion and, finally, self-isolation.

When it comes to future prospects, it came as no surprise that most of the middle-aged and older people with asylum in England intended to return to Serbia, mainly to Vojvodina,[21] after they accumulate savings in order to afford some real estate (a house with a piece of land).

Having summarized the optimal solutions for the forced migrants' status, some practical measures were suggested. First and most important is dual citizenship for each person who chooses to permanently settle in Serbia. This would enable refugees and displaced persons to get full citizenship

status and all due rights: freedom of movement, work, medical care, education, and political and other rights. Refugees' repatriation should also be encouraged, and this is especially important for the elderly, since their most important issue is the regularity of payments of their pensions from the places of their earlier residence (in former Yugoslavia).

Internally Displaced Persons (IDPs)

Unlike refugees, the total number of internally displaced persons in Serbia is decreasing too slowly. The first group of 225,738 persons left Kosovo and Metohija in 1999, following the withdrawal of the Yugoslav Army and security forces. Afterwards, an additional population of 4,200 persons left in spring 2004, after the series of violent acts of majority Albanians against ethnic minorities (non-Albanians) and international government (UNMIK) in the province. In future, one could expect further outflows of non-Albanians due to the claimed independence of Kosovo in March 2008.

Their actual total number is 206,504 (Table 3). According to the latest figures (2007), gender structure is almost equal. The workforce contingent (age 18–59) prevails, again without specific gender imbalances. One out of six is the elderly, with females dominating slightly, while the share of babies and the youth (age 0–17) is 11.3 per cent.

Table 3. IDPs in Serbia and Montenegro – age and gender structure, 2007*

age	M	%	F	%	Total	%
0–4	440	0.2	378	0.2	818	0.4
5–11	11246	5.4	10651	5.2	21897	10.6
12–17	12431	6.0	11609	5.6	24040	11.6
18–59	62293	30.2	61691	29.9	123984	60.0
60+	15975	7.7	19790	9.6	35765	17.3
Total	102385	49.5	104119	50.5	206504	100

*Note: vast majority settled in Serbia (92 per cent), minority of some 8 per cent fled to Montenegro

Source: http://www.unhcr.org.yu/utils/File.aspx?id=237 (accessed October 2009).

As for ethnic structure, most of them are Serbs (68 per cent), then Roma (12 per cent), and Montenegrins (8 per cent)[22] They live mainly in private accommodations (93 per cent), and about 7 per cent are located in collective centres. In 2002 there were about 550 collective centres in Serbia and Montenegro. However, in 2002 the procedure of their planned closure was launched. By the end of 2005 there were 278 centres, out of which 99 were official, while the rest were unofficial, with almost none of the refugees and a decreasing share of IDPs. According to the last UNHCR report, there are only 80 collective centres (62 are situated in Serbia and 18 in Kosovo). They accommodate 6,748 persons (1,702 refugees and 5,046 IDPs).[23]

When the quality of life is considered, this population is not only below the poverty line on a social scale or slightly over it, but is also extremely poor and at the very edge of society. Beside lacking regular income, they also lack suitable business opportunities. A survey carried out by international institutions on the sample of 1,400 people accommodated in Serbia showed that 52 per cent are unemployed, 14.4 per cent are working in the public sector, which often means that their job is just fictional (without payment or underpayment), 10 per cent are employed in private firms, and 5.5 per cent are engaged in seasonal jobs. There are 18.5 per cent of supported persons, out of whom 7.3 per cent are students and 11.2 per cent are retired. Their work is underpaid and consequently accompanied with the intense feeling of constant humiliation. There was the evidence of wages of only 1 DEM per day.[24]

Although formally "citizens" of Serbia, IDPs are restricted in claiming their basic human rights. Experiencing gross violations of their civil rights on an everyday basis makes them *de facto* "quasi citizens" of Serbia.

Since they rarely succeed in getting their residence in Serbia, their freedom of movement is restricted. This happens because the Serbian authorities imply that their homeland is in Kosovo, and that they will surely return there. That's why they are issued "temporary residence permits" that are valid for three months only, that would have to be prolonged afterwards. There are a lot of reports of cancellations of these documents for those who had to change their place of residence in Serbia or had to visit Kosovo. Thus not only do they suffer violations of freedom of movement, but also the essential right to choose a place to live.

Another problem concerning IDPs is claiming personal identification rights (obtaining identity cards, passports, working booklets). Basically, they have the right to gain new identity cards in Serbia, but in an attempt to obtain them, they have to provide a variety of documents/certificates on residence, birth, marriage, and citizenship. In order to have these issued, they often have to travel to the various local offices and archives that are relocated to different places in southern Serbia, once they have been displaced from Kosovo. That makes huge impediments for IDPs due to the necessity of making several trips, not only to apply for the documents, but also aquire them later on, which is hardly affordable by the majority of refugees.

IDPs have similar problems with working booklets. These documents can be obtained only in the firms or companies where they previously worked, while it is almost impossible to reach them from private companies at Kosovo.

Ex-employees from the public enterprises out of Kosovo are in a somewhat better position. They are able to get these certificates and utilize their pension rights more easily, for the appropriate records have been transferred to Serbian municipalities. The lack of work booklets prevents one from realization of the right to support oneself and receive social care, if necessary.

Another example of gross violation of their civil rights is medical care. With their health endangered, IDPs are a very sensitive group in this respect—76 per cent of them have chronic diseases that require long medical treatment. Alcoholism and psychosocial symptoms related to war traumas are also frequently present. Some 8 per cent of children suffer from partial or total exhaustion, and no less than 17. 2 per cent from stunted growth.[25] However, regardless of these facts, refugees have the right to be treated in primary and urgent medical care only, while for all other kinds of services, they are obliged to pay instantly. In terms of their general situation, it is clear that they cannot bear the costs of any medical treatment, which additionally contributes to further worsening of their already damaged health.

Social security rights are another field of great risk for IDPs. If one has a job in Serbia, whether it is paid or not, or if he/she has any private property (including Kosovo), he/she cannot apply for aid. According to the statistics of the Ministry of Social Security, less than 10 per cent of the population in Serbia receive benefits of social protection, although a survey on poverty carried out in 2001 demonstrated that one-quarter of internally displaced persons live at or under the poverty line (in terms of more than $1 per capita).[26]

The problem of property rights is also a very sensitive one. Despite the fact that many of the displaced persons have their property left in Kosovo, they are not able to access it. At the same time, they are unable to obtain aid for solving their housing problems as long as they live in Serbia or unless they are included in some large-scale repatriation programs.

Roma IDPs are in an even worse social position. They are at the very bottom, not only within this group, but in the overall society as well. The vast majority of them are located in collective centres or in slums of the cities and its outskirts. With many children (due to predominantly high fertility), elderly, large families, mostly unemployed, sick and disabled persons, they are almost completely marginalized. The level of education is low and children usually do not attend school. Their main income comes from begging and some kind of trade.

Regarding their future plans and perspectives, IDPs are in a very dubious situation. Contemporary Serbian authorities do not recognize Kosovo as an independent state (as unilaterally claimed in March 2008). Thus, they claim their return to the province, while the people affected do not believe in the sustainability of such a solution, particularly due to the absence of the Serbian army and police in Kosovo. In fact, despite the presence of international armed forces in the province (UNMIK), the primary reason for their fears and anxiety is lack of security and freedom of movement for Serbs and non-Albanians.

Policy: Strategic Documents and Perspectives

The Serbian government adopted three main documents that are the basis for integration of refugees from ex-Yugoslav republics. These are: National Strategy for Resolving the Problems of Refugees and IDPs, the Poverty Reduction Strategy, and the "Road Map."

In May 2002, the Serbian government adopted the National Strategy for Resolving the Problems of Refugees and Displaced Persons, with the support of the international and local stakeholders (UNHCR, UNDP, UNOCHA, NGOs, etc). The main goal aims at providing conditions in two broad directions: (1) repatriation and (2) local integration of refugees from Croatia and Bosnia-Hercegovina (according to their personal choice). Starting from the empirical evidence (surveys and interviews) which demonstrated the will of the majority of them to stay in Serbia, the integration into local settings was posed as the most desirable and durable solution. In that sense, the existing document (National Strategy) strives to facilitate the process. The strategy has well-developed schemes for ameliorating problems of housing, employment, property and legal status issues, security, and safety; and durable solutions for those accommodated in collective centres that are to be closed (those are the most vulnerable groups—the elderly, lone parents, mostly females, children without parents, sick people, the unemployed, and others unable to take care of themselves). However, the principle challenge of the implementation of the strategy is the great financial resources required, on the side of Serbian government and foreign funding, the latter being significantly reduced in 2003 and 2004.[27]

The Poverty Reduction Strategy Paper was adopted by Serbian government in 2003. Its basic goal was social end economic recovery of the country, with special attention paid to reducing huge overall poverty and vulnerable groups (like refugees and IDPs). Unfortunately, up to this date, it has stayed mostly unrealized, for the same reasons as the previously mentioned action plan, which is, actually, the complementary one. The second reason is the institutional gaps in development of the projected instruments.

In 2003 there was some political progress towards normalization of relationships between the neighbouring Balkan states, and henceforth a gradual improvement of certain

conditions for repatriation. A bilateral agreement between Serbia-Montenegro and Bosnia-Herzegovina was signed, and a visa regime with Croatia was abolished. The regional initiative called the "Road Map" was launched, aimed at finding long-term solutions by 2006 for all forced migrants in new Balkan states, derived out of former Yugoslavia. It was encouraged by the UNHCR, The Organization for Security and Cooperation in Europe OSCE, and the European Commission. On January 31, 2005, in Sarajevo the declaration on the regional resolution of the problems of refugees and displaced persons was signed (except those from Kosovo and Metohija), by the ministers of three states: Bosnia-Hercegovina, Serbia and Montenegro, and Croatia. The Road Map assumed a joint matrix of national action plans directed at repatriation or integration among the three signatory countries. Up to now, there have been only two chapters of joint implementation action created, one concerning common statistics and another related to access to basic human rights. Concerning these issues, it should be stated that the return shares are very low—in most cases persons who decided to repatriate to Croatia and Bosnia were pushed to return to Serbia after a while, for their homes were either destroyed, or repossessed, and their safety was jeopardized. So, the return to Bosnia-Hercegovina in 2005 was even twelve times less compared to 2002. The decreasing number of returns might be caused by the fact that it was the most difficult cases that remained to be solved.

Speaking of Croatia, officials report that there are 122,000 Serbs returnees, while the association of Croatian Serbs and the OSCE mission estimate the real number as being much lower. Furthermore, they assess that 60 to 65 per cent of Serbs have actually returned to Serbia, Montenegro, and Bosnia-Hercegovina after a short stay, due to unresolved issues: tenancy/occupation rights, restricted access to property, unregistered working hours (in the period 1991–1995 in Croatia), problems in claiming retirement rights, and low levels of safety and security.

As to IDPs, in 2006 the Serbian government and UNMIK signed the Protocol on Sustainable Returns, declaring freedom of settlement in places that might not be their original places of residence. Unfortunately, very few succeeded in returning to Kosovo, only 650, due to uncertain conditions at the ground, employment difficulties, restricted freedom of movement and security risks, continuing impunity and weakness of the rule of law, and also discriminatory practices toward them.

Final Comments

This short overview has been intended to demonstrate the vulnerability of these two social groups of forced migrants and, as well, the complexity and diversity of practical actions that are undertaken in finding sustainable solutions. *The very fact of the declining number of refugees does not necessarily mean that they are either repatriated or integrated into local society. On the contrary, it is very often the case that their humanitarian status has been cancelled and thus they were actually transferred to the poor domicile population, falling at the bottom line of the social ladder.* The vast majority of them are fully socially excluded (the elderly, the sick, the unemployed, those with special needs, women, children, lone parents, those accommodated in collective centres, etc.).

Although a majority of refugees opted for and received Serbian citizenship, it didn't bring them much improvement in social status. Despite their relatively better educational background, their unemployment rate is even greater than among the local population, and their access to health care and to social and protective services is hampered. This is due to the hardships of social transformation of Serbian society into the market economy and, consequently, low economic growth and overall political advancement, including the accession to the European Union and global institutions.

It is a fact that there are very detailed action plans developed to facilitate the integration of refugees, while the political status of IDPs is very complicated and, thus, vague. However, there are two types of impediments to the process of integration of refugees and IDPs: legal framework and lack of sufficient revenues.

The current legal framework prevents claiming of basic human rights, because it is based on the right to reside on certain territory, and does not take into account the vulnerability and reality of everyday life of these individuals. Secondly, the Serbian government has adopted very detailed strategies and signed agreements with neighbouring states on long-term solutions of either repatriation or local integration. Up to date, not much has been done in the area of repatriation, especially due to the lack of bilateral agreement concerning the most vulnerable refugees, former tenancy right holders, and elderly citizens. The risks of local integration into Serbian society are related to overall stalled social transformation and economic recovery, *i.e.*, lack of financial resources that would boost the otherwise very developed schemes in housing, income generating projects, women's employment, education, improved medical care, social protection of the disabled, the elderly, and the sick, etc.

The uniqueness of the IDPs must be particularly emphasized. The fact that Serbian government does not recognize the independence of Kosovo province, which has been unilaterally claimed by local Albanian authorities in March 2008, places the vast majority of non-Albanians who remained there, as well as those who have settled in Serbia, in a very complicated position. Namely, those who stayed in Kosovo

live in enclaves, isolated, socially excluded, frightened about their safety and their children's safety and future. For those who stayed in Serbia, the plans of repatriation and return to Kosovo seem to be fading, while the officials still "manipulate" their destiny in unsuccessful political negotiations, not being ready to give up the political struggle to return the province to Serbian sovereignty.

Notes

1. According to the relevant resources (UNHCR office in Belgrade), in 2009 the number of registered refugees in Serbia has been 86,336, which is seven times less comparing to their peak in 1996. The decrease has been facilitated due to four main channels: local integration (around 200,000 have obtained Serbian citizenship), returns (150,000 have returned to the countries of origin in the region), emigration to the West (46,000), while some of them died in exile (40,000, *Human Rights of Refugees, Internally Displaced Persons, Asylum Seekers and Victims of Trafficking in Serbia and Montenegro,* Report, <http://www.grupa484.org.yu>)
2. According to the UNHCR report, at the climax of armed conflicts among ex-Yugoslav nations in 1993, there have been around 2.5 million refugees and displaced persons in the region, which made up to one-fifth of the total forced migrants in the globe (15 million); Nada Raduski (Belgrade: CDI IDN, 2001; Ekonomski Institut, 1996).
3. The "eastern model" of nation building is, predominantly, related to sentiments of common territory, blood ties, genealogies, population movements, vernacular languages, tradition and customs, thus implying a group's homogenity, whereas the "western" one is related to legal and political community, citizenship, egalitarianism, liberty and democracy, civil culture, thus heterogenity; Saša Nedeljković, *Čast, krv i suze* (Belgrade: Zlatni zmaj /Odeljenje za etnologiju i antropologiju Filozofskog fakulteta, 2007).
4. Vladimir Ilić, *Manjine i izbeglice u Vojvodini* (Belgrade: Helsinški odbor za ljudska prava u Srbiji, 2001).
5. Mirjana Bobić, "Migracije," in *Studije o Izbeglištvu,* ed. Ivan Milenković *et al.* (Belgrade: Grupa "484," 2006; Mirjana Bobić, *Demografija i Sociologija: Veza ili Sinteza* (Belgrade: Službeni Glasnik, 2007).
6. David J. Whittaker, *Asylum Seekers and Refugees in the Contemporary World* (London and New York: Routledge, 2006).
7. *Ibid.,* 2.
8. Guiding Principles on Internal Displacement, Introduction, para. 2, <http://www.internal-displacement.org/8025708F004D404D/(httpPages)/CC32D8C34EF93C88802570F800517610> (accessed September 30, 2009).
9. In order to save space, I will not present the tables; but I will refer to data that I have already published in my article; see Bobić, "Migracije," 2006.
10. Mirjana Bobic, "Refugees and Internally Displaced Persons in Serbia: Statistics, Quality of Everyday Life, Social Capital, Coping Strategies, Policies," in *Migrations, Crises and Recent Conflicts in the Balkans,* ed. Alain Parant (Greece: LADS, University of Thessaly Press, 2006), 141–153.
11. *Ibid.*
12. However, some reports showed that refugees were not bound to remain on the social margin. According to an expert evaluation, the refugees brought to Serbia 2 to 6 billion euros of fresh capital (from savings, sale of their houses, apartments, properties) that could have been utilized in privatization projects; Djuric, Zvezdan, "Propuštena šansa," *Politika* 5 (October 2004).
13. It was realized with the assistance of the UNDP office in Belgrade; see M. Babović, S. Cvejić, and D. Rakić, *Position of Refugees in the Labour Market and Their Inclusion in Active Labour Market Policies* (Belgrade: NGO Group "484," 2007).
14. Vladimir N. Cvetković, *Strah i poniženje: Jugoslovenski rat i izbeglice u Srbiji 1991–1997* (Belgrade: Institut za evropske studije, 1998).
15. Jelena Vlajković *et al.*, *Psihologija izbeglištva* (Belgrade: Žarko Albulj, 2000).
16. However, more than half of the interviewees (56.5 per cent) had no permanent and stable social relations (low social capital) and, thus, remain in the vicious circle of isolation.
17. Rosalind Edwards, "Overview of the 'Social Capital': Its Relevance and Implications for Local Communities Conference," *Sociologija* 46, no. 3 (July-September 2004) (Belgrade: Sociolosko drustvo Srbije, 2004); S. Tomanovic, "Families and Social Capital in Serbia – Some Issues in Research and Policy," *Sociologija* 50, no. 1 (January-March 2008) (Beograd: Sociolosko drustvo Srbije, 2008).
18. Babović, Cvejić, and Rakić „Position of Refugees in the Labour Market and their Inclusion in Active Labor Market Policies (Belgrade: NGO Group 484, 2007).
19. Gordana Vuksanovic, *Jugoslovenske izbeglice između želja i mogućnosti za povratak* (Novi Sad: Katedra za sociologiju Filozofskog fakulteta, 2001).
20. In some districts in England refugees get support which amounts even to as much as 200 pounds per elder member of a household; in Canada, in the province of Quebec, they get 640 Canadian dollars per member, and in other provinces about 400 Canadian dollars, which is 15 per cent more than the welfare support assigned to the local population.
21. Vojvodina is the more developed part of Serbia, where there is a lot of empty space and homelands lacking descendants, due to lowered fertility and aging.
22. Data are based on the NGO and UNHCR reports, <http://www.grupa484.org.yu>.
23. *World Refugee Survey – Serbia Submission,* draft (Belgrade: Group 484, January 2008).
24. Kosovo IRL, "Situacija, problemi, rešenja?" (unpublished, Belgrade: Grupa 484, 2002).

25. *Ibid.*
26. According to some foreign humanitarian organizations, no less than 90 per cent live under the poverty threshold.
27. It has been estimated that the implementation of the strategy would cost 620 million dollars, 460 million of which are expected from foreign donations.

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Responses to Internal Displacement in Colombia: Guided by What Principles?

Ellen Fadnes and Cindy Horst

Abstract

This article aims to explain the gap between IDP law and practice in Colombia. Colombia's IDP legislation is considered one of the world's most advanced legal systems as it puts in practice the UN Guiding Principles on Internal Displacement. However, the reality of life for IDPs in Colombia does not match their legal rights. Especially the sections of the law related to preventing displacement and providing durable solutions for IDPs are poorly implemented. Following Ferguson's work on depoliticization, we argue that displacement in Colombia is treated as a technical rather than political problem, detaching it from root causes like landownership and structural class inequalities. This article provides an overview of the root causes and analyzes the different methods through which internal displacement is "depoliticized" in Colombia. In conclusion, we will discuss the wider implications of the Colombian case for understanding implementation challenges of the Guiding Principles.

Résumé

Cet article tente d'expliquer l'écart entre le droit des personnes déplacés internes et sa mise en application en Colombie. Le droit colombien en matière de déplacement interne est considéré comme l'un des systèmes juridiques les plus avancés au monde en ce qu'il met en pratique les Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre pays *des Nations Unies. Cependant, la réalité des personnes déplacées en Colombie ne correspond pas à leurs droits. En particulier, les sections de la loi relatives à la prévention des déplacements et à la mise en place de solutions durables pour les déplacés internes sont mal mises en œuvre. Suivant les travaux de Ferguson sur la dépolitisation, nous soutenons que le déplacement en Colombie est considéré comme un problème technique plutôt que politique, le détachant de ses causes premières telles la propriété foncière et les inégalités structurelles de classe. Nous donnons un aperçu des causes premières du déplacement et analysons les différentes méthodes par lesquelles le déplacement interne est « dépolitisé » en Colombie. En conclusion, nous discutons des implications plus larges du cas colombien pour la compréhension des défis de mise en œuvre des* Principes directeurs.

Introduction

In this article, we will analyze displacement in Colombia to illustrate some of the challenges faced in the implementation of the UN Guiding Principles on Internal Displacement. In the case of Colombia, one main concern is that the response to internal displacement has effectively depoliticized the causes and consequences of the displacement. Forced internal displacement in Colombia has been going on for decades, causing millions of Colombians to abandon their homes and seek refuge in neighbouring towns or large cities.[1] Today, Colombia hosts one of the world's largest IDP populations, and the UN has identified the situation in the country to be the worst humanitarian crisis in the Western hemisphere.[2] Yet the phenomenon only received attention after the mid-1990s, when the Colombian government officially acknowledged their responsibility and first steps towards the formulation of IDP rights were taken. The framework for IDP-related policies is provided by Law 387, which was passed in Congress in 1997. Currently, displacement-related laws in Colombia are heralded as the most progressive and comprehensive attempt to implement the Guiding Principles.[3]

Forced displacement in Colombia has commonly been explained by the severe and extensive political violence involving a number of armed actors, including paramilitaries, guerrillas, and the national army. Various guerrilla

groups emerged in the 1960s as a reaction to systematic oppression and marginalization of the rural and poor population throughout centuries, with the most important being the FARC (Fuerzas Armadas Revolucionarias de Colombia, or Revolutionary Armed Forces of Colombia) and ELN (Ejercito de Liberación Nacional, or the National Liberation Army). Whereas the first, which is claimed to be the largest and best organized guerrilla movement in Latin America today, was initiated by peasants, the second was organized by students and intellectuals inspired by the Cuban revolution. Paramilitary organizations emerged as the right-wing counter-insurgency, aiming to fight back the guerrillas and protect rich landowners and drug lords. Decades of struggle by the various armed groups for power and legitimacy have included brutal violence and massacres, with severe consequences for civilians. However, as we will illustrate, it is far too simplistic to explain forced displacement in Colombia as a random side effect of the clashes between armed groups without recognizing underlying political causes.

We argue that responses to displacement in Colombia have effectively depoliticized the situation, removing attention away from these and other political factors. This is done through practices that treat the conditions of the displaced as problems that require technical rather than structural or political solutions. Depoliticizing practices include a focus on humanitarian aid rather than prevention of displacement and durable solutions for the displaced, a governmental perspective that only acknowledges certain causes for displacement while denying others, and an invisibility of the displaced in the public debate on the Colombian conflict. In Colombia, many of the internally displaced are not recognized as IDPs and the remainder are then reduced to recipients of humanitarian assistance and not linked to the political conflict in the public debate. This enables an engagement with displacement in Colombia without connecting it to its underlying causes. In this article, we will draw on theorizing on depolitization as developed by Ferguson and Malkki.[4]

The data on which our argument is based was collected during fieldwork in Bogotá, Colombia, from June to August 2007, supplemented with a review of secondary sources. Interviews were conducted with representatives from displaced communities, civil society, and responsible state entities. A government-organized conference marking the ten years of the Colombian IDP law was attended, and participant observation also took place in IDP registration centres. A wide range of legal documents were collected, including the Colombian IDP law, the UN Guiding Principles on Internal Displacement, and verdicts and rulings from the Constitutional Court in Colombia. Furthermore, official documents from state entities and reports from NGOs and the UN were consulted. After providing a brief background to the conflict, the article first describes the discrepancy between law and practice in Colombia. The second section analyzes the different methods through which internal displacement is "depoliticized" in Colombia. In the conclusion, we will summarize our observations from the Colombian case in order to look at their implications for the protection of internally displaced people elsewhere.

Background to Displacement in Colombia

Latin America is known for its immense gap between social classes, as wealth and landownership have been concentrated throughout history in most parts of the continent. The income distribution was probably the worst in the world in the 1960s, and has amplified during the last half of the twentieth century, culminating in the neo-liberal era of the 1980s and 1990s.[5] The high concentration of landownership which characterizes Latin America has been a catalyst for widespread rural violence and one of the main triggers for the emergence of insurgency movements.[6] Violence in the rural areas has been endemic and persistent throughout the history of the continent, with the Spanish conquest and colonization as one of the most brutal periods. The agrarian system which emerged in the colonial and post-colonial period, where landowners monopolized territories and established large landed estates, paved the way for the unbalanced and exploitative relationships between land owners and tenants.[7]

In Colombia, the land structure where large *haciendas* turned the peasantry into oppressed wage workers continued throughout the post-colonial period. The accumulation of land as a source of power and the role of the paramilitaries in protecting the privileges of the landowners in Colombian history has been documented in various sources.[8] During La Violencia in the 1940s and 1950s, millions of persons were forced to flee their territories, which resulted in an increased concentration of land and ownership of agrarian property.[9] Up to this day, the depopulation of areas is used as a deliberate strategy by the armed groups to strengthen their territorial control and to appropriate agricultural land. The Colombian Commission of Jurists (CCJ) has established that territories that present possibilities for expansion of stockbreeding or extensive extraction of minerals and natural resources coincide with high levels of forced displacement.[10] The displacement has proven to be more intense in regions well-suited for agriculture or areas rich in minerals.[11]

The right to land is a fundamental necessity for the lives and livelihoods of the rural and often poor sections of society, including indigenous, Afro-Colombian, and other groups vulnerable to displacement. Displaced indigenous persons

especially face dramatic consequences of forced displacement from their territories, because of the important bonds they have with the earth. Mr. Eugenio Reyes,[12] who has been displaced from Sierra Nevada de Santa Marta in northern Colombia, mentions access to their land, *la madre tierra,* as the main issue that the more than eighty different groups of indigenous people are fighting for. According to him, if all actors would respect their legal access to a territory, this would enable indigenous communities to maintain safe and stable livelihoods. The Colombian conflict has a number of intertwined causes but the right to land is one of the major underlying factors. The situation has been called a "veritable *guerra de territorio* or war for land,"[13] and it is clear that this war for land has fundamental impacts on displacement in Colombia and the government's efforts of implementing the IDP law.

The great majority of the IDPs are *campesinos,* peasants from rural areas, with most often a relatively low degree of education and limited sources of income. As most IDPs end up in the urban centres, their displacement implies a complete change of life and the meeting with a new reality. The relationship between the displaced population and the urban politicians is characterized by mutual suspicion and distrust. The cultural and political differences between the intellectual elite in the urban centres and the displaced persons with origin in rural areas are an important obstacle for these two spheres of society to understand each other. This has deep-rooted historical origins in the institutionalization of feudal relationships between the landowning *patron* and poor *peon* and the systematic oppression of indigenous people. This history has great implications for the contemporary situation, and adds challenges to the implementation of the legal IDP framework.[14]

The historian Herbert Tico Braun focuses on the *cultural* relationship between the political and intellectual elites in the urban areas and their rural clientele.[15] In the 1950s, while in most other Latin American countries the state sought to incorporate the rural population more thoroughly in the nation, the Colombian political elite rather tried to dissociate themselves from the *campesinos.* The fact that large sections of the poor rural population never fully obtained their civil and political rights further created a sense of humiliation and exclusion among this population.[16] The gap between the rural and urban population contributes to explaining the lack of communication between those involved in the Colombian IDP situation. Since Law 387 was passed in Congress more than ten years ago, the encounters between the involved actors have been much more frequent, through meetings, hearings in court, and conferences. However, in many ways very little has changed, as Rosa Aguilar, a Kankuamo woman from la Guarjira, stresses when she explains her feelings on the government-organized conference marking the ten years of the Colombian IDP law:

> Today, Law 387 is 10 years old, but for us, the indigenous people of Colombia, this is not a celebration. At this conference, we wanted to inform the high officers of this country about our situation, but they are not even present. That shows a lack of respect for our culture and identity as indigenous people, as women, as Africans, and especially as those who have lived through the violence in this country.[17]

Rather than being a random side effect, forced displacement in Colombia is closely linked to struggles for land ownership, and armed actors use attacks on civilians as a deliberate strategy to seize and control land and to weaken other armed groups fighting for the same territory. What complicates the Colombian conflict and violence even more is that the government itself must be considered a perpetrator. The national army has been involved in attacks causing displacement, and investigations by Colombian control authorities and courts have proven close ties between central politicians and paramilitary groups. According to the Colombian weekly *Semana,* sixty-eight members of Congress were under investigation and thirty-one arrested in the month of April 2008 alone.[18] Moreover, the political elite and decision makers are themselves often powerful land owners, with little interest in redistribution of land. In light of these facts, it is interesting to study the implementation of the laws that have been put in place to protect the displaced.

Mind the Gap: IDP-Related Law and Practice in Colombia

Colombia's legislation on internal displacement was developed from 1994, after an announcement by Francis Deng, the representative of the UN Secretary-General on Internally Displaced Persons. The Colombian government, together with a large group of NGOs, had invited Mr. Deng to Colombia to meet with various representatives from the state and civil society.[19] As Walter Kälin, the present UN Secretary-General on Internally Displaced Persons, has pointed out, "Colombia has a long legal tradition, with a history of excellent legal scholarship and institutions dating from independence."[20] This benefited the development of Law 387, which was passed in 1997 and is applauded as one of the most progressive and comprehensive legal frameworks on internal displacement.

The approval of the law gave juridical basis to subsequent national action on behalf of internal displacement, and the National Plan for Integral Attention of Displaced Persons (SNAIPD) now constitutes the institutional framework for IDP protection. In line with the Guiding Principles

on Internal Displacement, which were under development when Law 387 was passed in Congress, the Colombian displacement legislation addresses all stages of displacement, including prevention of displacement; humanitarian assistance during displacement; and the right to return to the place of origin or permanently settle elsewhere. It explicitly confirms that it is the duty of the Colombian state to "formulate policies and adopt measures for the prevention of forced displacement, and for assistance, protection, socioeconomic consolidation and stabilization of persons internally displaced by violence."[21]

The legislation on displacement profited from the new Colombian Constitution that was introduced in 1991, which makes several references to human rights and creates a number of valuable mechanisms for the protection of civilians in general and the displaced population specifically.[22] For example, the important petition procedure *tutela* was introduced and enabled Colombian citizens to denounce violations of basic rights and receive a decision within ten days. The *tutela* is a "complaint that any citizen can bring before any judge in order to seek an immediate judicial injunction against actions or omissions of any public authority that they claim violates their constitutional fundamental rights."[23] The use of *tutela* has increased rapidly during the last decade, and the numerous petitions coming from displaced individuals since 1997 quickly made the Constitutional Court acknowledge the existence of a humanitarian crisis.[24]

In 2004 the Constitutional Court of Colombia concluded in ruling T-025 that the current assistance and response by the government towards IDPs was unconstitutional, ordering the state to promptly address this issue.[25] An unconstitutional state of affairs describes a *de facto* situation, in which by structural causes a large number of citizens—in this case the displaced population—are suffering in their daily lives because of recurrent violations of their constitutional rights.[26] The alleged lack of action by the government has further been criticized by a number of civil society actors, in addition to the UN Representative on Internal Displacement.[27] We suggest that prevention of displacement and the right to return or resettle are by far the most neglected areas of implementation. In the following section, we will provide an overview of the legislation and its implementation in the areas of prevention; humanitarian assistance; and durable solutions.

Preventing Displacement

According to Law 387, article 2, Colombians have the right not to be forcibly displaced. In relation to prevention, the law focuses on early communication of potential risk factors that may cause displacement, in order for the local and national systems to react and supply services before displacement occurs. The law furthermore underlines the importance of educating the general public on humanitarian law and of generating community tolerance, in addition to promoting immediate action from the armed forces on tumults or attacks. The government's responsibilities include the following measures:

> 1. Stimulate the formation of work groups for prevention and anticipation of the risks that may produce displacement, 2. Promote community and citizen actions to generate peaceful coexistence, and law enforcement activity against agents of disturbance, 3. Develop actions to avoid arbitrariness and discrimination, and to mitigate the risks to life, personal integrity, and the private property of displaced populations, 4. Design and execute an International Humanitarian Law Information Plan, and, 5. Advise the municipal and departmental authorities responsible for the development plans so that they include prevention and assistance programs.[28]

Preventing forced displacement in the midst of an internal armed conflict is arguably extremely challenging. The government has never had complete control over the national territory, and a number of armed groups are fighting for resources and political and social legitimacy in large parts of Colombia. An early warning system, Sistema de Alerta Temprana (SAT), has been developed by Acción Social[29] and coordinated by the Human Rights Ombudsman, but the risk assessment undertaken encompasses only certain armed, illegal actors. This undermines the dynamics of the ongoing conflict, as displacement is also caused by common hostilities and general lawlessness in areas with high criminal activity or as a side effect of activities that are carried out by the government to eradicate illicit crops.[30]

A further severe limitation of the system is that the national army is rarely ready to intervene when a warning is sent out. This has led potential victims to be reluctant to notify the authorities of displacement-related risks, fearing reprisals from armed groups.[31] In 2006, as an exception to the general unwillingness to respond to conflict risks, the national army did manage to mobilize and react after receiving reports of harassment and possible attacks in the Nariño department. However, instead of protecting civilians caught in the middle of the hostilities, soldiers were sent to protect areas of military importance such as the Pan-American Highway.[32] This suggests that Colombia's current military strategy does not focus on the protection of its civilian population from harassment and armed attacks. The fact that the number of displaced persons in Colombia is increasing every year is another indication that governmental efforts to prevent displacement are far from being implemented in accordance with Law 387.

Humanitarian Assistance

All displaced persons registered in the official IDP register, the Registro Unico de Población Desplazada (RUPD), are entitled to emergency assistance. It is further the responsibility of civil and military authorities to ensure the safe and free passage of emergency consignments to receiving communities. The law states that:

> once displacement takes place, the National Government shall initiate immediate action to guarantee emergency humanitarian assistance with the purpose of relieving, assisting, and protecting the displaced population, and attending to its needs in the areas of food, personal hygiene, supply management, kitchen utensils, psychological and medical assistance, emergency transportation, and temporary housing in appropriate conditions.[33]

Originally, according to the law, the humanitarian aid was limited to three months, which in exceptional cases could be extended for another three months, depending on the conditions and needs of the individuals or households.[34] However, in April 2007, the Constitutional Court declared this limitation unconstitutional,[35] thus taking an important step towards ensuring basic needs for IDPs during this critical phase before possible resettlement or return.

After the Constitutional Court in 2004 declared that the government was far from complying with the IDP law, access to humanitarian aid has increased significantly, especially in the capital where most IDPs end up. According to official statistics, nearly 80 per cent of the displaced population have been provided with the three months of basic assistance that they are entitled to.[36] A recent report from the Monitoring Commission for the Public Policies on Internal Displacement (MCPP)[37] disputes these high numbers and states that only 64 per cent of displaced households registered in the RUPD received emergency aid in 2006, and only 57 per cent in 2007.[38] Nonetheless, the resources invested in humanitarian aid have increased rapidly since 2004, and over the last five years the national budget for assistance to the displaced has risen from $80 million to $400 million annually.[39] Particularly in Bogotá and other large cities, significant distributions of basic assistance are accomplished and the Colombian displaced population has achieved an increased access to humanitarian emergency aid from state institutions.

Return and Resettlement

Durable solutions for IDPs are crucial to ensure safety and the possibility for sustainable livelihoods. The Colombian state is responsible for assisting and protecting returnees in their reintegration efforts, and if return is not an option other permanent solutions need to be made available. Law 387 specifies that the Colombian Institute for Agrarian Reform (Instituto Colombiano para la Reforma Agraria, INCORA) should "adopt special procedures and programs for the transfer, adjudication, and titling of land in the expulsion and reception zones of populations affected by forced displacement."[40]

The rights that are described here are far from reality for the displaced population. Return is problematic due to the state's lack of territorial control in many of the areas where displacement occurs.[41] Furthermore, there are very few resettlement projects and research suggests that hardly any of them have proven successful.[42]

One of the problems that has added to the difficulty of securing safe return for IDPs is the increasing number of former paramilitaries that are being settled in the areas from which people were forced to flee. An important step in the governmental plan for demobilization of these so-called self-defence groups has been to grant impunity to most paramilitaries who agree to surrender their weapons and provide them with comprehensive assistance for reintegration and resettlement. Former paramilitary soldiers in fact are reported to receive far greater support in return and resettlement than the displaced population.[43] The challenge of the impunity granted to these individuals leads to a reluctance among IDPs to return to their places of origin, as the perpetrators of their displacement may be settled in the same community.

Similar problems arise in relation to policies linked to the resettlement of the internally displaced. In 2004, the Colombian government granted an area of 17,000 hectares in Carimagua to IDPs. The area was meant to ensure the resettlement of approximately eighty families, allowing them to start up new lives in relatively safe areas. In February 2008 the Colombian newspaper *El Tiempo* revealed that the land originally given to IDPs to comply with the national IDP law was sold to international companies for the purpose of producing African palm for the production of biofuel and rubber. According to the Minister of Agriculture, the land was not appropriate for small-scale farming.[44]

A report from the Internal Displacement Monitoring Centre (IDMC) underlines how return to certain areas is also blocked because of the production of palm and producers' presumed links with paramilitary forces.[45] At times, the displacement may have been staged in order to enable such production in the first place. In 1996, for example, the national army led an attack on a guerrilla base in the Chocó region, causing massive displacement of the civilian population and abandonment of large areas. Soon after, private companies cultivating African palm for the production of biofuel established businesses in these territories. The government has financially and politically supported initiatives

to build such plantations, in order to eradicate illicit drug crops and promote regional development.[46] It is clear that return under these conditions is highly unlikely.

Internal Displacement: A Technical Problem or No Problem at All?

From the above, it is clear that the Colombian state is doing little in practice to fulfill its legal responsibilities to the displaced population, except to some extent in terms of short-term humanitarian relief. The effort invested at this stage of displacement is unquestionably necessary, but should not take place at the cost of far more complex issues like preventing displacement and ensuring secure resettlement or return. In this section, we will analyze the depoliticizing effects of treating displacement as a technical problem by merely or primarily focusing on humanitarian assistance. Furthermore, we will discuss two related processes that similarly disconnect displacement from its political and historical context. These processes include, first, the Colombian government's discourse on the armed conflict which excludes paramilitaries as potential perpetrators, and second, the invisibility of the displaced in the public debate.

Since 2004, financial allocations from the government have increased steadily, leading to the Colombian displaced population receiving increased humanitarian aid.[47] This is an important step forward in the implementation of Law 387. Emergency aid is vital for the displaced, who are largely moving from rural backgrounds to urban centres, and who are forced to leave their assets behind and have no foreseeable opportunity for income-generating activity.[48] Humanitarian assistance is also one of the more concrete obligations of the government towards the displaced population, which makes it easier to measure and reach tangible goals compared to the other rights IDPs have. However, there are a number of closely related reasons why a focus on the humanitarian aspects of IDP rights can be problematic. First of all, the emphasis on humanitarian assistance reduces the Colombian government's ability to enforce the IDP law in the areas of prevention, resettlement, and return, as the time and resources that are invested in one area cannot be invested in the other. Second, the choice of focusing on the humanitarian is unfortunate because it is a focus on technical, short-term solutions rather than political, long-term ones. The displaced are helped with this type of assistance in the present, but they are not provided with solutions for the future, nor is displacement of others prevented, so the problem itself is not addressed in any way.

Thirdly, humanitarian interventions tend to be constituted as the opposite of political ones,[49] portraying the former to be operating separately from any political or cultural context. Relief aid to displaced people purports to be based on a moral kind of "doing good" that denies the fact that processes of displacement as well as assistance provision are always determined by international historical and political-economic factors.[50] The perception of emergency assistance as "neutral" and based on a humanitarian imperative disguises all possible political intentions and interests. The aid system as an "anti-politics machine" obscures the power-structured relationships between "givers" and "receivers," by treating the conditions of the displaced as technical rather than structural problems that require practical rather than political solutions.[51] Furthermore, as Malkki argues, preventive measures do not come easily in the conventional logic of a "humanitarian operation," as they are conceived to be political and thus beyond the realm of the humanitarian.[52] This excludes the possibility of focusing on the legal obligation to prevent displacement from occurring in the first place.

The Discourse on the Conflict

When President Alvaro Uribe took office in 2002, his mandate was based on an electoral campaign promising a hard-line policy against the guerrillas. FARC is labelled a terrorist group by the Colombian government, which denies them a position as political actors.[53] By reducing insurgents to "terrorists" and "bandits," the Uribe administration has been able to redefine the contemporary situation. Colombia's High Commissioner for Peace, Luis Carlos Restrepo Ramírez, stated in March 2005: "In Colombia there is no armed conflict, but rather the threat of terrorism."[54] This has been repeated at various occasions throughout the years of the Uribe administration. A Colombian lawyer and human rights expert suggested, in an interview, that this rhetoric was one of the main obstacles for reaching sustainable peace and one of the core reasons for the failure to implement the comprehensive legal framework on IDPs.[55]

Ties to the United States have been strengthened since Uribe took office, which is reflected in the expansion of Plan Colombia—the US-funded assistance package aimed at eradicating the production of illicit crops and drug trafficking. In light of the US-led "War on Terror," the government discourse is reducing armed actors to terrorists, stripped of any legitimate political objectives. Furthermore, the Uribe government claims that, since 2006, the Colombian paramilitaries are completely demobilized and are no longer agents of displacement. The government argues that it has managed to demobilize approximately 30,000 paramilitaries, and retrieved around 12,000 small arms.[56] The discourse on the absence of "self-defence groups" such as the paramilitaries, in combination with the discourse on the absence of war, denies certain groups of displaced people access to

their rights and thus complicates the implementation of the legal framework. A displaced man in Bogotá explains how the assumed non-existence of paramilitary groups could affect one's possibilities to register as displaced and access IDP rights:

> If you go to denounce your case of displacement, there are some conditions. If you say that the ones who displaced you were the paramilitaries, they will tell you that they won't accept your declaration, because the paramilitarism was formally ended one and a half year ago. One and a half years ago, the High Commissioner of Peace said that the paramilitarism in Colombia has ended, that they'd buried it.

The Monitoring Commission for the Public Policies on Internal Displacement (MCPP) has proved these claims in the above-mentioned investigation on whether the government was complying with the demands from the 2004 Constitutional Court ruling T-025. The MCPP report revealed that displaced persons who had tried to denounce their displacement as caused by paramilitaries were systematically rejected in the public centres for registration. Thus, the discourse on the non-existence of an armed conflict and the supposed abolishment of paramilitary groups is further contributing to isolate the Colombian humanitarian catastrophe from its political and historical context. By portraying the armed groups as a sphere of society completely detached from state actions, the authorities urge for the sympathy of the general public, arguing that they are all fighting a common enemy. This allows for the usurpation of land to continue and for private companies to continue establishing themselves in areas abandoned by the displaced, complicating efforts of preventing displacement and ensuring safe resettlement.

The Invisibility of the Displaced

In the above, we have argued that displacement in Colombia is systematically removed from its political context through a focus on humanitarian responsibilities rather than responsibilities for prevention and durable solutions, and through a representation of the conflict that allows only certain groups of displaced access to (some of) their rights. Whereas Ferguson's analysis of how development aid functions as a practice of depoliticizing the question of poverty[57] is very useful in this respect, Malkki's work adds a crucial dimension by drawing attention to representational practices of the beneficiaries of aid as ahistorical, universal humanitarian subjects.[58] She shows that, for the aid encounter to be a neutral, apolitical act, the power relations between aid giver and receiver must be rendered invisible. Depolitization through aid practices can only occur because simultaneously, the beneficiaries of aid are made invisible, being reduced to mute victims rather than historical actors. The aid receiver is depicted as someone in need, devoid of agency, who is connected to the aid giver only in humanness rather than through history or the current everyday power-structured relationships between individuals and groups. Images of refugees and internally displaced people are commonly characterized by helplessness, suffering, and loss. This represents the displaced as a universal mass of victims, abstracted from the specific political and historical context which caused the displacement.[59]

In the case of Colombia, similarly, the displaced population is made invisible. Whereas the Colombian media does report on the armed conflict continuously, this news hardly ever covers displacement and is far from nuanced. The space for critical journalism is highly limited in Colombia because firstly, ownership of mass media is concentrated in the hands of the political elite and secondly, Colombia is one of the most dangerous countries for investigative reporters.[60] Threats and assassinations by armed groups are most often met with impunity, which makes journalists use a high degree of self-censorship.[61] As a consequence, displacement is rarely discussed within reporting on the armed conflict. A Human Rights expert who was interviewed indicates, "The displaced population is systematically made invisible. They are overshadowed by the personification of the kidnapped, the corpses of the 'diputados,' humanitarian agreements reached, etcetera (…)."[62]

According to this person, the invisibility of the displaced is not a coincidence but a deliberate strategy to remove public attention from the increasing problems related to displacement. But according to many of the displaced themselves, the main reason for their invisibility is the fact that journalists are simply not interested in their predicament. Mr. Andrés Lozano, who is a displaced indigenous man settled in Bogotá, voices this concern when he comments on what he considers to be the mass media's general lack of focus on and interest in the marginalized sections of the population:

> Last week during the demonstrations for the hostages, five persons were killed in that same week just outside Bogotá, and no one said anything. In Colombia, you will not hear anything in the media about the displacement and the assassinations of *campesinos* and of the lower class.

As this statement suggests, among the displaced there is a deep-rooted skepticism towards the political elite, which is seen to include the media as well. As noted above, in Colombian society, there has been a huge gap between the urban elite and the rural population for centuries, a situation which continues until today. Most IDPs are considered

different culturally and are viewed as *campesinos,* or peasants, who threaten the nature of urban culture.[63] This historically located gap is one of the explanations for the processes and practices described here, while these at the same time work towards making the gap invisible.

In Conclusion

Colombia's legislation on internal displacement is largely modelled on the UN Guiding Principles on Internal Displacement, which were developed at the same time. It is amongst the most comprehensive laws to secure the rights of IDPs due to a combination of international pressure and input as well as a very strong national expertise. Yet, as we have illustrated in this article, the implementation of the law has been very limited, and main achievements have only been made in terms of short-term humanitarian assistance. On the one hand, one may argue that it is crucial for the Colombian state to assist its displaced population and that this assistance is vital in enabling survival of the displaced in the initial, most difficult, phase of their displacement. Furthermore, it is crucial that a comprehensive law is in place and there is some evidence that this is an instrument that the IDPs can increasingly use to improve their situation. The utilization by IDPs of the *tutela,* for example, has contributed to changes, as authorities are held accountable to their legal obligations under Law 387.

On the other hand, one may also argue that the systems that are currently available to assist IDPs in Colombia effectively cover up the more structural problems underlying their displacement, which are thus left unaddressed both nationally and internationally. In fact, the implementation of the Guiding Principles in national legislation, and partial compliance with this law through the provision of humanitarian assistance of the displaced, may have prevented a public outcry on the situation in Colombia. The question is whether this is specific to the Colombian situation or whether it is common for states suffering from internal displacement to use the IDP category as a humanitarian category in order to avoid having to address the political issues underlying the displacement. While refugees who flee the country and cross a national border may obtain a legal status and protection under the Refugee Convention, this is not the case for IDPs because they are still under the jurisdiction of their own state.[64] Thus, being an internally displaced person is not a legal status, and imposing the Guiding Principles on any state is impossible because of the salience of territorial sovereignty.

Some argue that the Guiding Principles have been crucial in terms of recasting sovereignty as responsibility[65] or in highlighting the responsibility of the international community when states are unable or unwilling to address internal displacement.[66] Critical voices on the other hand have argued that the Guiding Principles add nothing to the existing body of international human rights law, as the incorporated rights are already covered by legally binding treaties. IDPs should thus be treated as any other victim of human rights violations, making the IDP category redundant.[67] The analysis presented here of responses to displacement in Colombia adds a concern to Hathaway's. We argue that the partial implementation of IDP legislation in Colombia and the remaking of the IDP as a humanitarian category facilitates a focus *away* from human rights violations. It is hardly likely that the Colombian case is unique in this sense.

Notes

1. Figures are widely disputed and range from government figures of 2.4 million to figures produced by the Consultancy on Human Rights and Displacement (CODHES) of 4 million.
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3. UNHCR, "Supplementary Appeal for IDPs in Colombia: Protection and durable solutions for IDPs in Colombia" (United Nations High Commissioner for Refugees, 2007), 2; P. Weiss Fagen, A. Juan, F. Stepputat, and R. Lopez, "Internal Displacement in Colombia: National and International Responses," ISS/IG. Kongevej Working Paper (Copenhagen: Institute for International Studies, 2003), 16.
4. J. Ferguson, *The Anti-politics Machine: 'Development,' Depoliticization and Democratic Power in Lesotho* (Cambridge: Cambridge University Press, 1990); L. Malkki, "Speechless Emissaries: Refugees, Humanitarianism and Dehistoricization," *Cultural Anthropology* 11, no. 2 (1996): 377–404.
5. R. Thorp, *Progress, Poverty and Exclusion: An Economic History of Latin America in the 20th Century* (Washington, D.C.: Inter-American Development Bank, 1998).
6. C. Kay, "Reflections on Rural Violence in Latin America," *Third World Quarterly* 22, no. 5 (2001): 741–775.
7. *Ibid.*
8. H. T. Braun, "Que haiga paz!" The Cultural Contexts of Conflict in Colombia [Let There be Peace! (…)], In *Peace, Democracy, and Human Rights in Colombia,* ed. C. Welna and G. Gallón (Notre Dame, IN: University of Notre Dame Press, 2007), 23–59; F. S. Gutierrez, "Internal Conflict, Terrorism and Crime in Colombia," *Journal of International Development* 18, no. 1 (2006): 137–150; M. Palacios and F. Safford, *Colombia. Pais Fragmentado, Sociedad Dividida* [Colombia: Fragmented Country, Divided Society] (Bogotá: Editorial Norma SA, 2002).
9. Comisión Colombiana de Juristas (CCJ), (2006) Revertir el destierro forzado: protección y restitución de los territorios

usurpados. Obstáculos y desafíos para garantizar el derecho al patrimonio de la población desplazada en Colombia, 2006; G. Gallón (2007) Human Rights: A Path to Democracy and Peace in Colombia, in *Peace, Democracy, and Human Rights in Colombia* (see note 8).

10. Comisión Colombiana de Juristas (CCJ).
11. Comisión Colombiana de Juristas (CCJ); A. M. Ibáñez and P. Querubín, Acceso a Teirras y Desplazamiento Forzado en Colombia. *Documento Cede* (Universidad de los Andes, 2004).
12. Names are changed in order to respect the privacy of informants.
13. R. Muggah, "Through the Developmentalist's Looking Glass: Conflict-Induced Displacement and Involuntary Resettlement in Colombia," *Journal of Refugee Studies* 13, no. 2 (2000): 138.
14. Braun; L. Obregón and M. Stavropoulou, "In Search of Hope: The Plight of Displaced Colombians," In Cohen, R. & Deng, F. M. (eds.) *The Forsaken People: Case Studies of the Internally Displaced* (Washington, DC: Brookings Institution Press, 1998).
15. Braun.
16. *Ibid.*
17. "Rosa Aguilar" (R.A)., indigenous displaced woman, interviewed July 17, 2007, in Bogotá, at the conference marking the ten years of Law 387.
18. "Una propuesta para la crisis," *Semana,* February 10, 2008, <http://www.semana.com/wf_InfoArticulo.aspx?idArt=111301> (accessed June 12, 2008).
19. Weiss Fagen, Juan, Stepputat, and Lopez.
20. Office of the High Commissioner for Human Rights (OHCHR), Mission to Colombia, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin* (Human Rights Council, 2007), 8.
21. Congress of the Republic of Colombia (COC), Ley 387 de 1997: Del Desplazado y de la Responsibilidad del Estado [Law 387 of 1997: On the Displaced and the Responsibility of the State], art. 3 (1997).
22. Weiss Fagen, Juan, Stepputat, and Lopez.
23. M. J. E. Cepeda, "How far may Colombia's constitutional court go to protect IDP rights?" *Forced Migration Review* (Special issue, December 2006): 2.
24. Corte Constituciónal de Colombia (CC), Sentencia T-025/2004.
25. *Ibid.*
26. *Ibid.;* also IDMC, *Colombia. New displacement continues, response still ineffective. Country report* (2009).
27. OHCHR, Mission to Colombia, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin* (Human Rights Council, 2007).
28. COC, Ley 387 de 1997 [Law 387 of 1997], art. 4.
29. Acción Social (officially: Agencia Presidencial para la Acción Social y la Cooperación Internaciónal) is a governmental entity established in order to channel and coordinate national and international resources to implement social programs assisting vulnerable groups in society, including IDPs.
30. Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), Más o menos desplazados [Consultancy for Human Rights and Displacement, More or Less Displaced], *Boletín de la Consultoría para los Derechos Humanos y el Desplazamiento,* No. 69 (Bogotá D.C., 2006); OHCHR, Mission to Colombia, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin* (Human Rights Council, 2007); Weiss Fagen, Juan, Stepputat, and Lopez.
31. OHCHR, Mission to Colombia, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin* (Human Rights Council, 2007).
32. *Ibid.*
33. COC, Ley 387 de 1997 [Law 387 of 1997], art. 13.
34. COC, Ley 387 de 1997]; A. M. Ibáñez and P. Querubín.
35. Corte Constituciónal de Colombia (CC), Sentencia C-278/2007.
36. M. Romero, "Year of Displaced People's Rights in Colombia," *Forced Migration Review* 29 (2007): 58.
37. MCPP is a commission established in 2005 to follow up on the 2004 sentence from the Constitutional Court, comprised by the research institute CODHES, the faculty of law at the Andes University, the former President of the Constitutional Court, and a number of representatives from the civil society; see <http://www.codhes.org/index.php?option=com_content&task=view&id=39&Itemid=52>.
38. Comición de Seguimiento a la Política Pública Sobre el Desplazamiento Forzado [Monitoring Commission for the Public Policies on Internal Displacement, MCPP], Proceso Nacional de Verificación de los Derechos de la Población Desplazada, 2008, 132.
39. A. M. Ibáñez and A. Moya, *La población desplazada en Colombia: Examen de sus condiciones socioeconómicas y análysis de las politicas actuales* [The displaced population in Colombia: an assessment of their socioeconomic conditions and analysis of the current politics], Report commissioned by Misión para el diseño de una estrategia para la reduccion de la pobreza y la desigualdad (MERPD) [The Mission for the design of a strategy to reduce poverty and inequality], 2007.
40. COC, Ley 387 de 1997 [Law 387 of 1997], art. 19.
41. Ibáñez and Moya.
42. Weiss Fagen, Juan, Stepputat, and Lopez .
43. OHCHR, Mission to Colombia, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin* (Human Rights Council, 2007).
44. "Tierras destinadas a víctimas del conflicto serán dadas a particulares por MinAgricultura e Incoder" [Land intended for victims of the conflict will be given to private persons by the

Ministry of Agriculture and Incoder], *El Tiempo,* February 10, 2008, <http://www.eltiempo.com/justicia/2008-02-10/ARTICULO-WEB-NOTA_INTERIOR-3952909.html> (accessed February 12, 2008).
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Contesting the Shape of Political Space: An Investigation of the "Threat of Asylum" in Britain

Sarah Doyle

Abstract

Defined in terms of a national security discourse, Britain's asylum policy facilitates a disturbing dissociation of the asylum seeker from the identity of the refugee. The roots of this discourse can, this paper argues, be understood if the asylum seeker is seen as the site of a clash between two conceptualizations of political space—one that sees only the international state system, marked by the rights of sovereign states and exclusive political spaces, and one that sees a more complicated global political structure, marked by spaces of danger and of opportunity, in which human beings, as such, have a right to demand hospitality and inclusion from the state. Aiming to understand this clash, and the possibilities for moving beyond it, this paper analyzes British asylum policy through the lens of Michel Foucault's account of sovereign biopower in Society Must Be Defended*, read together with Giorgio Agamben's work on the homo sacer and spaces of exception. These texts point towards the counter-narrative of the asylum seeker who refuses to disappear into discourses of national security, and who suggests a "rival structure" of political space. Understanding this clash requires uncovering the violence, discernible in British asylum policy, which sustains the international state system and in doing so, creates and marginalizes the asylum seeker. This paper draws out the deeply challenging and complex nature of the "problem of asylum," working against the simplification that a national security discourse imposes on the issue.*

Résumé

Définie en termes de discours autour de la sécurité nationale, la politique d'asile de la Grande Bretagne facilite la dissociation du demandeur d'asile de l'identité du réfugié. Cet article fait valoir que pour comprendre la racine de ce discours, il faut voir le demandeur d'asile comme le point de conflit entre deux conceptualisations de l'espace politique — l'une qui ne voit que le système international composé d'états caractérisé par les droits des états souverains et des espaces politiques exclusifs; et l'autre qui voit une structure politique globale bien plus compliquée, marquée par des espaces de danger et d'opportunités, et où les êtres humains ont le droit de demander l'hospitalité et l'inclusion de la part de l'état. Dans le but de comprendre ce conflit, et les possibilités de le dépasser, cet article analyse la politique du droit d'asile de la Grande Bretagne à travers les lentilles du compte-rendu du bio-pouvoir souverain par Michel Foucault dans Society Must Be Defended*, lu de concert avec l'œuvre de Giorgio Agamden sur le homo sacer et les espaces d'exception. Ces textes pointent vers la contre-narration du demandeur d'asile qui refuse de disparaître dans les discours sur la sécurité nationale, et qui au contraire propose une "structure rivale" d'espaces politiques. Pour comprendre ce conflit, il faut enlever la couverture cachant la violence qui peut être discernée dans la politique d'asile britannique, qui soutient le système international d'états et, ce faisant, crée et marginalise le demandeur d'asile. Cet article met à jour la nature profondément difficile et complexe du « problème de l'asile », et s'insurge contre la simplification qu'un discours de sécurité national impose sur le problème.*

> … we would know far more about life's complexities if we applied ourselves to the close study of its contradictions instead of wasting so much time on similarities and connections, which should, anyway, be self-explanatory.
> —José Saramago, *The Cave*

Introduction

There is something disturbing about the severity of the British reaction to asylum seekers. They are described as threats to national security, engendering increasingly strict border controls, are held in detention centres, are the focal point for xenophobic sentiments, and are generally assumed to be something other than refugees. This severity is also conspicuous in the protests of asylum seekers in Britain, especially among those who are detained, which take the form of hunger strikes, riots, escapes, and suicides. Such violence can be understood if the asylum seeker is seen as the site of a clash between two conceptualizations of political space—one that sees only the international state system, marked by the rights of sovereign states and exclusive political spaces, and one that sees a more complicated global political structure, marked by spaces of danger and opportunity, in which human beings, as such, have a right to demand hospitality and inclusion from the state.

Political space is not neatly defined in the way that the international state system suggests. It is chimerical and incoherent, shifting form depending on which activities and whose identities are recognized as political. Looking at political space from the perspective of a figure who finds him/herself on the margins of the international state system reveals both its instability and the violence with which its position of monopoly on political space is asserted. The asylum seeker is one such figure. Along with the refugee, she/he emerges as "a figure of the 'inter'—or in-betweeness—of the human way of being, as a figure of the 'inter' of international relations …."[1] The asylum seeker is one site at which the disciplining of the borders of the state and of identity takes place, and therefore at which the character of political space and identity is revealed and consequently also challenged.

Framed by Michel Foucault's account of sovereign biopower in "Society Must Be Defended" read together with Giorgio Agamben's work on the *homo sacer* and spaces of exception, this paper aims to uncover the violence, discernible in British asylum policy, which sustains the global political order and, in doing so, creates and marginalizes the asylum seeker. It draws out the contradictions that become obvious at the margins of this order, in the movements and claims of asylum seekers, and that suggest a "rival structure" of political space.[2]

The asylum regime, different from the refugee regime, brings a demand for refuge and recognition onto the territory of the state and is consequently more threatening and more directly subject to state efforts at control.[3] Asylum seekers are at odds with the international state system because of their generally clandestine movements across borders and because of their self-assertion, in the moment of demanding asylum from the state, as sovereign individuals and international political actors. The challenge implicit in their presence is countered by biopolitical maneuvering that sets them outside the nation, as a threat to national security. They are fit into the map of the international state system by being placed in a state of exception, where they can be understood according to Agamben's description of the *homo sacer*—a life divested of all identity except that of being human, excluded from the space of rights and politics.[4] The international state system is traditionally assumed to be all encompassing, to regulate the lives of all people. In the case of asylum seekers, it can only do so by pushing them to the limits of the system, by making them invisible. This violence must be hidden beneath a myth of civility; however the more assertive the violence, the more evident it, and the fragility of the system it supports, becomes. Asylum seekers themselves draw attention to it. Even from within a space of exception, they assert their presence as political subjects and thereby interrupt the discourses that attempt to define them. As objects of biopolitical control and exceptional measures, but also as political subjects, asylum seekers make visible a more complicated picture of overlapping, divergent, and sometimes conflictive political spaces, identities, and narratives.

The challenge that the asylum seeker poses to the normalcy and legitimacy of political space, as defined by the international state system, can be seen in three aspects of the relationship between this figure and the British state. It can be seen in the contradiction between the state's roles of "making live" and "letting die," evident in British asylum policy; in the language of emergency and establishment of a state of exception which, for the most part, constitute the reaction of Britain to asylum seekers and which reveal the challenge posed to the sovereign account of the political; and in the counter-narrative found in the asylum seeker who refuses to disappear into discourses of national security. The transformation of political space suggested by this challenge will be considered in the last section of the paper. This paper will first establish the background of the "problem of asylum," looking at the asylum seeker as he/she appears in international law and United Nations (UN) declarations, and in British law and policy.

The Problem of Asylum

The asylum seeker enters the state as a spectre of a "migration crisis," part of an imprecise category that is neither that

of the citizen nor that of the refugee, making claims based on international declarations of human rights in a space dedicated to citizen rights and already defined by the state as a threat. He/she is effectively unprotected by international ideas of obligation and legitimacy, which can act as a check on state behaviour. This ambiguous identity allows asylum seekers to be pushed to the obscure limits of national and international law, rights, and politics.

The transnational movement of asylum seekers is part of a larger trend of global migrations, which is eluding the control of governments and the international state system more generally and is proclaimed, by politicians across the political spectrum, to be unprecedented and menacing. International migration has grown dramatically in volume and scope since the Cold War and has had massive social and economic impacts, becoming a priority security concern in domestic and international politics.[5] These trends are framed as a crisis, generating harsh efforts to prevent unwanted immigration that have nevertheless proved imperfect, due to such factors as the demand for migrant labour and the difficulty of preventing such methods of entry as visa overstay and involvement with human traffickers.[6] This lack of control augments the image of crisis—a "crisis" that will continue for as long as the pressures that drive people to move in search of work and refuge, such as conflict, ecological degradation, and poverty, last. In Britain, the desire to "put migration at the heart of our foreign policy relationships" places migration on par with the traditional issues of high politics, such as war and the national economy, and is demonstrative of this widespread unease.[7]

International agreements suggest that the asylum seeker has a right to request refuge from the state, but go no farther. The 1951 *Convention relating to the Status of Refugees,* with the modifications adopted in the 1967 Protocol, defines the refugee as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …."[8] The UN defines the "asylum seeker" as someone who claims refugee status and is waiting for this claim to be decided by the state in which the claim is made. The UN, further, identifies many of the asylum seekers who do not qualify as Convention refugees as "persons of concern" who are fleeing "serious threats to their life and liberty."[9] The position of the asylum seeker in relation to the state tends, however, to be neglected and the category of the asylum seeker to occupy a grey zone between refugee and not-refugee. This is seen, for example, in the rules governing refugeeness, laid out by the United Nations High Commissioner for Refugees (UNHCR), which state explicitly that refugees must be neutral, apolitical, receptive of aid but not active.[10] Asylum seekers transgress these rules as soon as they demand to be recognized as refugees, necessarily dividing themselves from the category of the refugee.

Human rights documents that could be expected to speak to the position of those excluded from refugeehood demonstrate an ambiguity that allows the asylum seeker to again slip from sight. The *Declaration of Human Rights* states that all humans "should act towards one another in a spirit of brotherhood" and that everyone "is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[11] The alternative map of political space suggested in such statements is, however, reconciled with the traditional map of the international state system through a series of moves that leave the asylum seeker largely unprotected by standards of international legitimacy. These include articles that provide for a state of emergency, allowing for derogation from the Bill for the public good, leaving the definition of an emergency and the public good to the determination of states.[12] Ambiguity is also present in the prohibition of arbitrary detention, except in accordance with the law.[13] The law of the state is left as the ultimate author of the political.

One of the defining characteristics of the state is control of the physical spaces in and through which one can legally move. The principle of asylum challenges this fundamental characteristic by granting another entity—the individual in search of asylum—the right to move onto the territory of the state. The asylum seeker falls into the space of ambiguity described above when he/she asserts this right against the state. Asylum policy in Britain manifests as an issue of national security and public well-being. British policy documents and legislation relating to asylum therefore focus almost exclusively on deterrence and control rather than on humanitarianism, asylum, and rights. The current situation is described in crisis terms, with asylum seekers often framed as frauds, as something other than refugees and, sometimes, discursively coupled with "terrorists and others intent on harm."[14] This language of crisis is joined by that of exceptional measures. In 2002 it was announced that Tony Blair had taken over control of asylum policy and was considering, among other measures, deploying warships to fend off asylum seekers trying to reach Britain with the aid of traffickers.[15] The aggressive nature of this response has only augmented since 2002 and is generally supported, and in turn conditioned, by public opinion and the British press.[16]

The language of the five-year strategy for asylum and immigration, entitled "Controlling Our Borders: Making Migration Work for Britain," released by the Home Office in 2005, is oriented around policing, securing borders, and safeguarding the national interest, presenting asylum

seekers and others who enter illegally as a major threat that the Home Office is committed to dealing with.[17] This strategy includes increasing the number of failed asylum applicants detained until it "becomes the norm that those who fail can be detained." It also proposes to take a tougher stance on removals through, for example, making clear to the governments of source countries that "failure to co-operate [by receiving failed asylum claimants] will have repercussions." Removals of principal asylum applicants increased by 237 per cent between 1996 and 2006, with the largest numbers removed to Iraq, Turkey, Serbia and Montenegro, Afghanistan, and Pakistan.[18] This strategy, moreover, aims to minimize contact with asylum seekers in the first place, by "exporting … [British] borders around the world" with the aim of preventing asylum seekers from physically getting to British soil.[19] Though numbers continue to fluctuate, there was a recent drop in the number of asylum seekers entering Europe more generally, but particularly in Britain, where the lowest yearly intake of asylum seekers since 1993 was experienced in 2007. This is presented in the light of an achievement by the Home Office.[20] Whether the toughening of the asylum system in Britain has prevented "fraudulent" asylum seekers or "legitimate" asylum seekers from entering Britain is not considered. A strategy that focuses on detention and removal, and that makes it more difficult to enter Britain to claim asylum, is indicative of a system oriented towards national security rather than humanitarian concerns.[21]

Defined by the state as a threat and a fraud, the asylum seeker is distanced from the category of the refugee, allowing the state to approach the asylum seeker according to the imperatives of state security and sovereignty, rather than human security, without losing face internationally. British asylum policy displays the sovereign logic that works to recapture anomalies, netting them with categories that fit them into a map of sovereign nation-states. In the case of asylum seekers, this amounts to their disappearance as seekers of asylum under definitions that mark them as threats to the nation.

Sovereign Contradictions

The democratic nation-state is Janus-faced, presenting the paternal face of protection to the nation and the harsh face of the sovereign to those excluded from it. The contradictory characters of these two faces are reconciled by the idea of their radical separation; however this idea is made vulnerable by the unreliability of anything "two-faced." This tension is evinced in the state's response to asylum, which advertises itself as building a wall of protection around the people who belong to the state. At the same time, it reveals the sovereign power of the state to which every citizen is bound, bringing to light the state's dual role of threat and protector.

"Making Live" and "Letting Die"

A central myth of the modern nation-state describes it as a space of unity, order, and civility in which life is able to flourish, in contrast to the anarchical, violent, international space that lies outside its borders.[22] The violence of exclusion and exception, however, is required to manage the border between national unity and external threat, such that the state of nature where "anything can happen," which is described as prior and external to the state, hides within it.[23] In order for the state to appear as the protector of life and order, this violence must disappear. The exclusion of the asylum seeker from the space of politics and rights is one of the acts of state power that must be buried under other stories—stories of "making live."[24]

Foucault describes the political power operative within the modern democratic state as existing in three forms: sovereign power, disciplinary power, and biopower; or ultimate power vested in a sovereign entity by the people, normative power applied to the individual man-as-body [*sic*], and power applied to the collective body of man-as-species [*sic*], to the population. More specifically, Biopower refers to the exercise of power to nurture and protect the life of the nation, through the regulation of collective political and biological phenomena such as national identity and processes of birth, death, and production.[25] The first and last forms of power conflict as sovereign power's right over life and death, which is manifested as the right to "let live and make die," gets tangled with biopower's role of "making live and letting die."[26]

In order to make biopower work in concert with sovereign power, Foucault tells us that state racism is needed.[27] "State racism" offers an apt description of the relationship between the state and the asylum seeker. It refers to the discourse that creates a struggle between the race that wields power and defines social norms and the race that deviates from these norms and thereby threatens the biological identity, in other words the national identity, of the society.[28] Asylum seekers fall into this latter category. As non-citizens who enter the state to demand rights and recognition, they are deviants and constitute an invasion of the pure space of the nation. Racism functions to divide the population into those who the state must protect and nurture—the People—and those who can be detained, placed outside the law and exposed to death in order for the People to live, that is, to exist as more than just a collection of individuals.[29] This division of the population is part of the discourse of national security. The mantra of war—for the People to live, the other must die—becomes the mantra that the other must disappear or be excluded in order for the purity, vitality, and security of the People to be upheld.[30] Under the auspices of biopower, both internal and external security practices concentrate increasingly

on "the enemy within," who is generally equated with the unwanted immigrant, the outsider who is also an insider.[31] That the state cannot achieve complete control over entry to its territory is not important to its security efforts, which are more concerned with creating and protecting the national border.[32] While British asylum policy proposes to achieve a completely airtight state border, this is generally admitted to be impossible and even, from an economic point of view, given the reliance of the economy on illegal migrant labour, undesirable.[33] What this policy achieves with greatest effect is the division of the population within the state. The continued transgression of the territorial border is, in fact, necessary to the security project from which the state draws legitimacy, as it creates "the enemy within."[34]

The discourse of threat to, and protection of, a distinct national identity is present in the text of British border policy. The new policy direction for 2007 is described, for example, as "building progressively to a robust, secure, risk-based system of identity management" in order to "safeguard people's identity and the privileges of citizenship."[35] Management of the border between the British identity and other identities, in order to determine who belongs and who does not, is a central element of British policy initiatives oriented towards the protection of the nation. This management will occur as part of the National Identity System, through the use of biometric identity documents, which are central to the modern biopolitical project. These will be phased in over the next few years to function as internal borders. They will be checked by employers, government agencies, government service providers, and police—who are increasingly making use of mobile biometric readers to determine from people's fingerprints whether they are illegal.[36] Biometric technologies resolve the problem of practically identifying the enemy/other, which, in multi-ethnic states, can no longer be done on the basis of observable characteristics. They also hide their discriminatory function behind an objective, technological face.[37]

The politics of division is also evident in the dichotomy that is established in British policy documents to separate the good migrant—a source of benefit for the British nation—and the bad migrant—a source of harm. This language appears, for example, in a statement made by the then Home Secretary, Charles Clarke, which reads: "we need to ensure that we let in migrants with the skills and talents to benefit Britain, while stopping those trying to abuse our hospitality and place a burden on our society …."[38] The dichotomy generally appears in a form that explicitly links the good migrant with legality, vital economic contributions, and tax support for the welfare system, and the bad migrant with illegality, fraud, abuse of the welfare system, a flood of un-British values, organized international crime, and terrorism—in other words, with threat to the population.[39] In the words of a Refugee Council report, a constructed link between asylum seekers and negative subjectivities, particularly that of the terrorist, has helped to create a community of fear willing to respond to the asylum seeker through harsher, exceptional measures.[40] The linkage of the asylum seeker to negative subjectivities makes the asylum seeker distinctly other and provides a generically threatening identity that can be called to mind whenever one is forced to remember him/her. Hiding the asylum seeker beneath these negative categories is a necessary feature of state racism because in "the grammar of the biopolitical, 'one not only forgets the face of the other, but one must also forget that one has forgotten.'"[41] The asylum seeker is turned into a generic symbol of threat, without individual subjectivity and so without a face that could be forgotten.

The corollary of creating an other that can legitimately be subjected to the sovereign power to "make die" is the creation of the nation as a unified, distinct entity that can, and should, be protected. Defined in terms of explicit rules and associated values, the state has only a thin identity, one into which outsiders could integrate with relative ease. The national identity, based on myths of historical continuity and familial bonds, gives the state a thicker identity and thereby draws a reassuring dividing line between inside and outside.[42] The character of this identity escapes the need for definition, standing in relief against an outside threat. Moreover, discord and conflict, including that which is authored by the state under the auspices of "exception," are exported to the outside, onto such externalizable bodies as the asylum seeker.[43] Jef Huysmans explains that existential threats are part of a "peculiar process of constituting a political community of the established that seeks to secure unity and identity by instituting existential insecurity."[44] This process is underscored when the security measures taken in response to the threat from outside are themselves written into the text of the national identity. In a speech delivered by Liam Byrne, Minister of State for Immigration, Citizenship and Nationality, in June 2007, the National Identity System is said to be the modern equivalent of the nineteenth century railways and twentieth century national grid—a public good that will quickly weave its way into the nature of British life.[45]

A Blurring of Boundaries

The reconciliation of the contradiction between biopower and sovereign power is fragile and imperfect. A suspicion of the potential universality of the sovereign power to make die, in other words of the state of exception, raises its head as soon as this power is seen to be exercised, as in the case of asylum.

The exercise of sovereign power through the state of exception has traditionally existed, generally in times of war, as the temporally and spatially bounded legal suspension of all specific laws, in order to preserve the nation from what is identified as an existential threat.[46] For asylum seekers, this state is permanent, meaning that the state of exception is always present in democratic political spaces. It both bolsters the continuity of these spaces and the interests they support, and poses a permanent threat to their vitality by standing as their contradiction.[47] The possibility of suspending the law indefinitely points in the direction of Agamben's warning that the exception has spilled over spatial and temporal boundaries to become the rule.[48] That the exercise of sovereign power is constantly required in order for the normalcy it protects to exist means that this power is always in the background and that citizens themselves are in some way subject to it, as well as being party to its exercise. It suggests that citizens are objects of sovereign biopower first, only given the identity and rights of the citizen second.[49] If this is true, then citizens are in an insecure position that is the mirror image of that of the asylum seeker. Biometrics point to this conclusion. They are not used only to divide authentic from "fraudulent" asylum seekers, but to manage all identities, dividing authentic from inauthentic, such that the politics of asylum could be described as "writ large."[50] The nation and the outside inevitably cross into one another. The "space between discourses of belonging and unbelonging blurs, one bleeds into the other, and the logic that informs dichotomous hierarchies of being is exposed for what it is: an alibi for the legitimacy of the project of sovereignty."[51]

The contradiction between the sovereign and biopolitical powers exercised by the state and the omnipresence of sovereign power become evident as soon as the asylum seeker who is subject to the power to make die is recognized. This recognition is inhibited, however, by the nature of spaces of exception themselves, discussed in the following sections, which work to remove the asylum seeker from the political space of the nation and therefore to assert state control over political space and render asylum seekers invisible.

Capturing Political Space in the State of Exception

The asylum seeker unsettles the trinity of territory, state, and nation, which describes the political geography of the nation-state system,[52] by entering the territory of the state despite being prevented from entering the nation and by demanding entry to the nation by right and thereby acting as a sovereign body within a territory presumed to belong solely to a sovereign state. This trinity is reasserted through a national security discourse.

There is a feedback function between security discourses and understandings of political space and subjectivity. The former only make sense in terms of the latter, but the latter relies on the former in order to be reproduced as necessary and normal. Security crises are mobilized in the capture of political space,[53] as is visible in the security discourse surrounding asylum in Britain. However, in the exercise of state power to define the nature of political space can be seen both the power of the state and the instability of its project. Foucault describes this project as one side of a war that permanently divides society in two. The political organization of society is underwritten by relations of war, whereby some are able to "defend their victory and perpetuate it by subjugating others."[54] This war is a struggle not for domination, but to assert political reality.[55] The creation of a state of exception, to which asylum seekers can be relegated, defends the victory of the sovereign nation-state in the determination of political reality; however simultaneously reveals that the shape of political space is contestable.

The "Outside" Inside the State

As, in Barry Buzan's terms, a securitized issue, asylum policy is moved out of the public realm of political debate and is constituted instead as an area of existential threat that calls for actions not subject to public questioning or even to public sight, in other words, actions that occur in an exceptional space.[56] This move functions to exclude asylum seekers, but also to (re)constitute a certain vision of political space.

The space of exception refers to any space in which the ordinary rule of law has been suspended.[57] It exists at the limit of the state—simultaneously excluded from and captured by it. Inside-outside distinctions are made ambiguous in the space of exception, which in fact depends on this ambiguity to create a twilight quality that permits the impermissible and renders anomalies to the nation-state system invisible, or at least indistinct. In this space, the law applies in not applying. It is in this form, as pure law, that it has the greatest force. To be faced with pure law is to be faced with the endless potentiality of the law such that anything can happen without a law being broken—it is to be faced with sovereign power.[58] Asylum seekers are excluded from the space in which the legal rights of citizens operate as a check on state power. Britain deals with asylum seekers through a separate set of rules, which are subject to indefinite change as new policy documents are released, although some of the harshest policy decisions are occasionally ruled against by the courts.[59]

The state of exception does not only manifest as a space in which anything can happen, but also as a space that must remain excluded and invisible in order to exist. Physical and emotional distance must be created between citizens and asylum seekers in order to regulate the boundaries of inside-outside and normal-exceptional. This distance is established

through moves that take place in, and create, the state of exception. Paramount among these is the detention of asylum seekers in centres that are remote and prison-like and that place a physical wall between these asylum seekers and the British people.[60] They form part of the internal border of the nation. Importantly, detention centres also function to augment the image of the asylum seeker as criminal, which is sometimes exacerbated by the practice of handcuffing asylum seekers in public.[61] Such moves serve to cement a relationship of fear and difference, setting up physical and psychological boundaries to encounter and making the state of exception seem necessary while causing what happens within it to disappear.

Detention centres are paradigmatic examples of spaces of exception. They house thousands of asylum seekers waiting for their claims to be processed or waiting to be deported—a wait that is indefinite, sometimes amounting to eighteen months or more.[62] Detention centres operate like prisons, making use of solitary confinement, strip searches, and a general atmosphere of punishment, but without the safeguards of prisons, lacking the suicide prevention strategy of the prison system, having lower health care standards, and falling largely under private sector control.[63] The use of detention in Britain has been heavily criticized for infringing on human rights and failing to meet British standards of lawful detention, and has suffered a series of scandals, including riots, accusations of abusive treatment, and suicides.[64] Recently, there were disturbances at the Harmondsworth and Campsfield detention centres. Detainees engaged in hunger strikes and, at Campsfield, fires were lit and several among those detained escaped.[65] The exceptional treatment to which asylum seekers are subject can also be seen, more generally, in the fast-tracking of claims presumed to be unfounded, which denies the right to an in-country appeal, the poor quality of decisions, the absence of judicial oversight of the decision to detain an asylum seeker, which can be based on random selection and the number of spaces available in detention centres, the curtailment of publicly funded legal aid, and the limited access asylum seekers have to information about their case or about any legal recourse open to them.[66] A space of exception is also evident in the underground lives of failed asylum claimants who are not detained and who have not signed up for voluntary return. These people are cut off from access to welfare support, as well as being denied the legal right to work, and end up destitute or working in poor conditions in the underground economy.[67] The use of biometric identification will mean that these people, who have often lived in Britain for years, will face the omnipresent risk of being picked up off the street, out of schools, or at work to be detained and deported. Pushing these bodies to the limit of political space, into the realm of the exception, contains the outside inside the state and serves to re-establish the split in the population between those of the nation and those not of the nation.

Along with internal bordering mechanisms that establish spaces of exception within the state, Britain has expressed an interest in creating external spaces of exception that would be even less visible. In 2003, Britain proposed that the UNHCR, together with the EU, establish "Regional Protection Areas," which would be set up in unstable areas to provide protection for fleeing populations, and "off-territory Transit Processing Centres" outside EU borders, where asylum seekers would be detained and their claims processed, although the proposal for the latter has since been dropped. Both would remove the asylum seeker from the territory of the state, where it is difficult to render them, and the practices used to exclude them, entirely invisible.[68]

The pervasive use of exceptional measures has become necessary in order to defend the conception of political space that links state, nation, and territory to form an international state system that divides the world into exclusive political units. "The camp [the space in which the exception becomes the rule] is the fourth, inseparable element that has now added itself to—and so broken—the old trinity composed of the state, nation (birth), and land."[69] It serves to reconstitute the link between state, nation, and territory by containing the residual to the political system this link describes; however it also upsets this link by showing its imperfection. The space of exception exists, therefore, as a site of "dislocating localization" at the heart of the state.[70]

The Instability of the Sovereign Project

While it defends the sovereignty of the international state system, the state of exception also functions as a site of resistance to it.[71] It demonstrates the need for a defense, indicates the existence of conceptions of political space different from those that are "sovereign," and exposes the sovereign state that uses exceptional measures to the risk of being accused of criminal actions.

Sovereignty is supposed to go unquestioned, therefore defending it points to its vulnerability. The efficacy of a defense of sovereignty, which occurs through the labour of marginalizing anomalies, relies on its being forgotten.[72] While rationality is built up on top of the violence and contradictions that characterize exceptional measures, making them forgettable, it forms an imperfect cover. As it constructs justifications that explain increasingly harsh measures and that take it further from this discord, this rationality gets "more and more fragile, more and more wicked, more and more bound up with illusions, chimeras, and mystification."[73] In the almost hysterical harshening of border and

asylum policy in Britain, desperation seems to take the place of control. The more severe the measures taken, the more obvious and graceless the effort to capture political space becomes.

Crisis situations are the foil against which the stability and desirability of normalcy are thrown into relief, and yet they challenge the permanence of normalcy by being pointed to as a crisis, an exception. They highlight what does not fit into dominant discourses and therefore indicate the possibility of conceptualizing political space and subjectivity in different ways. In other words, the "state of emergency is also always a state of emergence."[74] The state's decision to approach the entry of asylum seekers into the state as a crisis, calling for exceptional measures, indicates that asylum seekers are aberrations to the normal order of politics and therefore necessarily pose a challenge to the sovereignty of the nation-state. Exceptional spaces themselves act as aberrations, or exceptions, such that "a system of sovereign, contiguous, discrete, and exclusive nation-states" is no longer a perfectly apt description of global political space, if it ever was.[75] They are the outside inside the state.[76]

Spaces of exception are not only damaging to the asylum seekers placed within them, but also to the policy makers who put them there. Agamben writes that the Sovereign itself exists in a permanent state of exception. That the sovereign state is the maker of laws places it, paradoxically, both inside and outside the law. The state declares the law to be absolute and yet has the power to suspend it, to decide on the exception.[77] By creating an exception in which policies of indefinite detention and forced deportation become possible, the state goes outside the law and therefore risks being branded as criminal just as the asylum seeker has been branded by the state.[78] This kind of challenge is seen in the literature and protests of organizations that work with asylum or human rights related issues.[79] While the balance is tipped in favour of the legitimacy of the state's actions with regards to asylum seekers, this challenge draws attention to the contentious nature of these actions and threatens to damage their legitimacy.

While the state of exception channels an exercise of power that aims to concretize the boundaries of sovereign political space, it creates a space on the periphery that challenges the state even as it asserts its authority, that is neither outside nor inside, legal nor illegal, with those inside it caught between entry and exit, and so effectively helps to disorder these boundaries.[80] In the disorder caused by the state of exception, the nation-state is revealed as a contestable unit of political space, lacking ontological status and existing only, albeit compellingly, in the acts that constitute and defend its reality.[81]

Interrupting Sovereign Stories: From Homo Sacer to Political Agent

Removed from the national space in which voices can be heard and political interaction is possible, asylum seekers are inhibited from acting as political agents; however even from within this space of exception, they are able to assert their presence and to issue a challenge to the traditional structure of international political space.

Homo Sacer

The asylum seeker who is banned from political space to a space of exception can be described as *homo sacer,* or bare life, a life that can be killed without homicide being committed.[82] Bare life is life stripped of all identity except that of being human. As such, it is de-subjectified, without political identity, rights, or agency. "Just as the law, in the sovereign exception, applies to the exceptional case in no longer applying … so *homo sacer* … is included in the community in the form of being able to be killed."[83] The asylum seeker, as bare life, is an object of unease and subject of repression.

The concept of national sovereignty locates sovereignty in the life of the citizen. This location of sovereignty rests on a fiction that joins birth to entry into the nation, such that there is no separation between the two concepts. This means that the human becomes "the immediately vanishing ground (who must never come to light as such) of the citizen" such that human rights become citizen rights.[84] Asylum seekers, unless they are made invisible, make this fiction obvious.[85] While held up as threats to national security, the fear that attaches to them runs deeper. In existing as bare life, they demonstrate the vulnerability and rightlessness of the human and cause those within the nation to cling more tightly to the assurance of their citizenship. Asylum seekers exist in the in-between of political space; shadow figures that are inhibited from taking shape as legitimate political agents until they re-enter the category of citizen—the only category of political subjectivity that is typically recognized.[86]

Placing certain bodies, as bare life, in a relation of exception with the state functions to ban them from speaking and acting politically.[87] Their presence as political subjects seeking asylum is denied such that stories matching the citizen to the human can ring out clearly. They are described out of existence and a different script—of lawlessness and trickery—is spoken for them. Citizenship is not only a legal category. It is also defined in terms of certain practices or modes of being.[88] Spaces of exception work to prevent asylum seekers from displaying these modes of being—including belonging to a community or contributing to economic processes within the state, making rights claims, and engaging in political speech—by rendering them silent,

invisible, and isolated. The violence of exclusion and exception is itself made less visible by the fact that those who already, in a way, do not exist cannot be excluded or subject to exceptional treatment. When rendered subjectless and voiceless, the asylum seeker's exposure to suffering also becomes invisible and meaningless.[89] Under the rubric of exception, the British state cannot be responsible for homicide, violence, or even complicity in a death brought about by suicide. The logic of the sovereign ban consists of "the permissible violent inscription of sovereignty on the bodies of those who have been reduced to bare life … [those who] are present, but their presence is absence."[90]

The movements and claims of asylum seekers can only be fit into the map of the international state system by being forced to disappear as bare life behind a discourse of threat. Treated as bare life, however, asylum seekers are turned into symbols of the vulnerability of life under the rule of the sovereign and of the violence on which the sovereign political order rests. To the extent that asylum seekers resist attempts to isolate and silence them, this vulnerability and violence become difficult to ignore.

Claiming Voice

Sovereign power is the power of capture—the capture, internalization, and domestication of what already exists.[91] It must always contend with the danger that what is captured will speak with its own voice and be heard. The bodies of asylum seekers have eluded capture to some extent, carrying the echo of a different politics even while they are categorized as threats, invaders, economic migrants, victims, or potential-citizens in an attempt to fit them into the narratives of the sovereign state. The asylum seeker is created through the conceptual work of categorizing, or boundary-drawing, but is simultaneously redrawing these boundaries. The very presence of the asylum seeker rendered as bare life speaks a challenge, stretching the bounds of political subjectivity. It is, in fact, this "production of 'presence' by those without power" that presents the most significant challenge to the exclusivity of citizenship.[92]

Agamben's description of bare life as lacking political subjectivity does not account for the politics of presence or the voice that breaks through the barriers of sovereign capture.[93] These moments of resistance are enough to stimulate a sense of unease, which fuels the hysteria characteristic of public discourse about asylum seekers. Trapped in a space of exception, bare, physical life can itself become a ground for political communication, as seen, for example, in the fifty-six or more suicides committed by asylum seekers detained in Britain since 1990 and, at the time of writing, occurring at a rate of one a month, the numerous hunger strikes held by detainees protesting the conditions of detention centres, the riots involving burned buildings and escapes, which turn invisible bodies into actively fleeing bodies, or the protest of a detained asylum seeker who sutured shut his eyelids and lips.[94] Different stories can be inscribed on these events, however stories of deviance and delinquency begin to ring hollow as the number of instances—in which the bare life of asylum seekers is turned into a symbol of protest, often echoed by an outcry from human rights groups—mounts. The subjectivity of the other cannot be completely erased. It rises through the threatening identity painted over it, evidence of the exceptional measures used against it. In asserting agency in the form of protest, those who are not citizens, and who are therefore not recognized as political agents, claim the subjectivity of the citizen and thereby put pressure on the boundaries of citizenship.[95]

When the subjectivity of asylum seekers is made visible, their decision to move, or "escape," emerges as a direct critique of the divisions of international political space.[96] Moreover, their suffering and protest within the state they have escaped to takes flight as a cry against the continuous, violent capture of political space by the state, which renders their escape meaningless. An encounter between citizens and asylum seekers then becomes difficult to avoid, as does the challenge asylum seekers pose. It is always through encountering the other that we learn about the stories we exist within. As Étienne Balibar writes, "even as they are 'from elsewhere,' [they] are also completely 'from here.'" They are "today's proletarians."[97]

The movement of asylum seekers across borders can be understood as an ontological activity.[98] It draws the self and other into a meeting, which is the basic moment in which new possibilities of being, or of seeing the self and the other, are formed. Their bodies push against the traditional, sovereign shapes of political space as they move through and between them. Along with the movement of these bodies, sovereign political space and the citizen also move.[99] This meeting of self and other is currently characterized by banishment and exception, which places the sovereign state and the citizen in a strained position of contradiction. The "imperatives of the political imaginary of the British state … are concluded in a narrative that holds the line, so to speak, that holds the one who seeks refuge over the horizon, literally and figuratively. It desires a narrative in which there is no rupture, an identity in which there is no ambiguity."[100] And yet the other who must be hidden in order for the narrative to run smoothly is always in the peripheral vision of those following this narrative, challenging its simplicity. In the presence of asylum seekers, and perhaps more in our response to them, the political map determined by sovereign biopolitical power, which counts on their disappearance, begins to surface as something unstable. An

awareness of the contradictions and violence used to maintain it begins to needle at the complacency of normal life, shaking its foundations and its image of civility. Rendering life bare may, in the end, be impossible.

Sketch of a Transformed Political Order

A revision of political space that would meet the challenge posed by the asylum seeker is worth considering, given the violence and contradiction that is necessary in order for it to be ignored. Asylum seekers' demands for refuge and recognition as human beings with political rights calls upon a conception of political space defined according to the principle of asylum, whose corollary must be hospitality, and according to the notion of human rights, which locates sovereignty in human life and does not define political subjectivity in terms of exclusion. This rebellious discourse, like the sovereign discourse of the state, is not based on truth or right, but on its ability to convince and to capture.[101] As suggested in the preceding sections, the force of this discourse, spoken through the movements, demands, and presence of asylum seekers, is demonstrated by its unsettling ability to draw attention to the contradictions of the sovereign political order and to create a space outside of this order that elicits continuous, imperfect efforts to recapture it.

The challenge posed by the asylum seeker can be elucidated by placing it in the context of the communitarian-cosmopolitan debate, which dominates discussions of whether and how the organization of political space should change. It is beyond the ambit of this paper to delve too deeply into the well-worn debate between the communitarian and cosmopolitan positions; however insofar as the asylum seeker challenges us to rethink these categories, a brief sketch, positioning the vision of political space suggested by the asylum seeker within this debate, is in order. In very rough terms, communitarianism captures the sentiment that states and those within them have a moral responsibility towards citizens before non-citizens, while cosmopolitanism is based on the instinct that moral obligations are to all humans, regardless of citizenship. The asylum seeker, in demanding the "right to have rights"[102] by virtue of his/her humanity, represents a cosmopolitan instinct, but in asking to enter the political community of the state, suggests the pertinence of communitarian value structures as well. This ambivalence resonates with the pervasive sense that both arguments give voice to an important moral intuition. The demands and movements of the asylum seeker suggest the inadequacy of the debate between the poles of cosmopolitanism and communitarianism. The challenge they pose is not an appeal for a borderless global community, as it is sometimes perceived to be, but rather for a fluid conception of community. More specifically, it seems to call for the denationalizing of citizenship, such that it is recognized to reside in anyone acting within a certain political space.[103] This call is seen in the asylum seeker's demand for the state's protection, for entry to the nation, and for the rights that, while termed human rights, manifest as citizen rights, as well as in their self-assertion as political subjects. Asylum seekers call for an expansion of the parameters of citizenship, demanding that the recognition and institution of citizen rights be located on the border instead of within it.[104] In other words, they call for citizenship to be renegotiated, according to the terms of hospitality, wherever a border is called into being to separate citizens from non-citizens, that is, wherever the other is encountered. Political community would thus become a continuously shifting concept, but inclusion would nonetheless be determined on the basis of concrete demands.[105] This challenge is not a call to bring down the state, but rather to accept as normal the permanent uncertainty of the blurring of inside and outside and to open a space for a limitless proliferation of insides and outsides, of potential communities and sites of negotiation.[106]

The vision of a more inclusive and more complex map of political space is, in fact, emerging in spaces and understandings that have slid into the map of political space, challenging the absolutism of the international state system. The "Don't Ask Don't Tell" and "Sanctuary City" initiatives, for example, have turned certain cities into solid representations of denationalized spaces in which inside-outside distinctions are blurred. Through these initiatives, essential services are provided to residents of cities by virtue of their presence, not their status.[107] The pressure that is being exerted on the international political order, in the movements and claims of asylum seekers, is powerful and is making ambiguous who is inside "the boundaries of civic and moral obligation" and who is within the space of rights.[108]

This is, admittedly, a rather compressed discussion of what a transformation of political space, in line with the challenge posed by the asylum seeker, might look like. It serves, however, to illustrate that essential to this transformation would be the decline of the nation, which is tied to the practice of state racism; the adoption of a skeptical attitude towards the sovereignty of the international state system, tied to a recognition of alternative, albeit nascent, forms of political space and subjectivity; and the recognition of the other who enters the political community, and claims political voice within it, as a citizen. While the entirety of the vision it calls for may remain elusive, the challenge conveyed by asylum seekers shakes the legitimacy of established structures and, moreover, gives rise to new forms of political space and subjectivity that emerge alongside and within these structures, denying their sovereign authority.

Conclusion

The difficulty of controlling the movement of asylum seekers and the enduring nature of the conditions that cause people to move across international borders mean that the tension between the sovereign account of the political and the account of the contradictions and violence of sovereign political space, evident in the movements of asylum seekers, is not about to fade. In the face of the contradiction between the British state's roles of safeguarding life and of banning life to a space of exception, the increasing desperation of moves to contain the asylum seeker and assert a traditional view of political space, and the assertion of political presence and rights on the part of the asylum seeker, the shape of political space may be driven into a more inclusive form.

On the other hand, the crisis of asylum and the exceptional response it elicits may be drawn out far into the future; or in Agamben's words, the exception may be becoming the rule.[109] The longer it takes to turn our gaze towards this crisis, over which stories of necessity and legitimacy are being heaped, the longer the bodies of those who do not fit into the map of the international state system will suffer the violence needed to make them invisible. If we take an interest in these bodies and in our own authenticity, then "it is precisely this topological zone of indistinction, which had to remain hidden from the eyes of justice, that we must try to fix under our gaze."[110] To gaze in this way is to acknowledge and return the gaze of the asylum seeker, which contains a challenge to reconceptualize political space such that the asylum seeker is able to enter it as one of an "us" that becomes unstable. While this vision of change is mythical, the chronically immanent question "is it possible," which greets all visions of change, is increasingly becoming a question that can be asked with regard to the continuance of the current ordering of political space. The violence required to transform what is currently normal may be less than the violence that is needed to sustain it.

Notes

1. Michael Dillon in Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (New York: Routledge, 2006), 46.
2. Robert W. Cox, "Social Forces, States and World Orders: Beyond International Relations Theory," *Millennium: Journal of International Studies* 10, no. 2 (1981): 127–130.
3. While the refugee, another "figure of the inter of international relations," is also an interesting subject for analysis, this paper takes the asylum seeker as its focus. Refugees differ from asylum seekers in two important respects. They are defined in less ambiguous terms, already labelled as victims and legitimate recipients of humanitarian aid and, at the same time, are more easily ignored by "Western" states as they exist in refugee camps that are distant from the territory, and jurisdiction, of these states, only coming into contact with them when selected as part of an annual resettlement quota. United Nations High Commissioner for Refugees (UNHCR), "Basic Facts," 2007, <http://www.unhcr.org/basics/BASICS/3b0280294.html#country%20quotas>. As a figure that is subject to state definition and direct state control, the asylum seeker brings more clearly to light the efforts of the state to assert authority over political space, in face of a "figure of the inter."
4. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Calif.: Stanford University Press, 1998).
5. Stephen Castles and Mark J. Miller, *The Age of Migration,* 3rd ed. (New York: Guilford Press, 2003), 2–4, 94.
6. Teresa Hayter, *Open Borders: The Case Against Immigration Controls,* 2nd ed. (London: Pluto Press, 2004), 97; Castles and Miller, 94–120.
7. Home Office (HO) and Foreign & Commonwealth Office (FCO), *Managing Global Migration: A strategy to build stronger international alliances to manage migration* (Central Office of Information, 2007), 2.
8. UNHCR, "Convention and Protocol Relating to the Status of Refugees," 2006, <http://www.unhcr.org>.
9. UNHCR in Nyers, 60; BBC, "Who are asylum seekers, refugees and immigrants?" 2004, <http://www.bbc.co.uk/dna/actionnetwork/A2179884>; Castles and Miller, 103–104.
10. Nyers, 118.
11. Office of the United Nations High Commissioner for Human Rights (OHCHR), "Universal Declaration of Human Rights," 1948, <http://www.unhchr.ch/udhr/lang/eng.htm>.
12. OHCHR, "Declaration"; OHCHR, "International Covenant on Civil and Political Rights," 1966, <http://www.ohchr.org/english/law/ccpr.htm>.
13. OHCHR, "Covenant."
14. HO & FCO, *A strategy,* 8.
15. Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), 107–108.
16. Roy Greenslade, "Seeking Scapegoats: The Coverage of Asylum in the UK Press," in Asylum and Migration Working Paper Series, ed. H. Crawley and D. Sriskandarajah (London: Institute for Public Policy Research, 2005).
17. HO, "Controlling Our Borders: Making Migration Work For Britain—Charles Clarke Sets Out Five Year Strategy For Immigration And Asylum," 2005, <http://press.homeoffice.gov.uk/press-releases>.
18. Home Office Border & Immigration Agency (BIA), "Asylum Statistics," 2006, <htpp://www.ind.homeoffice.gov.uk/applying/asylum/asylumstatistics>.
19. *Ibid.;* HO, *Borders, Immigration and Identity Action Plan: Using the National Identity Scheme to strengthen our borders and enforce compliance within the UK* (Central Office of Information, 2006), 10.

    Measures that "export the border" include visa requirements for nationals of countries that are major sources of

asylum seekers and fines for airlines and passenger ships found to have carried people without proper entrance papers into Britain; (Gibney, 122–125).

20. HO & FCO, *A strategy,* 6; BIA, "Asylum Statistics"; HO, "Protecting the Public, Securing our Future: A New Home Office for the 21st Century," 2007, <http://www.press.homeoffice.gov.uk/press-releases/Change>.
21. Refugee Council (RC), *Refugee Council Briefing: The New Asylum Model* (London: Refugee Council, 2007); David J. Whittaker, *Asylum Seekers and Refugees in the Contemporary World: The Making of the Contemporary World* (London: Routledge, 2006), 41.
22. See, for example, Richard K. Ashley, "Untying the Sovereign State: A Double Reading of the Anarchy Problematique," *Millennium: Journal of International Studies* 17, no.2 (1988): 227–262; Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1956); Kenneth Waltz, *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 2001); R. B. J. Walker, *Inside/Outside: International Relations as Political Theory,* Cambridge Studies in International Relations (Cambridge: Cambridge University Press, 1992).
23. Agamben, *Homo Sacer,* 106–107.
24. Michel Foucault, "Society Must Be Defended,"trans. D. Macey, ed. M. Bertani and A. Fontana, in *Lectures at the Collège de France, 1975–76,* ed. F. Ewald and A. Fontana (New York: Picador, 2003).
25. *Ibid.,* 242–246.
26. "Making die" does not simply mean murder, but also the exposure of someone to death, expulsion, rejection, and so on; (Foucault, 247, 254, 256).
27. *Ibid.,* 254.
28. *Ibid.,* 61.
29. Anne Orford, "Abject Spaces: Frontiers, Zones, Camps," in *The Logics of Biopower and the War on Terror,* ed. E. Dauphinée and C. Masters (New York: Palgrave Macmillan, 2007), 222–223; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 18.
30. Foucault, 254–255.
31. Didier Bigo, "The Mobius Ribbon of Internal and External Security(ies)," in *Identities, Borders, Orders: Rethinking International Relations Theory,* ed. M. Albert, D. Jacobson and Y. Lapid (Minneapolis: University of Minnesota Press, 2001), 112, 96.
32. Ayse Ceyhan and Anastassia Tsoukala, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies," *Alternatives* 27, Special Issue (2002): 33.
33. Teresa Hayter, *Open Borders: The Case Against Immigration Controls,* 2nd ed. (London: Pluto Press, 2004), 97.
34. David Campbell, "Introduction: On Dangers and their Interpretation," in *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, 1998), 11–12.
35. BIA, "Our objectives and values / Protecting the public, securing our future," 2006, <htpp://www.bia.homeoffice.gov.uk/aboutus/objectivesandvalues>; HO, *Action Plan,* 3.
36. HO, *Action Plan,* 3.
37. Benjamin J. Muller, "(Dis)qualified Bodies: Securitization, Citizenship and 'Identity Management,'" *Citizenship Studies* 8, no. 3 (2004): 284.
38. HO, "Controlling Our Borders."
39. Jef Huysmans, *The Politics of Insecurity: Fear, Migration, and Asylum in the EU,* New International Relations series (New York: Routledge, 2006), 3; Bigo, "Mobius Ribbon," 113.

    This linkage appears, for example, in the following excerpt: "People who come here legally to work not only supplement vital public services, such as the National Health Service, but also contribute significantly to the gross domestic product. These developments also bring challenges. As with other prosperous and open nations, our country is attractive to people seeking economic and social stability. We face threats from identity fraud, illegal immigration, organized and international crime and global terrorism"; HO, *Action Plan,* 4.
40. Anja Rudiger, *Prisoners of Terrorism? The Impact of Anti-terrorism Measures on Refugees and Asylum Seekers in Britain* (London: Refugee Council, 2007), 7, 45–46.
41. James Hately in Elizabeth Dauphinée, "Living, Dying, Surviving II," in *The Logics of Biopower and the War on Terror,* ed. E. Dauphinée and C. Masters (New York: Palgrave Macmillan, 2007), 234.
42. William Walters, "Secure Borders, Safe Haven, Domopolitics," *Citizenship Studies* 8, no. 3 (2004): 241–242.
43. Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001).
44. Huysmans, 47.
45. HO, "Securing Our Identity: A 21st Century Public Good" (speech by Liam Byrne, MP, Minister of State for Immigration, Citizenship and Nationality, to Chatham House, 19 June 2007), <http://www.press.homeoffice.gov.uk/Speeches/sc-identity-21st-century>.
46. Carl Schmitt in Agamben, *Homo Sacer,* 37.
47. Étienne Balibar, "Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence," *Constellations* 8, no. 1 (2001): 19.
48. Agamben, *Homo Sacer,* 38; Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 86–87.
49. Slavoj Zizek, *Welcome to the Desert of the Real!: Five Essays on September 11 and Related Dates* (London: Verso, 2002), 95.
50. Muller, 289–290.
51. Dauphinée, 234.
52. Agamben, *Homo Sacer,* 174–175.
53. Huysmans, 33.
54. Foucault, 18.
55. *Ibid.,* 225.

56. Barry Buzan, "Security Analysis: Conceptual Apparatus," in *Security: A New Framework for Analysis,* ed. B. Buzan, O. Wæver, and J. de Wilde (London: Lynne Rienner Publishers, 1998).
57. Agamben, *Homo Sacer,* 64, 174.
58. *Ibid.*
59. See, for example, RC, "High Court rules Home Office in breach of Human Rights Convention", RC 2003, <http://www.refugeecouncil.org.uk/news/press/2003/august/20030801high.htm>.
60. Bülent Diken, "From Refugee Camps to Gated Communities: Biopolitics and the End of the City," *Citizenship Studies* 8, no.1 (2004): 91, 94.
61. BBC, "Food protest by asylum detainees," BBC 2007, <http://news.bbc.co.uk/1/hi/scotland/6739135.stm>.
62. *Ibid. .;* Amnesty International (AI), "United Kingdom: Seeking Asylum is Not a Crime: Detention of people who have sought asylum," AI 2005, <http://web.amnesty.org/library/index/engeur450152005>; RC, "Refugee Council response to inquiry into disturbances at Harmondsworth/Campsfield detention centres," RC 2007, <http://www.refugeecouncil.org.uk/news/press/2007/>.
63. Athwal Harmit and Jenny Bourne, "Driven to Despair: Asylum Deaths in the UK," *Race and Class* 48, no. 4 (2007): 110–112.
64. AI, "United Kingdom"; BBC, "Inquiry into riot at asylum centre," BBC 2002, <http://news.bbc.co.uk/2/hi/uk_news/england/1821557.stm>; BBC, "Asylum seekers 'suffer sex abuse'," BBC 2003, <http://news.bbc.co.uk/2/hi/uk_news/england/oxfordshire/2926127.stm>; BBC, "Fire protest asylum seeker dies," BBC 2007, <http://news.bbc.co.uk/2/hi/uk_news/scotland/glasgow_and_west/6468103.stm>; Sarah Martin, *Inter-Agency Partnership Memorandum of Evidence: Joint Committee on Human Rights' Inquiry into the Treatment of Asylum Seekers* (London: Refugee Council, 2006).
65. BBC, "Campsfield's troubled history," BBC 2007, <http://news.bbc.co.uk/2/hi/uk_news/6449465.stm>.
66. AI, "United Kingdom"; RC, "response"; Diken, 94.

    The poor quality of decisions is suggested by the fact that, based on data from 2003, on average, one in five initial decisions were overturned on appeal, in non-fast-tracked cases; AI, "United Kingdom."
67. AI, "United Kingdom"; Refugee Council and Refugee Action (RC & RA) *Inhumane and Ineffective—Section 9 in Practice; A Joint Refugee Council and Refugee Action report on the Section 9 pilot* (London: Refugee Council, 2006); RC, "response".
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Temporary Protection and the Refugee Convention in Australia, Denmark, and Germany

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Abstract

This paper reports on a comparative study of temporary protection (TP) mechanisms in Australia and selected European jurisdictions. Specifically, it analyzes policy developments and trends in the use of TP mechanisms in Denmark, Germany, and Australia through a systematic examination of the evolution of "substitute protection" mechanisms; their implications for "effective protection" and their impacts on key stakeholders. The policy analyses are augmented by interviews and survey questionnaires with key NGO service providers in the three target jurisdictions. The paper argues that the traditional link between Refugee Convention protection and national territorial jurisdiction and responsibility is being undermined by extraterritorial processing and offshoring arrangements.

Résumé

Cet article rapporte une étude comparative des mécanismes de la protection temporaire des réfugiés en Australie et dans certains pays européens. Plus précisément, on y analyse l'évolution des politiques et les tendances du recours à la protection temporaire au Danemark, en Allemagne et en Australie par le biais d'un examen systématique de l'évolution des mécanismes de la « protection de remplacement », de leurs conséquences pour la « protection effective » et de leurs impacts sur les principales parties prenantes. L'analyse des politiques est complétée par des questionnaires d'enquête et des entretiens avec les principaux prestataires de services non gouvernementaux dans les trois pays à l'étude. On propose que le lien traditionnel entre la protection accordée par la Convention sur les réfugiés*, la responsabilité et la compétence territoriale est mis à mal par le traitement extraterritorial des réfugiés et les modalités de leur délocalisation.*

Introduction

The 1951 *Convention relating to the Status of Refugees,* henceforth Refugee Convention, and other associated standards may be seen as critical elements of liberal internationalist aspirations for universal human rights protection in the post–World War II era. These standards are based on the principle that justice as a dimension of citizenship rights needs to be extended to a global sphere rather than remain confined within the boundaries of a nation-state. Globalization is seen to have shifted the role of the state, creating challenges to its power from global markets, intergovernmental organizations, and NGOs;[1] undermining macroeconomic management (thus increasing public insecurity); and reasserting of the politics of the border.[2] The attempt by Australia and other western governments to deter, detain, and deport those entering "through the back door"[3] is seen by some as a move away from a rights-based liberal internationalism towards exclusionary nationalism or a "particularist internationalism"[4] which redefines asylum as a political benefit bestowed by the host state, rather than a human right invoked and accessed by individuals irrespective of their mode of entry.[5]

The increasing restrictiveness of asylum policies in western countries is part of a broader trend that has existed throughout the history of western humanitarianism where interventions have been made on a "selective," primarily self-interest basis.[6] The relatively unified nature of restrictive asylum policies is seen to arise from the sharp increase in asylum claims since the 1980s in western countries,[7] the loss of ideological prestige that granting asylum gave to host societies after the end of the Cold War,[8] and the decline in resettlement opportunities that occurred in the aftermath of the international economic recession and the changed labour requirements of globalization.[9] It is within this historical framework that more restrictive asylum policies such as temporary protection (TP) have recently been adopted in

many western countries including Australia that alter the definition and application of "effective protection"[10] as originally conceived in the 1951 Refugee Convention.

Indeed, one of the most striking features of the international refugee regime over the last twenty-five years is the development of alternative forms of protection to the 1951 UN Convention on Refugees.[11] Australia, Denmark, and Germany are three countries that in recent years introduced temporary protection regimes for Convention refugees as a keystone asylum policy. This article assesses the impact of TP in each of the three countries. It analyzes policy developments and trends, and then examines how these policies affect two main stakeholders: refugees, and non-governmental organizations that provide support services to refugees.

Background: Temporary Protection and the Refugee Convention

Between 1999 and 2005, Australia, Germany, and Denmark introduced policies mandating initial periods of temporary protection for Convention refugees. In 1999 Australia instituted a policy of providing three-year temporary protection visas (TPVs) to all asylum seekers arriving without a valid visa and later found to be Convention refugees. From 2002 in Denmark, and 2005 in Germany, all refugees have been subject to an initial period of temporary protection: for seven years in Denmark and three years in Germany. Following the election of a centre-left government in November 2007, Australia abolished the temporary protection visa regime in May 2008.

While the three countries discussed in this paper are all signatories to the Refugee Convention, each sits within a distinct context of regional and international refugee law. Australia draws on the Refugee Convention and other international treaties such as the *International Convention on Civil and Political Rights* (ICCPR) as the context for the development of its domestic refugee policy. Germany's refugee policy is developed with reference to both the Refugee Convention and the still-evolving EU-orchestrated Common European Asylum System. The Common European Asylum System includes the Schengen Agreement, the Amsterdam Treaty, and the Dublin Regulation, each of which, although careful not to breach the Refugee Convention, restricts the ability for asylum seekers to move within Europe. Seeking more control over asylum seekers entering its country, Denmark has opted out of the Common European Asylum System, though it remains a party to the Dublin Regulation and Schengen Agreement.

Historically, the concept of temporary protection has been seen as valid in cases of mass refugee movements, when individual status determinations are impractical in the short term and temporary group-based protection is appropriate. In western jurisdictions, prior to 1999, temporary protection was typically employed to meet interim protection needs in situations of "refugee catastrophes,"[12] or for complementary protection purposes, where an individual application for refugee status has been rejected but the person is found to be at risk of human rights abuse.[13] By contrast, this paper focuses on "substitute protection":[14] the recent application of TP to individually assessed Convention refugees in some western jurisdictions as a restrictive mechanism to reduce refugee rights and prevent integration. While "substitute" protection for Convention refugees does not breach a signatory state's *non-refoulement* obligations—provided precautions are taken ensuring that the refugees will be returned to a safe environment when the period of temporary protection ceases—these newer TP regimes commonly confer fewer rights on Convention refugees.[15] For Fitzpatrick, where TP is offered as a "diluted substitute protection for Convention refugees,"[16] it should be seen as a threat to the 1951 refugee regime.

Methodology

This paper reports on a systematic comparative examination of the evolution of the temporary protection mechanisms in Australia, Germany, and Denmark. It evaluates the implications of these policies for the 1951 Refugee Convention, and also the impact of various EU agreements on the European countries. The policy analysis is augmented by semi-structured interviews and surveys of key non-governmental organizations (NGOs) and service providers in Australia, Denmark, and Germany. The interviews were conducted and directed towards finding out the impact of temporary protection on refugees, on the services refugees required, and on the ability of NGOs to meet this need. Particular attention was paid towards the impact of the policy on protection status and permanency; access to settlement services and programs; education, health, and work rights; and cessation, repatriation, and integration mechanisms at the end of the temporary protection. The policy developments are examined in the context of corresponding political tensions between the uses of temporary protection to meet the aims of both liberal-humanitarian and restrictive policy impulses. The latter refers to the tension between border protection harmonization initiatives on one hand, and the maintenance of more restrictive national regimes articulated with an increasing "securitization" agenda on the other.

The Three Case Studies

Australia

Australia's humanitarian program resettles approximately 13,000 refugees each year. This quota comprises

two categories. The "refugee category" resettles 6,000 "offshore" refugees from UNHCR camps in areas assessed to be of greatest need. A further 7,000 resettlement places are set aside for the Special Humanitarian Program (SHP) (also "offshore") and for "onshore" arrivals. Offshore refugees are granted the full range of settlement services and enjoy the same range of rights as Australian nationals. Since the 1970s, the arrival of so-called "onshore" refugees, particularly "unauthorized" arrivals who arrive by boat without a visa of any kind, has caused a problem for successive governments. Onshore refugees are those who invoke their right to seek asylum once they have entered the migration zone. Although under international law this group is the only group that Australia is legally obliged to offer protection to, the unregulated nature of their arrival has been regarded as a problem by successive governments. Australia's temporary protection policy, introduced in October 1999, aimed to control and limit the arrival of onshore asylum seekers popularly referred to as "unauthorized" boat arrivals.

From October that year, all asylum seekers who entered Australia's migration zone without a valid visa of any kind, but who were found to satisfy Convention criteria, were initially granted temporary protection, before being able to apply for a permanent visa after three years. In September 2001 the policy was strengthened by the "seven-day rule," which declared asylum seekers who had spent longer than seven days in a country "where they could have sought and obtained effective protection"[17] were ineligible for the award of a permanent visa at any time. Given that onshore asylum seekers commonly take long and perilous journeys to Australia, and normally spend time *en route* in non-signatory countries such as Indonesia or Malaysia, this opened the prospect of "rolling" temporary protection periods for most onshore refugees.

The TPV was one aspect of a broad border protection strategy to "deter and deny" access of onshore asylum seekers to Australia's protection obligations. In 2001, the Australian government introduced a range of other border protection strategies, in addition to the mandatory detention regime in place since 1992. These included the positioning of immigration officers at domestic and international airports to detect people travelling on false documentation and strengthening the power of the Australian Navy to patrol the waters to Australia's north. Other restrictive strategies included "Operation Relex," which authorized the Navy to drag vessels approaching Australian waters back into Indonesian waters. They also included the collaboration of Australian and Indonesian intelligence to disrupt the activities of people smugglers in Indonesia.

The Pacific Solution was another strategy aimed at deterring potential asylum seekers. The policy was introduced in October 2001 when the *Migration Act* was amended to excise a number of outlying islands from Australia's migration zone. All asylum seekers who arrived by boat on these excised territories were held in detention centres on Nauru (and until 2005, Papua New Guinea), while their applications for asylum were processed. Such asylum seekers had no guarantee of being settled in Australia even if granted refugee status. Taylor[18] reported that, without access to judicial and administrative appeal procedures, refugee determination decisions on Nauru were more likely to be negative than those on the Australian mainland. These factors highlighted the increasingly limited avenues for seeking asylum in Australia between 1999 and 2007. A total of 10,800 TPVs were issued over this period.

In November 2007 a new Australian Labor Party (ALP) federal government was elected, ending eleven years of conservative Liberal-National party rule. In May 2008, the new ALP government announced that the TPV regime would be abolished and that future onshore asylum seekers found to have Convention refugee status would receive Permanent Protection Visas (PPVs). Existing TPV holders would receive "Resolution of Status" (subclass 851) visas, with equivalent rights to permanent protection visa holders. Eligibility for this latter visa was signalled in order to prevent exisiting TPV holders from going through the status redetermination processes required for the granting of a PPV. Also abolished were the temporary humanitarian visas (THV) routinely granted to offshore "Pacific Solution" asylum seekers who were later accepted by Australia under the Special Humanitarian program. Existing THV holders would likewise receive a permanent "Resolution of Status" visa. The Department of Immigration and Citizenship overview of the changes noted the following rationale for the abolition of the TPV regime:[19]

> TPVs and THVs were introduced by the previous government to discourage people smuggling activities resulting in unauthorised boat arrivals (UBAs) and to discourage refugees leaving their country of first asylum. The evidence clearly shows TPVs did not have any deterrent effect. In fact, there was an increase in the number of women and children making dangerous journeys to Australia.

The commitment to shut down the "Pacific Solution" camps in Nauru and PNG was also maintained, with the last asylum seekers from Nauru resettled in Australia in January 2008. From this time, however, "offshore entry persons" have been processed on the distant Australian territory of Christmas Island. The Labor government has maintained the excision of Christmas Island and other territories from the migration zone, and as such, continues to process "offshore

entry persons" in a way that limits their access to the Refugee Review Tribunal or other forms of judicial review.

Denmark

Denmark was the first nation to become a signatory to the Refugee Convention in 1952. It has long been regarded as having a generous asylum policy, primarily due to the implementation of alternative forms of protection status, including the so-called "*de facto*" status, under which asylum seekers who did not meet the strict criteria of the Refugee Convention could be granted protection if their situation warranted it. The *de facto* category included those avoiding military service, escaping situations of civil war, or subject to persecution for their gender or sexuality. Despite these generous policies, Denmark has not seen the mass influx of refugees experienced by other European countries.

A shift in public opinion over immigration in Denmark contributed to a change of government in November 2001. Legislative changes to immigration policy introduced in July 2002 sought to reduce the numbers of asylum seekers gaining entry to Denmark. These changes had three fundamental elements:[20]

> Denmark's commitment under international conventions must be honoured. The number of foreigners entering Denmark must be limited and stricter requirements must be introduced with regard to their obligation to support themselves. The refugees and immigrants already living in Denmark must be better integrated and get work more quickly.

A new asylum policy arose through a series of minor reforms, rather than one major legislative package. As Michael[21] from the Danish Institute for Human Rights put it, "We have seen one new piece of legislation after the other." From 2002, various changes were made to three key pieces of legislation: the *Integration Act,* the *Aliens Act* and the *Nationality Act.* Thoralf from the Danish Refugee Council notes, "We've seen changes to the Aliens Act on a steady half-year basis over the last few years. So you get a tightening up just a little bit every six months."

Though outside the EU asylum framework, Denmark is signatory to the Dublin Convention, which results in refugees having to conceal their route to Denmark, as the interviewees point out. Katrin notes, "It will first be asked whether they should be assessed in another country. If they are not identified or if their travel route is unclear, then they can be detained. These are the main reasons for detaining people."

Under the 2002 changes, the previous *de facto* status was abolished and replaced with "Status B" category. This new category continues to recognize the need for some forms of non-Convention protection under other sources of international law, such as the European Convention on Human Rights, and offers protection against torture and the death penalty. However, unlike the previous *de facto* status, Status B does not encompass persons fleeing civil war or forced military service. Katrin from the Danish Refugee Council explains that this legislation has particularly affected asylum seekers from Bosnia and Somalia, who would previously have been granted *de facto* status but are now ineligible.

One of the key changes in 2002 related to the dramatic increase in the length of the temporary protection visa period. Previously, refugees held a three-year temporary protection visa, and if found in need of further protection, were granted a permanent residency visa. In 2002, the newly elected government increased the length of the temporary visa to seven years, after which refugees could be granted a permanent residency and become eligible for Danish citizenship after nine years. The 2002 changes also introduced a series of limitations to family reunion rights. Family reunion was perceived by the Danish public to be a "backdoor route for spouses and their children to take advantage of Denmark's generous social benefits."[22] Under the new regime, both spouses must be twenty-four years old or older, and a Danish citizen cannot sponsor a parent aged sixty years old or older. If a Danish citizen wants to sponsor a spouse, the couple must be able to prove that their "ties" are closer to Denmark than any other country. The Danish spouse must pay a deposit of 6,700 euros and have a place to live. If the marriage does not last seven years, the foreign spouse may be required to leave Denmark. Other changes made in the 2002 legislation circumscribed the ways asylum seekers can lodge applications for protection. Asylum seekers can no longer lodge their applications at Danish embassies, but must be present in Denmark to seek protection.

Following the introduction of the new changes, Denmark experienced a significant decrease in the numbers of asylum seekers; in the same year, Norway experienced a large rise in asylum applications. This would circumstantially suggest that the temporary protection regime has impacted upon the numbers of people seeking asylum to Denmark. Approval rates for asylum applications also decreased following the introduction of the new laws. In 2005, the Danish Immigration Service (DIS) rejected approximately 90 per cent of asylum applications in the first instance, an increase from 50 per cent in 2002.[23]

Montgomery and Foldspang argue that recent refugee determination decisions also demonstrate a systemic bias against applications from Muslim asylum seekers.[24] Their study concludes that families who practised a religion other than Islam were eight times more likely to receive a residency permit than Muslims. Also more likely to succeed

in gaining residency were families in which the father had higher levels of education and was employed in administrative work rather than manual labour. They argue that without greater transparency, the asylum decision process "seems to favour the selection of socially and culturally well situated refugees, while human rights violations seem to play a diminishing role."[25]

In terms of welfare support, the payments available to temporary protection refugees in their first seven years stands at two-thirds of the amount received by other members of the community, including refugees with permanent protection. While there is an additional payment for families with children, it is capped at two children, so that larger families receive no further benefit. The differential payment is ostensibly designed to encourage refugees into paid work. Despite this approach, only 20 per cent of refugees were in paid employment in 2003 after the instigation of the policy, compared with 25 per cent in 2002.[26]

The Danish policy of geographical dispersal of refugees is based on the "Scandinavian ethos of egalitarianism" whereby all regions in Denmark should equally share the "burden" of refugee settlement.[27] While the basic concept of dispersal has support from the NGOs, an unnecessarily strict administration of the policy has negatively impacted on refugees experiences in their new country (Kristofer interviews). Many asylum seekers come to Denmark through social or familial networks, Kristofer explained, and the policy of dispersal does not recognize these networks. Refugees are thus often isolated from other contacts, even family members, who live in other areas of Denmark. Similarly, Wren argues that dispersal is determined by housing availability and demand, and commonly results in refugees being placed in areas of social deprivation, lacking adequate social opportunities, and settlement services.[28]

Germany

At the end of World War II, Germany introduced an asylum regime that was the most generous in the western world. Enshrined in the German constitution, or the Basic Law, the asylum policy ensured that all those who experienced persecution could seek asylum in Germany. Article 16(2)2 states: "Persons persecuted for political reasons enjoy the right of asylum." Schuster explains that the German Basic Law was a strong symbol of cleavage from the Nazi past, and contained within it all the universal liberal norms and values that had been "repressed" by Nazi rule.[29] She explains, "By enshrining these norms in the constitution, it was hoped that they would ensure the preservation of the liberal character of the new republic."[30] Thus, the Article in the Basic Law maintained Germany's remarkable liberal rule on asylum seekers and gave "unmatched protection"[31] until 1993. No other aspect of the constitution came to cause as much controversy.[32]

In the late 1980s and early 1990s, increasing anti-foreigner hostility and violence focused on refugees. In response, the government implemented measures in 1992 to limit the ability of refugees to seek asylum in Germany. While clause 16(a)(1) remained unchanged, it was joined with a number of clauses significantly limiting the scope of the original policy. In particular, 16(a)(2) now states that the right to asylum

> may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the [Refugee Convention] is assured … [in these cases] measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.

This clause has become known as the "Third Country Rule," which significantly altered the conditions under which people could seek asylum and limited the power of the courts to challenge its operation. Temporary protection legislation was introduced in January 2005. Under this policy, those assessed to be Convention refugees are granted a residence permit, valid for three years. After this time, the refugee's case will be reassessed, and if the refugee is found to be in need of ongoing protection, a permanent residency visa is granted.

During the initial three-year period, a residence permit can be revoked at any time if the asylum seeker has committed a crime, has engaged in "hate-preaching," or is found to have threatened German national security. Importantly, for Convention refugees, the permit can also be revoked if they are deemed to come from a country that is subsequently declared a "safe country of origin." The notion of "safe country of origin" was developed in Europe in the early 1990s as part of the strategy of providing protection to Bosnian refugees. Since 1992, Germany has had a list of "safe countries of origin" which is regularly reviewed and updated as part of its domestic law. To date, EU members have been unable to come to a consensus on safe countries to include a similar list in the Common European Asylum System.

As with Australia and Denmark, Germany's temporary protection regime is part of a broader suite of measures that aim to decrease the number of asylum seekers entering its territory. As a party to the EU asylum regime, asylum seekers to Germany are subject to three main EU agreements. The Schengen Agreement, which came into force in 1995, abolished checks at common borders of the signatory countries, meaning greater freedom of movement for EU citizens. For those from outside the Schengen area, the Agreement

means harmonized visa requirements, standardized checks at borders, and greater collaboration to combat crime. The resulting increased regulation of the borders of the EU has become known as "fortress Europe." The Amsterdam Treaty (1999) incorporated the Schengen agreement into European Union law. It established the criteria and mechanisms for determining which Member State is responsible for considering an asylum application, and outlined minimum standards for all aspects of the asylum process, including minimum standards for temporary protection. Finally, the Dublin Regulation, or Dublin II (2003), aims to prevent asylum seekers from submitting multiple applications for asylum within the Schengen area. Under the Dublin Regulation, asylum seekers are processed in (and if necessary returned to) the country deemed responsible for processing their application, usually the first European country through which the asylum seekers passed. The Dublin Regulation and Amsterdam Treaty, therefore, aim to limit so-called "asylum shopping."

Since the mid-1980s, only 5 per cent of asylum seekers to Germany have been assessed to meet the requirements of the Refugee Convention.[33] In 2002 and 2003, the grant rate for Germany was 3 per cent and 2 per cent respectively.[34] Many rejected asylum seekers stay in Germany on *Duldung,* or "tolerated" status, for many years. *Duldung* is a "technical" rather than formal legal category, and is applied in cases where deportation has to be postponed for administrative or legal reasons. It is the weakest form of "protection" offered by the German state, and does not grant any particular right or duration of stay. Rather, if obstacles to deportation are found to remain, *Duldung* status is renewed every six months. As a result, "*Geduldeten*" may live in Germany for many years, in a phenomenon referred to as *Kettenduldung,* or "chain"-*Duldung.*

There are an estimated 200,000 people with *Duldung* status living in Germany, some of whom are estimated to have been residing on *Duldung* status for over sixteen years. *Geduldeten* have restricted access to employment and receive state benefits at a rate 20 percent below conventional social welfare payments. They cannot work for a year after the initial grant of *Duldung* status, and work permits stipulate the number of hours that they may work. Children can go to school, but cannot access vocational training. Finally, *Geduldeten* do not have rights to family reunion.[35] As in Denmark, refugees and *Geduldeten* in Germany are allocated to a town in which they may live and work. Once allocated, refugees and *Geduldeten* are not permitted to travel further than thirty kilometres from the town, and it may be considered a breach of their residency permit if they do. There are legislative exceptions to this rule if the asylum seeker has found work in a different area.

In 2007, legislative changes were introduced designed to reduce the numbers of *Geduldeten*. The changes grant people with *Duldung* status who have lived in Germany for eight years, or six years if they have children, a temporary residency permit on 1 July 2007. At the end of 2009, these *Geduldeten* will be granted permanent residency if they have kept a clean criminal record; achieved independent financial security, regular employment, a high level of German language abilities, integration into German society, and adequate accommodation according to the size of their family; and ensured regular school attendance for children. As part of the agreement, the amount of social assistance provided to *Geduldeten* is reduced. If these criteria are not met by the end of 2009, the consequence will be deportation.[36] According to the Migration Policy Institute,[37] this may apply to approximately 50,000 of the 200,000 *Geduldeten* currently living in Germany.

Research Findings

Semi-structured interviews with NGO representatives working with refugees on TP were conducted in 2006 and 2007. Three NGOs from Germany and four from Denmark took part in the study.[38] These were compared with existing Australian data compiled by the authors over several previous studies.[39]

Five key themes emerged from the interviews. First, TP refugees in all three countries experienced social and financial difficulties occasioned by the TP policy. Second, the experience of temporary protection has led to a heightened sense of uncertainty in refugees' lives. Third, the lack of rights to family reunion under temporary protection regimes has been a prime source of hardship for TP refugees. Fourth, the interviewees were keenly aware of a new and restrictive political climate on refugee issues. Finally, NGOs experienced great challenges in meeting demands for their settlement support services and in maintaining their independence from government when advocating for refugee rights.

Social and Financial Difficulties for Refugees

NGO respondents from all three countries were concerned about the everyday financial and social pressures imposed on refugees under TP regimes. In Germany, Jurgen from *Flüchtlingsrat* Berlin noted that both refugee policy and the broader economic climate made it difficult for asylum seekers to live in Germany. *Geduldeten* may work after twelve months of being granted a residence permit, but only if they can secure a job that no other German unemployed person can perform. The result of this policy, according to Jurgen, is that 99 per cent of people with *Duldung* status are unemployed and dependent on social aid.

In Germany, Convention refugees have entitlement to the full rate of public assistance. Asylum seekers and *Geduldeten,* however, receive 80 per cent of the public assistance paid to unemployed German nationals, or less if they are part of the group given temporary residency visas in July 2007. In principle, this assistance is not given in cash, but in kind, such as the provision of medical treatment. Jurgen explains:

> This social aid from the state is lower than the social aid for Germans. They get only 225 Euro a month, if they get it in cash. Germans get 345 Euro plus housing and medical care. But the law says that asylum seekers should get food and clothes vouchers, not cash. So in many cases they only get pocket money of 40 Euro per month for an adult, for using public transport. Do you know how much public transport is? 4 Euro for a return ticket. So 36 is left for the month. And then you need to pay the phone …

Both Germany and Denmark have settlement policies requiring geographic dispersal, with the aim of shifting migrants away from the metropolitan centres where they might form ethnic "ghettos." Germany's dispersal policy restricts the movement of refugees and *Duldung* to an area of thirty kilometres around their homes. Refugees and *Duldung* are fined, and refugees may face problems with gaining permanency, if they breach this restriction. Jurgen argues that these policies limit the ability of refugees to integrate, by limiting employment and educational options, and also limit the ability for refugees to visit friends and family in other areas of Germany. In Denmark, Kristofer from the Danish Institute of Human Rights agrees with the general idea of geographic dispersal, but argues that it is too strictly administered:

> I think it's working to some extent … I'm not against it per se, otherwise everybody gets stuck in Copenhagen … But it has become extremely rigid, far too rigid, in that you are stuck in those places and families cannot get together.

Some interviewees saw positive effects, as some rural centres were benefiting from the increase in population and a revitalized community. As Karita from the Danish Red Cross notes:

> What happened over here in the remote northern part of Jutland, they found out that the asylum seekers who went to those centres went to shops and spent money there, and a few of the citizens could go and work at the asylum centres. When the immigration service came and said they were going to close down these centres because it is a stupid place to have asylum seekers, the whole village said "please no, don't close our centre, these are our asylum seekers."

A similar phenomenon of "regional renewal" occurred with TPV holders in rural Australia, with high profile rural community campaigns leading to the 2004 changes in the Regional Sponsored Migration Scheme, which allowed TPV holders in rural areas to gain permanent work visas and fill lower-skilled job vacancies, without first leaving the country and re-entering under a new "offshore" visa.

Interviewees also highlighted the lack of integration opportunities for TP refugees. In Denmark, children with temporary protection have the same access to education as Danish citizens, but for the first few years many of them attend school at the reception centres where they are accommodated, where they can only interact with other refugee children. Emilia and Henderson from the Research and Rehabilitation Centre for Torture Victims observe that this policy is in itself a barrier to integration. As Emilia argues, "You build up a system that prevents integration, and then you say people have to be integrated." Henderson continues, "Then you turn it around and say, well, there is something inherently wrong with you, you cannot integrate. You have a problem, it is within you."

Uncertainty in Refugees' Lives

NGO respondents in Australia, Denmark, and Germany each highlighted the impact temporary protection was having on the psychological well-being of refugees. Extended periods of temporary protection under the new regulations, Henderson says, are "creating a 7 year existential moratorium." Similarly, Emilia mentions cases of "complicated traumatic stress." In Denmark, in addition to temporary protection refugees, there is another group of refugees living in great uncertainty, the so-called "phase 3 rejected asylum seekers." This group are in a parallel situation to the *Geduldeten* in Germany—they are designated for removal from the country, but their immediate deportation is not possible for legal or technical reasons. As noted above, many asylum seekers from Somalia not granted protection under the new status B law are in this category. These phase 3 rejected asylum seekers are accommodated in the two "departure centres" at Sandholm and Avnstrup. As Katrin from the Danish Refugee Council notes:

> They can't get formal protection now, but still they can't be sent back. So they are sitting in the Avnstrup and Sandholm camps waiting. They cannot be sent out by force, because the police even do not dare to go there themselves, they do not dare escort them back to Somalia.

Regulations introduced in Germany in 2005 allow the government to revoke the refugee status of refugees who have been in Germany for less than three years, if the

situation in the country of origin is found to have changed. Where most countries consider past persecution sufficient reason for granting ongoing refugee status, TP jurisdictions commonly hold that the granting of a refugee visa may not be the "last word" on one's status. Since 2005, 18,000 Iraqis who had initially been granted refugee status in Germany have had their refugee status revoked on the basis of changed political conditions in Iraq.[40] As Johanson, from Germany's Centre for Treatment of Torture Victims, explains,

> They are saying people got political asylum because Saddam Hussein was in power and persecuting them. So he is no longer in power so there is no longer any danger of being persecuted, but in fact there is still a danger of being a victim of the war situation. For these two different situations you now get different statuses.

According to Johnson, many Iraqi refugees are still "afraid" that they may be eventually returned to Iraq. Those who have had their refugee status revoked but still hold a residency permit may stay in Germany until it expires, after which they are deported or granted *Duldung* status. The policy introduced in 2005 to grant permanency to some *Geduldeten* exacerbates the sense of uncertainty for people with tolerated status. Rather than issue an amnesty to all *Geduldeten,* the 2005 policy allowed each state to set up a commission to assess the humanitarian status of individual *Geduldeten.* These state commissions, made up of representatives from NGOs, would recommend to the Federal Minister of the Interior that an individual should be given permanent protection. Although this has benefited some individuals, Jurgen explains that he "has a problem with the justice, it is somehow extralegal. I would prefer if you allowed this for everybody who has been here for 5 years, it is more just."

One problem with this policy is that each federal state uses this policy differently. Berlin has put forward about 1,300 people for permanent status, of whom 650 have been successful. Other states have been less proactive about endorsing asylum seekers to the Minister of the Interior. The federal state of Bavaria has not set up a commission, and no individuals have been recommended to the Minister of the Interior. Johanson from the Centre for Treatment of Torture Victims in Berlin argues that granting amnesty to the large numbers of *Geduldeten* in Germany is "the task of the day," and that by setting up commissions to grant permanency to individuals the government has missed the opportunity to make a difference on a large scale. Jurgen agrees, arguing that this policy has served to keep the level of discussion about *Duldung* "low." He explains:

> It gives a solution to give to cases in the newspaper, they wanted to use this to keep the discussion low. It is used for political reasons, to give something to the Churches. So each Church's most-loved refugee can get status, which is what I don't like. It discriminates against others.

Right to Family Reunion

In all three jurisdictions, the restriction of rights to family reunion had the greatest impact on refugee lives. In Australia, refugees on TPVs had no right to family reunion. For those TPV refugees who had breached the "seven-day rule" by spending more than week in a third country *en route* to Australia, and were therefore threatened with "rolling" TPVs from 2001, it seemed likely that they might never be entitled to bring their families to Australia. Equally, for Australian TPV holders, leaving the country to visit relatives meant relinquishing their protection status and their right to re-enter the country.

Leach and Mansouri documented the feelings of guilt and despair among male TPV holders resident in Australia who were unable to bring their immediate families to Australia.[41] This policy had another impact, in that more women and children began to make the dangerous boat journey to Australia themselves. After 2001, an unprecedented number of women and children arrived by boat as exemplified by the disaster of the Suspected Illegal Entry Vessel (SIEV) X, which sank in August 2001, killing 353 of its 393 passengers. The majority of those who died were women and children, many of whom were travelling to Australia, where their husbands and sons were already resident on TPVs.

Restrictions on family reunification for refugees with temporary protection form another barrier to integration. In Germany, refugees have rights to family reunification. If their refugee visa is revoked, however, the person may stay in the country for the rest of his or her residence permit, but loses rights to family reunion. *Geduldeten* do not have rights to family reunion. Moreover, the policy of dispersal does not take into account the location of other relatives living in Germany, and many refugees are placed in regions a long way from family, and risk jeopardizing the grant of a permanent visa if they visit them.

With the change to asylum policy in Denmark in 2002, rights to family reunion were tightened. Refugees on temporary protection have no right to reunion with a spouse, unless the spouse proves strong ties to Denmark (the same applies to non-Danish migrants married to Danes) or are themselves assessed as refugees requiring protection from Denmark. A DK50,000 (US$10,000) bond is required for the reunion of spouses, and the Danish spouse must not have received social assistance for the period leading up

to the reunion. Equally, the spouse coming to Denmark must be capable of working. No spousal reunion is granted for a spouse less than twenty-four years of age, nor family reunion for parents if the parent is over sixty years of age.[42] These policies restricting family reunion are, according to Kristofer, "contrary to basic human rights principles," and operate to limit the ability for refugees to integrate.

Exclusionist Political Climate

Most interviewees noted the impacts on refugees of a wider shift in the public discourses on immigration. Kristofer mentions the Danish government's overt unwillingness to commit to international standards of human rights. Similar themes were notable across the three jurisdictions.

> Previous social democratic governments said we will respect our international obligations. The new party now says, well, what are our international obligations? Do we have a case for saying we will not do this? … We want to decide how policies should be made, we are not going to ratify a new legal instrument …. So I am hearing more and more of this rhetoric about human rights being "anti-democratic," and it is always focused on foreigners.

Denmark's transformation from one of the most progressive asylum states in Europe to a "hardliner"on refugee issues had certainly resulted in decreasing numbers of asylum seekers. Katrin describes this as the impact of "the rumour about Denmark":

> The rumour about Denmark and the fact that it is well known that it is difficult to get family reunion in Denmark, certainly that has had an impact … and changed things in rather a short period. Denmark used to be known for its human rights, and now it is completely different.

Kristofer notes that "the 2002 legislation had a tremendous signal effect. This signal was picked up around the world so the number of asylum seekers dropped." In spite of this, Kristofer sees a positive side to the development—a consciousness-raising effect on the wider public, as repressive regulations have in turn "created a tremendous human rights awareness." Accordingly, representatives of the Danish Refugee Council stressed the important role of more than 2,000 volunteers who are the mainstay of settlement and integration programs, helping children with homework, running language schools, and organizing leisure and community-building activities.

A common theme in the German interviews was the observation of increased difficulties for asylum seekers to gain protection in Germany. These difficulties include physical obstacles, such as increased policing in Eastern European states. Jurgen noted that Poland and other Eastern European countries are more likely now to deport and imprison asylum seekers. He states, "Eastern Europe in the beginning of the 1990s used to be the main refugee route, and now it is really dangerous for [asylum seekers] to come this way." Similarly, the introduction of the Schengen agreement, and policies like the third country rule, makes seeking protection in Europe more difficult. At the same time, there has been significant narrowing of the refugee definition, so that the rate of those granted refugee status is only 2 to 3 per cent. Many asylum seekers who would have once received refugee status no longer fit the criteria, and some of these remain in the country under *Duldung* status. As Jurgen puts it, "nowhere in the world is there such a low recognition rate."

The increased difficulty in gaining access to Germany is the aim of European Union border protection policy. Johanson observes that much of the EU approach to asylum seekers has been modelled on German policies. In some cases this relationship has been the reverse; for example, the policy of revocation of protection visas was originally an EU policy that was immediately adopted by Germany. Yet Johanson also acknowledges that one aspect of EU policy has improved the situation for asylum seekers. In addition to the Refugee Convention definition of refugee status, the EU now recognizes persecution against women, and persecution by groups other than the government of the country of origin, as criteria for granting refugee status. This has improved the chances of some asylum seekers in gaining protection in Europe.

Diminishing Resources for NGOs

Like their counterparts in Australia and Germany, NGOs across Denmark feel their advocacy and settlement support work has been increasingly impeded. Kristofer, as the head of the Danish Institute for Human Rights, reported experiencing personal attacks from the Danish People's Party (DPP), one of a coalition of parties in government since 2001:

> For two months if you entered into the webpage for the DPP … you would find a picture of me. When you "clicked" on me you find a list of all the nasty things I have done in my life. So they effectively put pressure on the new government to close us down. The decision was made, but then, thanks to a lot of support internationally as well as domestically, they figured that that was not such a good idea. But the threat of closure was a very symbolic gesture from the government that demonstrated the nature of the new times.

Kristofer went on to note the growing challenges facing refugee advocates in general, including financial constraints:

> Our organisation may be a particular target, but it is more general than that … we have never had such a difficult time in relation to freedom of expression. This is contrary to what the Prime Minister has claimed about freedom of choice … we have never had such a difficult time, where critical voices are constantly harassed, or suffering funding cuts, and so on.

For its part, the Danish Refugee Council has had its influence in asylum determination processes severely curtailed under legislative changes made in 2002. The Council previously had two of the five chairs on the Refugee Board, which makes decisions on individual applications for asylum. In 2002, the Refugee Board was reduced from five to three members, cutting out the Refugee Council places in the process. While the Council still retains a veto right in the so-called "manifestly unfounded" procedure, it is no longer represented on the more important body with the final say in asylum decisions.

Financial restraints on NGOs have affected their ability to advocate on behalf of refugees. The Rehabilitation and Research Centre for Torture Victims now works on a "paid per session" funding arrangement, for both rehabilitation services and research projects. This has had a significant impact on the scope of the services provided. In particular, it means staff time is spent providing direct individual client services, with a diminished ability to conduct "sector advocacy" on behalf of their clients as a whole. This arrangement brought on by recent conditions attached to government funding affects 95 per cent of the Centre's budget. As such, only 5 per cent of its budget is allocated towards sector advocacy to deal with wider policy issues.

Interviewees in Germany also experienced difficulties in providing services to refugees as a result of funding and resource cuts. Johanson notes that his organization, the Centre for Treatment of Torture Victims, is one of only four that receive funding from sources other than the German government. He explains that the "increased reliance on our services" means that "we have to work very hard to meet demand."

> We have very long waiting list, but we can't deliver the services that are needed by the people. We have lists on which people are waiting for 1 or 2 years. There is so much work needed apart from the psychotherapy, such as writing the psychological certificates and supporting them in their court cases as psychologists.

Two of the German NGOs also noted difficulties in maintaining independence from the government, which they regarded as essential to effective refugees advocacy. While *Flüchtlingsrat* Berlin receives 50 per cent of its funding from the European Commission, this money is channelled through the Federal Office for Migration in Germany, compromising the ability of the organization to maintain an independent stance. Jurgen explains:

> The Office for Migration visits us once a year and asks us if we are working well. Sometimes I feel that maybe if we are more critical of them they may not fund us … if I'm honest it is a problem to try to be 100% independent.

Similarly, Estella from Xenion, an organization that provides psychosocial help to refugees, stressed the importance of maintaining financial independence from other organizations. This is, according to Estella, "so we can say whatever we want without having to worry that the funding organisation will say 'no, we don't want that.'"

Conclusion

The case studies reported in this paper illustrate some poignant aspects of the impact of temporary protection regimes in three western jurisdictions. In Australia, Denmark, and Germany, recent trends in refugee policy have two contradictory elements. On the one hand, governments have introduced strategies to reduce the numbers of refugees entering the country. On the other, each has placed increased emphasis on the socio-economic and cultural integration of refugees into the community. This paper's findings strongly suggest that, rather than facilitating this integration, temporary protection regimes have actively hindered integration in a number of key ways. Reduced access to education, health care, language tuition, and employment services all serve to limit functional economic and social settlement of refugees and radically reduce the refugees' ability to function fully and competently in their new communities. Equally, the emotional distress caused by the separation of families and the lack of certainty about the future further disables refugees' capacity to integrate. In particular, the ever present and implicit threat of forced repatriation means that TP regimes are inherently incapable of fostering psychological and cultural settlement and, more critically, are prone to political and public "controversy."[43] In all three jurisdictions—until the abolition of the TPV in Australia in 2008[44]—the transition between temporary protection and permanent protection was not automatic. The refugee must meet certain criteria, including passing language tests and criminal record checks. Most importantly, the refugee must demonstrate a need for ongoing protection at the expiry of the period of TP. To do so, they must not come from a country subsequently declared a "safe country of origin." In terms of settlement support services, the research shows that that NGOs supporting refugees have found it increasingly

difficult to meet demands on their services, as the state has reduced rights of access to employment, provision of settlement services, and restricted access to mainstream welfare benefits.

Australian research comparing the mental health of refugees with temporary and permanent protection visas[45] shows that temporary protection can impact dramatically on refugees' mental health, and that the TPV status was the greatest single contributor to post-traumatic stress disorder (PTSD). TPV holders' experiences in detention contributed to this, but current living conditions, fears of returning home, worry about the family's safety, and lack of family reunion were also major contributors to mental health decline. One Australian study indicated that TPV refugees had a 700 per cent increased risk of developing depression and post-traumatic stress disorder in comparison with PPV refugees; and that these extended periods of temporary protection operated to "lock individuals into an unresolvable future-oriented" stress, undermining standard treatments and therapies for trauma premised on a "core assumption of safety as a necessary precondition."[46] The long-term effects of an extended exclusion from settlement services, in conjunction with the impacts of initial periods of mandatory detention, remain to be seen. These effects are likely to remain critical factors in the ongoing settlement experience of former TPV holders. Similarly, in Germany, Bosnian temporary protection holders were found to have experienced a "permanent state of anxiety" as a result of their temporary status.[47] This emotional distress can impact on the whole refugee experience, affecting refugees' ability to learn the host country language, to work, and to raise children in a healthy environment.

Temporary protection is one of many mechanisms for limiting refugees' access to protection, which also include extraterritorial processing and offshoring arrangements. These "substitute protection" mechanisms limit access to effective protection under the Convention. In the three countries discussed in this study, the temporary protection policies have obstructed successful integration. Policies that place limits on learning the language, that limit access to education or health care, and that restrict movement radically reduce the refugees' ability to function normally in their new communities. The emotional distress caused by the separation of families and the lack of certainty about the future further disables refugees' ability to integrate. In each case, TP policies undermine the stated goals of promoting greater integration and assimilation into the host country.

The internationalization of western refugee policy development is evident in the extent to which countries are able and willing to import harsher policies perceived to have been successful elsewhere. As Danish Refugee Council spokesperson Thoralf puts it, there is "no doubt" that the extraterritorialization phase of recent developments in asylum policy in Europe had been inspired by Australia's "Pacific Solution" arrangements. It seems likely that the "substitute protection" TP mechanisms introduced in Denmark and Germany were similarly influenced by the introduction of the Australian TPV in 1999. In this context, the dramatic decision of a new Australian government to abolish the TPV regime in 2008 is an important one, which is likely to be noticed internationally. This reform signalled the capacity of concerted domestic and international campaigns to reverse restrictive trends in Western asylum policy, held by many commentators to be "inevitable" in an age in which refugee issues are increasingly viewed through the prisms of national security and sovereignty.

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L'immigration irrégulière et le trafic des migrants comme ultime recours pour atteindre le Canada : l'expérience migratoire des demandeurs d'asile[1]

Estibaliz Jimenez, Ph. D.

Résumé

L'objectif général de cette étude est de comprendre l'expérience migratoire des demandeurs d'asile qui arrivent de façon irrégulière au Canada, notamment à l'aide de passeurs. Le phénomène de l'immigration irrégulière au Canada est analysé au moyen des expériences concrètes de migrants et d'informateurs-clés. Cette méthodologie permet de donner la parole aux migrants au sujet de leur vécu. Les résultats indiquent que l'immigration irrégulière et le recours aux services de trafiquants sont l'effet pervers du resserrement des frontières et du renforcement du contrôle migratoire, car elles deviennent les seules solutions pour les demandeurs d'asile. Cette recherche remet en question l'idée généralisée que les passeurs victimisent et exploitent systématiquement les migrants, en avançant qu'au contraire, les passeurs sont souvent ceux qui permettent aux migrants d'atteindre le Canada et de demander le statut de réfugié.

Abstract

The overall objective of this study is to understand the experiences of asylum seekers arriving illegally, including with the help of smugglers, in Canada. The phenomenon of illegal immigration in Canada is analyzed using the specific experiences of migrants and key informants. This methodology gives voice to migrants and their experiences. Results indicate that illegal immigration and reliance on human traffickers are the perverse effect of tighter borders and the strengthening of immigration controls, becoming the only solution for asylum seekers. This research challenges the widespread idea that smugglers routinely exploit and victimize migrants, arguing that, to the contrary, smugglers are often the ones who enable migrants to reach Canada and seek refugee status.

Introduction

La convergence de l'aggravation des disparités économiques, des conflits civils, de la violation des droits humains et de l'accroissement des moyens de communication et de transport a eu l'effet d'augmenter le nombre de migrants et de demandeurs d'asile qui arrivent dans les pays industrialisés, beaucoup d'entre eux par des moyens irréguliers. Percevant un abus du système d'asile par ceux qui n'ont pas besoin de protection, les États occidentaux ont établi des barrières composées de politiques et de mesures restrictives d'immigration, qui limitent l'entrée légale des migrants et des demandeurs d'asile sur leur territoire. Les réseaux de passeurs se sont développés essentiellement *en réponse* à la fermeture de plus en plus marquée des frontières des pays occidentaux et au besoin impérieux d'émigrer ressenti par de nombreux individus, malgré des coûts et des risques accrus. Ce point s'applique également, à plus forte raison, aux réfugiés et à toutes les personnes qui ont besoin, pour une raison ou une autre, de protection humanitaire.

L'idée selon laquelle le trafic de migrants et les groupes criminels sont étroitement liés serait plutôt répandue chez les politiciens, les organismes d'application de la loi et les législateurs[2]. Ce lien légitime et justifie la lutte contre l'immigration irrégulière[3]. C'est pour cette raison que la communauté internationale a adopté le *Protocole contre le trafic illicite de migrants additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée*[4]. Dorénavant,

l'implication des groupes criminels organisés dans le passage irrégulier des frontières est considérée comme un élément constitutif de la définition du trafic de migrants. Par conséquent, les dirigeants des pays ayant signé la *Convention des Nations Unies contre la criminalité transnationale organisée* (CCTO)[5] et le *Protocole contre le trafic* luttent contre le trafic de migrants en tentant d'éliminer les organisations criminelles qui l'opèrent. Le Canada a signé le 14 décembre 2000 et ratifié le 13 mai 2002[6] la CCTO et son Protocole et, en tant qu'État partie, il s'est engagé à combattre le crime organisé et le trafic de migrants, tant à l'intérieur qu'à l'extérieur de ses frontières. Le Canada a harmonisé sa définition d'organisation criminelle[7] avec celle de la CCTO et, après les attentats du 11 septembre 2001, notamment au moyen de la *Loi sur l'immigration et la protection des réfugiés*[8], il a renforcé les mesures prises pour combattre l'immigration irrégulière et le trafic de migrants.

Bien qu'une grande partie de la littérature[9] dépouillée dénonce l'implication des groupes criminels organisés et la victimisation des migrants dans le trafic de migrants, plusieurs recherches empiriques[10] remettent en cause ces discours. Plusieurs auteurs[11] ont montré que le trafic de migrants est un acte consensuel impliquant entre autres des réseaux informels qui offrent aux migrants l'accès si convoité aux pays occidentaux. Notre recherche tente de vérifier le rôle joué par les groupes criminels organisés et de confirmer ou d'infirmer la victimisation des migrants dans le trafic vers le Canada.

Méthodologie

Cet article comprend l'analyse qualitative d'entretiens en profondeur semi-directifs faits auprès de demandeurs d'asile et d'informateurs-clés. Dans le cadre de notre étude, 25 demandeurs d'asile[12] de plus de 18 ans ont été interviewés. Pour diversifier notre échantillon, plusieurs variables ont été prises en compte, entre autres : le pays d'origine des demandeurs (13 pays différents[13]), le sexe, l'âge, l'état familial, le niveau d'éducation, et s'ils ont des enfants et s'ils sont arrivés accompagnés par un membre de leur famille. Tous sont arrivés au Canada dans le but de revendiquer le statut de réfugié. Toutes les entrevues ont été transcrites textuellement, puis une analyse de contenu d'abord verticale et ensuite horizontale des thèmes émergents et récurrents a été réalisée à l'aide du logiciel Atlas. L'échantillon d'informateurs-clés[14] est composé de dix répondants, cinq avocats en pratique privée et cinq intervenants de la région de Montréal, comptant en moyenne plus de 15 ans de travail auprès d'immigrants et de demandeurs d'asile de différentes origines.

Cette démarche méthodologique permet d'atteindre deux objectifs de recherche. D'abord, connaître le phénomène de l'immigration irrégulière et du trafic de migrants au Canada et, deuxièmement, comprendre, au moyen des récits des migrants, l'expérience migratoire des personnes qui accèdent irrégulièrement au Canada. L'expérience migratoire englobe la période précédant le voyage, et le trajet et l'arrivée du migrant au Canada. Les avocats et les intervenants ont également été consultés pour obtenir leur point de vue à l'égard de l'expérience migratoire de l'ensemble de leur clientèle. Plusieurs de leurs témoignages rejoignent des aspects abordés lors des entretiens avec les migrants.

Résultats

Dans le but de comprendre l'expérience migratoire des demandeurs d'asile qui arrivent de façon irrégulière au Canada, notamment à l'aide des passeurs, les résultats ont été divisés selon différents thèmes. Premièrement, les raisons qui ont motivé les migrants à quitter leur pays, ce qui comprend le contexte sociopolitique du pays et le contexte personnel de l'individu. Deuxièmement, les obstacles vécus par les migrants pour arriver légalement au Canada et le processus qui a conduit à l'immigration irrégulière et au trafic de migrants. Finalement, le phénomène du trafic de migrants proprement dit, ce qui inclut le mode opératoire, la dynamique trafiquant-migrant et l'impact du trafic sur le migrant.

Les raisons qui motivent les migrants à quitter leur pays

Les récits des immigrants illustrent le contexte de vie de chaque individu avant qu'il ne quitte son pays et les raisons qui l'ont poussé à quitter son mode de vie, sa famille et sa demeure. Bien que seulement une minorité des immigrants de notre échantillon soient venus au Canada par un souci principalement économique, comme c'est le cas de deux Dominicaines, la majorité ont fait part du contexte sociopolitique du pays d'origine (guerre, absence de démocratie, corruption, discrimination) qui rendait leur vie intolérable. Plusieurs ont déclaré avoir échappé à une violence généralisée dans leur pays, par exemple Ousman[15], originaire du Tchad, et Charlie, d'Albanie. Alfredo décrit le Venezuela comme étant un pays où la démocratie est inexistante et où la pauvreté et le danger sont omniprésents. Voici le témoignage de Kanga :

> Je suis parti du Cameroun pour des raisons politiques, manquement aux libertés individuelles, manquement aux associations, la torture … je pense simplement que c'est l'histoire de toutes les soi-disant démocraties africaines. Donc, à tout cela il y a un certain appui, les forces de l'ordre, la police, la gendarmerie … qui sont là pour appuyer le pouvoir en place, une stratégie de matraquer toute politique quelconque à pouvoir apporter un peu de liberté dans le pays.

Tableau : Raisons et actes de victimisation qui ont motivé l'abandon de leur pays[16]	
Menaces de mort	11
Racisme, discrimination, nettoyage ethnique	6
Règlement de comptes (victimes ou menaces)	4
Voies de fait	4
Guerre au pays	4
Détention dans un camp	3
Torture	3
Famille menacée	2
Confiscation de la maison et des biens	2
Propriété saccagée	2
Pauvreté, manque de possibilités	2
Victime d'un attentat	2
Viol	2
Absence de démocratie, violation des droits et libertés	2
Violence familiale	2
Travaux forcés	1
Déportation hors de leur pays	1
Famille battue	1
Détention en prison	1
Témoin de violence à l'égard d'un membre de la famille	1
Séquestration	1
Témoin du viol d'un membre de la famille	1
Témoin de l'assassinat d'un membre de la famille	1

Mises à part les conditions difficiles du pays d'origine, la majorité des migrants déclarent avoir été personnellement exposés à des risques ou avoir subi des menaces, et d'avoir été l'objet de victimisations diverses. Les récits des 25 demandeurs d'asile ont permis de tracer le tableau suivant.

La majorité (23/25) des migrants disent avoir subi des violations graves des droits de la personne, provoquant chez eux un sentiment d'insécurité quant à leur propre sort et souvent à celui de leur famille. Plusieurs ont été victimes de mesures discriminatoires, tels que Barikore, jeune fille tutsi du Burundi ; Minarakore, également originaire de Burundi qui, en raison de sa double ethnicité, hutu et tutsi, a été doublement persécutée, et Pepe, un Mexicain homosexuel. Le contexte peut se traduire par un climat de violence extrême, comme l'illustre Soleil, du Congo :

> Les mercenaires, les Angolais sont arrivés et ils passent porte par porte et déjà dans notre maison on entendait comment les gens fuyaient de l'autre côté, les gens qui essayent de fuir étaient abattus sur place. Ils sont arrivés chez nous, ils ont cassé la maison et mon oncle qui était juste devant eux qui essayait de nous défendre a reçu des coups de baïonnette, c'est un couteau qu'on colle sur l'arme et il est tombé, il y avait beaucoup de sang et il nous demandait s'il allait mourir et nous on regardait ça, on criait, notre mère leur disait que nous on n'était pas des militaires, qu'on était des civils, mais ils n'ont pas voulu écouter ça et ils ont commencé à déchirer les vêtements de ma mère et ils l'ont violée devant nous. Après ils ont commencé à nous frapper et finalement … Donc, après qu'ils ont fini les viols, parce qu'ils ont violé et notre mère et nous-mêmes, nous on a été violés, moi et mon grand frère. Et puis ils nous ont mis dans un véhicule et ils nous ont amenés dans un camp et ils nous ont mis en détention pendant trois jours. Et pendant les trois jours, moi j'étais violé pendant les trois jours.

Plusieurs immigrants et leur famille ont été victimes de persécution, de détention et de torture pour des raisons politiques. Ce fut le cas de Fernando, de Colombie :

> Ils m'ont sorti de la maison de ma mère, ils m'ont amené dans un endroit en dehors de la ville, ils m'ont torturé, m'ont laissé presque mort. Ils m'ont fait quatre ou cinq chirurgies plastiques au visage pour essayer de dissimuler les imperfections, car ils m'avaient laissé complètement défiguré. J'ai récupéré comme j'ai pu, ça m'a pris 11 mois ou un an. À partir de ce moment, ma vie changea complètement. J'avais peur de sortir dans la rue, ma femme ne dormait plus, moi non plus, ce fut un traumatisme psychologique pour mon père et ma mère. Ce n'était plus une vie normale, je regardais continuellement en arrière, je continuais à recevoir des messages de menaces à la maison [*traduction*].

Les récits des migrants révèlent que les femmes sont très vulnérables à la violence, tant domestique que sexuelle et, dans plusieurs pays, elles ne jouissent pas de la protection gouvernementale. Nous avons rencontré Rosa, originaire du Mexique, victime de violence de la part de son mari, et Minarakore, jeune femme originaire de Burundi qui, après avoir été violée par son employeur, n'a pas été crue et a été torturée par la police.

Les avocats et les intervenants soutiennent qu'il y a une corrélation entre les pays où il existe des situations générant des réfugiés (conflits civils, terrorisme et absence de démocratie, etc.) et l'origine des personnes qui arrivent au Canada à l'aide de passeurs.

> Ils ont des problèmes avec la politique, ils sont poursuivis par quelqu'un pour leurs implications politiques, par exemple au Bangladesh, ou dans le cas de l'Inde, s'ils sont soupçonnés d'être un militant, ou terroriste, etc. Ils sont harcelés par la police, et finalement la famille décide : « Okay, ça suffit », ils vendent toutes leurs possessions, les bijoux, etc. pour rassembler l'argent, une somme d'argent pour payer l'agent. (Maître 2)

Les témoignages illustrent la situation complexe et dangereuse vécue par de nombreux migrants avant de fuir. Malgré la gravité de leur victimisation, ces individus n'ont trouvé ni protection ni assistance de la part de leur gouvernement (*victimisation secondaire*). Les crimes dont ils ont été victimes n'ont pas été résolus et les responsables n'ont pas été traduits en justice, ce qui aggrave le sentiment d'injustice et rend plus difficile le processus de guérison. Plusieurs des expériences relatées semblent répondre aux critères de la définition de réfugié ou de personne à protéger[17] au Canada[18].

Des obstacles pour accéder légalement au Canada

Les récits des migrants révèlent que l'entrée irrégulière au Canada est une réponse à l'absence de possibilité légale, du fait qu'ils ne répondent pas aux critères de plus en plus restrictifs établis par les pays de destination. Les coûts importants pour entreprendre une demande d'immigration et le manque de papiers d'identité exigés par les ambassades canadiennes font partie des obstacles. Soleil, originaire du Congo et obligé de s'enfuir au Gabon, témoigne des difficultés auxquelles un migrant en situation de déplacement forcé et originaire d'un pays en guerre peut être confronté.

> Au Gabon, ils nous arrêtent d'abord parce que tu n'as pas la carte de séjour. On n'a pas de papiers parce que lorsqu'on fuit la guerre, on n'a pas le temps d'avoir de papiers. Moi, j'avais mes papiers du Congo, mais ça valait rien, eux, ils voulaient d'autres papiers qui nous permettaient d'être là. Alors j'étais obligé de vivre comme un clandestin au Gabon, je mentais, je disais que j'étais Gabonais pour qu'ils ne m'arrêtent pas … Je demandais au HCR un titre de voyage, mais le HCR exigeait que quelqu'un se porte garant de moi où je voulais être rapatrié, quelqu'un devait garantir qu'il allait prendre soin de moi, où j'aillais dormir … Mais cela était très difficile.

Plusieurs migrants ont entrepris des démarches pour entrer légalement dans le pays de destination. Toutefois, c'est après avoir été refusés ou ignorés par le gouvernement d'origine ou de destination qu'ils ont eu recours aux moyens illégaux.

> J'ai demandé un visa pour les États-Unis, et ce, à deux reprises, mais comme je voyais que les choses devenaient de plus en plus menaçantes au Guatemala, j'ai décidé que nous partirions pour les États-Unis sans visa. C'était la seule solution qu'il me restait pour venir aux États-Unis. (Fernando, Colombie)

> Moi, je voulais aller en Europe, dans n'importe quel pays. Moi, je voulais partir avec n'importe quel moyen, mais légalement. J'ai fait une demande d'immigration au Canada, à l'ambassade, mais jamais j'ai eu de réponse. J'ai fait une demande aux États-Unis, ils m'ont répondu que c'était la responsabilité du HCR à le faire. Je demandais partout et je ne savais pas comment faire pour sortir du Gabon. Je n'avais pas d'autre choix que d'utiliser la façon illégale. Les réfugiés, surtout lorsqu'on sort d'un pays en guerre, on a peur que si on dit la vérité ça ne marchera pas, on est obligé de mentir. Au début on ne mentait pas, on a appris à mentir, on est obligé de mentir. (Laurent, Congo)

L'absence d'ambassade canadienne dans le pays d'origine est également un obstacle à l'obtention des documents de voyage et à l'accès légal au Canada. La majorité des pays d'Afrique (par exemple, le Burundi, la Mauritanie et le Rwanda) n'ont pas d'ambassade canadienne[19]. Cette situation augmente la difficulté pour un individu de faire parvenir les documents et de remplir les exigences requises pour l'obtention du visa canadien.

Les informateurs-clés confirment les difficultés que doivent surmonter les demandeurs d'asile qui veulent entrer légalement au Canada. Selon eux, la politique pour l'obtention d'un visa[20] s'avère un obstacle majeur :

> En Afrique centrale, en Afrique de l'Ouest, les gens savent que si tu demandes le visa au Canada, ils ne te le donneront pas. Le Canada, c'est le pire pays au monde pour avoir un visa. Contrairement à ce qu'on peut croire dans les médias canadiens, arriver légalement d'un pays où il y a beaucoup de réfugiés c'est extrêmement difficile. Même les gens savent que ça ne vaut pas la peine de demander un visa canadien. Ils vont essayer d'avoir un visa pour aller en Europe et après, à partir de l'Europe, ils vont se débrouiller avec un passeport français ou belge pour voyager jusqu'ici. Ou ils vont essayer d'avoir un visa pour aller jusqu'aux États-Unis, pour ensuite entrer au Canada. Beaucoup de réfugiés doivent utiliser une façon illégale, ils n'ont pas le choix. Il est presque impossible d'avoir un visa canadien pour quelqu'un qui pourrait être réfugié, pour arriver jusqu'ici. (Maître 4)

Plusieurs informateurs-clés légitiment et normalisent l'usage de moyens illégaux par les demandeurs d'asile au Canada, bien que selon eux, ce ne soit pas une option facile pour ceux qui y ont recours. C'est l'opinion exprimée par Maître 5 :

> Si on prend par exemple un Africain, c'est quoi les différents choix qu'il peut avoir? En tout cas, on doit oublier les voies officielles à

> moins de venir pendant un congrès ou pour participer à des manifestations sportives, mais c'est quand même très limité. Ce n'est pas tout le monde qui peut y avoir accès. Mais j'en ai vu quand même un certain nombre qui étaient venus de cette façon-là. Mais là encore, c'est très difficile pour eux parce que souvent ils se voient comme des fraudeurs. C'est très difficile et ils se sentent coupables de l'avoir fait par rapport aux personnes qui les ont aidés à faire partie d'une conférence, par exemple, ou les gens même ici au Canada qui les ont reçus.

Les récits des immigrants et des informateurs-clés confirment que le recours aux moyens irréguliers pour entrer au Canada, dont les faux documents, les déclarations mensongères et le recours aux passeurs, est la seule façon possible et que l'intensification des mesures de maintien de l'ordre aux frontières a un effet pervers.

Le trafic de migrants au Canada

En vertu du *Protocole contre le trafic*[21], l'expression « entrée illégale » désigne le franchissement de frontières alors que les conditions nécessaires à l'entrée légale dans l'État d'accueil ne sont pas satisfaites. Plus concrètement, le « trafic illicite de migrants » est « le fait d'assurer, afin d'en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel, l'entrée illégale dans un État partie d'une personne qui n'est ni un ressortissant ni un résident permanent de cet État[22] ». Dans la législation canadienne, en vertu de la LIPR[23], le trafic de migrants est une infraction passible d'une peine allant jusqu'à une amende maximale de un million de dollars et l'emprisonnement à perpétuité.

Parmi notre échantillon, 12 demandeurs d'asile ont fait appel aux passeurs. La majorité (9) sont des Africains, à l'exception de Fernando, de la Colombie, et de Tony et de Charlie, d'Albanie. Ce sont tous des hommes qui ont voyagé seuls ; leur âge moyen est de 30 ans. La plupart ont fait des études secondaires ou techniques et plusieurs ont fait des études universitaires. Tous travaillaient avant partir. La majorité (7) sont des pères de famille et sont soit divorcés, soit séparés. Quatre individus sont encore mariés, dont Fernando qui est venu accompagné de sa famille ; les autres ont l'intention de faire venir leur femme et leurs enfants au Canada.

Le passeur est-il membre d'un groupe criminel?

L'objectif de recherche est d'analyser le phénomène de l'immigration irrégulière et le mode opératoire du trafic de migrants au Canada. Entre autres, il s'agit de vérifier, au moyen des entrevues réalisées auprès de migrants et d'informateurs-clés, l'implication des groupes criminels organisés et la victimisation des migrants qui sont dénoncées par les discours politiques et juridiques, mais qui ont été remises en question par la recherche scientifique. Aux fins de la CCTO, « groupe criminel organisé » désigne une organisation structurée de trois personnes ou plus existant depuis un certain temps et agissant de concert dans le but de commettre une ou plusieurs infractions graves ou infractions établies conformément à la Convention, pour en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel[24].

Collaboration d'au moins trois membres : le passeur travaille-t-il seul ou en collaboration?

En vertu de la CCTO et du Code criminel canadien, une organisation criminelle est composée d'au moins trois membres et comporte une certaine hiérarchie et une distribution des tâches. Dans le cadre de notre recherche, les données d'entrevues suggèrent que la majorité des passeurs travaillent principalement seuls et qu'ils ne font pas partie d'une organisation criminelle quelconque. D'après les migrants, l'intermédiaire recommandé et qu'ils ont rencontré au début de la préparation du voyage est le même qui les ont accompagnés jusqu'à destination. Le passeur est décrit par les migrants consultés comme quelqu'un ayant plusieurs fonctions : le recrutement des clients, la facilitation de l'obtention des documents de voyage requis, la collecte d'argent, la transmission d'information et l'accompagnement durant le voyage. Toutefois, le passeur dispose d'un réseau de contacts et de connaissances qui lui facilitent la tâche et l'assistent dans la réalisation du passage illégal des frontières afin d'obtenir les documents de voyage. Ainsi en témoignent deux des migrants rencontrés :

> Il y a un éventail de relations, c'est-à-dire qu'on contacte une personne, on lui pose le problème, et puis cette personne a des contacts et ainsi de suite et ainsi de suite. C'est un peu comme une chaîne. (Kanga, Cameroun)

> À Dakar, on m'a recommandé un homme, un grand commerçant là-bas et il connaît des gens qu'ils peuvent t'aider pour avoir des documents. Il m'a dit : bon si tu veux sortir, je connais des gens qui peuvent t'aider sur ça, t'as pas de papiers, je connais des gens qui peuvent te procurer un passeport avec une autre photo d'une autre personne. (Baidy, Mauritanie)

Les avocats et les intervenants confirment que le passage illégal des frontières est effectué principalement par un seul passeur qui possède des contacts aux points stratégiques (ambassades, aéroports, etc.), sans pour autant faire partie d'un groupe criminel organisé, tel que défini par la CCTO ou la législation canadienne.

Dans notre recherche, nous avons cerné un seul exemple où le passage illégal semble avoir été effectué par une

organisation criminelle. C'est le cas de Fernando et de Maria, qui ont fait appel à des passeurs pour sortir du Guatemala et entrer aux États-Unis, en passant par le désert mexicain. Au cours de son voyage, le couple a vu différents passeurs se relayer pour le transport, ce qui implique une organisation et une structure.

Durabilité de l'activité illégale et la sophistication des moyens utilisés : passeur amateur ou passeur professionnel?

L'exercice d'une organisation criminelle doit s'étendre sur une période prolongée ou indéfinie. Au moyen des récits des immigrants, nous distinguons le passeur *amateur* du passeur *professionnel,* aussi dénommé *trafiquant.* L'*amateur* est celui qui s'improvise passeur et qui est opportuniste. Il dispose de contacts sur le terrain et est prêt à fournir les documents de voyage à ses clients et, à l'occasion, à les accompagner jusqu'au pays de destination. Ce fut, à titre d'exemple, le cas de Kokou, originaire du Togo, à qui son intermédiaire a prêté le passeport de son fils de nationalité française en échange d'une rémunération. Puisqu'il devait se rendre aux États-Unis, le passeur a profité de l'occasion pour accompagner Kokou jusqu'à Montréal. Cet intermédiaire n'est pas un professionnel dans le passage illégal des frontières. Il est possible d'ailleurs que ce soit la seule fois qu'il ait procuré l'entrée illégale à un autre individu.

Un *passeur amateur* est souvent une personne qui s'installe à une frontière et qui recrute ses clients sur place en vue de leur fournir le passage. Le mode opératoire n'est généralement pas très sophistiqué. Mentionnons, en guise d'exemple, les passeurs situés à la frontière des États-Unis avec le Canada, précisément au tunnel Detroit-Windsor, qui facilitent le passage illégal.

Les *passeurs professionnels* sont, pour leur part, des intermédiaires de longue durée ayant une expertise dans le passage illégal des frontières. Cette expertise sur le terrain est nécessaire pour plusieurs raisons. D'abord, le trafic est un crime transnational, et le voyage jusqu'au pays de destination est souvent long, ce qui implique le passage illégal des différents pays de transit et, parfois, l'usage de différents moyens de transport. Tony, d'Albanie, a pris premièrement le bateau pour aller en Italie, ensuite l'avion pour accéder aux États-Unis et finalement le train pour entrer au Canada. Le passeur connaît les routes à prendre, le type de surveillance aux points d'entrée, les procédures et les exigences dans les pays de transit et de destination ainsi que le système de protection des réfugiés dans le pays d'accueil. Deuxièmement, en voyageant souvent avec plusieurs migrants en même temps, le trafiquant s'expose à un plus grand risque de détection, ce qui requiert une grande logistique et une sophistication. Parmi notre échantillon, plusieurs migrants ont voyagé en groupe, accompagnés de leur trafiquant. Ce fut le cas de Maria et de Fernando, qui ont traversé différents pays avec 15 migrants irréguliers entassés dans une camionnette.

Le *professionnel* ne s'improvise pas passeur. Selon les récits recueillis, plusieurs passeurs ont été recommandés par quelqu'un qui avait déjà utilisé leurs services. Cela implique une permanence. Plusieurs de ces passeurs agissent depuis longtemps dans le commerce de l'immigration illégale.

Objectif d'en tirer un avantage financier ou un autre avantage matériel

Le trafic des migrants a toujours un but lucratif. C'est une condition *sine qua non* à la définition du trafic de migrants en vertu du Protocole et notre échantillon, sans exception, permet de confirmer cet élément. Selon les informateurs-clés, les migrants payent de grosses sommes d'argent aux passeurs. Le prix comprend les pots de vin pour les documents et la commission pour le passeur. Il faut ajouter les frais de transport, qui varient selon la distance, l'itinéraire et le moyen. L'accompagnement par le passeur jusqu'à destination, en raison du risque supplémentaire qu'il comporte, s'avère très coûteux. Selon les récits des migrants, le prix du passage illégal jusqu'au Canada ou aux États-Unis peut varier entre 5000 $ et 10 000 $[25]. Pour la plupart des migrants, l'argent est ramassé par la famille, qui leur vient en aide pour les faire sortir du pays. Selon les migrants et les informateurs-clés, l'accès au Canada est plus complexe et plus coûteux que l'accès aux États-Unis. En conséquence, plusieurs migrants choisissent de passer par les États-Unis pour entrer ultérieurement au Canada.

L'organisation de l'entrée illégale au Canada : acte humanitaire ou acte criminel?

Le postulat selon lequel le commerce d'immigration illégale s'avère un quasi monopole des organisations criminelles ne fait pas l'unanimité parmi les informateurs-clés interviewés. Les avocats et les intervenants affirment que les demandeurs d'asile réussissent souvent à entrer au Canada avec l'aide des membres de leur famille, des communautés religieuses et du parti politique dont ils sont membres. Voici quelques témoignages:

> Beaucoup de gens que moi je vois qui arrivent jusqu'ici, sont des gens qui sont venus avec des faux papiers. Ces faux papiers ont été organisés par leur parti politique. Des gens qui sont dans un même parti politique et qui ont des contacts pour aider les gens à venir. Je pense à des Togolais, qui se rendent au Ghana, ils vont chez un médecin qui est membre de leur parti et qui les aide à avoir de faux papiers pour passer, à prendre l'avion jusqu'au Canada, tout est organisé par leur parti politique. La même chose pour aller dans plusieurs pays où les réseaux ne sont pas des

> réseaux de type criminel ou de crime organisé. Mais vraiment des réseaux qui existent pour sauver les militants. Et on fait une erreur lorsqu'on assimile cette deuxième classe de personnes aux premières. (Maître 4)

> Je connais des gens qui sont venus grâce aux communautés religieuses qui les faisaient passer pour je ne sais pas qui, leur fils, leur fille, et qui ont été littéralement sauvés dans certains cas, grâce à ces gens-là des communautés religieuses. En Afrique, c'est très souvent ça. Fort heureusement. (Maître 5)

Selon les dires des informateurs-clés, il existe des personnes qui vont tout mettre en place pour aider quelqu'un qu'elles connaissent à entrer dans un pays sécuritaire. Ces personnes sont souvent considérées comme des criminels, et elles doivent faire face à la justice. Maître 4 rapporte un exemple concret :

> Moi, la semaine passée, je représentais à la cour criminelle un homme d'origine congolaise, qui était accusé d'avoir aidé une personne à entrer au Canada de façon illégale. Il avait emprunté les documents de sa femme pour aller en Europe pour aller chercher sa cousine qui avait été victime de violence collective au Zaïre. À l'aéroport, le subterfuge n'a pas fonctionné et l'homme a été condamné au criminel. Pas comme trafiquant, comme quelqu'un qui a aidé quelqu'un à violer la loi sur l'immigration.

Récapitulation

L'information recueillie au moyen de notre échantillon suggère que la majorité des passeurs répondent à plusieurs des critères d'une organisation criminelle organisée : expertise, durabilité et permanence, but lucratif, implication dans un marché illégal et caractère transnational. Malgré cela, notre recherche suggère que, contrairement à une partie de la littérature dépouillée et à la plupart des discours politiques, le service de passage illégal des frontières ne semble pas être majoritairement contrôlé par des organisations criminelles. Au contraire, les informateurs-clés constatent que l'entrée illégale d'une partie de leur clientèle a été facilitée par des membres de leur famille ou leur entourage. Cet élément suggère que l'organisation du passage illégal des frontières peut également avoir un but humanitaire, à savoir aider les réfugiés à accéder au régime de protection d'un pays d'accueil.

Le mode opératoire du trafic de migrants au Canada

D'après les migrants interviewés, la première prise de contact avec le passeur est une démarche facile, et le passeur est souvent recommandé par un membre de la famille ou une connaissance. Les informateurs-clés confirment que le réseau informel et la méthode du bouche à oreille sont les moyens courants pour établir le contact avec le passeur. Les migrants se fient également aux expériences d'autres personnes qui ont fait appel aux passeurs. C'est le cas de Soleil, du Congo : « Quelqu'un m'a parlé d'un passeur, il m'a dit qu'il avait déjà utilisé une fausse identité pour sortir du pays. Donc, il m'a présenté quelqu'un, que lui avait déjà utilisé, pour aller aux États-Unis. »

Deux migrants interviewés avaient pris connaissance des services de passeurs par l'entremise d'annonces classées des journaux. On y offrait des permis de voyage pour entrer au Canada :

> Il y a beaucoup de publicité dans les journaux : « Permis de résidence pour Colombiens, permis de famille, permis professionnels, avocats canadiens … »; « Viens à notre agence, etc. » Au Canada aussi il y a de la publicité semblable. Par exemple : « Ils t'ont rejeté, nous t'obtiendrons un permis d'immigration. C'est très facile. » Mais je me suis rendu compte que non, parce qu'ils me chargeaient 4000 $ pour venir au Canada et ils me disaient que je devais payer avant et qu'après on me recevrait ici : « Tu vas là, ils te font un procès et en moins d'un an tu as la résidence. » (Carlos, Colombie)

> Dans la presse guatémaltèque, il y a des annonces classées où ils te disent combien ça coûte pour passer aux États-Unis. Nous avons fait le premier contact avec les fameux *coyotes*. C'est annoncé presque comme si c'était un voyage touristique. Tu es une opportunité économique pour eux, tu es une source de revenus pour eux. Évidemment que c'est illégal. Mais ils l'annoncent dans les journaux. (Fernando et Maria, Colombie)

Le lien de confiance entre le passeur et son client est rapidement établi, et la crédibilité du passeur est rarement remise en question. Parfois, comme en témoigne Kanga, du Cameroun, pour les migrants, faire confiance à celui qui leur vient en aide est leur dernière chance de sauver leur vie. L'individu tend à fonder tous ses espoirs sur le passeur : « Lorsqu'on est dans ce type de problème, on peut se fier à n'importe qui. Il y a un adage chez nous qui dit que lorsqu'on ne veut pas se noyer, on s'accroche à un serpent. »

Les services offerts par le passeur

La mission du passeur est d'introduire le migrant dans un pays en contournant les lois d'immigration. Les passeurs offrent généralement une « trousse de voyage », qui comprend les documents de voyage (acte de naissance, passeport et visa), l'itinéraire, le transport et l'accompagnement jusqu'au pays de destination.

Sur 12 immigrants ayant fait appel à un passeur, 10 sont arrivés au Canada par voie aérienne, dont 8 en utilisant un faux passeport ou un vrai passeport, mais avec

une fausse identité. Plusieurs éléments ressortent des récits des migrants. Premièrement, la majorité (6/8) des demandeurs d'asile qui ont eu recours à un document de voyage frauduleux pour entrer au Canada sont Africains ; deux sont Albanais. Aucun immigrant d'Amérique centrale ou d'Amérique du Sud n'a fait usage d'un faux passeport. Deuxièmement, tous les immigrants ont voyagé avec un faux passeport d'une nationalité autre que la leur. Troisièmement, il existe une tendance (5/8) à utiliser des passeports provenant de pays dispensés de l'obligation de visa canadien ; les passeurs s'épargnent ainsi des efforts, des coûts et des risques. Finalement, trois (3/8) demandeurs d'asile ont voyagé avec des passeports portant la photo d'une autre personne. Ils étaient tous de race noire. Si pour le détenteur du passeport il était évident que la photo n'est pas la sienne, l'objectif est, selon les migrants, de déjouer un Blanc. Cette méthode semble fonctionner et n'est pas exceptionnelle.

Les récits des migrants et des informateurs-clés montrent que plusieurs documents de voyage ont été délivrés en raison de corruption parmi le personnel des ambassades canadiennes. Selon eux, nombre de passeurs possèdent des contacts à l'intérieur de ces bureaux[26] :

> Et lorsque l'agent obtient des visas canadiens dans les ambassades canadiennes dans les pays d'origine, c'est parce que l'agent paye de l'argent, il y a de la corruption. Si moi je demande un visa dans une ambassade canadienne, je n'obtiendrai rien. C'est un système énorme, tout le monde veut de l'argent. (Intervenante 2)

Service d'accompagnement jusqu'au pays de destination

Pour la majorité des migrants interviewés, c'était la première fois qu'ils prenaient l'avion, et le voyage au Canada était leur premier hors de leur région d'origine. Ils se sont alors retrouvés dans des aéroports internationaux, souvent munis de faux documents, mentant aux agents d'immigration. Tous ces éléments provoquent un stress intense chez les migrants : « Moi dans le voyage, j'avais une énorme peur. Je me suis dit, c'est grave, il a enlevé la photo de quelqu'un et il a mis la mienne. » (Soleil, Congo)

Huit migrants de notre échantillon sont entrés au Canada accompagnés par un passeur, dont Tony, d'Albanie, qui a eu recours à un passeur à deux reprises ; la première pour entrer aux États-Unis, la deuxième pour entrer au Canada. La présence du passeur durant le voyage semble avoir un effet positif pour les migrants. En raison de leur connaissance du fonctionnement des aéroports et du mode opératoire des agents d'immigration, les passeurs informent les migrants sur le déroulement du voyage et ils atténuent leur sentiment d'insécurité et leur nervosité.

> Je n'étais pas tout seul, la personne en question m'a encadré tout au long du voyage. Il est venu avec moi dans l'avion. Je le voyais. On se voyait. Mais il n'était pas vraiment à côté. C'était quelque peu un appui moral, ça donnait confiance. (Kanga, Cameroun)

> Lors du passage à l'aéroport, je n'ai pas eu vraiment peur. Avant d'arriver, le trafiquant m'avait dit de ne pas m'inquiéter, d'être tranquille, qu'il savait quoi faire, il était habitué à ça. (Charlie, Albanie)

Notre échantillon révèle que les passeurs adoptent différentes stratégies à l'arrivée au Canada. Si certains restent à l'écart, d'autres accompagnent le migrant durant les contrôles pour l'immigration. Dans la première stratégie, le passeur prend toutes les précautions possibles pour éviter les risques de se faire arrêter. Ainsi, durant le trajet, qu'ils soient dans les aéroports, à l'intérieur des avions ou devant les agents de contrôle de l'immigration, le passeur et l'immigrant font semblant de ne pas se connaître ; le passeur établit une distance entre eux, même si le migrant sait où se trouve son passeur. Au contrôle de l'immigration à l'aéroport du Canada, selon les dires des migrants, le passeur passe habituellement le premier et, une fois qu'il se trouve en sécurité, le migrant tente son tour. Le migrant est souvent laissé à lui-même et, en cas de difficulté, il doit se débrouiller seul. Les récits suivants en témoignent :

> **Et là, à l'aéroport, la personne qui est venue avec toi, elle passe avec toi?**
> Il ne faut pas. Il ne faut surtout pas qu'il ait l'air qu'il y a comme un lien avec quelqu'un, quoi.
>
> **Mais tu avais vu qu'il avait déjà passé?**
> Tout à fait. On ne se connaît pas, quoi. Après je passe avec mon faux passeport. Et on se retrouve à l'aéroport. En fait, notre contrat se finissait à l'aéroport. (Kanga, Cameroun)

Dans la deuxième stratégie, des passeurs accompagnent les migrants durant les contrôles de l'immigration et parfois, comme dans les cas de Charlie et de Kokou, ils font semblant d'être membres de la même famille. Le passeur prend le leadership et le contrôle de la situation, et l'immigrant se laisse guider.

> Le trafiquant était assis à côté de moi. On se parlait même dans l'avion, dans l'aéroport on était également ensemble, même devant l'agent d'immigration, au trafiquant ça ne le dérange pas. Moi, j'étais supposé faire comme si je ne parlais pas ni anglais ni français. Et le trafiquant parle en français, et il dit : « Voici mon fils, qui ne parle pas ni l'anglais ni le français. » Donc j'étais son fils et on venait en vacances. (Charlie, Albanie)

Une fois arrivés au Canada, les passeurs récupèrent généralement les passeports qui seront réutilisés, *recyclés,* parfois après les modifications nécessaires, pour faciliter le passage des frontières d'autres clients. Le passeport, autant falsifié, volé qu'emprunté, est un important outil de travail des passeurs, car il permet aux migrants de traverser les différents postes de contrôle de l'immigration et d'arriver au pays voulu. L'obtention d'un passeport exige une dépense et un effort supplémentaire au passeur, tel que le versement d'un pot-de-vin afin de corrompre les autorités, le paiement au voleur qui a fourni le document ou les frais de falsification. En conséquence, le prix varie si l'immigrant garde le passeport ou non. Par exemple, il aurait fallu que Tony verse 2000 $ US de plus pour le garder.

D'après notre échantillon, les migrants arrivés au Canada accompagnés d'un passeur et en possession d'un faux passeport ne revendiquent pas l'asile immédiatement à l'aéroport ; ils attendent d'être à l'intérieur du pays. Laurent, du Congo, en explique la raison :

> Mais le passeur était malin, il voulait reprendre le passeport. Moi je pensais que lorsqu'on arrive à l'aéroport de Montréal, tout allait être réglé, mais lui il avait dit : « Il ne faut pas faire la demande d'asile sur le champ », mais c'est parce que si je le faisais sur le champ, l'agent d'immigration allait récupérer le passeport. Donc, c'est pour ça qu'il nous disait : « Il faut pas le faire sur le champ. » Et là j'ai passé. Il a repris le passeport.

À l'opposé, les migrants qui n'ont pas eu recours aux services de passeurs ou ceux qui arrivent seuls à l'aéroport demandent tout de suite l'asile.

Les informateurs-clés confirment que leurs clients arrivent majoritairement en avion, mais ils connaissent des demandeurs d'asile qui sont entrés au Canada en bateau, surtout dans un conteneur, ou à pied, depuis le Mexique. Notre recherche suggère un danger accru lorsque l'entrée irrégulière au Canada se fait par un moyen autre que par voie aérienne. En voici deux exemples.

Après deux refus de visa américain, Fernando, Maria et leur fille, originaires de Colombie, ont décidé d'entrer aux États-Unis avec l'aide d'un trafiquant, surnommé *coyote* au Mexique. Le *coyote* leur avait proposé de les amener aux États-Unis pour 10 000 $US. Tout était compris : la nourriture, la voiture, le logement et les contacts pour l'immigration aux différents postes frontaliers. Mais le voyage ne s'est pas passé comme le *coyote* l'avait promis. La famille a manqué de nourriture, a dormi dans des maisons abandonnées et a voyagé avec 15 autres migrants entassés à l'arrière d'un camion. Le *coyote* n'a pas respecté son engagement de les faire traverser aux États-Unis ; il les a abandonnés dans le désert mexicain, sans nourriture ni eau. La famille a marché dans le désert pendant quatre jours, sans repères et craignant pour sa survie. N'arrêtant jamais de marcher et buvant de l'eau extraite des cactus, ils sont parvenus à sortir du désert et à entrer aux États-Unis.

Tony, d'Albanie, s'est rendu à la frontière canadienne au tunnel Detroit-Windsor, où des passeurs d'origine sud-américaine l'ont informé de la possibilité de traverser la frontière en sautant dans un train de cargaison en marche. Un trafiquant, en échange de 500 $US, lui a fourni des renseignements (meilleur horaire, quel train choisir, où se cacher et de quelle façon sauter) et, pour 500 $ de plus, lui a offert de l'accompagner. Une fois sur le territoire canadien, le passeur lui a indiqué de sauter en bas du train. Pris de peur, Tony n'a pas utilisé la technique enseignée par le passeur et il s'est blessé au bras. Ce type de voyage s'avère extrêmement dangereux et périlleux. Toutefois, le passeur a respecté son engagement à l'égard de son client : Tony a réussi à entrer au Canada. Tony savait que ce type de voyage était risqué, mais il était prêt à l'entreprendre, et le passeur était sur place pour lui offrir ses services. Selon Tony, il existe un réseau de passeurs permanent installé au tunnel Detroit-Windsor, prêt à fournir une entrée au Canada. L'existence d'un tel réseau signifie qu'il y a une demande pour ses services, c'est-à-dire des personnes prêtes à risquer leur vie pour demander l'asile au Canada.

Le trafic de migrants : victimisation ou sauvetage?

Selon la conception très répandue de la doctrine[27] et les discours politiques et médiatiques, les immigrants sont souvent victimisés et exploités par les passeurs, et ces derniers ne respectent pas leurs engagements. Cependant, les témoignages recueillis auprès de l'échantillon ne permettent pas de corroborer une telle affirmation. Au contraire, le passeur respecte généralement le contrat. Le migrant et le passeur se rencontrent avant le périple, ils établissent les conditions du voyage ainsi que le prix du passage. Le migrant paye d'avance les frais du passage. Ensuite, le passeur accomplit sa part et, une fois le migrant rendu dans le pays d'accueil, le contrat se termine.

Dans notre échantillon, la majorité des immigrants qui ont fait appel aux passeurs sont satisfaits des services reçus. Le passeur remplit sa part du contrat et les immigrants arrivent dans le pays de destination, le Canada, où ils revendiquent sa protection. Lorsque les migrants sont accompagnés par leur passeur jusqu'au Canada, ils se sentent en sécurité.

> J'ai suivi les indications que le passeur me donnait. Tout s'est bien passé et tout s'est déroulé comme convenu. Le passeur m'a tout expliqué, comment les choses vont se dérouler et la manière que je dois agir. Je n'ai aucune plainte contre mon passeur. Le contrat a été respecté et l'arrivée tant convoitée aux États-Unis a été réussie. (Tony, Albanie)

Il existe toutefois une exception dans notre échantillon, des gens pour qui l'expérience du passage illégal des frontières fut absolument traumatisante. Il s'agit de Fernando, Maria et leur fille, de Colombie. Voici leur témoignage:

> Nous avons commencé le voyage, un voyage qui fut une horreur. C'était un voyage pour lequel tu payes 10 000 $ pour te faire tuer. C'était l'achat d'un suicide. Le voyage fut complètement différent de ce que le type nous avait promis. Nous avons dû marcher, nous avons manqué de nourriture, nous avions faim, c'était très incommodant. Nous avons dormi sans protection contre les intempéries. Un autre facteur est venu aggraver la situation. Le *coyote,* comme se faisait appeler notre guide, nous a abandonnés dans le désert. Le *coyote* avait perdu toute crédibilité dès que nous avons passé du Guatemala au Mexique. Il avait perdu toute sa crédibilité, mais nous ne pouvions rebrousser le chemin. Nous avons voyagé d'une seule traite pendant 15 heures, dans un camion, 15 personnes ensemble, tous des illégaux. Nous avions un guide mexicain, qui nous avait fait passer la frontière. Pour traverser la frontière américaine, nous devions passer par un désert et le fameux fleuve. Nous avons commencé à marcher avec le guide mexicain, mais le deuxième jour, il nous a abandonnés. Il est parti avec les autres immigrants et il nous a abandonnés, ma femme, ma fille et moi, dans le désert. Nous avons dû marcher, boire l'eau salée du sol; nous n'avons pas mangé durant quatre jours. [*traduction*]

La famille a cru qu'elle allait mourir. Au moment des entrevues, Fernando, Maria et leur fille faisaient encore des cauchemars où ils se voyaient en train de marcher dans le désert sans savoir où aller. Dans leur cas, il semblerait qu'une organisation criminelle était responsable du voyage. Selon les médias, ce type de situation ne serait pas un fait isolé lorsque des migrants tentent de traverser le désert mexicain pour arriver aux États-Unis accompagnés par de trafiquants.

Plusieurs auteurs[28] soutiennent qu'en raison des coûts élevés du passage illégal des frontières, les migrants qui arrivent au pays de destination doivent travailler pour s'acquitter de leurs obligations à l'égard de leur passeur. Notre recherche nous amène plutôt à écarter quelconque contrôle, exploitation ou victimisation de la part des passeurs à l'endroit des immigrants. Tous les immigrants qui ont fait appel aux passeurs, à l'exception de Charlie, d'Albanie, avaient acquitté tous les frais avant de commencer leur voyage. Nous soulignons le cas de Charlie, pour qui le paiement a été effectué par la famille demeurant dans le pays d'origine, une fois que son arrivée sain et sauf au Canada a été confirmée. Cet exemple suggère que certains migrants peuvent négocier et personnaliser leur contrat de voyage avec le passeur, à l'image d'un contrat commercial.

Selon les informateurs-clés, la victimisation des immigrants par le passeur ne semble pas une pratique courante et la plupart considèrent les histoires d'abus auprès de migrants comme des cas d'exceptions. Les avocats et les intervenants établissent une dichotomie entre le passeur qui *abuse* et *victimise* les migrants et le passeur dit *sauveur* qui permet à l'immigrant d'atteindre une vie sécuritaire. Il ressort des entretiens, que malgré le fait que la relation entre le passeur et le migrant soit susceptible d'abus et que le migrant soit en position de vulnérabilité et de dépendance par rapport à son passeur, ce dernier demeure le seul et ultime recours pour se rendre au pays convoité et demander l'asile.

> Ces personnes-là que même s'ils rentrent dans l'illégalité, ils arrivent à sauver quand même des personnes. Que d'une autre façon, ils n'auraient pas pu arriver ici et avoir la protection du Canada. Oui, il y a des passeurs qui sont sans conscience, qui se font attraper comme les images qu'on a tout le temps, qui sont dans un bateau, puis il y a des gardes qui arrivent et les foutent à l'eau pour pas qu'ils se fassent attraper. Mais en même temps, il y a beaucoup de passeurs qui le font pour une bonne cause. (Intervenante 3)

À la lumière de nos résultats, les cas d'abus et de victimisation ne semblent pas aussi courants que le suggère une partie de la doctrine et des politiciens. Nous concluons qu'il est possible que des expériences avec des passeurs soient satisfaisantes et que les migrants arrivent sans danger au pays de destination[29].

Conclusion

Cette recherche s'inscrit dans le contexte actuel d'intensification des activités de maintien de l'ordre aux frontières, dans lequel la lutte contre l'immigration irrégulière et le trafic de migrants est devenue la priorité des États occidentaux, dont le Canada. Elle remet en cause le rôle joué par les organisations criminelles dans le trafic de migrants. Ainsi, les groupes impliqués dans l'immigration irrégulière relèvent de réseaux informels plutôt que des groupes criminels organisés. La menace que représente l'implication du crime organisé dans le passage clandestin d'immigrants est alimentée par les médias et exagérée par le discours politico-juridique dans le but de légitimer la lutte contre le trafic de migrants et mettre en place des mesures de contrôle migratoire.

Cette recherche a permis de comprendre l'expérience migratoire des demandeurs d'asile arrivés de façon irrégulière au Canada. Notre échantillon a permis d'obtenir différents résultats. La majorité des migrants qui empruntent des moyens irréguliers de migration et qui font appel aux passeurs sont victimes de violence et de persécution dans leur pays d'origine. Ils craignent sérieusement pour leur vie et, souvent, pour celle de leur famille. L'immigration irrégulière et le recours aux trafiquants sont l'effet pervers de la fermeture des frontières et du renforcement du contrôle

migratoire. Les témoignages des migrants et des informateurs-clés ont confirmé que l'appel au passeur est souvent la seule et dernière option pour atteindre le pays de destination en vue de revendiquer le statut de réfugié. En d'autres mots, les trafiquants comblent une demande et un besoin déjà existants.

Les récits des migrants, des avocats et des intervenants ont permis de remettre en question l'idée généralisée que les passeurs victimisent et exploitent régulièrement les migrants, et révèlent qu'au contraire, les passeurs permettent souvent à des migrants d'atteindre le Canada et de demander le statut de réfugié. Les données ont permis de montrer que la majorité des migrants interviewés ayant fait appel à des passeurs sont satisfaits de leurs services. La seule expérience discordante implique l'intervention de membres d'une organisation criminelle comme passeurs. Dans les autres cas, le passeur a simplement permis aux migrants d'arriver au Canada et de revendiquer le statut de réfugié. Toutefois, les récits des migrants et des informateurs ont révélé la vulnérabilité et les risques auxquels s'exposent les migrants en participant au trafic.

Nous concluons que les migrants et les demandeurs d'asile sont des victimes de la situation politique dans leur pays, des procédures strictes d'immigration et des exigences des pays occidentaux, dont le Canada. Les contrôles aux frontières et les moyens mis en place pour restreindre l'accès à ces pays risquent de victimiser davantage les migrants qu'ils ne criminaliseront les trafiquants.

Notes

1. Cet article est basé sur certains résultats de recherche de la thèse de doctorat intitulée *Le combat contre le trafic des migrants au Canada : Contrôle migratoire d'abord, lutte au crime organisé ensuite,* acceptée par l'Université de Montréal en mars 2007. Cette thèse a été codirigée par le professeur de criminologie Pierre Landreville et le professeur de droit François Crépeau.
2. Comité sénatorial permanent de la défense et de la sécurité, cinquième rapport sur *l'État de préparation du Canada sur les plans de la sécurité et de la défense,* février 2002 ; Comité permanent de la citoyenneté et de l'immigration, *Rapprochements transfrontaliers : Coopérer à notre frontière commune et à l'étranger afin de garantir la sécurité et l'efficacité,* décembre 2001. Gendarmerie royale du Canada, *Réseau de passeurs démantelé par la Gendarmerie royale du Canada,* 7 octobre 2001 ; Gendarmerie royale du Canada, Direction des renseignements criminels, *Contrebande de migrants illégaux par voie maritime,* Rapport des RC, septembre 1999.
3. Dans le préambule du *Protocole contre le trafic illicite de migrants par terre, air et mer additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée,* les États parties se disent « préoccupés par l'accroissement considérable des activités des groupes criminels organisés en matière de trafic illicite de migrants et des autres activités criminelles connexes énoncées dans le présent Protocole, qui portent gravement préjudice aux États concernés ».
4. *Protocole contre le trafic illicite de migrants par terre, air et mer additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée, Doc A/55/383,* adopté par la résolution A/RES/55/25 le 15 novembre 2000 et entré en vigueur le 28 janvier 2004. [Ci-après dénommé *Protocole contre le trafic.*]
5. *Convention des Nations Unies contre la criminalité transnationale organisée,* Doc A/55/383, adoptée par la résolution A/RES/55/25 le 15 novembre 2000 et entrée en vigueur le 29 septembre 2003. [Ci-après dénommée *CCTO.*]
6. Ministère des affaires étrangères et du commerce international, Le Canada ratifie la Convention des Nations Unies sur la criminalité transnationale organisée, le 14 mai 2002. Texte disponible à l'adresse Internet suivante : <http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?publication_id=379257&Language=F>.
7. *Infra* note 22.
8. Loi sur l'immigration et la protection des réfugiés, L.C. (2000), ch. 27, articles 117 et suivants. [Ci-après dénommée *LIPR.*]
9. Schloenhardt, Andreas, *Migrants Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region,* Leiden-Boston, Martinus Nijhoff Publishers, 2003 ; Salt, John, Hogarth, Jennifer, "Migrant Trafficking and Human Smuggling in Europe : A Review of the Evidence," dans Frank Laczko, David Thompson (dir.), *Migrant Trafficking and Human Smuggling in Europe: a Review of Evidence with Case Studies from Hungary, Poland and Ukraine,* Genève, Organisation internationale pour les migrations, 2000 : 11–164 ; Hill, Cindy. "Measuring Transnational Crime," dans Reichel, Philip, *Handbook of Transnational Crime & Justice,* Sage Publications, Thousand Oaks, 2005.
10. Chin, Ko-Lin. "The Social Organization of Chinese Human Smuggling," dans Kyle and Koslowski, *Global Human Smuggling Perspectives,* London & Baltimore, The Johns Hopkins University Press, 2001 : 216–234 ; Okolski, Marek. "Migrant Trafficking and Human Smuggling in Poland," dans Frank Laczko, David Thompson (dir.), *Migrant Trafficking and Human Smuggling in Europe: a Review of Evidence with Case Studies from Hungary, Poland and Ukraine,* Genève, OIM, 2000 : 233–328 ; Içduygu A., Toktas S. "How do Smuggling and Trafficking Operate via Irregular Border Crossing in the Middle East?," Evidence from Fieldwork in Turkey, *International Migration* 40(6), Blakwell Publishing, December 2002 : 25–54 ; Spener, David, "Smuggling Migrants through South Texas : Challenges Posed by Operation Rio Grande," dans Kyle and Koslowski, *Global Human Smuggling in Comparative Perspective,* Baltimore, The Johns Hopkins University Press, 2001 : 129–165.

11 Morrison, John, Crosland, Beth. *The trafficking and smuggling of refugees, the end game in European asylum policy?,* UNHCR's Policy Research Unit, Avril 2001 ; Chin, Ko-Lin. *Smuggled Chinese: Clandestine Migration to the United States,* Philadelphia, Temple University Press, 1999.

12. Tous les immigrants, à l'exception d'un seul, ont été rencontrés au centre Jardin Couvert de Montréal. Le Jardin Couvert est un programme communautaire du YMCA Centre-ville de Montréal, qui vise l'accueil des demandeurs d'asile, l'intégration des réfugiés et le rapprochement des cultures. Il est le milieu où les demandeurs d'asile sont généralement dirigés par les autorités canadiennes de l'immigration lorsqu'ils arrivent aux points d'entrée au Canada par le Québec.
13. Les demandeurs d'asile consultés sont originaires des pays suivants : Burundi (4), Colombie (4), Mexique (3), Albanie (2), Tchad (2), Congo (2), République dominicaine (2), Cameroun (1), Guinée (1), Mauritanie (1), Pérou (1), Togo (1) et Venezuela (1).
14. Les avocats ont été choisis en fonction de leur expertise et de façon à assurer une diversification. Ils ont été sélectionnés en fonction du type de clientèle qu'ils assistent et selon la communauté culturelle auprès de laquelle ils travaillent. À cet égard, on a cherché à trouver divers avocats qui travaillent majoritairement auprès des immigrants provenant, entre autres, d'Amérique du Sud, des pays musulmans, des pays asiatiques et d'Europe de l'Est. Tous les avocats ont leur bureau dans la région de Montréal.

    L'échantillon des intervenants qui travaillent auprès de réfugiés comprend également cinq informateurs. Il y a au total sept femmes et trois hommes ; cette répartition est le fruit du hasard. Tous ont une bonne expérience, dont deux comptant plus de 20 ans de travail auprès des réfugiés. Les organismes ont été choisis en fonction de leurs objectifs et mandats, ainsi que pour le type de clientèle qu'ils assistent.
15. Tous les noms des interviewés sont fictifs afin de préserver leur anonymat.
16. Plus d'une raison a pu être invoquée par l'interviewé pour fuir son pays.
17. Au Canada, plusieurs critères doivent être remplis pour que la Commission de l'immigration et du statut de réfugié (CISR) confère l'asile à un immigrant. Il existe deux possibilités. D'abord, le revendicateur doit être reconnu *réfugié, au sens de la Convention,* s'il a des raisons sérieuses de craindre la persécution dans son pays d'origine du fait de sa race, de sa religion, de sa nationalité, de ses opinions politiques ou de son appartenance à un groupe social (art. 96 LIPR). Deuxièmement, il doit être reconnu comme *personne à protéger,* si le renvoi vers son pays d'origine l'exposerait, soit au risque d'être soumis à la torture, soit à une menace à sa vie, soit au risque de traitements ou de peines cruelles et inusitées (art. 97 LIPR).
18. Tous les immigrants faisant partie de notre échantillon ont fait la demande de statut de réfugié et, lors de notre rencontre, la majorité était en attente de la première audience devant la CISR.
19. Voir la liste des ambassades canadiennes à l'adresse suivante : <http://www.dfait-maeci.gc.ca/world/embassies/menu-fr.asp>.

20 Le Canada a levé la dispense de visa à plusieurs pays qui sont, dans la plupart des cas, des pays producteurs des réfugiés. Voir Citoyenneté et Immigration Canada, *Le visa de visiteur est maintenant obligatoire pour les citoyens de la Dominique, de la Grenade, de la Hongrie, de Kiribati, de Nauru, de Vanuatu et du Zimbabwe,* communiqué de presse de la ministre de la Citoyenneté et de l'Immigration Canada, Elinor Caplan, le 4 décembre 2001.

21. *Supra* 3, article 3 (b).
22. *Supra* 3, article 3 (a).
23. En vertu de l'article 117 de la LIPR : « Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada. »
24. En vertu de l'article 121 (2) de la LIPR : « *On entend par organisation criminelle l'organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction* ». Et en vertu du Code criminel [art. 467.1(1)], « Organisation criminelle est un *groupe, quel qu'en soit le mode d'organisation a) composé d'au moins trois personnes se trouvant au Canada ou à l'étranger ; b) dont un des objets principaux ou une des activités principales est de commettre ou de faciliter une ou plusieurs infractions graves qui, si elles étaient commises, pourraient lui procurer — ou procurer à une personne qui en fait partie —, directement ou indirectement, un avantage matériel, notamment financier. La présente définition ne vise pas le groupe d'individus formé au hasard pour la perpétration immédiate d'une seule infraction.* »
25. Voici les montants déboursés par les immigrants interviewés : Tony, d'Albanie, a payé 5000 $US au passeur pour l'amener depuis l'Albanie jusqu'aux États-Unis. Le prix comprenait un faux passeport italien avec sa photo, l'aller en Italie (Bari) par bateau, et le transport en avion pour les États-Unis, l'accompagnement par le passeur jusqu'au passage du contrôle d'immigration dans le pays de destination. Tony a également versé 1000 $ au passeur pour traverser la frontière illégalement en sautant dans un train de cargaison en marche dans le tunnel Detroit-Windsor. Charlie, d'Albanie, a payé 10 000 $US pour que le passeur l'amène jusqu'au Canada. Le prix comprenait un faux passeport italien avec sa photo, l'aller en Italie (Bari) en avion, le transport en avion pour le Canada, l'accompagnement par le passeur jusqu'au

passage du contrôle d'immigration canadien. Baidy, de Mauritanie, a payé 220 000 CFA (500 $CAN) pour l'obtention des papiers. Minarakore, du Burundi, a obtenu pour 500 $ un passeport tanzanien avec sa photo et un visa pour le Canada, plus une commission pour le passeur. Pour deux millions FCFA (5000 $CAN), Soleil, du Congo, a obtenu un acte de naissance, un passeport gabonais et un visa pour entrer aux États-Unis. Laurent, du Congo, a obtenu pour 5000 $ les services d'accompagnement du passeur jusqu'au Canada. Fernando et Maria ont payé 10 000 $US pour passer du Guatemala aux États-Unis.

26. Le Groupe de travail sur la criminalité transnationale a établi que si l'influence sur le Canada de la corruption d'agents étrangers est limitée, l'immigration illégale, liée à la corruption, constitue quand même une source de préoccupation pour le pays. Source : MacLaren, Alasdair, *Incidence sur le Canada des actes de corruption dans d'autres pays d'agents publics étrangers,* Groupe de travail sur la criminalité transnationale, septembre 2000.
27. *Supra* 9.
28. *Ibidem.*
29. Dans le cadre de cette recherche, nous possédons uniquement le point de vue et le témoignage des migrants qui sont arrivés au Canada et qui ont demandé le statut de réfugié. Ceux qui ont fait appel à un passeur et dont le processus migratoire a échoué ne sont pas ici pour témoigner de leur expérience. Nous n'avons pas non plus le point de vue de ceux qui continuent d'être sous le contrôle des passeurs et qui ne sont pas libres de parler.

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Good Material: Canada and the Prague Spring Refugees

Laura Madokoro

Abstract

In August 1968, the Soviet Union sent troops into Czechoslovakia to crush the burgeoning spirit of reform known as the "Prague Spring." The Soviet invasion and the return of oppressive government measures triggered the flight of twenty-seven thousand people, eleven thousand of whom came to Canada. Using newly released archival records, this paper explores how the Canadian government approached the refugee crisis and argues that confident officials, buoyed by a charismatic leader and operating in an era of improved East-West relations, manipulated the conventional definition of a refugee and consciously adopted policies that enabled large numbers of Czechoslovakian refugees to resettle in Canada.

Résumé

En août 1968, l'Union soviétique envoie des troupes en Tchécoslovaquie pour écraser l'esprit de réforme en plein essor dit du « Printemps de Prague. » L'invasion soviétique et le retour de l'oppression étatique ont entraîné la fuite de vingt-sept mille personnes, dont onze mille sont venues au Canada. À l'aide de documents d'archives nouvellement rendus publics, l'auteur étudie la réaction du gouvernement canadien à cette crise des réfugiés et soutient que les autorités, confiantes, soutenues par un leader charismatique et opérant dans une atmosphère d'amélioration des relations Est-Ouest, ont manipulé la définition acceptée de réfugié et consciemment adopté des politiques qui ont permis à grand nombre de réfugiés tchécoslovaques de s'installer au Canada.

> In the wake of the 1968 invasion, the vast majority of the newcomers to the West did not undergo the risk of combating the Iron Curtain in the darkness of the Sumava forest; rather they arrived with passports and often by car, fully loaded.[1]

Introduction

In August 1968, Canadian prime minister Pierre Trudeau was vacationing in Spain, enjoying the warm sun and savouring the fine food of the region. In a very different part of Europe, Soviet and Warsaw Pact troops were massing on the borders of Czechoslovakia, preparing to put an end to the period of blossoming freedom and intellectual ferment known as the "Prague Spring." The Soviet invasion was a brutal reminder that the Cold War conflict, which seemed to have abated with the rise of détente in the early 1960s, had not yet been resolved. The invasion caused the flight of many thousands of Czechoslovakians and invited the possibility that Canada, and its allies in the North Atlantic Treaty Organization (NATO), would respond militarily to the violence. What would Canada do? Would it go to war to protect the borders of an independent nation? Would it help the refugees? The first option was never seriously considered but the issue of refugees framed much of the debate around the Canadian response to the crisis. This article explores how the Canadian government approached the refugee crisis in 1968 and argues that officials, buoyed by a charismatic leader and operating in an era of improved East-West relations, manipulated the conventional definition of a refugee and consciously adopted policies that enabled large numbers of Czechoslovakian refugees to resettle in Canada.

In doing so, this article takes the concept of "agency" and applies it to state officials rather than the migrants who were subject to their decisions. For the past ten years, scholars have revised the historic representation of refugees, turning to categories of analysis that acknowledge greater decision-making agency on the part of those individuals who choose to abandon situations of violence, poverty, and inequality.[2] This emphasis on choice has caused the traditional image of the persecuted refugee to be replaced with someone who, rather than being forced to leave, makes a conscious decision to do so.[3] Increasingly, the line between an economic

migrant (someone who moves for employment or business opportunities) and a refugee is blurring: "technically, refugees flee to save their lives, and migrants to improve their economic prospects; but distinguishing between them becomes difficult when people flee from countries where poverty and violence are direct consequences of the political system."[4] This article argues that governments, along with migrants, contribute to this convergence with implications for how countries of resettlement perceive, and prepare for, potential migrants. As a result, refugee agency must be understood against the reality that regardless of how much an individual can manipulate official categories of migration for their own purposes, the ultimate decision regarding their legal entry and resettlement still rests with the nation-state.

The movement of people from East to West between 1945 and 1989 provided an opportunity for committed anti-Communist governments to score strategic propaganda victories. Mass refugee movements, individual asylum seekers, and celebrated exiles were exploited to demonize repressive regimes in the Eastern bloc and simultaneously demonstrate the greatness of democratic societies. Governments in Western settler countries such as Canada, Australia, and the United States, with long traditions of using immigration policy to build nations in their own image, responded to the plight of the refugees based on the twin desires to communicate a message on the world stage and to advance the economic and social development of their nations. When the Soviet Union invaded Hungary in 1956, it created the first major exodus of "freedom fighters" to the Western bloc. Canada arranged for the transportation and settlement of thirty-seven thousand Hungarians in the largest single refugee movement to the country up to that point. It was a huge humanitarian effort and a major propaganda victory.

A decade later, the "Cold War refugees" of 1968 were seen quite differently by countries in the West. In Canada, officials viewed the "refugees" through the generous and optimistic lens of accommodation with the Soviet Union and stepped back from using the humanitarian crisis for propaganda purposes. Based on new archival evidence, this article shows how aid was extended based on national interests defined predominantly by labour and economic needs.[5] Discussions amongst officials in the Departments of Manpower and Immigration and External Affairs show that moderate views of the Soviet Union and a pragmatic view of migration policy as enshrined in the newly minted 1967 Immigration Act determined the nature of Canadian aid to the Czechoslovakians who fled the Soviet violence in 1968. In the process, the very essence of who, and what, the Canadian state considered a refugee was transformed.

Conceptualizing Choice

The legal concept of a refugee emerged after the Second World War when organizations such as the Intergovernmental Committee on European Migration (ICEM) and the United Nations High Commissioner for Refugees (UNHCR) were established to deal with the fallout of millions of displaced people. Concern for and a desire to protect the most vulnerable of people encouraged the growth of an international refugee regime, which was enshrined in the 1951 United Nations *Convention relating to the Status of Refugees* (Refugee Convention) and the associated 1967 Protocol.[6] The term "Convention Refugee," which places the onus on individuals having a "fear of persecution" to merit resettlement, has been manipulated by countries since its introduction, interpreted according to each signatory's legislative framework. In some countries entire bureaucracies have sprung up, dedicated solely to implementing the Convention. In others, only certain aspects of the Convention have been incorporated into national immigration laws, often in an *ad hoc* manner.[7] In tandem with these changes, the ideological foundations of the Cold War that led to the initial categorization of a refugee have ebbed and flowed over the years, as has the implicit sense of persecution embodied in early postwar use of the term. In fact, the term has come to be seen by many interested parties as simply a convenient tool to access settlement in a foreign territory.[8] The possibility of refugees posing some kind of threat, either as Communist infiltrators at the height of the Cold War, or more recently as resource-consuming unskilled labour, has evolved concurrently.[9]

Earlier conceptualizations of people displaced by war and trauma cloaked individuals in tragedy and despair.[10] After the Allied victory in Europe, refugee advocates masterfully exploited images of suffering and impoverishment to create a sensibility amongst the policy-makers and citizens in potential receiving countries that would facilitate the reception of refugees escaping the devastation on the Continent.[11] Caring for refugees was transformed into a virtuous and noble undertaking, one that demonstrated compassion and generosity. Some scholars have even declared that a country's refugee policy defines its very character. In the words of Canadian academic Howard Adelman, "Refugee policy is the litmus test of the concept of justice in a society."[12]

How states categorize migrant types has significant implications for how we understand the 1968 Czech movement and the Canadian state's response to crisis in the middle Cold War period. This article will show that the Czech refugees, long categorized as victims of Soviet violence and deserving of international humanitarian assistance, may not have actually fit this depiction and that, moreover, governments of the day knew this. This is a critical connection for if we rethink "refugee" as a category then, by necessity,

we also need to review how nation-states deal with humanitarian crises.

Regardless of how much agency an individual possesses, the ultimate decision regarding their legal entry and resettlement rests with the nation-state. It is generally assumed that states are motivated to act out of self-interest, to obtain a benefit or reward or to fulfill a particular objective.[13] Some scholars emphasize the significance of public opinion while others point to geopolitics as critical determinants in determining the nature of refugee aid.[14] In Canada, there is an additional line of argument that suggests the federal Liberal Party (which was in office at the time of the 1968 crisis) is the natural governing party of the country.[15] This political success is seen by many as stemming from the Liberals' historic ability to manipulate migration issues for electoral purposes.[16] Its efforts in "courting the immigrant vote" are well documented.[17] However, for a group to exercise influence on the political process they must be strategically important and this has never been the case for the Czech and Slovak communities in Canada. Dispersed across the country, often in sparsely populated districts, the communities' relationship with the Canadian state has never been an intimate one. In fact, it has often been subject to intense suspicion because of fears that the community's members were not committed to being "loyal Canadian subjects."[18] The rationale for extending millions of dollars in aid and resettling twelve thousand Czechs following the Soviet invasion came from another source.

History of the Czechs and Slovaks in Canada

The earliest Czech and Slovak migrants were agricultural and manual labourers who came to Canada at the end of the 1880s as settlement expanded westward.[19] By the end of the First World War there were only six thousand Czechs and Slovaks in all of Canada. However the population grew dramatically in the interwar period to thirty thousand by 1931, largely due to turmoil at home and restricted access to the United States.[20]

In 1938, the community's numbers increased slightly when the Canadian government resettled 1,200 Sudeten Germans from Czechoslovakia, encouraged by funding and political pressure from the British government in London.[21] In many ways, this earlier movement foreshadowed the decisions taken in 1968. Mackenzie King's government was determined to admit only a select group of refugees: "Many of these refugees … were skilled craftsmen, professionals and farmers—exactly the kind of settlers Canada wanted …"[22] The end of the Second World War marked another convulsion in migration from Eastern Europe to Canada as thousands of people fled oppressive, unstable regimes for opportunities overseas. The 1961 census recorded 73,061 Czechs and Slovaks in Canada, almost half of whom were born overseas. Significantly, 72.9 per cent of Eastern European immigrants who came to Canada between 1946 and 1961 cited politics as the reason for their decision to migrate.[23] Tight border controls imposed after the Communist coup in 1948 limited migration out of Czechoslovakia; however, the Canadian government did make a special effort to assist the "thousands of Czech officials caught on the wrong side of the Communist take-over."[24] This was both surprising given the government's fear of Communist infiltrators and understandable considering the great sympathy with which officials regarded the most "Western" of the Eastern European states.[25] Despite this historic affinity, the Cold War damaged ties between Canada and Czechoslovakia. Relations became so strained that at times even the most routine and administrative of matters could give rise to diplomatic tensions.[26] In 1954, members of the Czech community protested vigorously because they believed that Canadian authorities were preventing their families from joining them. Frustrated officials in the Department of External Affairs blamed the Czech government for refusing to issue visas and lobbied their counterparts in Prague to be more open.[27]

By 1968, Czech-Canadian relations were in a holding pattern. Canada had started selling wheat to the Eastern bloc in 1956 but ideologically the two nations were far apart. However, when changes in party leadership brought Alexander Dubček to power (replacing Stalinist-loyal Antonin Novotny) and Czechoslovakia's Communist leaders began to experiment with the idea of "socialism with a human face," Canadian officials became more hopeful. Excitement grew (both in Czechoslovakia and amongst observers in the Western bloc) as censorship rules were relaxed and a presidential amnesty was issued for all the victims of the Stalinist purges. There was a sense of real opportunity for change.[28] The Soviets actually seemed prepared to allow some degree of liberalization until a group of intellectuals presented an indictment of the previous two decades of Soviet rule titled "Two Thousand Words." Incensed, the Soviet leadership decided to resort to violence to curb any further liberalization efforts.[29] The Soviet Union, along with its Warsaw Pact allies, invaded Czechoslovakia on August 20, 1968. Thousands fled the country, including many of the intellectuals, writers, and artists who had participated in the exciting, heady days of the Prague Spring.[30] Others, caught abroad at the time of the invasion, waited to see what would happen next. The government in Prague soon became one of the most orthodox and repressive Soviet satellites and many vacationers never returned home. Instead, they were joined by the 150,000 people who fled the country in the year following the invasion in search of resettlement opportunities abroad. Twenty years later,

there was still one person crossing the border into Austria every four hours.[31]

The Canadian Reaction

Upon news of the invasion, Cabinet asked Prime Minister Trudeau to return from his holidays prematurely. Trudeau immediately agreed, offering to stop in London to discuss the situation with British prime minister Harold Wilson, but his ministers discouraged him. Cabinet wanted Trudeau to consult with them before visiting with heads of state abroad.[32] Back in Ottawa, the prime minister led a response that was both cautious and strategic in its approach. Canada's NATO membership meant it had to consider the possibility of a military intervention if Soviet violence spread across Eastern Europe. The Canadian government wanted to avoid this situation so the government's official statement carefully tried to denounce Soviet tactics while avoiding suggestions that an aggressive Western response was in the works. The government condemned the invasion as "a flagrant breach of the principle of non-intervention" and called it a "tragedy for all people who prize human freedom and national independence."[33] The statement portrayed NATO's "ultimate goal" as "seeking a durable East-West accommodation."[34]

Many Czechoslovakians were frustrated by the reaction of the West to the invasion of their homeland. The intellectual Ivan Svitak writes:

> Among the international consequences of the Soviet invasion of Czechoslovakia was the hypocritical rhetoric of Western liberals, who did not move a finger in the critical situation, because they were fascinated by a bridge-building policy toward the Soviet Union …. Another, and the worst, consequence was the détente policy which rewarded Soviet aggressive postures with far-reaching concessions. The Soviet intervention worked in the short run, and history again seemed to confirm that the West has written off the Czechs and the other Central Europeans behind the Iron Curtain.[35]

The United States was alone in wanting to exploit the crisis to demonstrate NATO solidarity and commitments in Europe. To this end, it pushed the organization to broadcast a statement that would reaffirm its commitment to maintaining current troop levels in Europe. Trudeau refused to go along.[36] Shortly after assuming office in the spring of 1968, his government had embarked upon a massive foreign policy review and he wanted to complete it before taking any new steps, or confirming any *status quo* positions, regarding Canada's NATO membership.[37] Nevertheless, the Soviet invasion required at least some consideration by Canadian officials about what Soviet actions meant for international peace and security, and Canadian diplomats immediately engaged with the broader implications of the crisis.

For the most part, Canadian officials interpreted the Soviet Union's invasion as a sign of insecurity rather than belligerence. From his perch at the Canadian embassy in Moscow, Ambassador Robert Ford suggested that "it would be a mistake … to interpret the Soviet invasion in Czech as prelude to a more aggressive military or political policy in Europe."[38] This was in tune with Trudeau's world view. While the prime minister was certainly not blind to the failings of Communism under Leonid Brezhnev, he was more sympathetic than many of his contemporaries to Soviet intentions. Instead of regarding their every act as evidence of aggressive expansion, Trudeau believed in respecting Soviet spheres of influence.[39] This meant that Trudeau was unwilling to encourage or condone conflict (economic, political, or ideological) with Soviet authorities. According to one historian: "Pierre Trudeau loathed totalitarianism and the repression it meant for its subject peoples … Yet Trudeau believed that in a world that was ideologically polarized, armed to the teeth and flirting with nuclear disaster, dialogue was preferable to confrontation."[40] These philosophical underpinnings and Trudeau's belief in the legitimate authority of governments (elected or otherwise) shaped his perceptions of the Soviet Union and its aspirations in the international arena.

In dissecting the thinking behind the invasion, Canadian officials concluded that the Soviets were trying to prevent any further liberalization within the Warsaw Pact. A week and a half after the invasion, senior officials in the Department of External Affairs completed a detailed analysis of the recent Soviet activity, in which they referred to "the emotionalism which has clouded Soviet judgment throughout the Czech affair" and the Russians' "extraordinary ignorance of the Czech realities." The memo concluded that the Soviet "position in East Europe is fundamentally weaker" because of the invasion and suggested, therefore, that the Soviet Union might become "less predictable."[41] Canadian diplomats worried about the state of affairs within both the Soviet Union and the Warsaw Pact generally in terms of the potential for greater conflict and violence. The Canadian government therefore adopted a policy of being as "unprovocative as possible," sensing that an "ideological breakup was taking place in Eastern Europe."[42] The media and the Czech and Slovak communities in Canada called upon the government to pay attention to the plight of those caught behind the invasion. Ottawa resisted. Taking issue with editorials in the *Globe and Mail* in particular, officials told Mitchell Sharp, the Secretary of State for External Affairs: "We can facilitate the entry of Czech refugees to Canada; we cannot help them escape from Czechoslovakia. To pretend we can would only

encourage false hopes and in fact make such escape more difficult."[43] As a result, the larger refugee situation and the Canadian response to it took some time to develop. Only when population flows into neighbouring Austria failed to abate weeks after the invasion did Canada look at the crisis from a more compassionate perspective.

Officials in the Department of External Affairs were the first to sound the alarm about a possible humanitarian crisis. On Labour Day weekend, recalled by some as "warm and sunshiny," Mitchell Sharp convened a gathering of senior bureaucrats from his department and a select few from the Department of Manpower and Immigration to discuss the "deteriorating situation."[44] The numbers of Czechs leaving the country continued to grow daily, and Sharp worried whether Austria was in a position to continue to absorb the flow from across the borders. In the recollections of some participants, the decision to provide refugee status to the Czechs came directly from the Secretary of State for External Affairs at this meeting.[45] One official explains: "There was no cabinet memorandum, nor indeed any discussion among Ministers. Mitchell Sharp made the decision and I can only assume made his peace with the Prime Minister and Mr. MacEachen (Minister of Manpower and Immigration) after the fact."[46] External Affairs may have led the initial charge but determining the logistics for implementing the special program was left to the devices of senior officials in Manpower and Immigration.

Offering Assistance

After External Affairs made the decision to examine the refugee situation, immigration officials turned their attention to reports about the refugees themselves. There was tremendous reluctance on the part of Canadian authorities to refer to the Czech refugees as "freedom fighters." In fact, a number of scholars have pointed to how different the Czech refugees were from earlier movements. In her work on the operations of the UNHCR in this period Louise Holborn notes the difference between the "68ers" and earlier refugees from Czechoslovakia. The group was "composed of much younger people—students, teachers, scientists, journalists and doctors. Many of them spoke English, French and German. They were in possession of valid passports, and often had financial means."[47] Similarly, Gil Loescher has observed that "most of the people did not seek to apply for asylum immediately but preferred to wait and see how the situation evolved in Czechoslovakia before deciding on a course of action." International organizations hesitated to label the Czechs as refugees for fear of creating an "artificial refugee problem."[48] It would look bad for everyone involved if somebody labelled a refugee opted to return home rather than be resettled. Canadian officials examined reports from Vienna, which emphasized the migrants' levels of education and employment qualifications, and began to think about how the country could best respond to the situation.[49] The key seemed to lie in the potential for the refugees to become important contributors to the Canadian economy.

The discussion around the economic potential of the Czech refugees was rooted in the broader shift in Canadian immigration policy in this period. Concerned about Canada's competitive edge, the federal government began to develop labour market policies in the early 1960s to promote the growth of professional services, entrepreneurial ventures, and lucrative industries such as manufacturing and production.[50] A large supply of skilled labour was required. Canadian universities were growing exponentially, producing thousands of new graduates annually, but still the government remained concerned. One solution was to increase immigration numbers. This new philosophy was enshrined in the 1967 Immigration Act, which provided for a points system to determine eligible migrants to Canada. The selection system that was introduced stressed skills, education, and adaptability and removed discriminatory clauses against formerly penalized areas such as Asia. The very restructuring and renaming of the Department of Citizenship and Immigration to the Department of Manpower and Immigration showed the emphasis the government was placing on migrants as a source of labour. Recruiting skilled migrants was a competitive business. As Ather Akbari explains, there was a "general relative international scarcity of highly trained manpower" and "economic indicators within Canada suggested that the postwar economic boom was over" so migrants did not necessarily see the country as a destination of choice.[51] As a result, the government was determined to use every opportunity to recruit skilled workers to Canada and the Czech crisis provided a nice opening, if it could be handled properly.

The Canadian government was drawn to the possibilities of acquiring highly skilled labour with the Czech refugees but at the same time, the archival records show that one of the major concerns for the government was managing the number of potential refugees. Officials in External Affairs cautioned that "political developments in Czechoslovakia may result in a much larger movement."[52] In other words, depending on how Moscow treated Dubček and what happened with border controls, the possibility of a larger exodus remained. In fact, Ottawa thought Moscow was "content to leave the borders fairly open so that liberal elements could eliminate themselves from the picture."[53] Canada was therefore loath to announce any grand resettlement scheme even though officials could barely disguise their interest in extending a helping hand to some of the Czech refugees, for they discerned tremendous economic potential in the

highly skilled and well-educated numbers that were leaving the country.

Trudeau's government needed a strategy that would avoid encouraging a mass exodus, which would upset the Soviets and liberal elements in Czechoslovakia, and yet would allow it to obtain the highly skilled refugees it so brazenly coveted. Canadian policy was to be selective, designed to facilitate the movement of only particular refugees.[54] Clever officials subsequently decided to apply the refugee definition to individuals who were outside of the country at the time of the invasion. This was a creative (mis)use of the legal definition of a Convention Refugee in order to give Canada's project in Austria greater legitimacy. Given that Canada only signed the Convention in 1969, officials had a fair bit of room to manoeuver on this front. One immigration officer recalls that he "had no problem with fudging the definition because the quality of the people who were asking to immigrate was so high."[55] Ironically, Allan MacEachen, the Minister of Manpower and Immigration, referred to the importance of selecting "true refugees" but the government's approach revealed a willingness to create an inflated sense of humanitarian need in the interest of obtaining high-quality migrants.[56]

In all of the discussions about whether to assist the Czech refugees, the precedent set by the Hungarian refugees in 1956 loomed large. At the time, Prime Minister St. Laurent's Liberal government had provided free transportation to those who wanted to come to Canada and in 1968 Allan MacEachen pushed his colleagues to take similar action. There was a great deal of reluctance. Some ministers pointed out that the Czechs seemed to be more financially stable than many immigrants coming to Canada. They proposed to offer loans rather than grants but MacEachen accused them of hypocrisy. He maintained that it would be "morally and politically indefensible to draw such a distinction between current Czech refugees and those from Hungary in 1956."[57] Cabinet eventually concurred and agreed to offer free resettlement services to the Czechs, placing them in the same category as the Hungarian refugees who had received generous financial and moral support twelve years earlier.

On September 6, the government announced a limited program whereby it would issue visas for those Czechs interested in migrating to Canada according to the "relaxed standards traditionally offered to refugees."[58] Normal requirements for sponsorship, potential employment, and financial assistance were waived. The government also set aside an initial $2 million to cover the travel and settlement costs for an expected two thousand refugees. Immigration officials decided to use the nine selection factors that were inscribed in the 1967 Immigration Act as a guideline for selecting refugees. As one official explains, this gave "the selection officers a good deal of discretionary power."[59] The refugees Canada selected for resettlement were seen as "'good material': predominantly young and well educated."[60] Gerald Dirks and Michael Lanphier have both commented on the "high quality" of refugees that Canada recruited during this movement: 19 per cent of the household heads had more than twelve years of formal education and 33 per cent were either skilled or professional workers.[61] Not wanting to risk the "survival of the Czech intelligentsia"[62] Canada declared from the start that its policy was to "accept but not recruit refugees."[63] However, the reality was that Canada was very interested in recruiting refugees and it proceeded to do so in Austria, in a manner that was hidden from both the Canadian public and Czech officials in Prague. The government was so successful in this vein that by October 1968 officials in External Affairs were able to report that the Czech government in Prague appreciated the "humanitarian, non-aggressive approach" and "accepted this as a concrete indication of (Canada's) moral support."[64]

The day before making a public announcement about the special program for Czech refugees, Allan MacEachen asked his cabinet colleagues what they thought of having a team go to Europe "for the purpose of contacting refugees who were highly qualified in scientific and technological fields and who may be interested in coming to Canada."[65] The politicians who remembered the success of Jack Pickersgill's trip to Vienna at the time of the Hungarian Revolution embraced this suggestion. However, External Affairs was opposed to the plan, declaring that "it had the appearance of a gratuitous political gesture which could be taken by the Russians as a desire on our part to make "cold war" propaganda."[66] Despite this opposition, ambitions to secure the best talent before rivals like Australia and the United States could do so propelled the mission forward.[67]

In due course, a special delegation, headed by Andrew Thompson (Member of Parliament for Toronto–Dovercourt) and including representatives from the Canada Council, the National Research Council, and other professional bodies, was dispatched to Vienna. When questioned in the House of Commons about the ethics of taking the "cream" of the movement, MacEachen defended the team's mission, arguing that everyone was welcome to apply and the team was to "assist the specially qualified Czechoslovakians who may want to come to Canada by exploring with them the opportunities that are available in the country. There is no intention … of taking any exclusive attitude toward any group of refugees."[68] Canada needed to sell itself and the special mission to Vienna was the best way to do it. Canada was well aware that migrants in Austria were gathering intelligence from each other about where the best place to resettle would be and learned to evaluate the many options that Western

countries, desirous of their talent, offered them. One immigration officer recalls, "They met other like-minded refugees in Vienna and talked about 'destination options' and which country had the 'better offers.'"[69] Humanitarian assistance was a competitive venture. Australia accepted six thousand refugees while the United States facilitated the entry of just over eleven thousand. Given Canada's comparative size, it seems that its officials excelled at recruiting potential migrants.

Interest in securing the best migrants prompted the government to act quickly, and traditional concerns that marked earlier movements, such as security and threats of Communist infiltration, were generally considered in hindsight.[70] The initial flow of refugees into Austria dwindled by October and Cabinet began to discuss ways of winding down the program. However immigration officials, who continued to monitor the situation in Vienna, noticed that very little of the two million dollars the government had set aside to assist the refugees had been used, so they began to envision ways to expand the program. They turned their attention to the possibility of enticing Czech students to come to Canadian universities and to facilitate their integration by providing language training. If any money was left over, officials argued that it could be disbursed to other Czech refugees for educational purposes.[71] This was far above what immigrants normally received in support from the government; however, Allan MacEachen lobbied for this expanded policy, arguing that Canada had a special commitment to the Czech refugees because "they had been specially invited and assisted."[72] It seems the government wanted to continue to extend special invitations under the guise of alleviating a humanitarian crisis. The original two thousand spaces allocated for Czech resettlement multiplied to twelve thousand by the spring of 1969, in large part because the educated and skilled refugees proved to be such "good material."

Coming to Canada

The relative affluence of the Czech refugees is one of the many factors that points to the problems with the conventional and overly romantic depiction of a refugee as destitute and helpless. Most of the Czech refugees who came to Canada paid their own way or opted to take out loans to fund their voyage. The first to arrive flew into Toronto on September 15, 1968. They consisted of a group of 203 refugees, most of whom had friends and family in Canada.[73] The *Globe and Mail* celebrated their arrival, profiling one "blond girl" in particular. According to the glowing article, she was "22, pretty, single and an architecture student. She wants to continue her studies in Canada."[74] The group was described in radiant terms: "as well dressed as any planeload of passengers getting off flights in Toronto, Montreal or New York" and "according to Immigration Department officials they include a small gold mine of talent."[75] The first group of two hundred plus refugees included medical doctors, dentists, fifteen engineers, and two television set designers. Many of the refugees settled in Ontario although a significant proportion also made their way to the prairie provinces of Manitoba, Alberta, and Sasktachewan where earlier Czech immigrants had established themselves.

By all accounts, the integration of the Czech refugees occurred relatively smoothly. It seems that many sectors of society participated in their resettlement, as the *Annual Report of the Department of Manpower and Immigration* for 1968–69 draws special attention to the role that private organizations and individuals played in helping with the arrival of the Czech refugees.[76] Behind the scenes, government officials continued to worry about the impact of the refugee movement on diplomatic relations with Czechoslovakia but for the most part the government's decisions did not affect the daily, lived experience of the Czechs in Canada.[77] The other positive indicator was the high employment rate for the refugees even in the immediate period following their arrival. At the end of October, the *Globe and Mail* reported that over eight hundred refugees had found work, almost half in their own professions.[78] A longitudinal study prepared by government found that the unemployment rate for the Czech migrants, after three years of being in Canada, was just above the national average (quite extraordinary considering the short time in which the refugees had been participating in the Canadian job market) and "a certain but only moderate occupation deflection in comparison with jobs held in Czechoslovakia."[79]

One particularly telling statistic about the success of the program is how few Czechs returned to Czechoslovakia. Almost a year after the migrants arrived, only six hundred of the twelve thousand refugees had gone back.[80] When individuals did decide to leave, the most vigorous attempts to dissuade them came from ardent anti-Communist Czech community organizations. The Masaryk Memorial Institute, which had been instrumental in settling thousands of Czech refugees in Ontario, tried to engage the government in preventing departures. In a lengthy petition, the Institute claimed that these refugees "made their decision to return to Czechoslovakia (during) a momentary feeling of depression and would probably be very sorry a few weeks after returning." They blamed Canadian authorities for raising false "expectations as to schooling and jobs and we are afraid that perhaps the problem of starting a new life in this country are not stressed strongly enough by our officials in Vienna."[81] Officials in Ottawa refused to curtail anyone's return home, even if it meant a possible propaganda victory for the Eastern bloc. For the government, the vast majority

who were determined to stay in Canada was victory enough. And as the political scientist Reg Whitaker has noted, given that it cost the government less than $1,000 to resettle each refuge, officials were probably quite pleased with the return on their investment.[82] The only disconcerting element to all of this was that the movement was presented to the Canadian public as a humanitarian one, not a self-serving one.

Conclusions

As the first group of Czech refugees prepared to leave for their new homes, the Canadian representative in Vienna told them, "You have all reached a difficult and momentous decision … Canada is glad to offer you a new home, but is saddened by the circumstances that have brought you to this step." He wished them "peace, contentment and a goodly measure of success, and especially may you establish a firm basis for the future of your children, in my country, which is so proud to welcome you!"[83] From the moment they conceived of a special program to assist Czech refugees, Canadian officials hoped that they would stay for the long term and make important contributions to the economic and social life of the country.[84] These hopes translated into public statements that reassured Canadians that aiding the Czech refugees did not pose a threat to their economic welfare or political security and that the offer of relief was indeed a noble and virtuous undertaking.[85] It was a carefully constructed charade, for Canadian officials also wanted to avoid embarrassing the Soviet Union during the crisis. There were many reasons for this subtle game of doublespeak but there is no doubt that the government communicated one message and acted on another.[86]

Politicians and scholars alike consistently reference the aid that Canada provided the 1956 victims of the Hungarian Revolution as a hallmark of generosity and selflessness.[87] No similar mythology exists around the Czech refugee movement of 1968. Scholars have ignored it, as have the participants. Neither Mitchell Sharp nor Pierre Trudeau mention the movement in their memoirs. By contrast, Jack Pickersgill describes his intervention in the Hungarian crisis as the highlight of his time with the Department of Citizenship and Immigration.[88] Perhaps it is difficult to be self-congratulatory when a movement serves ulterior motives. While the government spoke of saving refugees from "fear and persecution,"[89] the decision to resettle refugees from Czechoslovakia was much more pragmatic than the rhetoric of the day implied. The Czech refugees were depicted as victims of the Soviet violence when, in actuality, Canadian officials were concerned less with Soviet behaviour and more with how they could secure skilled migrants for themselves. The "success" of the movement was measured not by how many lives were saved or how many families were reunited, but rather by employment rates and income levels.

It was also measured by how Canada fared *vis-à-vis* the Soviet Union in the international community. The nature of Canada's response to the 1968 invasion allowed it to maintain polite relations with the Soviet bloc so the spirit of détente could continue to grow all the while obtaining talented migrants under the guise of humanitarian aid. This required a liberal interpretation of what a refugee was.

In the case of the 1968 Prague Spring refugees, the Canadian government conceptualized of the refugees in terms of the new Cold War atmosphere so they were predisposed to avoid overly "victimizing" the refugees. This would have embarrassed the Soviet Union and possibly created a more volatile situation in Eastern Europe. The government was critical but not vengeful. When officials in Vienna began to report on the strengths of the refugees, specifically their professional qualifications and education levels, Canadian politicians realized that they had an opportunity to recruit thousands of skilled workers. The resettlement program served two purposes: it alleviated a humanitarian crisis and it allowed the country to benefit economically and socially from the influx of thousands of talented individuals. The Canadian government downplayed potential security risks and did not hesitate to manipulate the idea of a refugee for political and economic ends. The only victim was the traditional conception of what it meant to be a refugee in need of assistance.

Notes

1. Otto Ulc, "Those Who Left: A Current Profile," in *The Prague Spring,* ed. Jiri Pehe (New York: Freedom House, 1988), 147.
2. Lissa Malkki has argued persuasively for the importance of migrant agency; see "Refugees and Exile: From 'Refugee Studies' to the National Order of Things," *Annual Review of Anthropology* 24, no. 1 (1995): 495–523. Madeline Hsu deployed the idea of migrant agency to great effect in *Dreaming of Gold, Dreaming of Home* (Stanford: Stanford University Press, 2000).
3. Dariusz Stola, "Forced Migrations in Central European History," in "The New Europe and International Migration," special issue, *International Migration Review* 26, no. 2 (Summer, 1992): 324–341.
4. Gil Loescher, *Beyond Charity: International cooperation and the Global Refugee Crisis* (New York: Oxford University Press, 1993). 6.
5. Government records at Library and Archives Canada (LAC) were consulted extensively in the preparation of this article. In particular, records from RG 25 (Department of External Affairs Fonds) and RG 76 (Immigration Program Sous-Fonds) were used to excavate the behind-the-scenes

discussions about what aid, if any, to offer the Prague Spring refugees. Interviews with former officials Allan Gotlieb, Gordon Barnett, and Michael Molloy were conducted for similar purposes.

6. The *Convention relating to the Status of Refugees,* penned at a moment of intense ideological conflict between East and West, allows anyone with a genuine fear of persecution to resettle outside their country of origin. The spatial and temporal limitations in the Convention were removed in the 1967 Protocol. Although Canada only ratified the Convention and the Protocol in 1969 (the delay stemmed largely from a fear of Communist infiltrators), the country applied the spirit of the Convention to its refugee policies since its inception.
7. Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford and New York: Oxford University Press, 2001).
8. Randy K. Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2005).
9. Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge and New York: Cambridge University Press, 2008).
10. Gil Loescher and John Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (New York: Free Press, 1986).
11. Michael Marrus, *Unwanted: European Refugees from the First World War through the Cold War* (Philadelphia: Temple University Press, 2002).
12. Howard Adelman, "Canadian Refugee Policy in the Postwar Period: An Analysis," in *Refugee Policy: Canada and the United States,* ed. Howard Adelman (Toronto: York Lanes Press, 1991): 172.
13. Matthew J. Gibney, "Liberal Democratic States and Responsibilities to Refugees," *American Political Science Review* 93, no. 2 (March 1999): 169–181.
14. Gary P. Freeman," Migration Policy and Politics in the Receiving States," *International Migration Review* 26, no. 4 (Winter 1992): 1144–1167; see also Loescher and Scanlan.
15. Reginald Whitaker, *The Government Party: Organising and Financing the Liberal Party of Canada, 1930–58* (Toronto: University of Toronto Press, 1977).
16. Ninette Kelly and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998).
17. Jack Jedwab, "Counting and Courting the Immigrant Vote: Will Canada's Foreign-Born Determine the Final Outcome of the 2004 Federal Election?" <http://www.acs-aec.ca/oldsite/Polls/15-06-2004.pdf> (accessed April 8, 2008).
18. Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester & Orpen Dennys, 1987).
19. John Gellner and John Smerek, *The Czechs and Slovaks in Canada* (Toronto: University of Toronto Press, 1968), 74.
20. *Ibid.,* 79. The authors point to the introduction of a quota system in the United States as the reason why Canada became an increasingly desirable destination.
21. Dirks, *Canada's Refugee Policy: Indifference or Opportunism?*, 74.
22. Irving Abella and Harold Troper, *None Is Too Many: Canada and the Jews of Europe* (Toronto: Key Porter, 2000), 48.
23. Most viewed their move as a permanent relocation rather than short-term exile. *Ibid.,* 80.
24. Reg Whitaker, *Double Standard*, 77. The United States also made special efforts to assist victims of the coup. Approximately two thousand Czechs were granted admission in 1948. Loescher and Scanlan, 19.
25. *Ibid.,* 77.
26. A similar situation arose five years later in 1973 when many "68ers" obtained citizenship and travelled back to Czechoslovakia on Canadian passports, assuming this guaranteed their protection. Canadian officials, worried that Czechoslovakia did not have a mechanism for renouncing citizenship, cautioned those who returned that "be they Canadian citizens or not" they were "subject to the full weight of the Czech legal apparatus, which could include prosecution for illegal emigration, and liability for the draft." Library and Archives Canada (LAC), RG 25, Volume 8640, file 20-1-2-CZECH, Political Affairs – Policy & Background, Part 9, 1972–1973.
27. LAC, RG 25, Volume 4150, file 232-AX-40, Emigration from Czechoslovakia.
28. Joseph Rothschild and Nancy M. Wingfield, *Return to Diversity: A Political History of East Central Europe since World War II*, 3rd ed. (Oxford: Oxford University Press, 2003), 170.
29. Joseph Skvorecky, a prominent writer and author, was one of the contributors to this manifesto. He fled to Canada where he and his wife founded *Sixty-Eight Publishers*, publishing almost two hundred works by Czech exiles. He was appointed a Member of the Order of Canada in 1992.
30. Jiri Pehe, ed., *The Prague Spring* (New York: Freedom House, 1988).
31. Ulc, 144.
32. LAC, RG 2, Volume 6338, Privy Council Office, Cabinet Conclusions, August 21, 1968.
33. *Canadian Annual Review of Public Affairs* 1968, cited in Robert Bothwell and Jack Granatstein, *Pirouette* (Toronto: University of Toronto Press, 1990), 191.
34. LAC, RG 2, Volume 6338, Privy Council Office, Cabinet Conclusions, August 21, 1968.
35. Ivan Svitak, "The Premature Perestroika," in Pehe, *Prague Spring*, 147.
36. LAC, RG 2, Volume 6338, Privy Council Office, Cabinet Conclusions, August 30, 1968.
37. This review caused Canada's NATO allies great concern.
38. LAC, RG 25, file 20-CZECH-1-3-USSR, Czech–political affairs.
39. Bothwell and Granatstein, 190.

40. Robert Wright, *Three Nights in Havana* (Toronto: HarperCollins, 2007), 91.
41. LAC, RG 25, file 20-CZECH-1-3-USSR, Czech–political affairs.
42. LAC, RG 2, Volume 6338, Privy Council Office, Cabinet Conclusions, August 28, 1968.
43. LAC, RG 25, Volume 8907, file 20-CZECH-1-3-USSR Czech–political affairs.
44. Joe Bissett, "The Czechoslovakian Refugee Movement, 1968," *CIHS Bulletin: The Newsletter of the Canadian Immigration Historical Society,* Issue 46 (July 2005): 2.
45. *Ibid.*, 2.
46. *Ibid.*, 2.
47. Louise Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972*, vol. 1 (Metuchen, NJ: Scarecrow Press, 1975), 516–517.
48. Loescher, *The UNHCR and World Politics*, 178.
49. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 1.
50. Freda Hawkins, *Canada and Immigration Public Policy and Public Concern* / (Kingston, Ont.: McGill-Queen's University Press, 1988), 139.
51. Ather Akbari, "Immigrant 'Quality' in Canada: More Direct Evidence of Human Capital Content, 1956–1994," *International Migration Review* 33, no. 1 (Spring 1999): 157.
52. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 1, Director General of Operations to Regional Directors, 5 September 1968.
53. LAC, RG 76, file 555-54-531, Memorandum to the Minister "Possible Modification of Czechoslovakian Refugee Program," October 15, 1968.
54. LAC, RG 25, Volume 20, File CZECH-1-3-USSR Czech – political affairs, 8907, Belgrade to Ottawa, August 30, 1968.
55. *CIHS Bulletin*, Issue 46, July 2005: 8.
56. LAC, RG 2, Volume 6338, Cabinet Conclusions. September 5, 1968.
57. LAC, RG 2, Volume 6338, Privy Council Cabinet Conclusions. September 10, 1968.
58. Dirks, *Canada's Refugee Policy: Indifference or Opportunism?,* 233.
59. Bissett, 3.
60. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 1, Couillard to Minister, 4 September 1968.
61. C. Michael Lanphier, "Canada's Response to Refugees," in "Refugees Today," *International Migration Review* 15, no. 1/2, (Spring-Summer,1981): 114; Gerald Dirks, *Canada's Refugee Policy: Indifference or Opportunism?* (Montreal: McGill-Queen's University Press, 1977), 233.
62. LAC, RG 25, Volume 8907, file 20-CZECH-1-3-USSR Czech – political affairs.
63. LAC, RG 76, file 555-54-531, Memorandum to the Minister "Possible Modification of Czechoslovakian Refugee Program," October 15, 1968.
64. LAC, RG 76, file 555-54-531, Memorandum to the Minister, "Possible Modification of Czechoslovakian Refugee Program," October 15, 1968. Officials also reported that Canada's approach made it the most popular foreign country in the post-invasion period.
65. LAC, RG 2, Volume 6338, Cabinet Conclusions. September 5, 1968.
66. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 1, Halstead to Brown, 5 September 1968.
67. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 1, Couillard to Minister, 4 September 1968.
68. Canada, Parliament, House of Commons, *House of Commons debates. Débats de la Chambre des communes* (Ottawa: Queen's Printer, 1968), September 19, 1968.
69. *CIHS Bulletin*, Issue 46, July 2005: 8.
70. LAC, RG 2, Volume 6338, Privy Council, Cabinet Conclusions, September 10, 1968. Howard Adelman has described the Canadian response to the Czech refugees as "overtly shaped by Canadian economic policies." See Adelman, "Canadian Refugee Policy in the Postwar Period," 193. Adelman notes a simultaneous decline in concern with security issues, "though Cold War ideology remained an important factor on a different plane."
71. LAC, RG 2, Volume 6338, Privy Council Cabinet Conclusions, October 3, 1968.
72. *Ibid.*
73. LAC, RG 25, file IM 5782-1 Refugees – Czechoslovakian Movement – General File, Part 2.
74. *Globe and Mail*, September 16, 1968, A1.
75. *Ibid*., A1.
76. Canada, Department of Manpower and Immigration, *Annual Report of the Department of Manpower and Immigration*. (Ottawa: 1969), 11.
77. Throughout the duration of the special program, discussions with Czechoslovakia focused on demands for the repatriation of particular individuals. Ottawa became concerned after reports surfaced in Prague that the family members of one of the refugees in Canada were being harassed in an attempt to force his return. Canadian officials refused to support this, citing the dangerous precedent that would be created. LAC, RG 25, Volume 8560, file 20-1-2-CZECH, Political Affairs – Policy & Background, Part 5. Oct.68–Apr.69, External Affairs to Prague, August 30, 1968.
78. *Globe and Mail*, October 24, 1968, A9.
79. Lanphier, 114.
80. *Globe and Mail*, August 8, 1969, A1.
81. LAC, RG 25, Volume 8560, file 20-1-2-CZECH, Political Affairs – Policy&Backgd, Part 5. Oct.68–Apr.69. In early 1969, there was a furious debate in the media and the House of Commons after some Czech dentists complained

that they weren't able to practice in Canada because the governing professional bodies refused to acknowledge their credentials. The government was accused of deceit in encouraging the dentists to move here despite the fact they couldn't practice. After a few weeks however, the government intervened on behalf of the refugees and furor died down.

82. Whitaker, *Double Standard,* 218.
83. LAC, RG25 , External Affairs , Series A-3-c , Volume 9013, file 20-CZECH-2-1, Political Affairs – Reports and Statistics – Periodic.
84. Traditional views of exile and refugees emphasize that one of the distinguishing characteristics of this state, *vis-à-vis*, economic migration, is that exile is temporary. Refugees yearn to return home. See Howard Adelman, ed., *Refuge or Asylum: A Choice for Canada* (Toronto: York Lanes Press, 1990).
85. *Globe and Mail,* September 16, 1968, A1.
86. Here I take issue with Gerald Dirks, who has described the Canadian response to the refugees of 1956, 1968, and 1981 as largely motivated by foreign policy considerations. He declares that Canada relaxed its regulations because as a "member of the Western alliance and an ideological foe of the Soviet Union, wished to embarrass Moscow and its allies by welcoming their nationals who sought a more satisfying way of life under a different sort of political system." See Gerald Dirks, "Asylum Policy in Canada: A Brief Overview," in *Refuge or Asylum: A Choice for Canada*, 94.
87. While the assistance is perhaps not as altruistic as some scholarly analyses suggest (for the Hungarian refugees were also selected on the basis of their employability and potential to adapt to Canadian society), it is nevertheless a proud moment in the history of Canadian immigration efforts.
88. Jack Pickersgill, *My Years with Louis St. Laurent: A Political Memoir* (Toronto: University of Toronto Press, 1975).
89. *Globe and Mail*, January 4, 1969, A1.

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Whither International Law? Security Certificates, the Supreme Court, and the Rights of Non-Citizens in Canada

Graham Hudson

Abstract

In this paper, the author examines the role of international law on the development of Canada's security certificate regime. On the one hand, international law has had a perceptible impact on judicial reasoning, contributing to judges' increased willingness to recognize the rights of non-citizens named in certificates and to envision better ways of balancing national security and human rights. On the other hand, the judiciary's attitudes towards international law as non-binding sources of insight akin to foreign law has reinforced disparities in levels of rights afforded by the Canadian Charter of Rights and Freedoms *and those afforded by international human rights. Viewed skeptically, one might argue that the judiciary's selective result-oriented use of international law and foreign law helped it spread a veneer of legality over an otherwise unaltered and discriminatory certificate regime. Reviewing* Charkaoui I *and* II *in international context, the author suggests an alternative account. He suggests that the judiciary's use of international law and foreign law, although highly ambiguous and ambivalent, both was principled and has progressively brought named persons'* Charter *rights more closely in step with their international human rights. Although the current balance between national security and human rights is imperfect, the way in which aspects of Canada's certificate regime have been improved suggests that international law is a valuable resource for protecting the rights of non-citizens in Canada.*

Résumé

Dans cet article, l'auteur examine le rôle du droit international sur le développement du régime canadien de certificats de sécurité. D'une part, le droit international a eu un impact perceptible sur le raisonnement judiciaire, contribuant à une volonté accrue chez les juges de reconnaître les droits de non citoyens visés par les certificats et d'envisager de meilleurs moyens de concilier la sécurité nationale et les droits de la personne. D'autre part, l'attitude de la magistrature à l'égard du droit international comme source non contraignante d'éclairement apparentée à la jurisprudence étrangère est venue renforcer la disparité entre la protection conférée par la Charte canadienne des droits et libertés *et celle offerte par le droit humain international. Avec scepticisme, on pourrait soutenir que l'utilisation sélective, axée sur les résultats que fait la magistrature du droit international et de la jurisprudence étrangère camoufle sous un vernis de légitimité un régime de certificat par ailleurs intact et discriminatoire. Situant les décisions de la cour dans l'affaire Charkaoui dans un contexte international, l'auteur suggère une autre lecture : l'utilisation qu'a fait la magistrature du droit international et étranger, bien que très ambiguë et ambivalente, était régie par des principes et a progressivement rapprocher les droits des individus sous la* Charte *de leurs droits humains internationaux. Bien que l'équilibre actuel entre la sécurité nationale et les droits de l'homme soit imparfait, la manière dont certains aspects de notre régime des certificats ont été améliorés suggère que le droit international est une ressource précieuse pour la protection des droits de non citoyens au Canada.*

Anyone interested in whether international law improves respect for non-citizens' rights in Canada would do well to survey the post-9/11 development of Canada's security certificate regime. First established in 1976, security certificate legislation authorizes the executive to arrest, detain, and ultimately deport non-citizens who are believed on reasonable grounds to, among other things,

pose a threat to Canadian national security. Certificates are issued by the Ministers of Public Safety and of Citizenship, Immigration, and Multiculturalism (the ministers) without any prior independent review, while significant portions of proceedings concerning the reasonableness of certificates and conditions of detentions are held in the absence of the public, persons named in certificates (named persons), and their counsel.

In *Charkaoui I,*[1] the Supreme Court (the Court) ruled that aspects of certificate provision violated the *Canadian Charter of Rights and Freedoms* (the *Charter*), breaking with courts' traditional reluctance to do so.[2] Relying on international law and foreign law, the Court found that extreme secrecy and executive discretion unjustifiably infringed named persons' right to a fair trial. Although the Court based its decision on long-standing Canadian criminal law principles, international law and foreign law supported its finding that the government could have achieved a more proportionate ways of balancing national security and human rights. In suggesting how to achieve this balance, the Court looked to analogous national security legislation in the United Kingdom, noting that it had been designed to (although it does not) comply with international human rights. It then suggested that adopting this system in Canada would bring certificate provisions into conformity with the *Charter.*

Acting on the Court's advice, Parliament integrated a version of the UK's special advocate system into the *Immigration and Refugee Protection Act*[3] (*IRPA*), providing named persons with limited legal representation during secret hearings. In addition to introducing a special advocate system, Parliament made it easier for named persons to procure conditional release pending a decision as to the reasonableness of the certificates against them; to appeal decisions about detentions and the reasonableness of certificates; to apply for protection as refugees or persons in similar situations; and to challenge the admissibility of evidence on the grounds that it has been acquired through the use of torture or other cruel, inhuman, or degrading treatment or punishment.[4] It would appear that the Court effectively used international law to expand the rights to which non-citizens are entitled.

However, a closer look suggests that international law has played a far more ambivalent and ambiguous role. On the one hand, the Court in this case curtly ignored powerful international legal arguments concerning the discriminatory nature of certificate provisions, a confusing choice considering its willingness to use international law when forming its judgment on issues of fairness, disclosure, and adversarial challenge. Far from simply producing mixed messages about the place of international law in Canadian courtrooms, this choice permitted the government to continue using immigration law provisions to perform quasi-criminal law functions. On the other hand, when international law was used, it was conflated with foreign law, as though the obligatory qualities of the former do not matter. In this case, the failure to distinguish international law from foreign law facilitated the entrenchment of a special advocate system the Court knew fell below international human rights standards.[5] In suggesting that this system would nonetheless pass Canadian constitutional muster, the Court seemed to have sent the government a message concerning how the form of certificate provisions could be altered without adversely affecting their overall function. The message was loud and clear: the *Charter* does not provide protections at least as great as those offered by international human rights.

Adding to the Court's inconsistent stance towards international law is its 2008 judgment in *Charkaoui II.*[6] Concerned with issues of disclosure directly relevant to those raised in *Charkaoui I,* the Court in this case ruled the government is required to retain and disclose to judges and special advocates all information on file relevant to a named person. Although the facts of this case concerned, among other things, the human rights dimensions of global intelligence agency co-operation, the Court did not cite international law even once. Yet, by forcing greater levels of disclosure, the decision helped remedy some of the more serious defects of the new special advocate system, effectively bringing it more closely in step with those international human rights standards the Court declined to fully enforce in *Charkaoui I.* What, if anything, influenced the Court's choices about whether, how, or why to use international law in these cases? Did it take seriously its role in giving effect to binding international law? If so, how did this affect its decision about the appropriate balance between national security and human rights?

The purpose of this paper is to sketch how international law has influenced court-led refinements to the security certificate regime. My focus will be directed primarily towards international human rights, although I will also recognize the place and impacts of other fields of international law. I will argue that, although its reasoning has been highly ambiguous and ambivalent, the Supreme Court's consideration of international law has contributed to marked improvements in the protection of named persons' rights. I will begin by looking at the legislative and the international contexts of certificate provisions. I will then examine how the Court used international law in *Charkaoui I* to bring certificate provisions into conformity with the *Charter.* After reviewing the many ways in which the government's legislative response failed to respect international human rights, I look at how these failings were compensated for in

Charkaoui II. I will conclude by offering an interpretation of how international law has affected the recognition of named persons' rights.

Legislative Context: The "Old" Certificate Provisions

Prior to *Charkaoui I,* security certificates were issued under the joint powers of the Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness[7] and were issued against non-citizens who were alleged to be inadmissible to Canada on the grounds of national security, the violation of international human rights, serious criminality, or organized crime.[8] Although foreign nationals could be detained without warrant, the ministers were required to issue a warrant in order to detain permanent residents.[9] Once detained, the ministers were required to refer the certificate and the evidence supporting its reasonableness to a Federal Court judge for review. Although there was no statutory obligation to make this referral within any specified period of time, the ministers generally did so shortly after detaining a named person. If found to be reasonable, the certificate stood as conclusive proof that the person named in it is inadmissible to Canada and stood as an effective removal order.[10]

Foreign nationals and permanent residents possessed markedly different rights while awaiting decisions about the reasonableness of a certificate. Foreign nationals were allowed to apply for a review of their detention only 120 days after a certificate had been found to be reasonable. Permanent residents, by contrast, had the right to a hearing before a judge within forty-eight hours of their being detained and once every six months after that point, up to and following a finding that the certificate was reasonable.[11] Although judges had the discretion to order the conditional release of foreign nationals and permanent residents, the factors that constrain the exercise of this discretion were not outlined in *IRPA* or its regulations.

Certificate proceedings were designed to operate with little regard for values of fairness, disclosure, or adversarial challenge. Reviewing judges were instructed to conduct proceedings "as informally and expeditiously" as possible; to receive into evidence anything that, in their opinion, is reliable and appropriate, even if it is inadmissible in a court of law; and to base their decisions on that evidence.[12] At the request of the ministers, judges were required to hear evidence in the absence of the public, the named person, and his/her counsel, if they were satisfied that the disclosure of such evidence would be injurious to national security or the safety of any person.[13] Finally, named persons were not provided with a statutory right to appeal decisions about either the reasonableness of certificates or their detention.

Certificate proceedings are similar to criminal proceedings in a number of ways. First, decisions about whether to issue them are made by the executive branch in consideration of information produced by a range of both civilian intelligence and law-enforcement agencies. Second, unlike standard immigration law proceedings that are decidedly more administrative in nature, certificate proceedings are presided over by a Federal Court judge. Third, and most clearly, named persons are arrested and detained indefinitely pending the outcome of proceedings.

Finally, if reasonable, certificates generally authorize the government to deport named persons to face arrests, detentions, criminal or military trials, and the serious risk of severe human rights abuses. There is no necessary connection between certificate-based deportations and the commencement of public prosecutions or human rights abuses abroad. However, given the nature of international counterterrorism law and policy, there almost always is a practical connection.[14] Named persons tend to be persons of interest to receiving states because, as alleged terrorists or serious criminals, they are viewed either as security risks by their home country or as sources of valuable information by partner states. Depending on levels of rights respect within their home countries, the deportation of named persons may expose them to the serious risk of persecution, torture, or other cruel, inhuman, and degrading treatment or punishment.

Despite the functional associations between certificate proceedings and criminal/extradition proceedings, principles germane to the latter were not legislatively integrated into the former, an omission Canadian courts had on a number of occasions ruled was constitutional.[15] Judicial reluctance to force improvements in levels of rights respect were influenced by formal distinctions between immigration/administrative law and criminal law, the weight of national security rhetoric, and the belief that non-citizens are not entitled to as full a range of rights as are citizens. Still, a modicum of procedural protection was provided in the form of a named persons' statutory right to be reasonably informed of the case against them and to be heard.[16] To these ends, judges provided named persons with summaries of the evidence that they had heard in private.

Like all non-citizens facing deportation, named persons also could apply for protection from the Minister of Citizenship and Immigration on the grounds that their deportation would expose them to the substantial risk of torture or similar abuse; claims of ordinary refugee status were barred, arguably consistent with international law recognizing national security as constituting, under the right circumstances, an exception to governments' obligation to protect Convention refugees.[17] Although a step in the right

direction, rules governing applications for protection from torture or similar abuse had the effect of halting security certificate proceedings and could not be made once a certificate had been found to be reasonable,[18] a strange provision considering that the risk of named persons' being exposed to human rights abuses increases after being labelled a *de jure* security threat.

International Perspectives and Avenues of Influence

Broadly speaking, there are two international perspectives that shape the interpretation and application of certificate provisions: international counterterrorism law and international human rights. On the one hand, a core objective of *IRPA* is to "promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals."[19] This objective is premised on states' internationally recognized right to exclude non-citizens from their territory[20] and on Canada's expanding international legal obligations to co-operate in the prevention and punishment of transnational terrorism.[21] Immigration officers, judges, and other decision-makers are accordingly required to interpret and apply certificate provisions so as to give effect to these international legal norms. While certificate provisions have been in existence since 1976, their operation is in this way amenable to shifts in international law and politics. Indeed, this is one of the reasons why post-9/11 counterterrorism law and policy has had such a profound impact on certificate proceedings despite the fact that the basic framework of Canada's current regime was constructed several months prior to 9/11.

On the other hand, Canada has accepted a fairly wide range of international human rights obligations that should similarly influence the interpretation and operation of *IRPA*. In addition to international customary law, Canada is obligated to respect such treaties as the United Nations *Convention relating to the Status of Refugees* and the *International Convention Against Torture* (*CAT*).[22] International human rights are infused directly into certificate proceedings by way of s. 3(3)(f) of *IRPA,* which requires judges and other decision-makers to construe and apply the Act in a manner that consists with Canada's international human rights obligations.

It is important to recognize that these legislative provisions, and the international legal norms they recognize, apply only to the interpretation and application of *IRPA*. The constitutional dimensions of certificate provisions, by contrast, are matters of constitutional law and, for purposes of this paper, the *Charter of Rights and Freedoms*. However, unlike the constitutional documents of some other common law jurisdictions (and unlike *IRPA*),[23] the *Charter* does not outline whether, how, or why judges may use international law when interpreting and applying its provisions. Precisely how international law can or should factor into the judicial review of certificate provisions is consequently ambiguous.

Traditionally, judges adhered to what might be called the "presumption of conformity" doctrine when deciding about whether to receive international law. This doctrine stands for the principle that judges will, absent clear evidence to the contrary, presume that legislatures intend for statutes to conform with Canada's international legal obligations and will interpret legislation accordingly.[24] The purpose of this doctrine is as its name implies: to ensure conformity between domestic law and Canada's international legal obligations. It is, in other words, a tool by which the judiciary can help secure compliance with international law and which depends on the recognition of international law as *law* and not mere rhetoric or window dressing. However, because legislatures are free to legislate contrary to international law if they so choose, judges have only a limited role as enforcers. Indeed, they have tended to be conservative, using international law to refine or touch up legislation but not as an independent source of domestic rights and obligations. And, because this doctrine predated the *Charter* by decades, its use has generally been restricted to the interpretation of ordinary statutes and not the review of law or policy for consistency with constitutional rights.

Recently, this doctrinal landscape has changed and, with it, the place of international law in the context of *Charter* litigation. In 1987, Brian Dickson C.J. held that:

> … the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.[25]

There are at least two doctrines that may be extracted from this passage.[26] First, there is the presumption of minimal protection doctrine, whereby international law serves as a floor below which no Canadian law may fall. Practically, what happens is the following. During the course of *Charter* litigation, legal counsel for one party must establish the existence of a right at international law. If it is demonstrated that this right exists and is binding on Canada, then judges

are presumptively obligated to enforce it. Opposing counsel must then somehow rebut this presumption in order to justify the limitation of the right. Thus, while judges are not obligated to independently or proactively consider international law, they are obligated to protect any undefeated international right established by counsel during the course of *Charter* litigation.

Second, there is the relevant and persuasive doctrine, whereby international law serves as a source of insight or perspective that helps judges resolve problems with complex international or transnational dimensions.[27] The idea here is that international law connects decision-makers from various jurisdictions towards a common set of principles that offer *potential* solutions to recurring problems. Judges are free to pick and choose those rules and principles they think help construct the best approach to the issues they face. Unlike the presumption of conformity doctrine, the relevant and persuasive doctrine is not directed towards enforcing international law; its core concern is with improving the quality of judgment as measured in part by its responsiveness to diverse social identities, interests, and expectations. What is more, on this reading, judges are not obligated to recognize the relevance or applicability of international legal arguments. It is up to judges to decide what international legal norms are relevant to a dispute, in consideration of the fact that specifically international human rights law is always presumptively relevant and persuasive in the adjudication of constitutional rights.

It is generally agreed that the relevant and persuasive doctrine has become the most commonly used of the three approaches, although it uneasily coexists with the other two doctrines.[28] Aside from the tremendous confusion this mixture of doctrines produces, the relevant and persuasive doctrine is, seemingly, inherently unpredictable. Insofar as the interpretive utility of international law is a matter of judicial discretion, it is not clear what factors determine whether, how, or why international law will be used; judges are free to arbitrarily pick and choose norms that help them rationalize decisions made on other grounds altogether.[29] Insofar as international law serves in this way as a mere rhetorical device, its status as binding law is in danger of being lost. Some suggest that judicial discretion in this area may be exercised on the basis of a global judicial identity and commitment to the rule of law, such that judges from various jurisdictions extrapolate from each other's decisions a common body of legal rules and principles.[30] These bodies of law exert a normative influence or pull similar to precedent, guiding judges towards the "best" possible solution to recurring global problems. In this way, the use of international legal norms, even merely as relevant and persuasive sources of insight, is principled.

Whatever may be its merits and demerits, the relevant and persuasive doctrine has both reflected and contributed to a considerable increase in judges' willingness to weave international law into their judgments, particularly in the context of *Charter* litigation. Combined with legislative directives to interpret and apply *IRPA* in consideration of Canada's international legal obligations, the judicial review of the constitutionality of certificate provisions has been steeped in international legal perspectives. How, if at all, have these perspectives influenced the development of Canada's certificate regime?

International Law and Judicial Reasoning in Charkaoui I

Charkaoui I concerned the appeals of three persons who were named in security certificates: Adil Charkaoui, Hassan Almrei, and Mohamed Harkat. Charkaoui was a permanent resident, Almrei and Harkat were foreign nationals, and all three were at one time recognized as Convention refugees. The appellants argued that the certificate scheme under which their detentions were ordered violated sections 7 (the right to life, liberty, and security of the person), 9 (the right to not be arbitrarily detained or imprisoned), 10 (c) (*habeas corpus*), 12 (the right not to be subjected to any cruel or unusual treatment or punishment), and 15 (the right to equality and to be free from discrimination) of the *Charter*.

International human rights do not appear to have directly influenced the Court's s. 7 analysis. The Court instead relied upon fairly standard English common law doctrines in finding that s. 7 affords named persons the right to a fair hearing, which includes the right to know the case against one, the right to answer that case, and the right to have that case judged on the basis of the facts and the law.[31] Since named persons and their counsel were excluded from participating in substantial portions of certificate proceedings, since decisions could be made almost entirely on the basis of evidence that was withheld from named persons and their counsel, and since this limited judges' capacity to test the reliability, credibility, and sufficiency of that evidence, they were found to have been denied the right to a fair hearing.

The Court did rely upon international and foreign law when approaching the question of how the government's national security objectives could be more proportionately balanced with named persons' s. 7 rights. After reviewing a number of Canadian alternatives, including the procedures utilized by the Security Intelligence Review Committee (SIRC) when it was responsible for testing the reasonableness of the ministers' allegations,[32] the Court evaluated the UK's approach to secret national security proceedings. While this seems to signal the constructive use of international and foreign law, it was somewhat unnecessary since

the UK model was designed in the image of the SIRC model, but lacks many of its procedural safeguards. This raises the question of whether reliance on external legal perspectives served the interests of the appellants or the government. In approaching this question, it would be helpful to briefly highlight the movement of this institutional framework across jurisdictions.

Priori to 2001, SIRC was responsible for reviewing security certificates alleging the inadmissibility of non-citizens to Canada and for forwarding recommendations as to whether they thought the certificate was reasonable. The Minister of Citizenship and Immigration and the Solicitor General would then decide whether or not to issue the certificate. If they decided to issue the certificate against a permanent resident, they then had to refer it to a Federal Court judge for a review of its reasonableness.

Through the course of its investigations, SIRC utilized various kinds of legal counsel. Among those it used were security-cleared special advocates who enjoyed fairly broad powers to subpoena persons and documents, were permitted access to confidential, security-sensitive information, and were mandated both to challenge the non-disclosure of information and to cross-examine witnesses as to the relevance, reliability, and sufficiency of evidence. Special counsel were permitted to interact with named persons and their counsel throughout the process, including after having been apprised of secret evidence, and were permitted, in tandem with the Canadian Security Intelligence Service, to prepare and provide named persons with summaries of confidential information and evidence. Named persons were then allowed to provide special counsel with a list of questions to be asked during secret proceedings and to request that additional witnesses be called.[33]

In 1997, the UK integrated elements of the SIRC model into its own law because, one year earlier, the European Court of Human Rights (ECHR) ruled that the use of secret evidence, the absence of adequate legal representation, and the lack of meaningful judicial review, all in the context of national security proceedings, violated articles 5 (4) (right to challenge the lawfulness of detentions) and 13 (right to a remedy for breach of *Convention* rights) of the *European Convention on Human Rights*.[34] Referencing the SIRC system, the ECHR held that the UK could have used less restrictive means to pursue its national security objectives, an example of how courts in other jurisdictions use something like the relevant and persuasive doctrine.

The UK subsequently designed a model in the image of SIRC, whereby a Special Immigration Appeals Commission utilized special advocates to represent named persons during secret proceedings. However, the UK chose not to include key protections characteristic of the SIRC system. For instance, unlike special counsel for SIRC, special advocates operating within the UK system are not permitted, except under exceptional circumstances, to interact with named persons once they have been apprised of secret evidence or to subpoena witnesses and documents and were, at the time *Charkaoui I* was decided, severely under-staffed and -resourced.[35] Special advocates have on a number of occasions stated that these limitations seriously inhibit their capacity to receive instructions from, and protect the interests of, named persons.[36] These flaws, and possible solutions, have also been regularly identified by UK parliamentary committees and were brought to the Court's attention by a number of interveners.[37]

Although it expressly recognized these flaws, the Supreme Court went on to note that members of the UK Special Immigration Appeals Commission have "commented favourably on the assistance provided by special advocates" and that English courts have similarly endorsed this model.[38] By relying on the rulings of English courts on the matter, and ignoring the views of special advocates and parliamentary committees, the Court was making at least one of two statements. First, international human rights against which the UK model runs have no binding force on Canada and so are norms the government may, but is not obligated to, respect. It is true that the pronouncements of the ECHR and the norms of the *European Convention of Human Rights* are not binding on Canada. However, we are bound to respect the rights of Convention refugees and the terms of *CAT,* two sources of law that formed part of the principled base upon which the ECHR rested its ruling. Insofar as the UK's system and security certificates have analogous effects on affected persons, the ECHR's ruling is, I think, about as relevant and persuasive as a judgment can possibly be and certainly indicative of what are Canada's international legal obligations. Insofar as this is so, it was incumbent on a court that claims to take international law seriously to more thoroughly work through the ways in which the UK's legislative response failed to meet international human rights standards. Second, the Court tried to avoid this by suggesting that the opinions of the English judiciary are compelling pronouncements on the compatibility between the UK system and international human rights. The "views" of their legislative committees, civil society groups, and special advocates, by contrast, are moral or political in nature and do not stand up nearly as well as relevant and persuasive sources of insight.

The Court's dismissal of a range of persuasive international human rights perspectives highlights the qualitative difference between international human rights and constitutional rights, even if the two are at times closely intertwined. It also demonstrates that the *Charter* does not

provide levels of protection at least as great as that afforded by international law.[39] Rather, international law may be used as an interpretive aid, but need not be enforced by Canadian courts. This suggests that international law functions much like foreign law, with the latter in this case determining judges' interpretation of the content, scope, and domestic relevance of international legal norms. All of this raises such questions as: What structures Canadian courts' use of international and foreign law? Does it matter whether external law is binding, or need it simply be relevant? How is relevance determined? Does this depend on law's genesis in judicial decree or express legislative enactments? While there are no ready answers to these questions, it is clear is that greater receptivity to international and foreign law does not by itself enhance the responsiveness of judgment to values of human dignity.

International and foreign law were also referenced during the Court's ss. 9 and 10(c) analysis. In addition to American case law, the Court cited article 5 of the *European Convention on Human Rights* and related case law in support of its finding that foreign nationals possess a statutory and common law right to "prompt review to ensure that their detention complies with the law."[40] Taking notice of the fact that permanent residents who allegedly pose a threat to national security are entitled to an automatic review within forty-eight hours of their detention and then again every six months, the Court ruled that there was no reason why foreign nationals should not be entitled to the same procedural protections. Given the obvious presence of reasonable alternatives consistent with the government's stated legislative objectives, the Court ruled that detention provisions pertaining to foreign nationals unjustifiably infringed ss. 9 and 10(c). International human rights, though cited, do not appear to have played a prominent role in the Court's identification of the right in question or in its assessment of whether the limitation of this right was justified. Instead, they served to add rhetorical force to a legal principle that was firmly anchored in Canadian law.

Subsequent references to international human rights facilitated the finding that security certificate and detention provisions do not violate ss. 12 and 15. Counsel for Mr. Almrei argued that the security certificate scheme in general and the detention provisions in particular together transformed "the appellant's detention into one that is cruel and unusual."[41] In responding to this claim, the Court cited an ECHR judgment in which it was found that indefinite detentions in contexts where the detainee has no hope of release or recourse to effective legal processes may constitute cruel and unusual treatment.[42]

The Court concluded that *IRPA* is consistent with s. 12 of the *Charter.* Properly interpreted, *IRPA* provides detainees with hope of release and access to regular and "robust" detention reviews in which Federal Court judges are authorized to order conditional release.[43] The Court did recognize that *IRPA* left judges considerable discretion as to how they would structure detention reviews and that they have generally "set a high standard for release."[44] It responded to these concerns by detailing a list of factors the consideration of which would facilitate the conditional release of more detainees. The factors to be considered are: reasons for detention; length of detention; reasons for delay in deportation; anticipated future length of detention; and alternatives to detention.

In rendering this aspect of its decision, the Court tried to justify why it took a different approach from that taken by the House of Lords in *A and Others v. Secretary of State for the Home Department* (*Re A*).[45] In that case, seven of nine judges found that provisions mandating the indefinite detention of non-citizens for reasons of national security was discriminatory and hence violated article 14 of the *European Convention on Human Rights.* The House of Lords noted that, alongside immigration law provisions, the UK had effectively relied on anti-terrorism criminal law provisions which did not distinguish between citizens and non-citizens and which were supplemented with robust procedural safeguards. Since it could not be shown that non-citizens pose a greater threat than citizens, the House of Lords ruled that treating the former more harshly than the latter was discriminatory. The UK responded to this judgment in 2005 by replacing its certificate scheme with control orders that do not, strictly speaking, authorize indefinite detentions and which may be issued against both citizens and non-citizens.[46]

The Supreme Court of Canada ruled that *Re A* is not relevant to Canadian law since the impugned provisions in that case provided for indefinite detentions, while *IRPA,* properly administered, does not. There is some force to this claim, since the UK cannot deport non-citizens when there are substantial grounds for believing they would face the risk of torture or similar abuse, even if such persons pose a serious threat to national security.[47] To the extent that the government decides not to release a detainee, s/he will remain in detention indefinitely and for reasons unconnected to deportation. By virtue of the Court's ruling in *Suresh v. Canada (Minister of Citizenship and Immigration),*[48] Canada may deport persons to face the substantial risk of torture or similar abuse under exceptional circumstances. Further, in light of the Court's ss. 9 and 10(c) ruling in *Charkaoui I, IRPA* provides even persons who cannot be deported a realistic chance of release as well as access to procedures in order to procure that release. This, the Court concluded, means that Canadian detainees do not face indefinite detention.

In its submission, the University of Toronto International Human Rights Clinic argued that detention provisions in Canada and the UK cannot be so easily distinguished. As mentioned, Canada still may not, *except under exceptional circumstances,* deport persons to face the substantial risk of torture or similar abuse. Insofar as judges adopt a narrow definition of what qualifies as exceptional circumstances, named persons who cannot be released for reasons of public or personal safety face the prospect of indefinite detentions. The Supreme Court was unwilling to recognize this, missing another opportunity to fully engage with, much less give effect to, Canada's international human rights obligations.

This left the appellants' s. 15 claim that *IRPA*'s security certificate and detention provisions discriminate against non-citizens. The International Human Rights Clinic submitted that, as the UK had done for several years, Canada has responded to terrorist threats using both immigration law provisions and criminal law provisions. They further submitted that conduct which leads to findings of inadmissibility for reasons of security may also constitute an offence under Part II.1 of the *Criminal Code of Canada.* This being so, the Canadian government distinguishes between citizens and non-citizens when it might just as effectively proceed with criminal law provisions or even administrative law provisions applicable to citizens and non-citizens alike, as is currently done in the UK.

The International Human Rights Clinic's argument was curtly rejected in the course of three paragraphs, with the Court concluding that there was no evidence to show that detention provisions have been "unhinged from the state's purpose of deportation."[49] Missing was a robust analysis of whether *IRPA*'s clear distinction on enumerated grounds constitutes *discrimination,* whether similar objectives could be pursued through criminal law provisions or through administrative law provisions which do not distinguish on the basis of citizenship, and what might be Canada's international human rights obligations as informed by UK case law. This latter omission is surprising, given the weight the Court accorded to English judicial opinion on the legality of the UK's special advocate system.

What's the Difference? The "New" Provisions

The government responded to *Charkaoui I,* and to the reports of three parliamentary committees,[50] by overhauling the certificate regime. One of the more significant changes it made relates to the commencement of proceedings. Under the old provisions, judges were to consider the information and evidence upon which a security certificate was based in private for seven days. After this time, they provided named persons with a summary of the evidence, excluding evidence the disclosure of which would, in the judge's opinion, be injurious to national security or the safety of any person. Judges were also required to hold *ex parte, in camera* proceedings when hearing evidence the disclosure of which would, in her opinion, be similarly injurious. Under the new provisions, proceedings begin the instant a certificate is referred, while initial summaries are provided by the ministers and exclude evidence that, in their opinion, would compromise national security or personal safety. Further, judges are required to hold proceedings *ex parte* and *in camera* when hearing evidence the disclosure of which *could* be injurious to national security or the safety of any person.[51] This is a change that lowers the burden the government must meet in order to exclude named persons from proceedings.

The weakening of procedural safeguards in these respects has to some degree been counterbalanced by provisions governing the powers and responsibilities of special advocates. Section 83(1)(b) states that a judge shall appoint a special advocate during any security certificate or detention review proceeding. Section 86 expands this right to other proceedings in which the government applies for non-disclosure of evidence. Section 83(10(b) requires judges to select special advocates from a list established by the Minister of Justice after hearing representations from both named persons and the minister, giving added weight to the preferences of the named person. However, s. 83(1.2) requires a judge to appoint a person specifically requested by a named person, unless such an appointment would result in unreasonable delays, there is a conflict of interest, or that person possesses knowledge the disclosure of which would be injurious to national security or the safety of any person and where there is a reasonable risk of inadvertent disclosure.

The role of special advocates is to protect the interests of named persons during secret proceedings. They perform this role by challenging the government's applications for non-disclosure as well as the relevance, reliability, sufficiency of, and weight to be accorded to undisclosed information. In carrying out these functions, special advocates are entitled to receive from the ministers any evidence that has been provided to reviewing judges but which is not provided to the named person. Using this evidence, special advocates may make oral and written submissions, participate in closed proceedings, cross-examine witnesses who testify, and, with judicial authorization, exercise any other powers necessary to protect the interests of the named person.[52] Finally, the government is obligated to provide special advocates with "adequate administrative support and resources."[53] This last provision was included in response to the Court's observation that the lack of administrative support and resources for special advocates used to be one of the principal weaknesses of the UK model. It remains to be seen whether the term "adequate" will be interpreted

relative to the standards set by SIRC or to another, lower standard.

Although these provisions enhance the level of procedural protections afforded to named persons, the government's interest in secrecy is protected through a number of conspicuous limitations upon special advocates' powers. As in the UK's system, special advocates must apply for judicial authorization to subpoena documents or witnesses and to communicate with any person about a proceeding after having accessed secret evidence.[54] As mentioned, these restrictions on communication and investigation seriously inhibit special advocates' capacity to protect the interests of named persons. Without the power to subpoena documents or witnesses, the ministers may withhold or even destroy information that is relevant to a named person's defence; the only information a special advocate or reviewing judge sees is that which supports the government's position. Without access to all relevant information, and without the ability to communicate with named persons throughout a proceeding, special advocates quite simply cannot fully assess the relevance, reliability, or sufficiency of submitted evidence; clarify misunderstandings or the negative implications of circumstantial evidence; submit contrary evidence the existence of which is known only by a named person or a select few others; or ask witnesses appropriate questions during cross-examinations.

These structural limitations are exacerbated by the fact that, under the new provisions, the *ministers* provide named persons with the initial summary of the information and evidence to be used against them. In the likely event that these summaries will be heavily redacted and lacking in useful information, named persons will be unable to effectively forecast what kinds of strategies their special advocates should adopt while the two are still permitted to communicate. In order to remedy this problem, special advocates will need to access the information and evidence that has been excluded from the initial summary, a power they have been given in their capacity as representatives during secret hearings. Of course, this means that they will be prohibited from communicating with named persons the instant they exercise this power.

The upshot of this arrangement is that named persons' right to be informed and their right to be heard have been disconnected from each other, with neither being adequately safeguarded. Given the existence of secret proceedings, the right to be heard can only be fully protected if special advocates are present in these proceedings. Prior to participating in secret hearings, special advocates can, of course, communicate with named persons and their legal counsel in order to review allegations, disclosed evidence, legal arguments, and general litigation strategies; in this way, they give a voice to named persons. However, named persons' right to be informed is improved beyond the usual provision of summaries only if special advocates effectively challenge the ministers' motions to keep contested evidence classified. This, in turn, depends in no small part on special advocates' ability to communicate with named persons on an ongoing basis which, it should be restated, does not require communication about the content of secret evidence. This is all to say that the rights to be informed and to be heard are mutually constitutive; the full realization of one requires the full realization of the other. Without ongoing communication—without a continuous cycle of information being received and communicated by named persons—the new provisions alone cannot effectively improve either named persons' right to know the case against them or their right to be heard.

Some of these problems could be bypassed if special advocates were authorized to subpoena documents and witnesses. With access to greater volumes of information, some of which may be exculpatory in nature, special advocates would be better positioned to challenge evidence against a named person. Ideally this information could be accessed prior to the commencement of secret proceedings. If not, it would still improve special advocates' understanding of the facts and context associated with the ministers' evidence. And, if it were decided in a secret hearing that the information could not be safely disclosed, the information could still be forwarded directly to named persons in summary form. Notwithstanding the fact the information may not ever reach a named person, enhanced access to information that is held but not submitted as evidence by the ministers would improve levels of adversarial challenge and, by implication, reviewing judges' ability to decide on the basis of the facts and the law.

Although the new provisions do not grant special advocates the power to communicate with named persons (or anyone else) during proceedings or the power to subpoena documents and witnesses, judges possess the *discretion* to offer these powers on a case-by-case basis.[55] The new provisions share other, discretionary features of the UK model. As mentioned, Canadian special advocates may be disqualified from representing named persons if there is a risk of the inadvertent disclosure of personal knowledge when such disclosure would be injurious to national security or the safety of any person.[56] In the UK, special advocates who possess knowledge of confidential information that pertains to a case at hand are prohibited from participating in that case without judicial authorization. Often, this occurs when special advocates acquire expertise in a certain geographical area, such as how terrorist networks operate in one or two specific countries.[57] Once they possess knowledge of secret

facts, they may be disqualified from representing particular detainees on the grounds that the inadvertent disclosure of this knowledge may betray what information and contacts the government has. While this provision has a legitimate function, coupling it with a blanket prohibition on case-related communications between even two special advocates (as is the case under the terms of *IRPA*) paralyzes networking among special advocates. Again, unlike the SIRC model, special advocates working in the context of *IRPA* are likely to operate more or less in isolation from each other and without being able to apply certain kinds of expertise.

Despite these negative observations, amendments to provisions governing arrests and detentions have integrated other, arguably more positive aspects of the UK model. Since *Re A,* the UK has replaced its security certificate system with control orders which fall under two types: those that derogate from the *European Convention on Human Rights* and those that do not. Non-derogating control orders impose restrictions upon, among other things, a person's movement, place of residence, communications with others, and access to means of communication such as cellular phones and the internet. The violation of these conditions is an offence punishable by imprisonment. So long as these restrictions cumulatively fall short of restricting liberty, as defined under article 5 of the European Convention on Human Rights, English courts have held that non-derogating control orders are consistent with international human rights.[58]

In similar fashion, the Canadian government has moved towards formally replacing indefinite or prolonged detention with conditional release. First, in response to *Charkaoui I,* the government has brought *IRPA* into compliance with ss. 9 and 10 (c) of the *Charter* by removing legislative distinctions between foreign nationals and permanent residents. Anyone who is arrested and detained is entitled to a review within forty-eight hours of the beginning of their detention and then again once within every six-month period until it is determined whether a certificate is reasonable. Second, named persons who remain in detention six months after a certificate has been determined to be reasonable may apply for a review of the reasons for continued detention. Judges are obligated to order the detention to continue if satisfied that release on conditions would be injurious to national security or endanger the safety of any person, or, if the named person is unlikely to appear at a proceeding or for removal.[59] Interestingly, the old provisions had similar wording and, in the case of foreign nationals, the burden of demonstrating the need for continued detention lay upon the government. Finally, persons released under conditions may apply for another review of the reasons for continuing the conditions within six months of the preceding review. Unlike violations of control orders, violations of the terms of conditional release are not criminal offences, but may result in the resumption of detention. In such an instance, detainees may continue to apply for review and for release under conditions in the usual way.

Whither International Law? Charkaoui II

Viewed in isolation, *Charkaoui I* is an ambivalent ruling that does not seem to support the hope that international law can improve levels of respect for non-citizens' rights in Canada. To be sure, the Court considered international legal norms to be relevant and persuasive sources of insight into the constitutional dimensions of security certificates. However, contrary to the normative values to which the relevant and persuasive doctrine is directed, the result seems to have been the limitation, rather than vindication, of named persons' rights. On the one hand, when international law was used, it was treated as no more authoritative than foreign law, with the two being merged in order to offer an alternative to reinstituting the SIRC model; this alternative raised levels of rights respect in certificate provisions, but only to the absolute bare minimum. On the other hand, international law was ignored when its use would have supported the provision of more expansive procedural protections or the dismantling of the certificate regime altogether. Nowhere to be seen were principles associated with the presumption of conformity doctrine or the presumption of minimal protection doctrine. Either of these doctrines would have forced the consideration of international human rights as authoritative legal norms notionally more binding than foreign law, while the latter might well even have required the government to provide more than the bare minimum of procedural protections required by the Court's reading of the *Charter.* By ignoring these doctrines, and the principles that underpin them, the Court was able to refine the certificate regime while leaving it more or less functionally intact.

However, *Charkaoui I* should not be viewed in isolation. Indeed, shortly following the amendment of the certificate regime, the Court did a surprising thing when it rendered its judgment in *Charkaoui II;*[60] it chose to refine the amended certificate regime in such a way as to give effect to those international human rights standards it flat-out refused to enforce a year earlier. It did so by imposing upon the government a general duty to retain and disclose all information on file relevant to a named person to special advocates and reviewing judges, and by authorizing reviewing judges to forward such information as can safely be disclosed directly to named persons.[61] The net effect of this ruling has been to compensate for special advocates' inability to subpoena documents and witnesses without reviewing judges having to grant these powers on a case-by-case basis. Now,

all information on file that is relevant to a named person must be disclosed in every certificate proceeding; there is no need for special advocates to request documents on an *ad hoc* basis. With the assistance of special advocates and the ministers, reviewing judges are then responsible for deciding what information may safely be disclosed, what must be kept secret, and, of course, whether a certificate is reasonable or an unconditional detention is justified.

What is interesting about this case is that it helped remedy one of the most serious defects of the UK model without there being a single reference to either international law or the constitutionality of our special advocate system. The decision was predicated entirely on criminal law principles the application of which was justified on the basis of analogies between certificate proceedings and criminal law proceedings as well as between civilian intelligence agency and law enforcement agency activities. Yet, viewed within the broader, post-9/11 transformation of the security certificate regime, and Canadian national security law and policy most generally, this decision was without a doubt steeped in international perspectives. The Court was acutely aware of how Canadian national security agencies have been sharing intelligence with foreign and international national security agencies in flagrant disregard for principles of privacy, fairness, and public review.[62] This consciousness may be inferred from facts that: the expanded integration of Canadian national security agencies with those of foreign countries is a conspicuous component of our post-9/11 national security policy;[63] the issues raised in *Charkaoui II* related to information CSIS subsequently acquired (but did not disclose) from Moroccan authorities and that contributed to the issuance of a Moroccan arrest warrant against Mr. Charkaoui; and the Court cited excerpts from Justice Dennis O'Connor's report on Maher Arar, which details the extents to which Canada participates in unregulated global intelligence agency coordination.[64] Finally, the Court recognized that CSIS's intelligence is used to facilitate the deportation of named persons to face the serious risk of human rights abuses abroad.[65]

Given Canada's role in international counterterrorism practices, and the kinds of impacts this has on the well-being of named persons, the Court ruled that weightier criminal law principles of disclosure must be applied to certificate proceedings. Reviewing judges have since required the government to disclose to special advocates thousands of pages of previously classified intelligence.[66] Initially, the ministers had redacted significant portions of this information based on their consideration of relevance and privilege, including "covert human intelligence source privilege."[67] On March 12, 2009, the Federal Court lifted most redactions made to sixty-seven contested documents.[68] On the opposite side of the spectrum, the Federal Court later ruled that special advocates are only entitled to such information as is "necessary to examine and verify the accuracy of the information submitted."[69] Setting the threshold of what information is relevant to "necessary" raises the bar well beyond the "reasonable possibility" test stipulated in criminal law.[70]

Still, on the whole, *Charkaoui II* has effectively compensated for the absence of legislative provisions granting special advocates the power to access all information in the government's possession and to subpoena documents and witnesses,[71] two core weaknesses with the UK model. Principles of disclosure enunciated in this case have since also been interpreted by lower courts to enable special advocates to communicate with each other about confidential information, again compensating for restrictive legislative language in this respect.[72] While the Supreme Court did not strike down or rewrite legislative provisions in this case, it encouraged lower court judges to exercise their legislatively mandated discretion to bring certificate provisions more closely in step with international human rights standards that were note given effect in *Charkaoui I*.

Concluding Remarks

International human rights have considerable appeal as instruments well suited for the protection of non-citizens' rights in Canada. They have proven to be particularly attractive in the context of security certificates because they inhere within individuals irrespective of personal characteristics, national political boundaries, or the exigencies of public policy. As with all immigrants, persons named in security certificates have traditionally been denied the equal protection of Canadian constitutional law because they are not citizens and because judges have often accepted that national security concerns can justify the limitation of their human rights. *Charkaoui I* and *II* signal a marked shift in judicial attitudes about the rights to which named persons are entitled and about the proper balance between national security and human rights, a shift that has been influenced by international legal perspectives generally.

However, the precise nature and scope of international law's influence has been highly ambiguous and ambivalent. In *Charkaoui I,* the Supreme Court of Canada's interpretation of international law and foreign law encouraged the deeper integration of a flawed, foreign-based regime into Canadian national security law and policy. Yet, it chose to ignore international human rights perspectives critical of that regime and it chose not to require the reinstitution of elements of a traditional domestic regime that would have improved levels of disclosure, fairness, and adversarial challenge. No justification was given for why one set of international legal norms was recognized and the other disregarded, nor why foreign

law should be given greater weight than those international human rights Canada is obligated to respect. Finally, no justification was offered for why international or foreign law should have been used at all when there existed ample domestic resources for improving the constitutional defects of the certificate regime. In fact. international and foreign law here served as a way to escape the reinstitution of this regime, along with its comparatively robust procedural protections. To make matters even worse, the Court chose not to use international law at all in *Charkaoui II,* even though the facts and issues of the case directly engaged Canada's role in international counterterrorism practices.

These cases may be evaluated in a wide number of ways. Skeptics will doubtless see in them all that is wrong with our law of reception, and perhaps even with constitutional adjudication as an avenue towards achieving greater social justice. We see in these rulings nothing more than the judiciary's clumsy attempt to use whatever tools were available to achieve the results they wanted. What is given in one case can be taken away in another, leaving named persons and government bodies alike in the dark concerning precisely what are their rights and obligations. And, at the end of the day, the desired result seems to have been the preservation of an arguably discriminatory regime that both submits and exposes non-citizens to a litany of human rights abuses. While not the cause, international and foreign law played no small role in rationalizing the reconstitution of this regime.

Yet, an alternative view is equally plausible: one that reformulates the results the Court was looking for, although not the means. One might hypothesize that the Court from the very beginning was persuaded by the international human rights arguments submitted by Mr. Charkaoui, Mr. Almrei, Mr. Harkat, and those intervening on their behalf. However persuasive these arguments may have been, a range of practical problems precluded the issuance of a judgment to that effect. The government had, after all, firmly declared its intention to deconstruct the SIRC regime and was committed to using the powerful rhetoric of (inter) national security to insulate certificate proceedings and associated practices from meaningful parliamentary and judicial review, two powerful, policy-oriented bases upon which to argue for judicial deference. The Court was also acutely aware that judge-led attempts to strike better balances between national security and human rights in other jurisdictions had proven to be quite ineffective. In the UK, for instance, the House of Lords relied on international human rights in finding that the UK's version of security certificates unjustifiably discriminated against non-citizens and was therefore illegal.[73] The UK government responded by replacing the impugned regime with one that permitted the targeting of both citizens and non-citizens.[74] From its perspective, the problem of discrimination had been solved and, in one sense, international human rights were given effect. But this effect was purely symbolic and painfully ironic; the well-being of those caught up in national security machinery was effectively compromised as a result. The point had been missed.

This in mind, the Supreme Court of Canada had a choice: to issue a decision that formally consisted with available international human rights norms or to issue a decision that was more likely to give practical effect to those norms in the long run. By recommending the further entrenchment of a flawed, foreign-based certificate regime in *Charkaoui I,* it opted for the latter. Although symbolically the decision was conservative if not outright apologetic, it left open the possibility of progressively infusing into this system those international human rights standards that likely could not be given practical effect at first instance. This progressive infusion is precisely what occurred in *Charkaoui II,* whereby many of the international human rights standards that the Court seemed to disregard a year earlier were grafted onto the regime through the exercise of judicial discretion. Following *Charkaoui II,* certificate proceedings (but not certificate provisions) have been characterized by expanded levels of disclosure, fairness, and adversarial challenge. Persons named in security certificates have accordingly been far better positioned to defend themselves and, in fact, Mr. Charkaoui successfully relied on the principles enunciated in *Charkaoui II* to secure his unconditional release in October 2009.[75] With Hassan Almrei having won his freedom in December 2009,[76] it would not be unreasonable to speculate that the certificate regime is facing an existential threat.

It may be said that international law need not have played a role in this process at all; the Court might simply have had its eyes fixed on gradually reinstating the SIRC model. But even here, international law served as a highly useful means of realizing that end. Given our courts' outright refusal to recognize certificate provisions as unconstitutional prior to *Charkaoui I,* international legal and political developments post-9/11 were also critical variables affecting changes in judicial attitudes towards the rights to which non-citizens are entitled. The point is not that international law determined these decisions one way or another, but that the global dimensions of certificate proceedings and of Canadian national security law and policy have required judges to consider international legal norms as *reasons* for deciding in one way and not the other.

All things considered, it is best to take a modest view of the impact of international law on judicial reasoning in general and the development of our certificate regime in particular. If nothing else, *Charkaoui I, Charkaoui II,* and their

aftermath highlight that judicial decrees and legislative enactments reflect a complex arrangement of conflicting perspectives, values, and expectations that do not dissipate once a ruling is handed down. Courts must anticipate and respond to as many of these forces as possible if their decisions are to be both authoritative and effective. Even in cases that are thoroughly global in nature, international law is just one among many resources that help judges perform this task. As unsatisfying as the amended certificate provisions are from the perspective of international human rights, they constitute the system within which special advocates and others must work. What matters now is how various actors perform within the often tedious and unglamorous phases of day-to-day practice and decision-making. Will Canadian courts decide to continue using their discretionary authority to shape certificate proceedings in the image of international human rights, or are the new provisions nothing more than their way of casting a thin veneer of legality over an essentially arbitrary process? As with anything else, we will just have to wait and see.

Notes

1. [2007] 1 S.C.R. 350.
2. *Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711; *Charkaoui v. Canada Minister (Citizenship and Immigration),* [2004] 3 F.C.R. 32; *Charkaoui v. Canada Minister (Citizenship and Immigration),* [2004] 1 F.C.R. 528.
3. R.S.C. 2001, c. 27.
4. *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act,* S.C. 2008, c. 3, ss. 83–87, amending *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, Part 1, Division 9.
5. *Charkaoui I, supra* note 1 at para. 83. The Court cited a UK parliamentary report that included extensive consideration of international law; United Kingdom, House of Commons, Report of the Constitutional Affairs Committee, *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates* (March 2005). As I will detail below, numerous interveners also drew the Court's attention to the ways in which the regime fell below international human rights standards.
6. *Charkaoui v. Canada (Citizenship and Immigration),* [2008] 2 S.C.R. 326
7. The Minister of Public Safety and Emergency Preparedness is now styled the Minister of Public Safety; the Minister of Citizenship and Immigration is now styled the Minister of Citizenship, Immigration and Multiculturalism.
8. References to *IRPA* throughout this section will be to the Act in force between December 12, 2006, and February 21, 2008. *Immigration and Refugee Protection Act, supra* note 3, s. 77(1). I also speak in the past tense throughout this section, although some of the provisions cited are still in force.
9. *Ibid.*, s. 82(1)(2).
10. *Ibid.*, s. 81(1)(2).
11. *IRPA, supra* note 3, ss. 83 and 84.
12. *Ibid.*, ss. 78 (c) and 78 (j).
13. *Ibid.*, s. 78 (e).
14. Adil Charkaoui, for instance, was made subject of an arrest warrant in his home country of Morocco after he was detained through a security certificate. A number of independent reports on Morocco issued in 2004 highlight the regular use of torture and similar abuse, deplorable prison conditions, indefinite detentions, targeting of Muslims and other racialized minorities, excessive and unregulated use of emergency legislation, the lack of adequate legal representation for persons charged with broadly defined terrorism-related offences, the lack of due process, and the lack of an independent judiciary; see Human Rights Watch, "Human Rights at a Crossroads" (October 2004) 16:6(E), online: Human Rights Watch <http://www.hrw.org/reports/2004/morocco1004/> (accessed 30 May 2009); Human Rights Committee, 82nd Session, "Concluding observations of the Human Rights Committee: Morocco" (CCPR/CO/82/MAR1), 1 December 2004 at paras. 10, 14m 15–17, 19–21. For a more recent report, see Amnesty International, Annual Report 2009, online: Amnesty International <http://report2009.amnesty.org/en/regions/middle-east-north-africa/morocco> (accessed 30 May 2009).
15. *Chiarelli, supra* note 2; *Charkaoui supra* note 2.
16. *IRPA, supra* note 3, ss. 78 (h) and 78 (i).
17. *Convention relating to the Status of Refugees,* 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969/6 (entered into force 22 April 1954, accession by Canada 2 September 1969), Arts 1(F), 33. For the Supreme Court's ruling on national security-based deportations to face the reasonable risk of human rights abuses, see *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3.
18. *IRPA, supra* note 3, ss. 79 and 81 (c).
19. *Ibid.,* s. 3(2)(h).
20. James Nafziger, "The General Admission of Aliens under International Law" (1983) 44 American Journal of International Law 804.
21. See, for example: United Nations Security Council, 4385th Meeting, "Resolution 1373 (2001)" (S/RES/1373). 28 September 2001; United Nations Security Council, 4956th Meeting, "Resolution 1540 (2004)" (S/RES/1540). 28 April 2004; United Nations Security Council, 5261st Meeting, "Resolution 1624 (2005)" (S/RES/1624), 14 September 2005.
22. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36.
23. The United Kingdom and South Africa, for instance, have respectively used statutory and constitutional provisions

to clarify their laws of reception. See: The Human Rights Act (U.K.), 1998, c. 42; *Constitution of the Republic of South Africa Act 108 of 1996,* ss. 39, 233.

24. *Re Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*, [1932] 2 D.L.R. 250 (S.C.C.); *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioner's Residences,* [1943] S.C.R. 208; *Daniels v. R.*, [1968] S.C.R. 517; *National Corn Growers Assn. v. Canada (Import Tribunal),* [1990] 2 S.C.R 1324; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1988), 160 D.L.R. (4th) 193 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.
25. *Reference Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 at 348–349. Dickson C.J. made the same statements regarding section 1 of the *Charter* in *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 at 1056–1057.
26. Gibran van Ert, *Using International Law in Canadian Courts* (The Hague, London, & New York: Kluwer Law International, 2002) at 253–254.
27. There are a wide variety of ways of unpacking this general claim. A few examples include: Craig Scott, "'Transnational Law' as Proto-Concept: Three Conceptions" (2009) 10:7 German Law Journal 877; Reem Bahdi, "Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts" (2006) 34:3 George Washington International Law Review 555; Mayo Moran, "Authority, Influence and Persuasion: *Baker,* Charter Values and the Puzzle of Method" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004); Stephen J. Toope & Jutta Brunnee, "A Hesitant Embrace: Baker and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 357; Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 New York University Journal of International Law and Politics 501.
28. See, for instance, *R. v. Hape,* [2007] 2 S.C.R. 292. See also Graham Hudson, "Neither Here Nor There: The Non-Impact of International Law on Judicial Reasoning in Canada and South Africa" (2008) 21 Canadian Journal of Law and Jurisprudence 322; Stephen J. Toope, "Keynote Address: Canada and International Law," in *The Impact of International Law on the Practice of Law in Canada. Proceedings of the 27th Annual Conference of the Canadian Council on International Law, Ottawa October 15–17, 1998* (The Hague: Kluwer Law International, 1999) 33.
29. Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto & Vancouver: Butterworths, 1992).
30. Scott, *supra* note 27; Craig Scott & Phillip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise" (2000) South African Journal of Human Rights 206; Anne-Marie Slaughter, "A Typology of Transjudicial Communication" in Thomas Franck & Gregory H. Fox, eds., *International Law Decisions in National Courts* (Irvington-on Hudson, NY: Transnational Publishers, 1996) 37.
31. *Charkaoui I, supra* note 1 at paras. 28–29.
32. For a detailed description of how the SIRC system worked, see Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990) 3 *Can. J. Admin L. & Prac.* 173.
33. Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, online: University of Ottawa <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf>, at pp. 7–10.
34. *Chahal v. United Kingdom,* (1997) 23 E.H.R.R. 413, [1996] Eur. Ct. H. R. 54.
35. *Charkaoui I, supra* note 1 at para. 83.
36. Forcese & Waldman, *supra* note 33 at 48.
37. United Kingdom, House of Commons, Constitutional Affairs Committee, *supra* note 5 at 33; United Kingdom, House of Commons and House of Lords, Joint Committee on Human Rights, "Review of Counter-terrorism Powers: Eighteenth Report of Session 2003–2004" HL 158, HC 713 (4 August 2004), at para. 41.
38. *Charkaoui I, supra* note 1 at para. 84.
39. Some argue that the *Charter* should be interpreted in just this way; see van Ert, *supra* note 26 at 253–54, 269.
40. *Charkaoui I, supra* note 1 at para. 90.
41. *Ibid.,* at para. 90.
42. *Soering v. United Kingdom* [1987] Eur. Ct. H. R. 88.
43. *Charkaoui I, supra* note 1 at para. 123.
44. *Ibid.,* at para. 101.
45. [2004] U.K.H.L. 56.
46. *Prevention of Terrorism Act* (U.K.), 2005 c. 2.
47. *Chahal, supra* note 34 at para. 107. The UK has respected this decision.
48. *Supra* note 17.
49. *Charkaoui I, supra* note 1 at para. 131.
50. House of Commons, Report of the Standing Committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (March 2007); Senate, Report of the Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times* (February 2007); House of Commons, Report of the Standing Committee on Citizenship and Immigration, *Detention Centres and Security Certificates* (April 2007).
51. References to *IRPA* throughout this section will be to the Act in force since June 18, 2008. *Immigration and Refugee Protection Act, supra* note 3, s. 83(1)(c).
52. *Ibid.,* ss. 85.2 and 85.4(1).
53. *Ibid.,* s. 85(3).

54. *Ibid.,* ss. 85.2 (c) and 85.4(2).
55. *Ibid.*, s. 85.2 (c). This section states that judges may grant special advocates "any other powers that are necessary to protect the interests" of named persons.
56. *Ibid.*, s. 83(1.2)(b)(c).
57. Forcese & Waldman, *supra* note 33 at 40.
58. *Secretary of State for the Home Department v. MB (FC)* [2007] U.K.H.L. 46.
59. *Immigration and Refugee Protection Act, supra* note 3, s. 82(5).
60. *Charkaoui, supra* note 6. .
61. *Ibid.*, at para. 2.
62. *Ibid.*, at paras. 25–28, 47, 54.
63. Canada. Privy Council Office, *Securing an Open Society: Canada's National Security Policy* (Ottawa: Queen's Printer, 2004); The global coordination of Canadian national security agencies is largely directed by the Integrated Threat Assessment Centre; online: Integrated Threat Assessment Centre, <http://www.itac-ciem.gc.ca/index-eng.asp> (accessed 30 May 2010).
64. Canada, Parliament, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006). See also, International Commission of Jurists, "Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights" (Geneva, 2009) at 67–73.
65. *Charkaoui II, supra* note 60 at para. 54.
66. See, for instance, *Harkat (Re),* (2009) F.C. 340 at para. 7.
67. *Ibid.*, at para. 7.
68. *Ibid.*, at para. 9.
69. *Harkat (Re)* (2009), F.C. 203 at para. 12
70. *R v. Stinchcombe,* [1991] 3 S.C.R. 326.
71. Special advocates have not, however, been often granted requests to cross-examine government witnesses; see *Harkat (Re)* (2009), F.C. 204.
72. *Harkat (Re)* (2009), F.C. 59. It should also be noted that similar changes have been made in the UK; see Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 414.
73. *Re A, supra* note 45.
74. *Counter-Terrorism Act* (U.K.), 2008, c. 28.
75. *Charkaoui (Re)* (2009), F.C. 1030.
76. *Almrei (Re)* (2009), F.C. 1263.

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Seeking Refuge in an Unrecognized State: Oromos in Somaliland

Anna Lindley

Abstract

The self-declared state of Somaliland is much better known as a refugee producing territory than a refugee destination. Yet in recent years the territory has witnessed growing non-Somali immigration from the Oromo regions of Ethiopia. In the wake of marginalization and oppression in Ethiopia, these newcomers find a precarious refuge in Somaliland, demonstrating some of the challenges of in-region protection and integration in the Horn of Africa.

Résumé

L'État non reconnu mondialement du Somaliland est mieux connu comme territoire producteur de réfugiés que destination pour ceux-ci. Pourtant, le Somaliland a vu ces dernières années une augmentation d'immigrants non somaliens provenant de l'Oromie en Éthiopie. Dans le sillage de leur marginalisation et oppression en Éthiopie, ces nouveaux arrivants trouvent un refuge précaire en Somaliland, démontrant certains des défis de la protection à l'intérieur de la région et de l'intégration dans la Corne de l'Afrique.

Somaliland, the *de facto* state on the northern periphery of the Horn of Africa, is best known as the site of mass emigration as a result of political oppression and civil war. In recent years, however, the territory has witnessed growing immigration. A significant proportion of Somaliland's migrant population originate not from war-torn southern Somalia, but rather from various parts of Ethiopia. While an Ethiopian presence is not a new phenomenon it has been increasingly noticeable in recent years as Somaliland has stabilized. Some of these immigrants work in Somaliland's capital, Hargeisa, for the Ethiopian mission, businesses, or NGOs, and some fled to Somaliland since 2007 in the wake of the Ethiopian government's brutal counter-insurgency campaign in the Ogaden region. This account, however, focuses on a third group, exploring the fortunes of people of Oromo origin living in Somaliland. The Oromo are the largest ethnic group in Ethiopia, but have found themselves marginalized from power under successive regimes, most recently by the Ethiopian People's Revolutionary Democratic Front (EPRDF), which came to power following the 1991 revolution which brought down the authoritarian Derg regime. Political and economic oppression in the Oromia region, following the withdrawal of the Oromo Liberation Front (OLF) from the Transitional Government of Ethiopia in 1992, have forced unknown numbers to leave the country.

Most research in the last twenty years on Ethiopian refugees has focused on large refugee camp populations in Djibouti, Sudan, and Kenya and the major resettled populations in North America and Europe. There is a dearth of information on the situation of the many Oromos living in the Somali regions. Indeed, for outsiders, it is often hard to believe that anyone would seek refuge in the Somali territories, which in the last two decades have been much better known for producing than hosting refugees. Their presence has recently been brought to international attention as a result of transit migration and boat smuggling to Yemen—although many are not in transit, but have been living in the Somali regions for several years. Recent research by the Refugee Studies Centre, Oxford University[1] in Hargeisa, Somaliland, offers some insights into the situation of this population and the challenges they face, drawing on twelve individual interviews and group discussions with some twenty-five people, carried out with the help of two Oromo-speaking research assistants in July 2008, as well as consultations with NGO workers, UNHCR, government officials, business people, and other local residents.

Causes of Migration

Despite initial high hopes, ethnic federalism initiated by the EPRDF is now thought by some analysts to have failed to accommodate grievances, while promoting ethnic–self awareness among all groups of Ethiopians.[2] According to Oromo research participants, their problems in fact escalated following the 1991 revolution. Most directly, they described a climate of fear and repression, claiming that the government and regional authorities used accusations of links to the OLF to justify a range of repressive measures, including extrajudicial killings, detentions without trial, and harassment of people publicly expressing criticism of government policies and of their families.[3] A minority of our research participants volunteered the information that they had supported the OLF concretely in some way, and many more said that more broadly there was considerable resentment and politicization among their communities as a result of their treatment at the hands of the authorities.

The research participants also described other treatment by state officials that they saw as intended to disempower their communities. Among them were people of poor as well as relatively prosperous backgrounds, and they had previously engaged in a range of occupations—working as traders, farmers, herders, students, and casual labourers. They emphasized the natural wealth of the areas they live in, but were frustrated by what they saw as undermining economic measures, such as the debt relations resulting from the distribution of fertilizers on credit by local officials and the selective authorization and withholding of trading licences. The prohibition on using the Oromo language in many areas of public life was lifted by the EPRDF, but participants asserted that the repressive political climate and the introduction of new and intrusive local institutions (supposedly as a means of promoting community development) had deliberately disrupted patterns of trust and mutual support in their communities.

Various factors triggered the departure of those interviewed. Most had left in the run-up to the 2005 elections and since, when there was a surge in Oromo arrivals in Somaliland. Many cited examples of close relatives who had been killed or imprisoned. Many had been imprisoned themselves, and subjected to torture and inhuman treatment. A significant proportion had been high school or university students and had been caught up in the waves of surveillance, expulsions, and arrests that followed various student demonstrations. The general pattern was that they had left alone, secretly, and often precipitously—following detention, a traumatic event, or threat from officials—with the primary aim of getting out of Ethiopia. Most said that they had come to Somaliland simply because it was close, without knowing much about the situation there. This picture contrasts with the commonly held view in Somaliland that the Oromos are economic migrants. Reportedly some people from Oromia do travel to Somaliland primarily to work for a few months or years, but none of the people participating in this research said that they had left Ethiopia to find work. Rather they emphasized that they had reluctantly left behind families, fertile lands, university careers, or business interests, in the face of what they felt was considerable personal danger, for an economically dismal existence in Somaliland.

Situations in Somaliland

People originating from the Oromo region are generally among the poorest of poor in Somaliland. They are effectively restricted to the worst-paid jobs, jobs which Somalilanders find demeaning, such as rubbish collection, toilet digging and emptying, clothes washing, and other casual work. They are criticized for begging with their children, something seen by locals as alien and shameful. Some are able to find work as watchmen but generally on lower pay than locals. Stories of abusive employers abound: most commonly, research participants reported problems with getting paid for work they had done, some saying that their employer threatened to report them to the Ethiopian mission and the Somaliland criminal investigation department to make them give up for fear of deportation.

Community relations are generally rather segregated, due to the language barrier, distinct culture, and belief among many locals that the Oromos are Christian (although many coming to Somaliland are in fact Muslim). As non-Somalis, they fall outside the Somali clan arbitration system, and have struggled to resolve disputes with members of the host community. Recognizing the way things work locally, a committee of Oromo elders was established, with the approval of the Ministry for the Interior, to try to represent their interests, but has struggled to be taken seriously by Somali elders. The suicide bombings of the Ethiopian mission, United Nations Development Programme offices, and the Presidential Palace, and a subsequent backlash against "foreigners," including Oromos, in Somaliland, did not make things any easier.

A Precarious Refuge?

Somaliland itself has undergone massive political upheaval in the last thirty years. Growing resistance to Siyad Barre's regime culminated in the civil war of 1988–1991. During the 1990s, despite a relapse to conflict mid-decade, a political system was gradually established that has since ensured stability and peace. But the Somaliland government has not been recognized internationally, and has recently come under major political strain regarding disagreements over the much-delayed presidential elections. Oromo research

participants emphasized the poverty of Somaliland—one describing the position of immigrants as: "It is like leading the life of a watchman of another watchman."

Nevertheless, legally speaking, insofar as it governs the population in areas where it has effective control, the Somaliland government is bound by customary international human rights law.[4] Moreover, under Article 10 of its constitution, Somaliland has committed to international obligations entered into by the Republic of Somalia, including the 1951 and 1969 Refugee Conventions. Specifically, Article 35(1) of the Somaliland constitution specifically grants foreign citizens the right to seek political asylum.

An asylum system has been established, administered by a Refugee Eligibility Committee under the Ministry of the Interior, working in co-operation with UNHCR. All this is rather remarkable progress, given the precarious political and economic situation of Somaliland. However, early reports of corruption and lack of capacity led to the suspension of registration (with the interim measure of large-scale registration exercises) pending an overhaul of the system, which reopened in 2008. In 2008, Somaliland had some six thousand registered asylum seekers and well over one thousand recognized refugees, mainly Ethiopian Oromos. Refugees were given a recognition letter and were able to claim a US$50 allowance each month from UNHCR. For reasons already mentioned, the prospects for local integration are deemed slim and some have been resettled in third countries. But a large proportion of Oromos in Somaliland are not registered as asylum seekers, either because they simply want to work, or through fear, poverty, or ignorance.

However, the protection of Ethiopian nationals seeking refuge in Somaliland is at best patchy. There have been numerous reports of deportations or attempted deportations of Ethiopians from Somaliland, including some of our Oromo research participants and people they had known personally.[5] Many of the participants lived in fear of deportation, and several explained that they moved frequently around the city to avoid detection. According to international conventions which Somaliland has committed to honour, asylum seekers and refugees should be protected from return to a country where their life or freedom may be threatened. Moreover, according to Article 35(3) of the constitution, foreign citizens in general can only be extradited where a formal extradition treaty exists: according to Human Rights Watch no such treaty can exist with Ethiopia, as it does not recognize Somaliland's independence.[6] However, the Somaliland authorities can come under considerable political pressure to be co-operative, or at least not obstructive: Ethiopia is the regional superpower and Somaliland's major regional ally, and the government is highly dependent on revenue from Berbera Port and the trade corridor into Ethiopia.

It is hard for many Oromos in Somaliland to access any kind of assistance. Compatriots are sometimes able to offer some help, but they are generally struggling to survive themselves. NGOs are generally not particularly interested in assisting non-Somalis, given the major issues facing many local people. As one interviewee put it, "There are many NGOs in this country. But it is impossible to approach them because the local community won't allow you. You have to pass many hedges to get them." In this context, the UNHCR, the Refugee Welfare Centre (run by Save the Children and funded by UNHCR), the Refugee Committee, and the Hargeisa University Legal Clinic (funded by UNDP) provide crucial if limited support. More generally, the International Organization for Migration (IOM) has been trying to sensitize local communities to the rights and needs of migrants, particularly those on the move through Somaliland.

With problems in Ethiopia ongoing, and many lacking the funds to move any further than Somaliland, the Oromo presence in Somaliland is likely to continue. There are children born in dire poverty to Oromo parents, who are unlikely to "return" to Ethiopia. While many in Somaliland may not yet be willing to contemplate the idea, alongside the territory's many other challenges, people of Oromo origin are likely to continue to form a permanent minority in Somaliland in the long run, and deserve to live in dignity.

Notes

1. This research was conducted as part of a wider project on migration in the Somali regions; see http://www.rsc.ox.ac.uk/research_current_rz5.html and http://www.micro-conflict.eu.
2. International Crisis Group, *Ethiopia: Ethnic Federalism and its Discontents*. Africa Report No. 153. (Nairobi and Brussels: International Crisis Group, 2009).
3. See also Human Rights Watch, *Suppressing Dissent: Human Rights Abuses and Political Repression in Ethiopia's Oromo Region* (New York: Human Rights Watch, 2005).
4. See Human Rights Watch, *"Hostages to Peace" Threats to Human Rights and Democracy in Somaliland* (New York: Human Rights Watch, 2009).
5. See also Human Rights Watch, *"Hostages to Peace"*; also Amnesty, *Human Rights Challenges: Somaliland Facing Elections* (London: Amnesty, 2009).
6. See Human Rights Watch, *"Hostages to Peace."*

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