Journal on Migration and Human Security

Reconfiguring the Law of *Non-Refoulement*: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection

Mark R. von Sternberg
Catholic Charities Community Services, Archdiocese of New York

Executive Summary

Both geographic and normative constraints restrict access to surrogate international human rights protection for those seeking a haven from serious human rights abuses. Primary among territorial restrictions has been the fall-out from the US Supreme Court's decision in *Sale v. Haitian Council Centers* in which the court explicitly ruled that nothing in US statutory law, or in the 1951 Convention on Refugees or its 1967 Protocol, precluded the interdiction of Haitian refugees in international waters and their return to the country of origin without an effective interview on their protection clams. This ruling is in transparent contradiction to the general international law norm of *non-refoulement* according to modern scholarship and emerging case law. This paper concludes that *Sale* should be overturned by statute as should related pre-screening practices. A new standard of "jurisdiction" should be adopted which does not depend on territorial access to a signatory state but on whether the state is exercising power in fact. Similar concerns exist with respect to safe third country agreements which often offend the international customary right of the asylum seeker to choose where his or her claim will be filed. This paper argues that the right of choice should be recognized and onward travel and admission to the country of destination allowed. This result is especially called for where return of the alien by the country of first contact raises serious concerns under the law of *non-refoulement*. Imbalances noted in this paper include those generated by the new terrorism related grounds of inadmissibility in the United States and the summary denial of children's asylum claims flowing from gang violence.

Other questions are raised in this paper concerning work authorization and detention of asylum seekers. Access to an employment authorization

document for those filing colorable claims should be recognized by statute to render US practice consistent with that of most other states. Release from detention, on the other hand, for asylum seekers has now been broadly recognized by the US Department of Homeland Security where the asylum seeker's identity can be ascertained and the claim is non-frivolous in nature. This approach is largely consistent with international law, although there have been unnecessary delays in implementing it.

On the substantive law, the international customary norm of *non-refoulment* has been expanded considerably through the development of *opinio juris* by scholars and the practice of states. This paper traces efforts in Europe to develop a law of temporary refuge for those fleeing civil war situations characterized by humanitarian law violations. Similarly, case law under the European Convention of Human Rights has now come to focus on the harm the claimant would suffer as the result of conditions in the country of origin without identifying an explicit agent of serious harm. Related to these developments has been the notion of complementary protection under which relief can be conferred where the alien would suffer serious harm upon return to the home state but not for a Convention reason. These approaches have now received approval in the European Union Asylum Qualification Directive so that international protection may now be conferred either because the alien would suffer serious harm on account of the intensity of human rights violations taking place in the country of origin, or those conditions, taken in conjunction with the claimant's personal situation, support a finding that the claimant would be impacted. This paper argues that this latter standard has now been made a part of the customary norm of *non-refoulement* and that it should be recognized by statute as a basis for non-return and coupled with status where the new standard can be met. Such a measure would help restore the nation's commitment to human rights and humanitarian concerns.

Introduction

Several major problems face the individual in need of international human rights protection. The first of these is whether he or she can access some state system wherein the claimant can be granted relief. Another is whether that state system will recognize the claimant as a "refugee" or as someone upon whom it can confer some form of surrogate international human rights protection. This paper attempts to discuss two major areas of concern which affect the dilemma of refugee flight and the search for durable solutions.

The first of these is examination of the procedural bars to seeking asylum and other forms of refugee protection as manifested in interdiction on the high seas and safe third country agreements (together with other ancillary restrictions on refugees including detention and filing requirements). The second entails a review of state substantive standards governing eligibility for protection and the conformity of those standards (or the lack thereof) to the international norm of *non-refoulement*. Primarily, the paper will look to United States

practices in relationship to international requirements as a template for purposes of developing its comparative model.

Part A: Geographic Scope of the Law of *Non-Refoulement*

I. Prefatory Remarks

Whatever broad discretion the sovereign may have over migration in general, that discretion is sharply delimited in the crucial area of human displacement and the related phenomenon of forced migration. For here, the sovereign's power clashes with treaty law and with the international customary norm of *non-refoulement*. Under customary law as codified in article 33 of the Refugee Convention of 1951, a refugee may not be returned to the frontiers of a state wherein her life or freedom would be threatened by reason of race, religion, nationality, membership in a social group or political opinion.[1] Similarly, customary law and article 3 of the Convention Against Torture also preclude the return of any person to a state wherein there are good reasons to believe that that individual would be subject to torture.[2]

A question of some immediacy, therefore, is: when does the obligation to refrain from *refoulement* crystallize? There is some dispute about this as the *Sale* case (discussed below) attests. The most encompassing (and, in this author's consideration, the correct) view is that advanced by Guy Goodwin-Gill: state responsibility is engaged wherever state action takes place and irrespective of physical location. Hence,

> "[t]he principle of *non-refoulement* has crystallized into a rule of customary law, the core element of which is prohibition of return *in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the [customary] rule are determined by [its] essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border or through its agents outside territorial jurisdiction." (Goodwin-Gill 1996, 143) [emphasis in original]

A more conservative view is that the obligation of *non-refoulement* becomes engaged when a noncitizen reaches an international frontier. Under this view, "[t]oday, there appears to be ample support for the conclusion that Article 33(1) is applicable to rejection at the frontier of a potential host State" (Noll 2005, 542, 549). Non-rejection, in turn, however, implies limited admission, at least for the purpose of determining whether the noncitizen

1 Convention Relating to the Status of Refugees, signed 28 July 1951, entered into force 22 April, 1954, 189 UNTS 150, art. 33(1). On the customary law aspects of the treaty provision, see generally Goodwin-Gill and McAdam 2007. The bar is both a rule of customary law and a rule of *jus cogens*, thus enjoying universality and non-derogability. See generally, Parker and Neylon 1989. In this respect, *jus cogens* describes norms which have risen to the apex of international customary law so that they are said to have acquired the features of universality and non-derogability. *Id*.

2 See, Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, adopted 10 December 1984, entered into force 26 June 1987, G.A. Res. 39/46, 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51, at 197 (1984), reprinted in 23 ILM 1027 (1984), minor changes reprinted in 24 ILM 535 (1985), 5 HRLJ 350 (1984) [Convention Against Torture or CAT], art. 3. On the customary law underpinnings of article 3 of the Convention Against Torture, see, Rosati 1997.

is a refugee (or reasonably fears the imposition of torture), and so for ascertaining the full scope of the host state's obligations vis-à-vis the individual under consideration.[3]

What does *non-refoulement* as a threshold matter require? Under *non-refoulement*, states have a responsibility (a) to avoid returning aliens to a state wherein it is reasonably clear that the alien will be persecuted or tortured; and (b) to avoid sending the alien to a state which does not itself observe the norm of *non-refoulement* (Noll 2005, 549). As a subsidiary obligation of these two major injunctions, states also have a responsibility to refrain from sending an alien who presents himself at the border anywhere before conducting an interview as to whether the alien has a prospect of persecution or torture.[4] A state which summarily returns an alien to any state under the circumstances described above engages in the prohibited activity of "rejection at the frontier."[5]

II. Interdiction at Sea and In-Country Processing by Officers of the Asylum State

With respect to interdiction at sea, it was long believed that the practice of "picking up" asylum seekers at sea and returning them to their home states without a hearing was patently illegal under general international law. At a minimum, it was maintained, such individuals were required to receive a hearing on persecution and torture (a "screening interview") before being forcibly repatriated. Indeed, prior to a mass influx of Haitians resulting from the overthrow of President Jean Bertrand Aristide in the early nineties, it had been the practice of US cutters patrolling the Caribbean to provide such interviews (Goodwin-Gill and McAdam 2007, 146-50).

In 1993, however, the US Supreme Court issued its decision in *Sale v. Haitian Centers Council, Inc.*[6] In that case, the court upheld the current interdiction policy in which the Coast Guard, feeling that it would have to admit substantial numbers of Haitians to US territory if the interviews were to be continued, resolved to repatriate fleeing Haitians without any dialogue with them as to what would happen once they were forced back. Looking at this practice, the court reasoned that the term "return" in the statute, like the

3 Perhaps the most interesting evidence of this principle can be found in the United Nations High Commissioner for Refugees (UNHCR) Executive Conclusion XXXII, *Protection of Asylum Seekers in Situations of Large-Scale Influx*. According to the UNHCR Conclusion, arriving asylum seekers are to be admitted to the country in which they first seek refuge. If that state is unable to admit them on a durable basis, it should admit them on a temporary basis and given the following protections. Such asylum seekers (1) should not be penalized nor have their movements restricted solely on the ground that their presence in the country is considered unlawful; (2) should enjoy the full enjoyment of civil rights guaranteed under the Universal Declaration of Human Rights; and (3) should receive all the necessities of life. In all cases, the norm of *non-refoulement* and the bar against rejection at the frontier "must be scrupulously observed." UNHCR Executive Committee of the High Commissioner's Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 21 October 1981, No. 22 (XXXII), available at: http://www.refworld.org/docid/3ae68c6e10.html.

4 Note on *Non-Refoulement* (Submitted by the High Commissioner) EC/SCP/2, International Protection (SCIP), 23 August 1977, ¶ 7. Executive Committee of the High Commissioner's Programme, 28th Session of the Sub-Committee of the Whole on International Protection, available at: http://www.unhcr.org/3ae68ccd10.html.

5 *Id.*

6 509 US 155 (1993).

word "*refouler*" in article 33 of the Convention, was the practical equivalent of the term "deport." Accordingly, a state was precluded from returning aliens in such circumstances *only where* the alien had in actual fact presented herself at the frontiers of a signatory state. It was only in the context of removal from the territory of the "refouling" state that the bar against *refoulement* could come into effect.

The criticism of the US Supreme Court as the result of this ruling was considerable. One celebrated editorial by Goodwin-Gill, appearing in the *International Journal of Refugee Law,* noted that the only legal effect of the court's decision was that it had added itself to the list of violators (1993, 461). The majority's misunderstanding of the French verb *refouler* (which means to "drive back" in English) was complete and unqualified. What is of moment under international law was not the place the asylum seeker was being driven from (here the high seas), but rather where he or she was being driven to (in many instances, relatively certain persecution). As noted previously, the Refugee Convention must be interpreted so as to give effect to its overriding objective, i.e., to prevent refugees from being exposed to persecution. It is difficult if not impossible to reconcile this purpose with the interpretation given by the US Supreme Court to the scope of article 33 in the *Sale* case.

On May 20, 2004, the Inter-American Commission on Human Rights ruled that Haitians interdicted on the high seas by the United States were entitled to fair hearings on their claim to refugee status, concluding that this was a protected right under the American Declaration on the Rights and Duties of Man.[7] The commission also directed the US government to provide reports on Haitian asylum seekers interdicted in international waters, which are to include the number of those interdicted who have made refugee claims and the conditions under which those claims were heard.[8]

The damage done by the *Sale* decision is difficult to assess. One of its chief effects was to create a legal "black hole" with respect to interdiction on the high seas where there was, according to the court, no law, and hence refugees could have no rights. The vestiges of *Sale* are still being clung to by major jurisdictions such as Australia which continues to participate in interdiction and removal programs (McAdam 2013, 435). What remains of interest, however, is that the court would not repeat with Guantanamo detainees the mistake it had made in *Sale*: in the *Boumediene* case the court ruled that the writ of *habeas corpus* extended to those detained on the Guantanamo naval base, rejecting arguments that federal courts lacked jurisdiction because US territorial sovereignty was not involved.[9]

In *Boumediene,* the court arguably overturned the two principal barriers affecting noncitizens seeking relief in US courts: alienage and extraterritoriality. It had long been accepted in US jurisprudence that *habeas* jurisdiction would not extend to aliens seeking to invoke US constitutional protections in an extraterritorial setting (Legomsky and Rodriguez 2009, 169-71).

The court had originally rejected these restrictions in *Rasul v. Bush*,[10] with respect to

7 Inter-American Commission on Human Rights, Report No. 51/96, Decision of the Commission as to the Merits of Case 10, 675 (March 13, 1997), available at: http://www.cidh.org/annualrep/96eng/USA10675.htm.

8 *Id*.

9 *Boumediene v. Bush*, 553 US 723 (2008).

10 542 US 466 (2004).

statutory *habeas*. By the time *Boumediene* was decided, however, the *habeas* statute had been modified so as to preclude jurisdiction over the Guantanamo detainees in US district courts. Relying on constitutional *habeas*, therefore, *Boumediene* enshrines the essential principle spawned in *Rasul*: the US has retained "practical sovereignty" over Guantanamo by virtue of its *de facto* control there and its exercise of actual power over all matters having to do with the naval base.[11]

Following *Rasul*, the *Boumediene* Court determined, in effect, that the issue of jurisdiction should be based on a practical inquiry into whether the United States was exercising unrestricted power over the Guantanamo base rather than a formal inquiry into territorial sovereignty.

Sonia Farber has explained how this essentially new judicial outlook affects refugees, both those detained at Guantanamo and those found in other extraterritorial settings (2010). Primarily she explores the situation of refugees detained at Guantanamo, but explains that the court's decision should extend to other refugees as well. Her examination of the issues illustrates convincingly how the court has now effectively abandoned the "legal black hole" theory it had pursued in *Sale* pursuant to which refugees have no extraterritorial rights because there is no substantive law to which they can turn for protection.

A related practice is "pre-clearance." Pre-clearance has been adopted by certain states in an effort to block asylum seekers attempting to leave a country of claimed persecution from accessing the territory of the former. In *Regina (ex Parte European Roma Rights Center) v. Immigration Officer at Prague Airport and Another*,[12] the House of Lords was asked to review a practice under which British officials temporarily stationed at Prague Airport denied access to UK-bound aircraft (and thus to Britain) of Czech members of the Roma ethnic group where it was the purpose of the latter to seek asylum in the United Kingdom.

The Lords were careful to distinguish the *Regina* case from *Sale*. In this case, the individual seeking protection had not reached an international frontier, the threshold requirement for those who would meet the Convention refugee definition. The term *non-refoulement* can have no logical application, the Lords ruled, if the asylum seeker remains inside the country of claimed persecution for, in that instance, there is nowhere to return him to; unfortunate though his plight may be, the putative refugee remains inside the country wherein his human rights are being abused. The Lords notwithstanding struck down the arrangement based on application of article 14 of European Convention on Human Rights (ECHR) (precluding discrimination): by targeting only Roma for removal from UK-bound flights, Great Britain had violated the affected passengers' right to equal treatment under the ECHR.

A compelling brief submitted by the United Nations High Commissioner for Human Rights (UNHCR) takes issue with the conclusion that refugee law was not implicated by the pre-clearing practice.[13] The UNHCR position is that a state which obstructs the passage

11 During oral argument in *Rasul*, this principle was best illustrated by the revelation that an envelope would not get off the base unless it had a US stamp on it. The *Rasul* Court turned for its approach to some very pedigreed jurisprudence established through Lord Mansfield's rulings to the effect that the writ follows dominion or power exercised by the crown outside of the realm. *Rasul*, citing *King v. Cowle*, 2 Burr 85497 Eng. Rep. 587 (K.B. 1759); *Ex parte Muwenya* [1960] 1 Q.B. 241 (C.A.), through Lord Evershed).

12 [2004] UKHL 2004, reprinted in (2005) *International Journal of Refugee Law* 17: 217.

13 UNHCR, *R (ex Parte European Human Rights Center et al.) v. Immigration Officer at Prague Airport*

of refugees must do so within the law. In this respect, "pre-clearance" within the state of claimed persecution is the practical equivalent of "rejection at the frontier." As noted by the US delegate to the 1951 Plenipotentiary Conference, Louis Henkin, rejection at the frontier can take a variety of forms, including closing the border. The practical consequence of what was done at the Prague Airport was to close the UK border to Roma asylum seekers.[14]

The result contended for in the UNHCR Brief has obvious parallels in the position of Goodwin-Gill set forth earlier that the state may act through its agents outside its territorial jurisdiction and that this is enough to engage state responsibility. Apart from this, states may not exercise such rights as they do have in bad faith. Such exercise would be tantamount to an *abus de droit*. The UNHCR position is not to the effect that UK officials must admit every Czech national who presents herself for admission; rather, examination must be made to determine whether the applicant is a refugee, and, if so, admission must be permitted on a temporary basis.[15]

In *Hirsi v. Italy,* the European Court of Human Rights adopted legal positions which were comparable to those the UNHCR had been advancing in the Prague Airport case and which had been articulated earlier by Goodwin-Gill in his editorial on *Sale.*[16] In *Hirsi,* the court was asked to resolve Italy's removal of Somali and Eritrean refugees to Libya without any kind of examination with respect to the latter's well-founded fear of persecution or other significant harm. The Strasbourg Court held that this practice violated both the *non-refoulement* provisions of article 3 of the ECHR and constituted a collective expulsion in contravention of article 4 of protocol 4 to the ECHR.

On the violation of article 3, the court found that it would not measure whether the state engaged in returning the refugees to Libya had territorial jurisdiction over them, as had the Supreme Court in *Sale.* Rather, it examined whether Italy exercised power in fact over the claimants in determining if the norm of *non-refoulement* had been violated.[17] On the collective expulsion violation, the court adopted an argument which had been put forward in the *Prague Airport* case. The court ruled that collectively removing these claimants to Libya without an interview would frustrate the fundamental aim of the treaty by precluding them altogether from reaching a forum where they could apply for some form of surrogate international human rights protection.[18] Although neither the 1951 Refugee Convention, nor the ECHR guarantee a refugee claimant a forum in which to advance his or her application, these instruments contemplate that at some juncture such a forum must exist for the right to *non-refoulement* to be meaningful. Adopting procedural mechanisms which would effectively preempt the right of non-return violates the instruments in the same way that rejecting the claimant at the border would.

and Another (UNHCR Intervening), (2005) *International Journal of Refugee Law* 17: 425.

14 *Id.*

15 *Id.*

16 *Hirsi Jamaa and others v. Italy*, ECt.HR Judgment of Feb. 23, 2012 [Grand Chamber], No. 39473/98, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509. See also, den Heijer 2013, 265.

17 *Hirsi* case, *supra*, at 66.

18 *Id.* at 76-78 (holding that Italy's actions violated the principle of *non-refoulement* and stating that Italy must grant the applicants an opportunity to obtain asylum in Italy). See also, den Heijer 2013, 280-85.

The *Hirsi* case is illustrative of modern trends in a number of respects. In the first place, it recognizes the existence under customary law of a norm of both direct and indirect *non-refoulement* (i.e., return to Libya where inhuman treatment might be imposed, plus the risk that Libya, through its own violation of the norm of *non-refoulement,* would return refugees to Eritrea and Somalia where they would incur risk of persecution). In addition, and of equal importance, it was of no moment for the tribunal that those being returned by Italy to Libya had not requested asylum or any other form of surrogate international human rights protection. It was not, the court ruled, for the returnees to advance their claims for protection; it was for the repatriating state to determine whether any of those it was sending back would be subject to cruel, inhuman or degrading treatment upon return.[19]

III. Burden Sharing and "Safe" Third Country Agreements

"Safe third country agreements" now constitute one of the most effective barriers to international human rights protection today. Such agreements are fundamentally undesirable in principle in that they offend the received doctrine that the asylum seeker should have his or her choice as to where to file. This principle obtains in part because of the differing positions of states on the application of international criteria to international protection claims.[20] UNHCR has provided guidance with respect to where an asylum seeker should apply for refuge. UNHCR has determined:

> [A]n examination of the internationally accepted principles relating to asylum reveals that none of them suggest —much less prescribe—that the right to seek asylum has to be exercised in any particular country, or that a person who has been forced to escape his country to save his life or freedom would forfeit his right to seek asylum if he does not exercise it in the first country whose territory he has entered.[21]

Despite this clear statement of policy, it remains the continuing trend to restrict the asylum seeker's options, such as in the case of the US-Canada Safe Third Country Agreement, which is discussed in detail below. UNHCR has spoken out specifically on the international law implications of the US-Canada Agreement. Among other things, it has remarked that any agreement should reflect the principle that the wishes of the asylum seeker as to which state to seek refuge in should be taken into account "as far as possible." UNHCR also has maintained that asylum should not be denied on the sole ground that it could have been sought in another state.[22] UNHCR observes that there are broad bars existing under both Canadian and US refugee law, noting that some of these may be inconsistent with

19 See generally, den Heijer 2013.

20 In further support of the asylum seeker's right to choose where to file, see, Hathaway 1991. See also, Goodwin-Gill and McAdam 2007, 394-95, for an overview of differences of views and policies under modern law. Broadly, the safe third country concept is one which permits states to send asylum seekers to third countries with which the applicant has some connection making it reasonable for him or her to go there, and where the applicant can receive refugee protection consistent with the 1951 Convention and not otherwise be subject to direct or indirect *refoulement*. *Id*.

21 United Nations High Commissioner for Refugees, *The 'Safe Third Country' Policy in the Light of the International Obligations of Countries vis-à-vis Refugees and Asylum Seekers*, London, July 1993, quoted in Mole and Meredith 2002.

22 See generally, US, Canada Initial 'Safe Third Country' Final Draft Agreement, (2002) *Interpreter Releases* 79(37): 1431.

international standards. An asylum seeker may be denied protection in one jurisdiction but not in another. Such an imbalance in outcomes should, in principle, be avoided.[23]

Prototypes of the "safe third country" agreement which reflect a lack of political will to provide international human rights protection where it is needed are the Schengen[24] and Dublin[25] Conventions. Historically, these treaties required that an asylum seeker virtually apply in the first signatory state into which he or she came into contact. Subsequent movement to another signatory state would entail the refugee's being returned to the country "of first presence" for determination of his or her refugee status claim. This regime was later supplemented by a Resolution on a Harmonized Approach to Safe Third Countries which provided that once an asylum seeker presented a claim for international protection in a signatory state, an initial decision had to be made as to whether there was a safe host country outside the European Union (EU) to which the noncitizen could be sent before any determination was made on whether another state within the EU has jurisdiction to hear the application (Achermann and Gattiker 1995, 22-23). If such a "safe" country existed, the alien was to be sent there. If it did not, the asylum seeker would be transferred to the country of first presence within the EU which would, once again, make a fresh determination as to whether a "safe" host country existed outside the EU before it would entertain the claim. The Dublin Convention has now been effectively superseded by two EU regulations which have been styled as "Dublin II."[26] Dublin II does make some improvements. However, Dublin II remains, for the most part, a restatement of the old convention-based regime under which the country of first presence remains the state responsible for adjudicating the application for international protection (Goodwin-Gill and McAdam 2007, 400-02).

Safe third country options are extremely controversial and, in the opinion of many scholars, derogate in practice from the protections of the 1951 Convention (Hathaway 2005, 324-32; see also Borchelt 2002; Dunstan 1995) Among other things, such agreements clearly promote the "refugee in orbit" syndrome which has raised such concern among refugee scholars and which frustrates the rational planning of any transnational system of burden sharing under which refugee rights are to be taken seriously. Under the "refugee in orbit" syndrome, a refugee claimant is returned to another state where he or she is deemed to have a prior presence and which in turn declines jurisdiction either because there is another country of first presence or because of a need to re-adjudicate the safe host country issue.[27]

The recent US-Canada Safe Third Country Agreement avoids this dangerous pitfall, but it clearly presents other dangers.[28] Among other things, the agreement (which was

23 *Id*.

24 Convention Applying the Schengen Agreement of June 14, 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84 [Schengen Agreement].

25 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One Member State of the European Communities, June 15, 1990, 30 I.L.M. 427 [Dublin Convention].

26 Council Regulation (EC) No. 343/2003 ("Dublin II") of Feb. 18, 2003 and Commission Regulation (EC) No. 1560/2003 of Sept. 2, 2003. See also, European Commission Press Release, *Determining which Member State is Responsible for an Asylum Application – Dublin Convention Improved and Transformed into a European Community Regulation*, available at: http://europa.eu.int/comm/justice_home/news/intro/printer/news_191202_en.htm.

27 *Id.*

28 Agreement between the Government of the United States and the Government of Canada for Cooperation

implemented in 2005) provides that individuals who present themselves for admission at a land border port of entry, or who are being removed from the territory of one signatory state into the territory of another, will be returned to the country of first presence for adjudication of their refugee claims.[29] The agreement thus does not (as is commonly believed) preclude "double filing," since an asylum-seeker could file in one jurisdiction and then enter without inspection into the territory of another and file a second time. This aspect of the agreement has been strongly criticized since it would seem to promote smuggling and disorder at the border, one of the principal goals which it was entered into to avoid.[30]

Concerns about enforcement of the treaty on the Canadian side flow from the United States' continuing use of the death penalty and excessive reliance on "Terrorist Related Grounds of Inadmissibility" in determining eligibility for refugee-type relief. As is well-documented, the United States' use of its "material support" provisions preclude from asylum or withholding claimants who have been coerced into supporting questionable organizations thereby eliminating any consideration of individual responsibility in applying this already excessively broad terrorism-related preclusion (Settlage 2012, 142).[31]

In the related area of the "persecutor bar," for instance, the UNHCR has crafted an exception which would eliminate from the bar individuals who are coerced into administering serious harm provided that the harm they fear is imminent and greater than the harm they would inflict. [32] The exception is tailored, in other words, to reach those cases which have intrinsic merit and would avoid the truly harsh consequences of applying the bars indiscriminately to those asylum seekers who may constitute a security risk for the host state and those who do not.[33] Adopting the proposed test of UNHCR to those charged under the "terrorism"

in the Examination of Refugee Status Claims from Nationals of Third Countries (Agreement), available at: http://gov/graphics/lawsregs/Draft/Agree090402.pdf.

29 *Id*.

30 See, "Family Unity, Other Issues Discussed at House Hearing on the US-Canada Safe Third Country Agreement," (2002) *Interpreter Releases* 79 (41): 1570.

31 The "Terrorism Related Grounds of Inadmissibility," or TRIG, include the bar to asylum existing for those who provide "material support" to a "terrorist organization." See, 8 USC § 1158 (b)(2)(A)(v) and 8 USC § 1182(a)(3)(B)(i)(VI).. Section 208(b)(2)(A)(v) precludes from asylum individuals who have engaged in "terrorist activity." "Terrorist activity," in turn, is defined to include the commission of any act which the agent knows or should know "affords material support [to an individual or terrorist organization] including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification weapons (including chemical, chemical, biological or radiological weapons), explosives or training [….]." "Terrorist organization" is defined in section 212(a)(3)(B)(vi) as one designated as such by statute, [Tier I] as one designated as a "terrorist organization" by the Department of State by regulation [Tier II], and finally as any organization of two or more persons which has engaged in prohibited "terrorist activities." See, 8 USC § 1182(a)(3)(B)(vi).

32 For a restatement of the customary international law test, see Hathaway 1991, 218. The test has been approved and is in effect in Canada. *Ramirez v. M.E.I.*, (1992), 135 N.R. 390 (F. C.A.). See also, *Negusie v. Holder*, 555 US 511 (2009), in which the Supreme Court rejected the Board's previous application of the persecutor bar on the ground that the agency was looking at the wrong statute as authority for its view that the existence of "coercion" was extraneous to a finding on whether the bar applied. Although *Negusie* was decided in 2009, no ensuing decision of the Board has yet been made.

33 For an excellent discussion of the security-related provisions of article 9 of the Refugee Convention [giving states the right to adopt provisional measures towards individuals who constitute risks to national security], see Hathaway 1991, 263-66. Hathaway recommends an especially restrictive interpretation of article 9 in light of its potentially preclusive nature.

bars would avoid criticisms of the statute as presently interpreted to the effect that, by not individualizing the cases which are before them, agencies and courts have departed from the obvious intent and purpose of the Refugee Convention and Protocol that the threats to the security of the host state be actual, and not presumed.

The most egregious feature of "safe" third country agreements, however, is that they completely eliminate any choice of forum on the part of the asylum seeker, thereby subverting the refugee's freedom to determine where to file, which is a right recognized under international law. Usually cited as a virtue of the "system," this component constitutes a potentially fatal weakness. Some jurisdictions are simply more liberal than others with respect to specific types of claims. It is now broadly recognized, for instance, that Canada has remained the advance party with respect to a number of types of claims, notable among them asylum applications arising out of civil war scenarios, those based on draft resistance or desertion, and gender-based claims predicated on domestic violence.[34]

Moreover, the United States has recently announced, through its Board of Immigration Appeals (BIA), a firm stance against asylum cases brought by children seeking to avoid involvement with criminal gangs. As discussed below, Canada has adopted a policy of allowing such claims in appropriate, if limited, circumstances.[35] Should not the asylum seeker's choice of forum be honored in such instance? It is one thing to adopt a controversial position against certain types of cases based on largely ideological grounds. It is another thing entirely to impose that result on the international system by preventing refugee claimants from reaching a jurisdiction wherein their claims can be heard within a favorable framework of decision. Such results should be eschewed by signatory states rather than be encouraged by them. And the policy against "forum shopping" should be subject to an appropriate exception recognizing in the asylum-seeker the right to access a more sympathetic forum. This should particularly be the case where return of the asylum- seeker to the home state would raise grave issues under the law of *non-refoulement*.

IV. The One-Year Filing Deadline and Limits on Employment Authorization

Under the Immigration and Nationality Act (INA), as amended in 1996, asylum seekers are not eligible if they apply for relief more than one year after their arrival in the United States. Over an 11-year period ending in June 2009, this measure affected more than 30 percent of affirmative asylum-seekers; i.e., those who filed for asylum with the Department of Homeland Security (DHS), as opposed to seeking asylum in removal proceedings before an immigration judge (Schrag et al. 2010, 688). As has been widely noted, many asylum seekers do not speak English, making preparation of a *pro se* claim a virtual impossibility. The usual preoccupations of those seeking protection is to secure the aid of friends and family members who can give the alien shelter and otherwise provide the necessities of life. Access to a professional is difficult at best, and the *pro bono publico* bar is presently overwhelmed with cases making representation even more difficult (Legomsky and Rodriguez 2009, 1045-46).

34 See, for example, von Sternberg 2002, 254-98 and authorities cited therein.
35 See, Section B.IV, *infra*.

DHS justifies this restriction by insisting that the one-year filing deadline applies to asylum only, and not to the other mandatory relief provided under international law, i.e., withholding of removal under INA section 241(b)(3) [the relief provided for under article 33 of the 1951 Convention] and relief under article 3 of the Convention Against Torture. While this is formally true, asylum is the only remedy which provides the asylum seeker with an immediately available durable remedy, i.e., local integration. Denying that remedy under international law and policy must be supported by a valid state interest. Such an interest cannot be identified: there is simply no governmental concern which is addressed by forcing asylum seekers to file within a particular time period (see Pistone 1996, 95).[36] On the other hand, there is considerable prejudice to the asylum seeker by imposing such a restraint.

All asylum seekers in the United States are subject to the employment authorization rules which prescribe that "work permission" cannot be granted until the application has been pending for at least 150 days. An application which has been pending without adjudication for over 180 days will confer automatic work authorization.[37] These new rules, however, foreclose asylum seekers to the US job market while their claims are pending and thus make it potentially impossible to advance a claim. The deleterious effects of the employment authorization regime include "more homelessness, psychological deterioration, stress, illegal work, exploitation and begging" (Legomsky and Rodriguez 2009, 1060). The practice is made all the more offensive in that most other jurisdictions allow asylum-seekers to work while their claims are pending (ibid.).

V. Expedited Removal and Detention

Expedited removal was introduced into US law in the 1996 "reform" legislation.[38] In broad outline, those who arrive with false documents or no documents are to be summarily removed without a hearing. If the alien makes any one of three representations (i.e., that she wishes to apply for asylum, that she fears persecution, or that she has "concerns" about return), she is to be placed in a "credible fear" interview.[39] In that interview, she must show a "significant possibility" that she could make out a developed asylum claim, or she will be

36 Some scholars have suggested that denying asylum to those who file more than one year after arriving in the United States offends international law because it forces such refugee claimants to fall back on the balance of probabilities test contained in section 241(b)(3) of the statute, and there is no support for the conclusion that those seeking to show they are entitled to *non-refoulement* under article 33 of the Convention are subject to a higher standard under international law than are refugees under article 1(A)(2). Such arguments do have support in seminal treatise writers. See, for example, Grahl-Madsen 1966, 196. The *travaux preparatoires* do not explain the different wording chosen for the formulations respectively of refugee status and *non-refoulement*; but neither do they give any indication that a different standard of proof was intended to be applied in one case rather than in the other." Notwithstanding the support in treatise law, a change in results in US law would require the US Supreme Court to overturn its own precedent decision in *Cardoza-Fonseca v. INS*. 480 US 421 (1987). This development is far from likely, especially since the plain language in the convention tends to support the court's reasoning.

37 8 CFR § 208.7(a)(1). No employment authorization shall issue prior to the running of the 180 day period. INA § 208(d)(2).

38 See generally, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (1996).

39 INA § 235(b)(1)(A). A comparable procedure exists for those advancing claims under the Convention Against Torture. See, 8 CFR § 208.31.

returned forthwith to the country of embarkation.[40] During the pendency of that interview, the asylum seeker is to be detained.[41] The statute says nothing about detention after the asylum seeker is found to have a "credible fear."

The statute and the implementing regulations provide that the following four classes are subject to expedited removal:[42]

- aliens who present themselves at a US port of entry as "arriving aliens"[43] (although that term is nowhere defined in the statute);
- aliens arriving by sea;[44]
- noncitizens who are physically present in the United States without having been admitted or paroled who are (1) encountered by DHS within 100 miles of the Canadian or Mexican border, and (2) cannot establish to the satisfaction of DHS that they have been within the United States for more than 14 days;[45]
- aliens who are subject to the US-Canada "Safe Third Country Agreement."[46]

Procedural protections are significantly lacking in this process. Threshold questions continue to exist with respect to what happens at the encounter between immigration inspectors and persons potentially subject to expedited removal. In this first meaningful interview with DHS, the alien must make one of the three representations which are set out above (see Ramji 2001, 117). To what degree is there effective communication between DHS front-line officers and otherwise qualifying asylum seekers (due to the absence of translators or other causes)? To what extent are those with a fear of persecution being returned at this stage without any kind of meaningful interview and, thus, in contravention of customary international law? An environment of comparative secrecy has historically surrounded the inspection process (see Legomsky and Rodriguez 2009, 1052-56). Moreover, even when the alien succeeds in having herself made the subject of a "credible fear" interview by an asylum officer, an immigration judge has only limited review over this determination "within seven days."[47] These and other features of the law have given rise to the possibility that the United States may well be violating the law of *non-refoulement* without such violations being documented.

Questions about the credible fear process as a whole are particularly relevant now that the BIA has announced its controversial policy (noted above) of disfavoring asylum claims brought largely by children seeking to avoid recruitment into criminal gangs and fearing personal violence by these gangs as a result. The Asylum Officer's Training Manual specifically adds *Matter of M-E-V-G-*[48] and *Matter of W-G-R-*[49] to the considerations which an asylum officer must take into account in determining whether a credible fear of persecution has been

40 INA § 235(b)(1)(B)(i).
41 INA § 235(b)(1)(B)(iii)(IV).
42 INA § 235(b)(1)(A)(i) and (iii); 8 CFR § 235.3(b)(1).
43 8 CFR § 235.3(b)(1).
44 67 FR 68924 (Nov. 13, 2002).
45 69 FR 4887 (August 11, 2004).
46 69 FR 69479 (Nov. 29, 2004).
47 INA § 235(b)(1)(B)(iii)(III).
48 26 I&N Dec. 227 (BIA 2014).
49 26 I&N Dec. 208 (BIA 2014).

established.[50] These cases add a "social distinction" and a "particularity" requirement to the now widely accepted *Acosta* test for social group (immutability, fundamental beliefs, or past associations which have become immutable through the passage of time). In so doing, these cases threaten to frustrate the natural evolution of asylum law through development of the social group ground which, according to classical refugee scholarship, remains open-ended. The specific nature of this threat flows from the nature of the social group ground itself which has been repeatedly held to provide the most accessible framework wherein the Convention refugee definition can evolve by recognizing new developments in human rights and humanitarian law, and by taking account of fresh patterns of discrimination which could not have been anticipated at the time the Convention was drafted.

Shutting down this evolutionary process through the credible fear interview poses risks of considerable magnitude. For it is through "new" types of cases that the future growth of the law can crystallize. Negative results, taking place at the credible fear stage, effectively cauterize this process, leaving the potential development of the jurisprudence in a conceptual "black hole." The fact that this cauterization will take place without any effective review process, and without a decisional record of any kind, makes this development a particularly deleterious one, and one which is particularly damaging to the public interest.

A second level of concern relates to the continuing detention of asylum seekers after they have met the "significant possibility" standard. "Expedited removal" was an attempted codification of international customary law relating to the filing of "frivolous" asylum claims (see Kerwin 2001, 3). States are permitted to return aliens summarily where they put forward asylum claims which are utterly baseless or which are false (i.e., are "manifestly unfounded or abusive").[51] Where an alien meets the "credible fear" standard, however, such concerns should receive less deference.[52] Detention which goes beyond the state's interest in guarding itself against spurious applications can no longer be defended as supported by a valid public interest: the state's justification in continuing detention becomes more questionable (see Goodwil-Gill 2003, 185).

The views of Goodwin-Gill largely parallel those of UNHCR. As concerns article 31(1), prosecuting asylum seekers for presenting false documents or otherwise penalizing illegal entrants "without regard to the circumstances of flight in individual cases" as well as the refusal to consider their refugee claims, constitutes a violation of the Convention and of general international law (Goodwin-Gill 2003, 218). With respect to article 31(2), the detention of asylum seekers is an exceptional measure and recourse should be had to it only in the circumstances "permitted by law." A balancing of interests is required in this process. States should always apply the "least restrictive alternative," and less burdensome measures (such as "reporting and residence requirements, guarantors, bail, and the use of open centers") usually are available. Detention should never last beyond the period needed to satisfy the criteria relative to identity and well-founded fear and never should be used to deter asylum seekers from advancing their claims (ibid., 231).

50 US Citizenship and Immigration Services, Asylum Officer Training Course: Credible Fear. 2014, 25-26, available at: http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf.

51 UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 39, available at: http://www.refworld.org/docid/3ae6b31d83.html.

52 INA § 235(b)(1)(B).

In 2005, the US Commission on International Religious Freedom (USCIRF) issued a significant report under the International Religious Freedom Act which responded to specific congressional concerns regarding alleged irregularities which had arisen during the course of the expedited removal process (USCIRF 2005). Among other things, the report contains the following conclusions:

- There existed a wide divergence of release rates between jurisdictions.
- Asylum seekers were often incarcerated in extremely harsh and inhuman conditions, and sometimes interred with common criminals.
- A significant proportion of aliens (15 percent) who had made one of the required representations (wish to apply for asylum, fear of persecution, or concern regarding return) were nonetheless being returned by immigration officers without undergoing a credible fear interview.
- The rate of finding "no credible fear" by asylum officers with respect to those interviewed was extremely low (about one percent). However, with respect to review by immigration judges: about 25 percent of those found to have a "credible fear" who were represented by counsel in immigration court prevailed in their asylum claims, while only about two percent of those who were not so represented were successful (Kuck 2005, 239).

These findings go far to support the views of critics of congressional policy to the effect that, in their administration of the law, DHS has produced serious gaps in protection. Two years after the adoption of expedited removal, USCIRF issued a subsequent report concluding that, although the shortcomings of the system had not been adequately addressed, the program was still being expanded (USCIRF 2007).

Mindful of these considerations, DHS in 2010 adopted a more progressive parole policy with respect to detained persons under the expedited removal regime. Basically, US Immigration and Customs Enforcement set forth criteria for parole which would be governing under the following circumstances:

(i) the respondent has passed the credible fear examination so that it is clear that a significant possibility exists that he or she could advance a mature asylum claim if given the opportunity to do so; and
(ii) satisfactory evidence exists as to the respondent's identity.[53]

Despite these advances, Human Rights First has noted that the reforms in practice are not advancing with adequate speed and are not reaching a sufficient number of applicants.[54] In response to the situation in the United States and elsewhere, UNHCR adopted new Guidelines on Detention in 2012 making clear that indefinite and mandatory forms of

53 Memorandum from Joseph E. Langlois, Chief, Asylum Division of US Immigration and Customs Enforcement, to Quality Assurance/Training Asylum Officers, re: Providing Notification of ICE's Parole Guidelines to Arriving Aliens Found to Have a Credible Fear of Persecution or Torture. 30 December 2009. available at: http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/MEMO%20-%20Providing%20Notification%20of%20ICE's%20Parole%20Guidelines.pdf.
54 Press Release, Human Rights First, "Human Rights First Urges Fulfillment of Detention Reform Promises,"6 October 2010, available at: http://www.humanrightsfirst.org/our-work/refugee-protection/detention.

detention violate general international law. In connection with the asylum process proper, the guidelines mandate that detention may be used only to secure the identity of the asylum seeker, and to assure that the resulting claim is not manifestly unfounded or abusive. Detention may also be utilized in the asylum context to assure public safety and health standards, but any such restrictions must be proportional to the interests which they serve. Beyond these broad public purposes, special measures must be adopted to assure that the rights of vulnerable classes are respected, including lesbian and gay applicants, women and children and children with disabilities, with a search for alternatives to detention being actively considered (UNHCR 2012).

Part B: Substantive Scope of the Norm of *Non-Refoulement*

I. Prefatory Remarks

There are inherent limitations to the relief provided by protection against persecution and torture, and the effort of international law to deal with these limitations is reserved for the later sections. For the moment, it is essential to remark that scholars are divided on whether *non-refoulement*, as a customary norm, is limited thematically to the persecution and torture scenarios, or whether the law of non-return may be more encompassing. There has been considerable commentary (and some case law) to the effect that states are under a customary law injunction to refrain from returning noncitizens to countries which are affected by full-blown civil war.[55] This development has been largely the product of expanding interpretations of the customary law of *non-refoulement*. There may well be other contexts in which the bar is applicable, including those in which the noncitizen will be returned to conditions threatening his or her right to life.[56]

Some writers have seen in this form of temporary protection an emerging, albeit truncated, right to asylum.[57] Recent developments within the UNHCR support an extension of this temporary right to those intercepted by a state or states on the high seas. It now seems clear that the norm of *non-refoulement*, with its corresponding right to temporary admission, will influence the developing law of territorial asylum. Emanations from the underlying right of *non-refoulement* are effectively restraining state action in the immigration field so as to provide the affirmative, or positive, side of the "dialectic" which is presently informing international human rights protection.

II. The Customary Norm of Non-Refoulement

Several sources are consulted here with respect to modern scholarly views of *non-refoulement,* after which there will be an effort to place these in the context of modern practice. The most recent study of *non-refoulement* is the highly influential article written

55 For a dispute among scholars on this issue, see Goodwin-Gill 1986, 897; Perluss and Hartman 1986, 551. For a contrary view, see Hailbronner 1986, 857.

56 See, for example, § IV.A, *infra*.

57 See, for example, Helton 2003, 162-66 (referring to the right to temporary admission as provisional asylum).

by Elihu Lauterpacht and Daniel Bethlehem (2003, 87). The article draws upon some of the jurisprudence which is analyzed in this study, and it concludes that the customary norm of *non-refoulement* includes a bar against return in whatever form under circumstances where the alien would be exposed to:

- a threat of persecution;
- a real risk of torture, inhuman or degrading treatment or punishment;
- a threat to life, physical integrity or liberty (ibid., 150).

Thus while the Convention itself bars both torture and "cruel, inhuman and degrading treatment," article 3 protection (the *non-refoulement* clause) extends only to those individuals who can demonstrate that they are likely to be tortured (Rosati 1997, 1777). Despite this limitation, there is a growing consensus that the customary law of *non-refoulement,* in its present form, extends to cruel, inhuman or degrading treatment as well as to torture (Lauterpacht and Bethlehem 2003, 87). The distinction between torture on the one hand, and cruel, inhuman and degrading treatment on the other, is coming to produce dramatic differences in result, as is evidenced by the adjudications of the European Court of Human Rights at Strasbourg. In any case, it would appear that return to the "death penalty syndrome" meets the normative requirement for *non-refoulement*.

Among the areas which have been developed by the Strasbourg Court has been the question of protection for those who would be returned to conditions of ongoing civil conflict. The Strasbourg Court has ruled in this respect that, where the intensity of violence in the home state is such that it must have an impact on any individual living there, article 3 relief is appropriate.[58]

III. Competing Models of International Protection

Two representative models which offer absolute protection based on a showing of objective displacement are the Organization of African Unity (OAU) Convention and the Cartegena Declaration. These instruments enlarge considerably the concept of "refugee." The OAU Convention,[59] for instance, expands the refugee definition to include (besides those who would otherwise be covered under article 1A(2) of the 1951 Convention) individuals who have been displaced by "external aggression, occupation, foreign domination or events seriously disturbing public order."[60]

The Cartagena Declaration,[61] built upon the OAU's philosophy to provide protection from objective conditions (such as generalized violence or mass violations of human rights) which proved threatening to social existence in general.[62] These two instruments constitute unambiguous improvements over the Refugee Convention where large numbers

58 *Sufi and Elmi v. United Kingdom* (European Court of Human Rights, App. Nos. 8319/07 and 11449/07, 28 June 2011).

59 See, for example, Convention Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S. 14691, *entered into force* June 20, 1974 [OAU Convention].

60 *Id.*, art. II(2).

61 Cartegena Declaration, in Annual Report of Inter-American Commission on Human Rights 1984-85, OEA/Ser.L/II.66, doc. 10, Rev. 1, at 190-93 [Cartegena Convention].

62 *Id*., art. III(3).

of refugees are seeking conditions of safety in the host state. During time of mass influx, the OAU Convention and the Cartegena Declaration would permit group admissions based on a form of common victimization rather than the highly individualized and difficult to administer well-founded fear test.[63]

The essential model of protection advanced through this approach (i.e., human rights violations leading to flight irrespective of targeting based on a policy of discrimination) eventually gained acceptance as customary international law. In the wake of the Yugoslavian War of 1991-1994, certain European states (most notably Germany) found that they were confronted by mass influxes which were extremely difficult to process under the individualized machinery of the 1951 Convention. These states accordingly implemented what became later known as the customary norm of "temporary refuge." Temporary refuge is now recommended by the UNHCR as providing a flexible form of protection.[64] Those covered by the customary norm would include persons who fled from areas affected by violence and those who, by reason of their personal situation, are presumed to be in need of protection.[65]

Temporary refuge clearly provides for an expedited method of protection and avoids the prolonged factual determinations inherent in refugee status proceedings. Group determinations are based on easily verifiable conditions in the home state (e.g., mass violations of human rights flowing from acts of ethnic cleansing, etc.). And there is no need on the part of those seeking protection to show that they have a well-founded fear of persecution.[66] All of these protection regimes have common characteristics. The chief benefit is the continuing right of *non-refoulement,* the right not to be returned to conditions in which human rights are not being maintained to an acceptably minimal level. On the other hand, each of these regimes is temporary in nature: the alien can be returned when the conditions giving rise to flight have subsided. Hence these regimes do not follow the North American and European model of permanent asylum.

63 Group determinations are permissible under the 1951 Convention, but are hardly ever resorted to. See, UNHCR, *Handbook on the Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to Refugees* ¶ 44 (Geneva 1992). Apart from these treaty-based regimes, the UN General Assembly has expanded UNHCR's mandate from time to time to include largely undefined categories of persons whom the World Organization deems worthy of international protection. Accordingly, the commissioner's competence has been broadened to include the following: "refugees and displaced persons of man-made disasters"; "refugees and displaced persons of concern to the Office of the High Commissioner"; "refugees and externally displaced persons"; and "refugees and other persons to whom the High Commissioner's Office is called upon to provide assistance and protection." In interpreting these terms, UNHCR has historically turned to the refugee definitions set forth in the Cartegena Declaration and the OAU Convention. UN General Assembly, *Note on International Protection*, 7 September 1994, A/AC.96/830, ¶ 32, available at: http://www.refworld.org/docid/3f0a935f2.html.

64 UN General Assembly, *Note on International Protection*, 7 September 1994, A/AC.96/830, ¶ 46, available at: http://www.refworld.org/docid/3f0a935f2.html.

65 *Id*., ¶ 47.

66 *Id*., ¶ 46.

IV. Exceptional Leave to Remain," Article 15(c) of the Qualification Directive, and Canada's New Consolidated Grounds Approach to International Protection

"Exceptional leave to remain" has long played a role in European asylum systems. It remains as one of the most widely used methods within the EU to obtain protection where the Convention refugee definition cannot be satisfied.[67] Relief under state provisions relating to "subsidiary protection" strongly track state responsibility under article 3 of the ECHR, in the sense that the criteria to be met have generally been similar.[68] Several significant differences have characterized treatment under "exceptional leave to remain" on the one hand, and article 3 relief on the other: 1) relief under article 3 confers only the right to *non-refoulement* while "exceptional leave to remain" has usually bestowed status on the noncitizen; 2) "exceptional leave to remain" falls subject to the Refugee Convention's exclusion grounds, while article 3 relief does not.[69]

"Exceptional leave to remain" has also been subject to state discretion, and criteria supporting relief have varied from one state system to another (McAdam 2005, 562). In 2004, the EU announced a Qualification Directive[70] which would at least set down minimum standards for obtaining relief on a humanitarian basis. The directive indicates that it applies to any noncitizen with respect to whom there are "substantial grounds" for believing that the person would, upon return, face a "real risk of suffering serious harm" as defined in article 15. Article 15 establishes what "serious harm" means:

- death penalty or execution;
- torture or inhuman or degrading treatment or punishment of the applicant in the country of origin; or
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (ibid., 469-93).

The first clause is an apparent effort to codify the jurisprudence of the *Soering* decision[71] in which the ECHR determined that it would violate article 3 of ECHR for a state to return an individual to face capital punishment in the United States under specified circumstances. The dispute over the death penalty will undoubtedly continue to mark this striking difference between the manner in which the EU (joined by Canada) on the one

67 For an excellent study on the potential reach of "subsidiary" or "complementary" relief, see, McAdam 2007, 462.

68 Article 3 of the European Convention on Fundamental Rights and Freedoms precludes repatriation to a country wherein the alien will be subject to torture or to inhuman or degrading treatment or punishment. There exists a close correlation between "cruel and unusual treatment or punishment" on the one hand, and "inhuman or degrading treatment" on the other. See generally, Immigration and Refugee Board of Canada Paper on *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*, 2002, § 4.5.1 and 4.5.1.1. available at: http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/ProtectLifVie.aspx#s1.

69 For an excellent review of the new directive, see, McAdam 2005, 462.

70 Counsel Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12, available at: http://europe.eu.int/eur-lex/pri/en/oj/dat/2004/1-304/1-30420040930en00120023.pdf.

71 161 Eur. Ct. H.R. (ser. A) 50 (1989).

hand, and the United States on the other, treat torture relief. How this conflict will finally be resolved unquestionably depends of how general international law comes ultimately to treat imposition of the death penalty. Importantly, for purposes of resolution of this question, a number of significant universal and regional instruments enjoin abolition of the death penalty altogether. Among these instruments are Optional Protocol Number 2 to the International Covenant on Civil and Political Rights (with a limited exception for war crimes);[72] Protocol Number 6 to the ECHR;[73] and a Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[74] Apart from the above, state practice is clearly moving away from the death penalty as a legitimate sanction for violations of municipal law (Steiner and Alston 1996, 807-09).

The second clause appears to be a specific reference to ECHR article 3 jurisprudence, and would seem to incorporate case law of the Strasbourg Court (McAdam 2005, 478-79). Finally, the third clause is the one which would appear to go beyond the existing case law in covering those who objectively would be threatened with indiscriminate violence upon return. This clause has obvious potential to address the situation of civil war victims who have legitimate claims to protection even though they cannot show individual targeting. Nonetheless, it would appear from a reading of the entire text of the directive that such was not the intent of the directive since:

> Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm. (ibid., 481, quoting Directive Recital 26)

As one excellent review of the directive notes this recital gives rise to substantial problems. It suggests, among other things, that the violence supporting a claim must be more than random. This reading, however, would cause the recital to clash with the text of article 15's definition of "serious harm" (ibid., 481-82).

A recent case which has revolutionized the law in this area is *Elgafaji v. Staatssecretaris van Justitie*,[75] where the European Court of Justice (ECJ) ruled on the substantive standard which had to be met in order for the claimant to receive relief under article 15(c). The claimant was an Iraqi national whose father had worked for British security services. The ECJ ruled that a claimant under article 15(c) was not obligated to show that he would be targeted by virtue of his personal circumstances. Rather, in a decision which was largely followed by the Strasburg tribunal in *Sufi and Elmi*, when determining the scope of article 3 of ECHR, the court determined that a claimant could be granted relief by demonstrating that the level of violence in the relevant country or region was such that any individual facing such conditions would fall subject to the threat contained in article 15(c). In sketching the methodology it would follow, the ECJ determined that the claimant's individual circumstances and the intensity of the violence in the country of origin were

72 G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991, available at http://www1.umn.edu/humanrts/instree/b5ccprp2.htm.

73 Available at: http://www.mfa.gov.tr/grupe/ed/eda/pro6.htm.

74 Available at: http://world.policy.org/americas/dp/achr-dp.html.

75 Case C-465/07 (Court of Justice of the European Union, Grand Chamber, 17 February 2009), ECR [2009] 1-921. Two recent pieces explaining the decision in the context of United States and world developments are the following: Fullerton 2013 and Lambert 2013.

coefficients of each other. Hence: (a) the higher the level of internal violence the claimant was able to show, the lower would be her burden to make out an individualized risk; and conversely (b) the greater the claimant's individual risk by virtue of special circumstances, the lower the level of internal violence which must be shown.[76]

This paper argues that the rulings in both *Sufi and Elmi* and in *Elgafaji* represent customary international law.[77] Together, they reflect a growing trend in the formation of *opinio juris* pursuant to which the tribunal looks to, not whether there is an agent in the country of proposed deportation who will target the claimant for serious harm, but rather whether the "refouling" state is under an obligation to refrain from acts which will "expose" the claimant to torture or to cruel, inhuman and/or degrading treatment. Where the claimant satisfies his or her burden of proof concerning the "certainty of risk" (whether by virtue of the exceptionally high level of violence prevailing in the relevant state or region, by virtue of the claimant's personal situation, or through a combination of the two), the normative standard should be considered to have been met.

The ruling in *Sufi and Elmi*, predicated on the high level of violence in the state of proposed deportation, supported a grant of *non-refoulement* under article 3 of ECHR. Article 3 rulings have always served as strong evidence of the emergence of a rule of customary law (Lauterpacht and Bethlehem 2003, 159). The decision in *Elgafaji,* on the other hand, providing for non-return based on a high level of violence in the state or region, on the claimant's personal situation, or on some combination thereof, serves mainly as a methodological support to the strong normative result shared by the Strasbourg Court and by the ECJ. Indeed, in *Sufi and Elmi*, the European Court of Human Rights (ECtHR) acknowledged the strong relationship between article 3 of ECHR and article 15c of the European Qualification Directive, noting that the two provisions offered "comparable forms of relief."

Hélène Lambert has described how the decision in *Elmi and Sufi* had been preceded by a number of ECtHR cases holding that individuals might be exposed to serious harm by virtue of their position standing alone (e.g., members of minority clans in Somalia) (Lambert 2013, 229). Lambert also notes the humanitarian plight often occasioned by acts of violence arising from civil strife (homelessness, famine, disease) and remarks that protection against these developments may well fall within the ambit of the two provisions.[78] Taken together with the irreducible ethical underpinnings of the normative

76 *Elgafaji*, *supra*. In the United States, practitioners began to advance that the customary law of *non-refoulement* precluded return of noncitizens to States which were engulfed in seismic civil conflicts characterized by violations of the laws of war. This theory was rejected in two major decisions, one by the Board of Immigration Appeals, and one by the Ninth Circuit. *Matter of Medina*, 19 I&N Dec. 734 (BIA 1988); *Echeveria Hernandez v. INS*, 923 F.2d 688 (9th Cir. 1991). This paper submits that *Elgafaji* contemplates a different situation, and where the individual can show, either because of the intensity of the violence, or because the claimant would be affected because of his or her personal situation, the standard of the customary norm has been met.

77 The analysis here builds on the customary right to *non-refoulement* as opposed to the right which exists, for instance, under the Convention against Torture and under regional treaties such as article 3 of the European Convention on Human Rights. There exists substantial overlap between these three forms of relief. For an explanation of these remedies in modern practice, see Lauterpacht and Bethlehem 2003, 158.

78 See Meron 1989, 87 proposing consideration of the fundamental ethical character of. a norm in determining its customary law character. Meron was discussing the *Nicaragua Judgment*, 1986 International

rule itself (protection against certain risk based on objective conditions), it is submitted that both *Sufi and Elmi* and *Elgafaji* represent independent but highly inter-related rules of general international customary law.

Canadian law has adopted the substance of this new standard in the reforms which parliament passed in 2002. Canada's new Immigration and Refugee Protection Act (IRPA)[79] enlarges considerably the grounds upon which international human rights protection may be sought in Canada. Presently, protected status can be conferred based upon any one of the following showings:

- the individual fears persecution based on a Convention refugee ground;[80]
- the individual is in danger of torture;[81] or
- there is a risk to the individual's life, or a risk of cruel and unusual treatment or punishment.[82]

The last two grounds have now been substantially developed in two position papers prepared by Canada's Immigration and Refugee Board (IRB).[83] Both papers are extensive and will not be analyzed in detail here. However, it is important to note that the bases for relief covered by Canada's new statute and in the IRB papers track both the predicates for humanitarian leave to remain and, to a large degree, the scope of *non-refoulement* as a customary norm developed by Lauterpacht and Bethlehem. The passages which follow will lay significant stress on the first of these papers (*Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*) to ascertain the meaning of the very central terms which are used in the new provisions and which the papers seek to define.[84]

The IRB Paper on *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*

Court of Justice 14, which looked to the public declarations of states as evidence of *opinio juris* rather than to the practice of states. *Sufi and Elmi* (as well as *Elgafaji*) are thus related to that broader range of decisions initiated by *D- v. the United Kingdom*, No. 146/1996/767/964, European Court of Human Rights, Given at Strasbourg , May 2, 1997, prohibiting as a violation of ECHR article 3 the return of an alien to St. Kitts where such *refoulement* would entail an agonizing death from AIDS due to the absence of adequate medical resources in the country of origin.

79 Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]. The full title of the act is: An Act Respecting Immigration to Canada and the Granting of Refugee Protection to Persons Who Are Displaced or in Danger.

80 *Id*., § 96.

81 *Id*., § 97(1)(a).

82 *Id*., § 97(1)(b).

83 Immigration and Refugee Board Legal Services Division, Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Danger of Torture (May 15, 2002); Immigration and Refugee Board Legal Services Division, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (May 15, 2002) [Hereinafter IRB Paper on *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*].

84 At the outset, it is necessary to observe that neither form of relief is the product of Canada's direct obligation under an international treaty. IRPA § 97(1)(a) and § 97(1)(b) are statutory creations which borrow from treaty law, international customary law, and sometimes from Canadian domestic law. Accordingly, the bars to refugee status [articles 1F(a), (b) and (c)], which would not preclude relief under CAT (nor under ECHR article 3) do preclude relief under IRPA § 97(1)(a) and § 97(1)(b). Accordingly, those who have committed crimes against humanity, war crimes or crimes against the peace are not eligible to apply, as are those who have committed serious non-political crimes or acts contrary to the purposes and principles of the UN.

(2002) looks both to Canadian jurisprudence and to international adjudications for guidance in determining what kinds of harm are protected against. Principal among these determinations have been the rulings of the ECtHR at Strasbourg. Under the accepted standard, there is no requirement that the harm feared be connected to a protected ground. Accordingly, threats based on personal vendettas or retaliation over private loss may satisfy the new test (although there must, naturally, be a showing that there is an absence of state protection). And, the claimant need not demonstrate that the threat is directed at him or her personally, only to a group to which the claimant belongs. Nonetheless, victims of "random violence" do not qualify unless they can show that the risk to which they are exposed is greater than that faced by other citizens of their homeland generally. The position paper thus invites an analysis which would conform to that adopted by the ECJ, i.e., one in which the intensity of the violence is balanced against the individualized threat to the applicant.[85]

An important feature of section 97 of the IRPA jurisprudence is its ability to reach situations in which classical refugee doctrine has proven largely ineffective. An example of this case law (referred to briefly before) is the situation of individuals largely situated in Latin America who have been targeted by criminal gangs because the claimants have refused to cooperate with them. This situation has been discussed previously in connection with the drawbacks of regional refugee protection systems which force upon the claimant a particular forum in which to file. The subject is raised here to analyze how the Canadian model (somewhat like the European in this respect) can create remedies for victims of gang violence where the American model has largely failed.

In *Tobias Gomez v. Canada*,[86] a Salvadoran family sought refugee status and relief under section 97 based on the following facts. The family had been repeatedly threatened and extorted by MS-13 gang which had attempted to recruit the principal applicant's son. The Federal Court Trial Division reversed the Immigration and Refugee Board based on its failure to consider whether the son was a member of a particular social group based on his opposition to MS-13's recruitment practices for purposes of the Convention refugee definition under section 96 of IRPA. The most important aspect of its ruling, however, was the court's ruling under section 97. For there, the court clearly drew the line between generalized harm (not a basis to fear either persecution or torture), and an individualized threat. Specifically,

> In my view…[t]he applicants were originally subjected to threats that are widespread and prevalent in El Salvador. However, subsequent events showed that the applicants were specifically targeted after they defied the gang. The gang threatened to kidnap Mr. Tobias Gomez's wife and daughter, and appear determined to collect the applicant's outstanding "debt" of $40,000.00. The risk to applicants has gone beyond general threats and assaults. The gang has targeted them personally.[87]

85 IRB Paper on *Risk to Life or Risk of Cruel and Unusual Treatment or Punishment*, § 3.1.7.
86 (F.C.T.D., no. IMM-6423-10), September 23, 2011).
87 *Id*.

V. The American Model of "Temporary Protected Status": Protection Based on Situational Need as Opposed to the "Well-Founded Fear" Test

Of all the models which have been discussed so far, that which provides the broadest coverage is unquestionably the US Temporary Protected Status (TPS) model. Subject to its conditions (which are considerable as is shown below), TPS provides protection against not merely gross human rights violations in the home state, but also other destabilizing factors, such as economic or natural calamity, which have made social life in the country of origin non-sustainable.[88] In this sense, TPS approaches the ideal of protection based on humanitarian need which has been put forward by Francis Deng in the UN Guidelines on Internal Displacement. Those Guidelines apply to:

> 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.[89]

In a similar way, US law, through the INA § 244, sets forth the conditions under which the Attorney General (now DHS) may designate a state (or a part of a state) for TPS purposes. These conditions are:

- The state to which repatriation would be effected is engaged in internal armed conflict so that returning the alien thereto would pose a serious threat to his or her personal safety. [90]
- There has been a natural calamity in the state in question such as an earthquake, drought, or environmental disaster which has resulted in a significant disruption of living conditions. For this ground to apply, it must also be shown that the foreign state is temporarily unable to accept return of its own nationals, and that the foreign state has requested designation officially.[91]
- There are other "extraordinary and temporary" conditions in the foreign state which prevent nationals from returning in safety, provided that the Attorney General does not find that the temporary stay of these non-nationals in the United States is contrary to the US national interest.[92]

To be eligible under section 244, a qualifying alien must show:

- That s/he is a national of the designated state (or, if not a national, that s/he is

88 INA § 244(b)(1).

89 See, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission of Human Rights, Mass Exoduses and Displaced Persons*. Report of the Representative of the Secretary General, Mr. Francis Deng, Submitted pursuant to Commission resolution 1997/39 (Addendum), U.N. Doc. E/CN.4/1998/53/Add.2, 54th Sess., Annex [*Guiding Principles on Internal Displacement* or *Guiding Principles*] (1998), Introduction, Scope and Purpose, available at: http://www1.umn.edu/humanrts/instree/GuidingPrinciplesonInternalDisplacement.htm.

90 INA § 244(b)(1)(A).

91 INA § 244(b)(1)(B).

92 INA § 244(b)(1)(C).

stateless and that the designated state is the country of last residence). [93]

- The alien has been physically present within the United States since the date of the DHS's most recent designation of the country involved. [94]
- The noncitizen has resided continuously in the United States since the designation by DHS. [95]

There can be no doubt but that TPS has provided a widely utilized remedy since it was added to the statute in 1990. The countries (or parts of countries) which have been designated for TPS protection include the following: El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, Sudan, Angola, Bosnia, Guinea-Bissau, Kuwait, Lebanon, Province of Kosovo, Serbia-Montenegro, and Rwanda.[96] These designations have been on a variety of grounds including gross civil rights violations flowing from civil war (Liberia, for instance),[97] to the occurrence of natural calamity such as a devastating hurricane (Honduras).[98]

Serious limitations in the statutory remedy, however, dramatically curtail its effectiveness —in ways which often make it appear unreasonable. For instance, protection under INA § 244 extends only to those who are in the United States at the time of designation. This aspect of the legislation clearly reflects congressional anxieties regarding the prospect of promoting mass influxes into the United States if the statute were to be extended to those arriving after designation in the hope of securing a safe haven. Nonetheless, the automatic cessation of benefits for those arriving after the designation date draws an essentially arbitrary line as concerns the protected class contemplated by the humanitarian purposes of the statute.

There is no reason, in principle, to offer protection to those already here at the time of designation, while denying it to those arriving afterwards: both categories stand in the same need. Moreover, since designation itself is usually coeval with human-made or natural calamity, those already here would probably not be motivated to flee such catastrophe in coming to the United States, but would have come here for alternative reasons. The class which would be coming here to seek protection, those arriving after the event giving rise to designation, would be the class least likely to receive it.

Another, and perhaps more disturbing feature of the legislation relates to the need for designation before the right to such protection can be asserted. Under INA § 244, no form of temporary non-deportability will be conferred unless a designation under INA § 244(b) has been made by DHS. Not every country meriting designation has received it. Like the cut-off point running from the entry of DHS's order, the requirement of designation eliminates whole populations from protection who, in principle, should qualify for it (Kerwin 2014, 56-57). One glaring example of the limitations under discussion relates to Haiti right after Jean Bertrand Aristide's deposition and forced expulsion in late 1991. Designation was not conferred on Haiti until the shattering earthquake of 2009, despite widely accepted country

93 INA § 244(c)(1)(A)(i).
94 INA § 244(c)(1)(A)(ii).
95 INA § 244(c)(1)(A)(iii).
96 See, 8 CFR Part 244 [Temporary Protected Status: Country Reference Chart].
97 56 FR 12746 (March 27, 1991).
98 64 FR 524 (Jan. 5, 1999).

condition reports showing that Haitians were suffering under systemic human rights abuses at the hands of security forces and their allies.[99]

In this connection, the jurisprudence of the Strasburg Court under article 3 of the Qualification Directive and of the ECJ under article 3 of ECHR is more limited than TPS: protection is far from automatic and, as has been seen, its scope has not been effectively extended to the large categories of human-made or natural disaster which are now covered under INA § 244. Nonetheless, the European approach at least has the potential to reach those in flight for humanitarian reasons which the TPS provisions do not. Obviously, an adjudicative approach trades off certainty of result for the comparative benefit of not being eliminated from protection by arbitrary time lines or by exclusionary rule-making as to the countries from which flight will confer eligibility for relief.

What is needed in the United States is a case-based jurisprudence which would offer an individualized remedy based on a showing that removal would offend prevailing humanitarian standards. At a minimum, the new standard should incorporate the language of article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of ECHR to the effect that: "States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*".[100] Such jurisprudence would provide for a period of humanitarian stay, temporary in nature, based on an individualized showing that return of the noncitizen to the country of origin would subject him or her to conditions which offend prevailing humanitarian standards.

Conclusion

This paper argues that the United States obtains far more constructive results when it turns to international law than when it relies exclusively on domestic law. This observation holds true whether one is looking at the procedural aspects of a case (e.g., when protections begin to apply), or to substantive elements (e.g., who at the end of the day is entitled to protection). Some practical policy recommendations follow.

Chief among the policy recommendations is that *Sale v. Haitian Council Centers* should be legislatively overturned. Congress should make clear that US "jurisdiction" exists wherever the nation exercises power in fact, whether that locus be on the high seas or through some pre-screening device as was the case in the *Prague Airport* case. It should provide that there can be no direct or indirect *refoulement* without a personal interview which would inquire into whether the noncitizen: (i) has a concern about returning; (ii) wishes to apply for asylum; or (iii) fears persecution in the home state or torture anywhere in the world. *Sale* has done substantial damage by encouraging states to employ strategies which constitute violations of the law of *non-refoulement*. The *Hirsi* case together with the

99 For an excellent overview of "fixes" which could be made to the current TPS system, see, Bergeron 2014.
100 General Comments adopted by the Human Rights Committee, No. 20, ¶ 3, reprinted in General Comments adopted by the Human Rights Committee, Nos. 1-23, reprinted in Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. No. HR1/GEN/1/Rev. 1 (29 July 1994). Significantly, prohibited acts of torture include acts of third parties. *Id*., ¶ 13.

response of other jurisdictions and the opinion of scholars, offers evidence that *Sale* is not consistent with *opinio juris*. As it did when adopting the *Refugee Act of 1980*, the United States should bring its own law into conformity with general international law, including customary law and *jus cogens*, a peremptory norma of international law.

In calling for the statutory overturning of *Sale,* the author is mindful of the political difficulties. Eliminating interdiction in this manner may be more of long-term project than an immediate legislative possibility. However, *Sale* constitutes a salient violation of a fundamental rule of customary international law (the right of *non-refoulement*) and its legislative reversal would seem appropriate as a matter of public policy. It would also render US immigration strategy more consistent with the country's long-standing concern with human rights as manifested in the public policy underpinnings of the *Refugee Act of 1980*.

In the area of safe third country agreements, there should be some acknowledgement of the asylum seeker's right to choose his or her forum of adjudication. Accordingly, provision should be made, both in the US-Canadian model and in all such future agreements, to permit onward travel and admission to the country of destination for individuals who have not yet filed a protection claim in the country of first presence under specific conditions. These conditions would include: (1) circumstances where the jurisprudence of the country of destination provides a significantly more favorable framework of decision; and (2) return of the alien to the home state raises serious questions under the law of *non-refoulement*. Such a measure would preempt the phenomenon of double filing (something the current regime does not do), while preserving the individual's customary right to choice of forum. Restoring this right of choice would, moreover, help to address imbalances in the modern system under which certain types of claims are recognized by some signatory states but not by others.

Work authorization and detention should also be revisited. Today, permission to work is covered by statutory schemes permitting the application for an Employment Authorization Document only after 150 days have elapsed after the filing of an asylum claim. This arrangement has led to much hardship for asylum seekers, often making it impracticable to advance or pursue a claim. The majority of jurisdictions retain more generous work authorization regimes. This paper proposes that the United States should emulate these signatory states by adopting a statutory scheme which would allow work permission upon the filing of a non-frivolous application for asylum.

The current requirement was designed to deter the filing of manifestly unfounded or abusive claims. The difficulty and unfairness of the resulting system has derived from the fact no effort was made to segregate *bona fide* claims from those which were not. The indiscriminate hardships of a waiting period (to obtain work authorization) imposed on the frivolous and non-frivolous alike operated to discriminate against those genuinely in need of surrogate international human rights protection.

As concerns the question of detention, it appears clear that there is no division in principle between the goals of US standards and international law. With few exceptions, detention is permissible only to ascertain the identity of the asylum seeker and to assure that the claim, as filed, is not manifestly unfounded or abusive. A rule of proportionality is followed,

explicitly in international practice, mandating that any detention not be excessive in view of the goals it is intended to secure. US practice should adopt and adhere to this principle.

As concerns expedited removal, Congress was mindful in 1996 of the manner in which unfounded asylum claims could be used to facilitate access to US territory without a proper visa. In the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRAIRA), it sought to expand the restrictions against putative refugees by providing for their "summary" or "expedited" return in the absence of specific representations, or for failure to meet the credible fear standard before an asylum officer. For those who qualified for a credible fear interview, there remained the prospect of imminent and certain detention which could be prolonged after the credible fear interview had been passed (Legomsky and Rodriguez 2009, 506-07). Expedited removal imposes these restraints on genuine and the non-genuine asylum seekers alike, thereby arguably subjecting refugees to a penalty in derogation of the Convention. This paper recommends a statutory provision mandating release from detention once (a) the noncitizen has passed the credible fear interview; and (b) satisfactory evidence has been introduced regarding the asylum seeker's identity.

The final policy recommendation relates to the scope of the substantive relief which can be sought in the United States. At present, available remedies are essentially restricted to asylum and/or withholding of removal (predicated on a showing of serious harm based on race, religion, nationality, membership in a social group, or political opinion), or to an objective demonstration that the individual would be tortured if returned. European law has exceeded these particularized and often narrow formulas, and permits relief predicated in large measure on generalized conditions obtaining in the country of origin.[101] This is a step forward of considerable magnitude. The US model of TPS (which mirrors these protections in part, and often goes beyond them) suffers from the integument of politics in the process of "designating" states in the first place. In addition, persons in most need of relief—those who fled the triggering event itself, whether civil war, drought, or a shattering earthquake—are excluded from protection by virtue of the provision which precludes coverage for those arriving post-designation.

Congress should pass legislation to incorporate into US law the broad relief now available under article 3 of the ECHR and article 7 of the ICCPR, referred to earlier. The remedy created should include as well relief pursuant to the *Elgafaji* standard conferring non-return coupled with status where either the intensity of the violence in the home state standing alone, or the intensity of that violence taken in conjunction with the claimant's individual circumstances, support a finding that the alien would be impacted upon return.[102] The adoption of a supplementary approach (at least where civil war claims are concerned) would, through the flexibility of an adjudicative model, more adequately accommodate the needs of those in need of protection. Such a system would bring US law into conformity with the customary law of *non-refoulement* and help restore the country's historical

101 *Elgafaji v. Staatssecretaris van Justitie*. Case C-465/07 (Court of Justice of the European Union, Grand Chamber, 17 February 2009), ECR [2009] 1-921.

102 See, for example, Kerwin 2014. In a similar, but more comprehensive, series of policy recommendation, the author suggests, *inter alia*, the adoption of a nonimmigrant visa for those who face persecution, danger or harm flowing from conditions in the country of origin. The proposal made here would confer relief upon those already in the United States (irrespective of *when* they arrived), provided that they could satisfy the statutory standard either before an immigration judge or before DHS.

commitment to human rights and humanitarian concerns.

Serious barriers have been erected in the United States with respect to access to *non-refoulement* and concerning the normative standard governing relief itself. The United States should look to advances made in the legislation and jurisprudence of other states as a model for its adoption of more appropriate standards—both on procedure and on substance. Customary international law and the scope of *non-refoulement* require no less.

REFERENCES

Achermann, Alberto and Maria Gattiker. 1995. "Safe Third Countries: European Developments." *International Journal of Refugee Law* 7(1): 19-38. http://dx.doi.org/10.1093/ijrl/7.1.19

Bergeron, Claire. 2014. "Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term 'Temporary' Residents and Strengthening a Centerpiece of US Humanitarian Protection." *Journal on Migration and Human Security* 2(1): 23-43. http://dx.doi.org/10.14240/jmhs.v2i1.23

Borchelt, Gretchen. 2002. "The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards." *Columbia Human Rights Review* 33(2): 473-525.

den Heijer, Maarten. 2013. "Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case." *International Journal of Refugee Law* 25(2): 265-90. http://dx.doi.org/10.1093/ijrl/eet020

Dunstan, Richard. 1995. "Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office 'Safe Third Country' Practice." *International Journal of Refugee Law* 7(4): 606-52. http://dx.doi.org/10.1093/ijrl/7.4.606

Farber, Sonia. 2010. "Forgotten at Guantanamo: The *Boumediene* Decision and Its Implications for Refugees at the Base Under the Obama Administration" *California Law Review* 98: 989-1022.

Fullerton, Maryellen. 2013. "Stealth Emulation: The United States and European Protection Norms." In *The Global Reach of European Refugee Law*, edited byHélène Lambert, Jane McAdam and Maryellen Fullerton, 201-24. New York: Cambridge University Press.

Goodwin-Gill, Guy S. 1986. "Non-Refoulement and the New Asylum Seekers." *Virginia Journal of International Law* 26(4): 897-918.

———. 1993. "US Supreme Court take aim at International Law – Again." *International Journal of Refugee Law* 5(3): 461-62. http://dx.doi.org/10.1093/ijrl/5.3.461

———. 2003. "Article 31 of the 1951 Convention Relation to the Status of Refugees: Non-penalization, Detention and Protection." In *Refugee Protection in International*

Law: UNHCR's Global Consultations on International Protection, edited by Erika Feller, Volker Turk and Francis Nicholson, 185-252. New York: Cambridge University Press. http://dx.doi.org/10.1017/CBO9780511493973.011

———. 1996. *The Refugee in International Law*. 2nd ed. New York: Oxford University Press.

Goodwin-Gill, Guy S. and McAdam, Jane, 2007. *The Refugee in International Law*. 3rd ed. New York: Oxford University Press.

Grahl-Madsen, Atle. 1966. *The Status of Refugees in International Law*. Leyden: A.W. Sijthoff.

Hailbronner, Kay. 1986. "*Non-Refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Thinking?" *Virginia Journal of International Law* 26(4): 857-96.

Hathaway, James C. 1991. *The Law of Refugee Status*. Toronto: Butterworths.

———. 2005. *The Rights of Refugees Under International Law*. New York: Cambridge University Press. http://dx.doi.org/10.1017/CBO9780511614859

Helton, Arthur. 2003. *The Price of Indifference*. Oxford: Oxford University Press.

Kerwin, Donald. 2001. "Looking for Asylum, Suffering in Detention." *Human Rights* 28(1): 3-5.

———. 2014. "Creating a More Responsive and Seamless Refugee Protection System: The Scope Promise and Limitations of US Temporary Protection Programs." *Journal on Migration and Human Security* 2(1): 44-72. http://dx.doi.org/10.14240/jmhs.v2i1.24

Kuck, Charles H. 2005. "Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices." In *Report on Asylum Seekers in Expedited Removal, Volume II Expert Reports*, 235-50. Washington, DC: US Commission on International Religious Freedom. http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/legalAssist.pdf

Lambert, Hélène. 2013. "Introduction: European Refugee Law and Transnational Emulation." In *The Global Reach of European Refugee Law*, edited by Hélène Lambert, Jane McAdam and Maryellen Fullerton, 1-24. New York: Cambridge University Press. http://dx.doi.org/10.1017/CBO9781107300743.001

Lauterpacht, Sir Elihu and Daniel Bethlehem. 2003. "The Scope and Content of the Principle of Non-Refoulement: Opinion." In *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by Erika Feller, Volker Turk and Francis Nicholson, 87-177. New York: Cambridge University Press. http://dx.doi.org/10.1017/CBO9780511493973.008

Legomsky, Stephen H. and Christina M. Rodriguez. 2009. *Immigration and Refugee Law and Policy*. 5th ed. New York: Foundation Press.

McAdam, Jane. 2005. "The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime." *International Journal of Refugee Law* 17(3): 461-16. http://dx.doi.org/10.1093/ijrl/eei018

———. 2007. *Complementary Protection in International Refugee Law*. Oxford: Oxford Monographs in International Law. http://dx.doi.org/10.1093/acprof:oso/9780199203062.001.0001

———. 2013. "Australia and Asylum Seekers." *International Journal of Refugee Law* 25(3): 435-48. http://dx.doi.org/10.1093/ijrl/eet044

Meron, Theodor. 1989. *Human Rights and Humanitarian Norms as Customary Law* New York: Oxford University Press.

Mole, Nuala and Catherine Meredith. 2002. *Asylum and the European Convention of Human Rights*. Strasbourg: Council of Europe Publishing. http://www.refworld.org/pdfid/4ee9b0972.pdf.

Noll, Gregor. 2005. "Seeking Asylum at Embassies: A Right to Enter under International Law." *International Journal of Refugee Law* 17(3): 542-73. http://dx.doi.org/10.1093/ijrl/eei020

Parker, Karen and Lyn Beth Neylon. 1989. "Jus Cogens: Compelling the Law of Human Rights." *Hastings International and Comparative Law Review* 12(2): 411-63.

Perluss, Deborah and Joan F. Hartman. 1986. "Temporary Refuge: Emergence of a Customary International Norm." *Virginia Journal of International Law* 26(3): 551-626.

Pistone, Michele R. 1996. "Asylum Filing Deadlines: Unfair and Unnecessary." *Georgetown Immigration Law Review* 10(1): 95-103.

Ramji, Jaya. 2001. "Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act." *Stanford Journal of International Law* 37(1): 117-62.

Rosati, Kristen. 1997. "The United Nations Convention against Torture: A Viable Alternative for Asylum Seekers," *Interpreter Releases* 74(45): 1773-1784.

Schrag, Philip G., Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach. 2010. "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum." *William and Mary Law Review* 52(3): 651-804.

Settlage, Rachel Gonzales. 2012. "Indirect Refoulement: Challenging Canada's Participation in the Canada-United States Safe Third Country Agreement." *Wisconsin International Law Journal* 30(1): 142-89. http://hosted.law.wisc.edu/wordpress/wilj/files/2013/01/Settlage.pdf.

Steiner, Henry and Philip Alston. 1996. *International Human Rights in Context.* Oxford: Clarendon Press.

UNHCR (United Nations High Commissioner for Refugees). 2012. *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*. http://www.unhcr.org/505b10ee9.html.

USCIRF (US Commission on International Religious Freedom). 2005. *Report on Asylum Seekers in Expedited Removal*. Washington, DC: US Commission on International Religious Freedom. http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal.

———. 2007. *Expedited Removal Study Report Card: 2 Years Later*. Washington, DC: US Commission on International Religious Freedom. https://www.hsdl.org/?view&did=470165.

von Sternberg, Mark R. 2002. *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law.* Boston: Brill.