Forum
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Refugees

THE LONG ROAD TO PROTECTION

Introduction by Susan Martin

This Forum marks the end of the fiftieth anniversary of the UN Convention relating to the Status of Refugees. The 1951 Refugee Convention is a product of its time that has endured for half a century. The horrors of World War II and the Holocaust were fresh in the minds of the framers of the convention. Few countries had opened their doors to the victims of Nazism, leaving millions to perish. In 1951, displaced persons camps still proliferated across Europe—a harsh reminder of the continuing legacy of persecution. At the same time, the Communist takeover of Eastern Europe produced still more refugees who were unable or unwilling to return to their home countries.

Although primarily focused on events in Europe, the 1951 Convention, particularly as amended by its 1967 Protocol, established universal principles for the protection of refugees. The Convention defines refugees as persons outside of their home countries who are unwilling or unable to avail themselves of the protection of their own governments because they have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Signatory states agree that they will not return refugees to countries in which the latter have a well-founded fear of such persecution (often referred to as a commitment to non-*refoulement*). The Convention does not require states to admit refugees permanently, but it sets out the rights of refugees and the responsibilities of states toward those who are granted asylum. It also identifies individuals who are not deserving of protection, relieving states of the obligation to protect those who have persecuted others, have committed particularly serious non-political crimes, or pose threats to their national security.

Although adopted to meet the challenges of 1951, the Refugee Convention has proven to be a living instrument for protection, not least because the situation it envisioned—people fleeing for their lives—continues to this day. The causes and places from which people flee may differ, but they are no less compelling than those of fifty years ago. At present, there are about 15 million refugees under the mandate of the UN High Commissioner for Refugees (UNHCR), the international organization responsible for assisting and protecting refugees. About 7 million persons in their own countries—refugee returnees and internally displaced persons—also come under the UNHCR mandate, generally because the UN secretary general or General Assembly has requested the assistance of UNHCR. This represents a small proportion, however, of the more than 25 million internal refugees, most of whom receive no protection from the international community.

The work of the UNHCR certainly has not slowed down in its fifty years of operation. Although initially given only a three-year mandate and limited financial resources, UNHCR has proved invaluable in responding to what have become recurrent humanitarian crises. From the Hungarian refugee crisis in 1956 to the various outflows generated by wars of liberation and surrogate Cold War conflicts of the 1960s, 1970s, and 1980s, to the horrendous ethnic conflicts of the 1990s, UNHCR has offered assistance and protection to civilians fleeing warfare, repression, and instability. The current Afghan crisis is only the most recent example of the persistence of forced migration.

These refugee crises present continuing challenges to the international community, as the four articles in this Forum describe. Erika Feller, Director of the UNHCR Department of International Protection, begins her article by discussing recent international setbacks that make protection of refugees all the more needed but difficult: the terrorist attacks of September 11; growing displacement in Afghanistan; continuing violence in Colombia, Chechnya, and Angola; breakdowns in peace processes in the Middle East; and the exploitation of human misery by traffickers of people. It is in this context that the reticence of many countries—particularly the wealthy ones that have long urged compliance with the convention—to admit asylum

seekers is all the more problematic. Feller describes UNHCR's efforts through the Global Consultations on International Protection to reinvigorate support for the 1951 Convention and strengthen its implementation.

Eric Schwartz provides a vivid picture of the dilemma faced by countries in adhering to their obligations under the Convention. He draws on his experience in the Clinton White House to analyze U.S. efforts to respond to flows of boat people fleeing a combination of persecution and poverty. Applying these lessons to the post-September 11 world, he urges policymakers to ensure that refugee protection remains a key priority as they confront the threat of terrorism. From an African perspective, Khoti Kamanga also raises the issue of balance between protection and security. He discusses legal initiatives taken by East African states to incorporate the principles of the Convention into domestic law. Long known for their generosity toward the millions of refugees who sought protection on their territory, Tanzania, Kenya, and Uganda have responded more cautiously in recent years to increasing numbers of asylum seekers and their impact—real and perceived—on national security. Wendy A. Young focuses on a different but equally important aspect of refugee crises—how to provide for the physical and legal protection of refugee women and children. These two groups account for about 80 percent of the world's displaced population. In keeping with the times in which it was written, the Refugee Convention does not explicitly reference gender or age in defining the reasons that refugees may be persecuted, nor does it lay out mechanisms to provide for the physical security of vulnerable populations. As Young describes, new guidelines and policies have been adopted—although not always implemented—that fulfill the spirit of the Convention and help promote protection of refugee women and children.

I purposefully stated that this Forum marks—not celebrates—the anniversary of the Refugee Convention. Despite progress during the past fifty years in protecting and assisting refugees, there continue to be far too many unprotected displaced persons in the world to find cause for celebration. Refugee protection requires renewed commitment not only to humane treatment of those forced to flee their homes, but also to new initiatives that address the causes of such flight and provide durable solutions for the displaced. It is hoped that this Forum will stimulate new thinking and new approaches to what has been an enduring humanitarian problem.

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The Refugee Convention at Fifty

Erika Feller

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The year 2001 saw significant international setbacks. The world watched the events of September 11 in New York and Washington with disbelieving horror. The humanitarian situation inside and around Afghanistan has noticeably worsened. Peace processes in East and West Africa and the Middle East have broken down, and settlement efforts from the Western Sahara to the Balkans have been obstructed. Violence grinds on in Colombia, Angola, and Chechnya. Trafficking and smuggling of people for gain have proliferated, leading to an exponential increase this year in the exploitation of human misfortune. The list is soberingly long. This is the context in which we commemorate the fiftieth anniversary of the 1951 UN Convention relating to the Status of Refugees.

In one form or another, human displacement is a feature of each of these developments. The figure for refugees and internal displacement invoking the mandate of UNHCR remains at 22 million. In the face of this, the humanitarian, human rights, and people-oriented rationales for the 1951 Convention are as strong as ever. The anniversary offers a timely opportunity to focus on the Convention, the role it currently plays, the challenges it faces, and the extent of its implementation. On the whole, the Convention has proved its resilience; its non-political character has been instrumental in enabling it to operate in today's often highly-politicized context, and overall, respect for the Convention remains strong. That

being said, it is also clear that implementation across the spectrum of the Convention's provisions is inconsistent and encounters many obstacles.

Obstacles to the Refugee Convention. A number of obstacles to the Convention are operational in nature. The sheer size of many refugee outflows can make individual identification of refugee status and the rights envisaged in the Convention purely impractical, at least in the first instance. Mixed population flows do not always lend themselves to management completely within the Convention framework. The daunting task of creating a measure of physical security for refugees, as well as for the humanitarian staff that protects and assists them, can in practice become the overriding protection objective, necessarily rendering long-term other aspects of protection envisaged in the Convention. Militarized camps are of particular concern since they endanger the security and lives of their inhabitants and the surrounding communities. Responsibility for separating, disarming, and interning armed elements, and taking other measures to neutralize them, lies outside the scope of the Convention. The physical and social vulnerabilities of women, children, and elderly refugees have become a particular protection preoccupation as well.

Physical security is the most visible of the protection problems confronting refugees. Nonetheless, it cannot be divorced from the more structural and legal aspects of refugee protection, which the 1951 Convention more directly addresses. Physical and legal security go hand in hand. Without laws in place, or at least a guiding framework of principles or benchmarks within which refugee problems should be addressed, physical protection may well prove a distant, elusive objective. For this reason, UNHCR pursues activities directed at promoting both physical and legal protection, where possible, in tandem.

Structural and Legal Challenges. A number of structural and legal challenges confront the application of the Convention.

First, the "integrationist" approach taken to the Convention's application has given birth to systems that, in some countries, are not well enough attuned to mass refugee arrivals, or even to processing large numbers of individual asylum-seekers. The length and cost of many state procedures for granting refugee status has led some governments to question the utility of the Refugee Convention. The fault here lies not with the Convention itself; the Convention does not prescribe the procedures for its own application. It is also carefully framed to define minimum standards without imposing obligations exceeding those that states can reasonably be expected to assume.

Second, defining who qualifies for protection poses problems. There is some discrepancy between Convention refugees for whom states have explicitly accepted responsibility and the broader class of persons within UNHCR's competence. A consensus needs to be reached on such issues as whether or not the victims of violence and persecution by non-state actors are entitled to protection as refugees, and whether the notion of persecution can be reasonably extended to protect women from gender-related violence. Among states, a general understanding of definitions and responsibilities is necessary in order to introduce greater certainty of and accountability for protection.

Next, the changed displacement environment also contributes to problems not always fitting with the Convention framework. Flexibility in the Convention's application is called for anyway, consistent with its purpose and its intent. Going beyond this, however, it is clear that the Convention does not cover all protection needs and has to be buttressed through the further development not only of international legal tools, but also of practical response possibilities.

Recent Roadblocks. This last point has a particular resonance in light of recent events. The 1951 Convention does not extend protection to those who have committed particularly serious offenses. The prohibition on *refoulement* is lifted where persons are a danger to national security or where they are convicted of a particularly serious crime. In the event that human rights provisions in other international instruments come into play to prevent return, this has no effect on the proper working of the 1951 Convention. The excluded still remain excluded, without any benefits of refugee status. The Convention, if properly applied, should not offer safe haven to criminals. Nevertheless, a number of states are currently examining additional security safeguards to build into procedures for determining refugee status so as to strengthen the guarantees offered by the exclusion provisions. UNHCR's hope is that any additional security-based procedural safeguards will strike a proper balance with the refugee protection principles at stake.

Simply because people arrived illegally does not delegitimize their claim.

Furthermore, while there is a general understanding that more equitable burden- and responsibility-sharing among states would improve the political climate and asylum possibilities for refugees, in practice responsibilities are not well shared, and there is no system in place that effectively operates to ensure this. Thus, the incentives for burden-shifting, rather than burden-sharing, are more commonplace. The Convention is not specific on how burdens can best be shared, even though burden-sharing underpins its effective implementation.

Moreover, at the international level there are complementary forms of protection—most notably human rights instruments—that strengthen the protection available to those meriting it, but also occasionally grant protection to those who do not. Unintentionally, this has left questions hanging over the institution of asylum, with public confidence eroded when persons who are clearly not entitled to refugee protection are nevertheless allowed to stay for human rights reasons.

It is unfortunate that the trend toward criminalization of asylum seekers and refugees seems to be on the rise. While there are certainly some people in both categories who have been associated with serious crime, this does not mean that the majority should be damned by association with the few. Increasingly, asylum seekers are having a difficult time accessing procedures and overcoming presumptions about the validity of their claims in several states. These problems stem from their ethnicity or their mode

of arrival. Simply because people arrived illegally does not delegitimize their claim. Sharing a certain ethnic or religious background with those who may have committed grave crimes does not mean that one is a criminal and should be excluded. UNHCR endorses multilateral efforts to root out and effectively combat international terrorism. At the same time, resolute leadership is called for to de-dramatize and de-politicize the essentially humanitarian challenge of protecting refugees and to promote better understanding of refugees and their right to seek asylum.

Just like protection for those seeking asylum, solutions for refugees also should not be made victims of September 11. Refugee resettlement should not be put in jeopardy. UNHCR has been concerned about a disinclination on the part of some resettlement countries to maintain their programs at promised levels—particularly for certain ethnic groups. Resettlement remains imperative, not least in the context of the Afghan refugee situation. Continued support for resettlement is crucial. For its part, UNHCR is maintaining its efforts to diversify the number of resettlement countries and strengthen its programs, from emergency processing to more systematic and elaborate use of resettlement to create durable solutions for refugees.

Back to the Refugee Convention.

There are too many myths about what the Refugee Convention is and what it is not. For UNHCR, the Convention is where refugee protection starts. It serves, together with its Protocol, as the most comprehensive instrument at the international level to safeguard the fundamental rights of refugees and regulate their status in countries of asylum. It is no more and certainly no less. It is not a migration-control instrument. It is not a bill of rights and therefore does not lay out rights and responsibilities without their proper limits. It does not provide a safe haven for terrorists. Moreover, it is not about additional burdens for states.

Resettlement remains imperative, not least in the context of the Afghan refugee situation.

Regarding the increasingly automatic equation of "refugees" with "burdens," it is true that there are costs associated with hosting refugee populations, particularly for protracted periods in less-developed countries. But refugees do eventually go home. In cases where they do not, many refugees have proved a distinct advantage for receiving communities. History is replete with examples of refugees bringing skills that contribute to the societies and national economies receiving them. A too-ready equation of refugees with burdens is not only misguided, but significantly distorts perceptions of the refugee problem and the needs to be addressed. In a refugee situation, the primary need to address is the human predicament of the refugee. The burdens that refugee flows may create demand sensitivity and an international response—as indeed the 1951 Convention recognizes—but they cannot be allowed to obscure the fact that refugees present a humanitarian and human rights responsibility, not a burden to be kept at bay.

A desire to return the Convention to its proper context and to promote a better understanding of its strengths, its limitations, and its potential motivated the UNHCR to convene the Global Consultations on International Protection this past year. Refugee voices were also heard at the two important refugee forums hosted in Paris and Rouen, France. UNHCR is grateful for the support the Consultations have received across the board, including most recently at a meeting of the Commissioners for Refugees from the South African Development Community countries. The first ever meeting of the SADC Commissioners took place on September 20 and 21, 2001, in a region that has 1.3 million refugees and nearly 4 million internally displaced persons (IDPs). The SADC Commissioners' endorsement of the Global Consultations process, with an undertaking by the countries represented to participate at the upcoming Ministerial Meeting in December 2001, was most welcome.

At this Ministerial Meeting of State Parties, scheduled for December 12 and 13 of 2001, a Declaration will be adopted that reaffirms the centrality of the 1951 Convention and its Protocol in the international protection regime. It also emphasizes the importance of the commitment of states to proper and principled implementation of the Convention. The Declaration builds upon widespread endorsement of the Convention and strengthened implementation throughout the anniversary year in many fora. They include the Inter-Parliamentary Union Council in Havana, the Organization of African Unity (OAU) Heads of State and Government Summit in Lusaka, the Organization of American States (OAS) General Assembly in Costa Rica, the European Union (EU) in Brussels in 2001, the Parliamentary Assembly of the Council of Europe in Strasbourg, and through the revised Bangkok Principles adopted by the Asian-African Legal Consultative Committee (AALCC) in its annual meeting in New Delhi.

Many ideas for strengthening implementation were put on the table at these meetings. They range from a more regularized system of reporting and periodic meetings of state parties to review implementation, to harmonized regional processes for application of the Convention provisions. Improved monitoring and more active support for the UNHCR's supervisory role under Article 35 of the Convention are fundamental to improved implementation. A number of ideas were also presented during the Global Consultations Expert Roundtable, which was held in Cambridge in July 2001. Promoting a more creative use of the Executive Committee forum was one of them. Overall, the challenge is to find ways to strengthen implementation that add to, rather than dilute, the primacy of the voice and authority of the UN High Commissioner for Refugees, in pursuance of the mandate that attaches to this office and that Article 35 of the Convention reinforces.

The Future of the Refugee Regime. Clearly, there are challenges to the overall regime that call for ways to supplement the protection it offers. The Global Consultations process continues to be a source of ideas in this regard. At the end of the process, which is currently scheduled for the middle of 2002, UNHCR intends to bring together the proposals that the Consultations have generated into what has already been labeled an "Agenda for Protection." The Agenda should serve as a guide to action

for UNHCR and an inspiration for states, NGOs, and other protection partners in setting certain objectives for the years ahead. The responsibility for following up on the Agenda will be shared. It cannot bind the hands of anyone. Elements of this Protection Agenda will be available to the Ministerial Meeting.

The Global Consultations is a process with specific objectives and outcomes in mind. Reaffirmation of state support for the 1951 Convention as well as a clear commitment to its strengthened implementation will be one important outcome of the process. An update of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* will be a product of the expert roundtables; this should contribute to a better understanding and application of the Convention's terms. As regards the Agenda for Protection, implementation of the follow-up activities will take time, and will have to be programmed in a staged, possibly multi-year manner. Ultimately, the Global Consultations process has been motivated by the goal of furthering refugee protection, predicated on the realization that it is ever more a global concern. International refugee protection has been accepted as a common trust. Responsibility for such a trust must be shared by many, or it will be borne by no one.

Editor's Note: The text is a modified excerpt of the address made by Ms. Erika Feller, Director of the Department of International Protection, to the Fifty-second Session of the Executive Committee of the High Commissioner's Program, October 2001.

Practicing at Home What We Preach Abroad

Lessons on Refugee Policy from the Clinton Administration

Eric Schwartz

From the outset of the Clinton administration, senior officials struggled with how to respond to flows of boat people fleeing persecution and poverty and seeking refuge and resettlement in the United States. Whether involving Haitians, Cubans, or Chinese, the issue forced the Clinton administration to consider whether it would implement, close to home, the very policies of refugee protection that U.S. administrations had urged upon other nations for years. For example, the United States had long encouraged governments of Southeast Asia not to deny entry to Vietnamese boat people. Yet, when refugee influxes threatened U.S. borders, was the United States prepared to offer the same protection that it advocated? An examination of the Clinton administration's responses to four cases of irregular migration yields important answers, as well as lessons for policymakers concerned about effectively managing the tensions between the imperatives of refugee protection and law enforcement.

While they had initiated planning for a new approach on Haiti, national security specialists advising then-Governor Clinton during the 1992 campaign had focused largely on issues of "high policy," such as the conflict in the Balkans and the future of NATO. They never expected they would have to

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become experts on shipboard screening of refugee applicants, construction of safe-haven camps in the Caribbean, or transforming the U.S. military facility at Guantanamo Bay from a naval base into a refugee camp. Such issues, however, quickly became major concerns for Washington. Initially, the greatest attention was focused on Haiti.

Lessons from Haitian Migration.

In Haiti, migration pressures were fueled by both the repression of a military regime and dire economic conditions. The first Bush administration (1989–93) had demonstrated that Haitian migration could be controlled even in the absence of political reform on the island. While the Bush administration had opposed the military coup against President Aristide in 1991 and urged the restoration of democracy, removal of the military regime was not a major foreign-policy priority for President Bush. In the absence of a winning strategy to establish a democratic government in Haiti, a critical question was how to prevent large-scale emigration by boats. The answer was Executive Order 12807, also known as the "Kennebunkport Order," issued on May 24, 1992. The Order provided the legal basis to end screening for interdicted Haitians, and the Bush administration instituted the controversial practice of direct return of asylum seekers to Haiti. The Bush migration policy was condemned by candidate Bill Clinton, who vowed to reverse the policy and augment efforts to promote the reestablishment of the democratically-elected government of Haiti.

On January 5, 1993, President-elect Clinton's national security advisers gathered in Little Rock to determine how to translate these campaign commitments into policy. Participants included the president-elect and Vice President-elect Al Gore, as well as advisers who would shortly become secretary of state (Warren Christopher), secretary of defense (Les Aspin), national security adviser (Anthony Lake), deputy national security adviser (Samuel Berger), and administrator of the Agency for International Development (Brian Atwood). While the meeting, which the author also attended, ended with a commitment to promote the return of President Aristide, the conclusion on refugee policy was more ambiguous. Participants were sobered by analyses indicating that expectations in Haiti about a loosening of U.S. migration policy were running very high, and that a quick alteration of policy risked a presidential inauguration accompanied by massive boat departures from Haiti. In addition to the law-enforcement and political challenges of such potential outflows, the president's advisers were concerned by the possible loss of lives that could result from boat journeys in unseaworthy vessels.

Even strong proponents of a more liberal migration policy had accepted that a change would not be immediate, and the Little Rock meeting ended with a decision to sustain the practice of direct return "for the time being," but without any clear indication of how long that would be. Although the president-elect directed that preparations be made to accommodate a change in migration policy over time (such as by stocking up the Guantanamo Bay Naval Station with supplies and making contact with other governments to request they provide refuge to Haitians), the administration's primary focus was the political situation inside Haiti. And while the administration made serious efforts to enhance U.S. resettlement opportunities for Haitians

through authorized programs, the U.S. policy of direct return of interdicted boat people remained in effect.[1]

In early 1994, the political situation in Haiti remained unchanged and there were increasing calls from African-American leaders, among others, for a new U.S. government approach. The administration conducted a policy review, and on May 8, 1994, the president announced new political initiatives, including a tightened sanctions regime. The administration also named former congressman William Gray as special adviser on Haiti. Gray, a prominent African-American who played an important role in anti-apartheid efforts in Congress during the 1980s, brought great energy to U.S. efforts on Haiti, and his appointment signaled heightened U.S. resolve. The new administration initiatives also set the stage for the later U.S. threat to remove the military regime by force.

Given what the president characterized as the declining human-rights situation in Haiti, as well as the need to build domestic political support for the administration's new approach, the May 8 announcement also included a change in policy on refugee-processing procedures. In particular, the president announced that Haitians departing Haiti by boat would no longer be returned directly, but would be interviewed to determine whether or not they merited protection due to fear of persecution. If so, they would be provided refuge outside of Haiti. If not, they would be returned.[2]

The administration could neither secure nor quickly implement sufficient commitments from other governments in the region to provide safe haven or resettlement for Haitian refugees, and the administration's initial disinclination to use the Guantanamo Bay Naval Station to hold asylum seekers left U.S. officials with two options in implementing the new policy: bring asylum seekers into the United States or screen them on ships.[3] Fearful that the former option would empty Haiti of much of its population, the administration chose the latter course. Even so, outflows quickly outstripped U.S. capacity to screen and return non-refugees, and the administration subsequently did adopt a safe-haven policy, in which all boat people were given temporary refuge at Guantanamo, but were not considered for resettlement during the crisis.

This major shift in migration policy had been strongly recommended by specialists at both the State Department and the Department of Justice. They argued that a safe-haven policy would provide greater protection for those who needed it, because nobody would be returned to Haiti against his or her will during the political crisis on the island. At the same time, the specialists contended that by eliminating the prospect of resettlement, a safe-haven policy would diminish incentives for boat departures for those who were leaving for primarily economic reasons. In other words, only those truly in fear of political persecution would leave if protection did not equate to resettlement in the United States.

At the senior level within the White House, there was skepticism that the suggested approach (with its elimination of screening and return of non-refugees) would stem the outflows from Haiti, but in deference to the specialists, a decision was made to adopt the proposal. Ultimately, the specialists were proven correct; the modification, and the elimination of the possibility of immediate resettlement in the United States, accomplished the dual objectives of ending

large-scale outflows and sustaining basic protection. When the political crisis in Haiti abated, the majority of those who had been at Guantanamo returned voluntarily to Haiti. The administration then undertook a screening procedure at Guantanamo for the relatively small numbers who were not prepared to return to Haiti voluntarily.

The U.S. experience in Haiti offers several critically important lessons on migrations that result from poverty and repression.

First, so-called "pull factors"—the policies of refugee-receiving countries—are critical determinants of the behavior of those contemplating boat departure from countries mired in both poverty and repression. This point was demonstrated most graphically by the large reduction in outflows after President Bush instituted direct return in 1992. (To put it bluntly: if you cannot get out, you will almost certainly stop trying.) In the same way, the Clinton administration's decision to continue to provide protection through a safe haven at Guantanamo broke the link between protection and resettlement, and reduced boat departures to a trickle.

A second and related lesson is that it seems morally and politically acceptable to break the protection-resettlement link in migration emergencies. When the United States did so in Haiti, it discovered that a little bit of protection goes a long way. In fact, rather than criticizing the U.S. government for suspending the resettlement option, the non-governmental community was supportive of a safe-haven policy.

Third, if a government must break the link between protection and resettlement, it ought to ensure that, when the situation in the country of origin is stabilized, those who fear return will have their claims heard. With thousands of U.S. troops essentially occupying Haiti, it was far from easy in late 1994 to convince senior U.S. officials that those Haitians refusing to return home were entitled to a case review before being returned involuntarily. Protection advocates within the administration prevailed, however, and the Immigration and Naturalization Service conducted a screening process. Although the United Nations High Commissioner for Refugees objected to the specific procedures that the U.S. government employed, the case reviews did vindicate the basic principle that individuals claiming a fear of persecution ought to have their claims assessed.

Fourth, addressing underlying political issues can play a critical role in avoiding migration crises. This is true for at least two reasons. Most obviously, enhancing the human-rights climate in countries makes remaining a more feasible option for those who might otherwise feel compelled to leave. In addition, taking measures to foster a new political environment diminishes the likelihood of political controversy surrounding decisions to return asylum seekers to their countries of origin. (However, given the failure to implement long-term economic and political development strategies in Haiti, the large-scale return of Haitian boat people at this point might well provoke controversy.)

Lessons from Cuban Migration.

In the summer of 1994, in the midst of the Haitian crisis, the Clinton administration confronted a second significant irregular-migration challenge from the Caribbean. This one involved Cuban boat people. At that time, and in the context of severe economic hardship and

increased efforts by Cubans to depart by boat, Fidel Castro harshly criticized what he claimed were inadequate U.S. efforts to stem boat hijacking. Castro made it clear that he would no longer deter efforts by Cubans to leave by boat; such departures escalated throughout August with thousands leaving each week.[4]

In late August, the magnitude of the outflow compelled the administration to make the difficult political decision to end the long-standing U.S. policy to permit entry into the United States of all Cubans rescued at sea by the U.S. Coast Guard. From that point on, interdicted Cubans were diverted by the Coast Guard to a safe haven at Guantanamo Bay (though some were later moved to Panama), where the U.S. Department of Defense was rapidly preparing to house many tens of thousands of Cubans.

At about the same time, the Clinton administration entered negotiations with the government of Cuba on an agreement, which was reached in September 1994 and was designed to bring about safe, legal, and orderly migration. Under this arrangement, the United States agreed to legal migration of 20,000 Cubans each year. In return, Castro agreed to discourage irregular departures from Cuba. Pursuant to a May 1995 follow-up agreement, the United States began to return Cubans interdicted at sea, and the government of Cuba committed itself to reintegrating returnees. The government of Cuba also agreed not to take action against returnees due to their attempt to leave Cuba by boat.[5] These agreements still left open the question of just how the United States would deal with refugee claims made by Cubans interdicted at sea. After consultation with the United Nations High Commissioner for Refugees (UNHCR), the United States instituted a ship-board screening procedure for interdicted Cubans in which those with credible claims to refugee status were to be taken to Guantanamo for interviews. Those deemed "refugees" would be neither returned to Cuba nor resettled in the United States, but resettled in third countries—an option chosen due to fears that a U.S. resettlement plan for boat people from Cuba would encourage large-scale departures from the island.

Addressing underlying political issues can play a critical role in avoiding migration crises.

Many of the lessons surrounding the mixed migration from Cuba were similar to those learned in Haiti, but some were new as well.

First, U.S. officials learned that ending a form of preferential immigration treatment was politically sustainable even when dealing with a strong domestic political constituency. Cuban-Americans have traditionally supported the right of entry of all Cuban boat people. At the same time, many Cuban-Americans in Florida shared the concerns of other Floridians about mass migration and the resulting stresses on social services and law enforcement. Moreover, some members of both Congress and the broader public questioned the fairness of preferential treatment for Cuban asylum-seekers.

Second, the administration learned that cooperation with governments of

countries of origin can be a critical element in an overall effort to regularize migration.[6] When dealing with a refugee-producing country, this can raise very tricky protection issues. In terms of preventing large-scale loss of life at sea and avoiding mass influxes of asylum seekers, refugee-receiving countries have a strong interest in encouraging source countries to crack down on migrant smuggling and discourage irregular departure. In urging authoritarian governments to implement such efforts, however, refugee-receiving countries risk being complicit in denial of the right to seek asylum for those fearing persecution. Part of the answer is for countries of origin to end political controls on legal exit, and for refugee-receiving countries to expand refugee resettlement opportunities for those who are victims of human-rights violations. In the end, there is no simple resolution to this very difficult dilemma—a dilemma that the U.S. government also confronted in the context of China.

Lessons from Chinese Migration. For the Clinton administration, the issue of irregular boat migration from China first arose in early 1993 when U.S. law-enforcement officials detected several ships carrying large numbers of Chinese who were hidden on the vessels. The ships appeared to be moving toward the United States. In some instances, they were interdicted far from U.S. shores—such as in the case of the merchant vessel *The Eastwood*, a ship that the U.S. Coast Guard encountered in the Pacific and then transported to the Marshall Islands. In other cases, the ships managed to enter U.S. waters.[7]

Compared to the magnitude of U.S.-Mexico border crossings, the numbers involved in these alien-smuggling incidents were small, but they were met with significant media attention and public visibility. The accounts of abuse connected with these operations were chilling. Migrants and their families reportedly pledged as much as $30,000 per person to criminal syndicates, and those who arrived in the United States were forced to pay off these debts in indentured labor.[8]

After reviewing the issue at a special White House meeting on June 11, 1993, the president issued Presidential Decision Directive 9 (PDD 9) on Alien Smuggling. PDD 9 committed the United States to: first, strengthening U.S.-based law enforcement against smugglers; second, combating smuggling operations at their source, by working more closely with source nations, enhancing intelligence collection efforts, and promoting more rigorous standards for the flagging of ships and safety of life at sea; third, working with other governments to interdict and redirect smuggling ships in transit; and finally, modifying procedures related to the processing of asylum claims and return of non-refugees who smuggled into the United States.

The Chinese alien-smuggling incidents provide insight into the relationships between law enforcement, immigration control, human rights, and protection. On the one hand, U.S. administrations had historically pressed the Chinese to permit freedom of movement and emigration. Moreover, the Clinton administration was concerned about the fate of returnees to China and had undertaken serious efforts to obtain information about those who had been returned from the Marshall Islands in the 1993 *Eastwood* incident. On the other hand, pursuant to the policies of PDD 9, administration officials were pressing the

Chinese to undertake greater efforts to stem smuggling at the source, and to agree quickly to repatriation of their nationals.

Because these conflicting objectives were both valid, a significant lesson from the Clinton administration's experience with alien smuggling is the importance of policy coordination and integration. Effective action to deal with complex migration issues must be multifaceted. Tension between various policy goals is inevitable, but the key is to ensure that all bureaucratic actors, including personnel responsible for law enforcement, human rights, migration, and state and local governance, have a seat at the policy table, so that government agencies are not acting at cross purposes. For protection advocates, such policy integration should be a key objective, as it is often protection equities that are at greatest risk in migration crises.

Another lesson from the alien-smuggling incidents is the importance of effective management of public affairs. Land-border migration presents far greater policy challenges to U.S. officials than smuggling by ships. Yet the images of Chinese nationals wading to shore were highly compelling and of considerable interest to the media, Congress, and the American public. The challenge for policymakers was twofold: first, to demonstrate to the public a capacity to crack down on the criminality represented by the alien-smuggling enterprise, and second, to ensure that the threat was seen as a challenge and not a crisis. The administration's policy was more successful in addressing the first part of this challenge than the second.

Lessons from Vietnamese Migration. The Clinton administration's experience with asylum seekers from Vietnam also presents lessons on the issue of return in the context of mixed migrations. The lessons here are related but distinct from those in the prior cases, because Vietnamese boat people did not seek direct entry to the United States, but rather sought first to reach other Asian countries by boat, in the hope of subsequent transit to the United States.

In 1995 especially, the Clinton administration considered the situation of tens of thousands of Vietnamese asylum-seekers who were living in refugee camps in Southeast Asia and had been deemed not to merit protection, but were refusing to return voluntarily to Vietnam. Many had ties to the United States and claimed to have been unfairly denied refugee status. Both the United States and governments in the region were reluctant to permit direct U.S. resettlement. The position of the United States (as well as the view of UNHCR) was that the UNHCR-supervised refugee-determination procedures that resulted in denial of refugee status for these claimants had, on balance, been fair. Moreover, there was considerable concern that direct resettlement to the United States of the "screened out" asylum-seekers might stimulate further boat departures from

Attempts to address irregular migration challenges will only be successful through enhanced international cooperation.

Vietnam, and would be strongly resisted by the governments in Asia that were hosting the refugees.

Nonetheless, several NGOs, members of Congress, and Clinton administration officials believed that some review of the cases was merited. They argued that flaws in the screening process were not trivial, and that the historical associations between many of the denied asylum-seekers and the United States justified such reconsideration. In Congress, there were proposals for re-screening of denied asylum-seekers by U.S. immigration officials, and direct U.S. resettlement from the countries in Southeast Asia. Such proposals, especially if reflected in legislation, risked creating expectations and unrest in the refugee camps. Thus, the administration adopted a plan, based on an NGO proposal, in which screened-out Vietnamese who returned to Vietnam from first asylum camps in Asia would be given the chance to interview for U.S. refugee resettlement *after* their return to Vietnam.[9] After two years of negotiations, Vietnam and the United States ultimately agreed on terms in 1997. The program resulted in the resettlement of many thousands of boat people who would have otherwise been denied this option. As importantly, it helped to diminish resistance to return and may have also helped to prevent violence in the return process for the many thousands who did go back to Vietnam.

While this precise model is not likely to be replicated, the arrangement is a useful reminder of the need for creativity in the development of plans to encourage voluntary return. Such creativity is necessary not only in the case of asylum seekers denied permanent resettlement, but also for other non-citizens who are in receiving countries but whose presence is not permanently authorized. These include temporary workers as well as those who have fled political violence and have been granted temporary protection in the host country.

Meeting the Challenge of Irregular Boat Migration. The policy responses to these four cases suggest that the Clinton administration was both aware and responsive to the human rights of asylum seekers in the cases of mixed boat migration. At the same time, its record was far from perfect, as law-enforcement and migration control did at times trump basic protection concerns. Perhaps more importantly, these examples offer some general lessons for future U.S. administrations. The lessons are likely to be relevant regardless of the policy or tactical adjustments in U.S. immigration policy after the tragic events of September 11.

New threats justify new multilateral legal tools.

• *Promote international cooperation and multilateral efforts on irregular migration issues.*

Attempts to address irregular migration challenges will only be successful through enhanced international cooperation. For example, the Clinton administration undertook a range of

national measures on alien smuggling and trafficking. But it very quickly became apparent that unilateral efforts are only one component of an overall effort to address criminal activity relating to migration. Governments must work together to enhance intelligence sharing and cooperation, as well as coordination on the range of issues relating to law enforcement. Also, as suggested in the discussions of Cuba and China, enhanced dialogue and cooperation with refugee-producing countries—taking into account the delicacy inherent in that effort—must also be part of the equation. If immigrant-receiving governments are to expect good working relationships with source countries on issues such as border management and alien smuggling, they may also have to demonstrate a willingness to consider immigration policies that take special account of developmental and humanitarian concerns in countries of origin. The events of September 11 further underscore the importance of common international efforts in this area.

Finally, new threats justify new multilateral legal tools. One example is the UN Convention against Transnational Organized Crime and, in particular, its protocols relating to migrant smuggling, and trafficking in persons. These represent important steps in establishing more effective measures for collective action; they will help law-enforcement agencies ensure that criminals do not fall through the cracks of the international system in a globalized world.

• *Creatively seek to integrate protection and enforcement.*

Serious efforts to craft enforcement measures that also promote refugee protection are not only appropriate in humanitarian terms, but also help to ensure that key migration constituencies (including non-governmental organizations) will not oppose enforcement. Addressing the dual objectives of protection and enforcement is an important theme of the cases cited at the outset of this paper. One example of this thinking is reflected in the United States Victims of Trafficking and Violence Protection Act of 2000, signed by President Clinton.[10] In addition to enhancing a range of law-enforcement authorities in the area of trafficking, this legislation contains a special provision to authorize legal immigration status for victims of trafficking who are willing to assist in the investigation and prosecution of those who trafficked them.

• *Resist minimally sufficient policies toward irregular migration.*

Common international efforts to address irregular movements should not result in a reduction of refugee protection to the minimum standards permissible under international law. With the majority of the world's refugees in developing countries, which have far fewer resources than developed countries, harsh policies in the North have a clear demonstration effect in the South. In addition, harsh policies encourage potential claimants to forego formal procedures, putting them at greater risk of victimization by alien smugglers or abusive employers.

For example, while temporary protection is an appropriate mechanism in circumstances of crisis, it should not be terminated without opportunities for refugee-status determination for those who desire it. Moreover, large-scale repa-

triations should only be encouraged after careful determination that withdrawal of temporary protection is justified.

While states have an interest in ensuring that refugee claims are considered without undue delay, expedited procedures must provide claimants with basic safeguards against return to persecution. In the case of interdicted asylum-seekers from Cuba, for example, the Clinton administration developed a detailed screening protocol. No such procedures are in place for Haitians, however.[11] To be sure, there are varying views about whether it is appropriate to establish different procedures for different groups of interdicted boat people based on the conditions of the country of origin. But whatever one's view on this issue, there does not seem to be a formal U.S. government process for establishing basic generic standards, and for considering where special procedures may be appropriate to ensure protection.

• *Do not abandon the prospect of long-term resettlement in cases of irregular migration.*

As the circumstances of migration from Cuba and Haiti demonstrate, there may be good reasons to preclude the option of resettlement in certain instances. In many cases, however, resettlement is still a valid and even desirable course of action for several reasons. Despite the recent worldwide economic downturn, developed countries will need to sustain high levels of immigration as populations age in the decades to come and governments find themselves without a sufficient working-age population to support retirees.[12] In appropriate cases, adjustment of status for asylum seekers who have arrived through irregular migration may be one of several means to meet economic requirements. In addition, the process of legalization can assist the government in its efforts to account for resident non-citizens and discourage criminality against migrants—including abusive labor practices.

Conclusion. At its fifty-first session in October 2000, the Executive Committee of UNHCR endorsed a proposal to begin a Global Consultation with governments, refugee-protection experts, NGOs, and refugees. The stated goal of the Consultations is to "revitalize the international protection regime and to discuss measures to ensure that international protection needs are properly recognized and met."[13] At a time in which the process of globalization has encouraged increased worldwide migration (both authorized and irregular), the Consultations have helped to ensure that protection concerns continue to be prominent in government migration policy.

In the wake of September 11, the immigration control agenda has taken on much greater prominence for U.S. officials, as the Bush administration seeks to prevent entry of those who pose security threats to the United States. The recent U.S. experience with irregular migration has demonstrated that law enforcement and refugee protection objectives can not only co-exist, but can also be mutually reinforcing. Nonetheless, this proposition is not always self-evident. Thus, the challenge for policymakers will be to exercise the creativity and perseverance required to ensure that refugee protection remains a key U.S. priority, and the statesmanship necessary to guide public opinion on these crucial issues.

NOTES

1 Administration officials expanded the "in-country refugee processing" program. Under this program, Haitians who claimed fear of persecution could apply for U.S. resettlement at U.S. facilities within Haiti. Administration critics, however, argued that, even with an expanded in-country program, direct return of boat people was unacceptable. They expressed concern that many Haitians would fear (and be at risk of) reprisal if they applied for U.S. resettlement at U.S. facilities in Haiti, and thus should retain the option of flight by boat.

2 The President was not specific about the procedures and logistical arrangements that would be used to ensure protection. These issues were still under consideration and final decisions were in some measure dependent on the results of U.S. requests for assistance from other governments in the region.

3 This disinclination was due largely to the fear that Guantanamo would serve as a magnet, encouraging large-scale departures from Haiti, as well as to the general opposition of the military to the use of Guantanamo for these kinds of non-military activities.

4 Castro was particularly angered by the killing of a Cuban Navy Lieutenant at Mariel during a hijacking on August 8. Based on information provided by survivors, U.S. officials challenged Cuban accounts of the incident, and thus did not seek to deport or take other legal action against the alleged assailant (who had arrived in the United States).

5 Office of Multilateral and Humanitarian Affairs, National Security Council, Migration Accords, Joint Communique, September 9, 1994; Joint Statement, May 2, 1995.

6 In this instance, "relearned" (or reaffirmed) may be a better characterization. For example, U.S.-Vietnamese cooperation on the Orderly Departure Program in 1979 established an in-country emigration-processing alternative to boat departures for Vietnamese who had prior associations with the United States.

7 Between May and August of 1993, there were at least four such ships that entered U.S. ports. (Unpublished Justice Department fact sheet in author's personal records.)

8 White House Office of Press Secretary, Fact Sheet: Alien Smuggling Policy, June 18, 1993.

9 Letter to Eric Schwartz from Shep Lowman, USCC/Migration and Refugee Services, Lionel Rosenblatt, Refugees International, and Dan Wolf, LAVAS, dated April 26, 1995. (Author's personal records.)

The administration developed a range of criteria for entry under this program, including (but not limited to) past association with the United States during the war period.

10 See Justice Department fact sheet <http://www.usdoj.gov/crt/crim/traffickingsummary.html>.

11 As a practical matter, the Coast Guard does appear to inform relevant agencies of government if an interdicted Haitian comes forward with a claim for protection, and there does appear to be an appreciation within the government of the importance of ensuring against return of a claimant with a well-founded fear of persecution. This general practice is consistent with a 1972 Nixon administration directive against summary return, but is not highly formalized.

12 See discussion of this issue in National Intelligence Council, "Growing Global Migration and Its Implications for the United States" (March 2001, NIE 2001-02D); and Commission of the European Communities, "Communication From the Commission to the Council and the European Parliament On a Community Immigration Policy" (Brussels: 22 November 2000).

13 UNHCR, "Global Consultations on International Protection: Organizational Meeting" (Geneva: EC/GC/00/2, 24 November 2000), at 1, A/AC.96/944 para. 23(a). Global consultation documents, which address many of the issues in this paper, can be found at <www.unhcr.ch>.

International Refugee Law in East Africa: An Evolving Regime

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Tanzania, Kenya, and Uganda, henceforth referred to as "East Africa," occupy 682,912 square miles—territory slightly larger than the combined area of Arizona, California, New Mexico, and Texas. Aside from its sheer size, East Africa distinguishes itself for other reasons. Together with the neighboring Great Lakes region and Horn of Africa, East Africa constitutes a major global flashpoint of forced migration. Collectively, these areas account for more than a quarter of Africa's 3.4 million refugees and asylum seekers.

This paper first examines the general legal framework that determines the treatment of refugees in East Africa by looking at the Organization of African Unity Convention Governing Certain Aspects of the Refugee Problem in Africa, 1969 (hereafter, the OAU Refugee Convention). Next, it presents a country-by-country analysis of specific legislative and policy responses, ultimately seeking to establish how and to what extent each country has abided by the instruments of international refugee law. Finally, it makes modest suggestions as to how the East African countries can more effectively and efficiently deal with forced migration.

Treaty Practice in East Africa. The key to assessing East Africa's response to refugee problems is an understand-

ing of the relationship between international commitments and domestic laws. The legal system prevailing in East Africa is essentially dualist: for international treaties to become operational at the national level, domestic legislation is crucial.[1]

For a treaty to become part and parcel of the laws of the land and consequently capable of being enforced, parliament must ratify it and then enact an enabling legislation.[2] In this convoluted procedure lies part of the explanation for the discrepancy between the relatively high number of treaties these countries have signed or ratified, and the paltry few treaties that have ever been accompanied by an enabling legislation.

East Africa constitutes a major global flashpoint of forced migration.

The OAU Refugee Convention.

The preamble of the 1969 OAU Refugee Convention commences with the recognition that the "United Nations Convention of July 28, 1951 as modified by the Protocol of January 31, 1967 constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment." Besides its comparatively more encompassing definition of refugees, the OAU Refugee Convention reaffirms both the "peaceful and humanitarian" nature of asylum and the rule on non-*refoulement*.[3] Another pertinent provision of the OAU Refugee Convention is the recognition that refugees must respect the laws of the country of asylum and that the country has exclusive jurisdiction over the refugees. Furthermore, the OAU Refugee Convention prohibits acts that are "likely to cause tension between Member states, and in particular by the use of arms, through the press, or by radio." Another rule of international refugee law that is reaffirmed in the OAU Refugee Convention underscores the "voluntariness" of repatriation.[4]

While many sections of the OAU Refugee Convention overlap with the UN Refugee Convention and Protocol, some go beyond the scope of the international regime. Three additional obligations are worth pointing out. First, signatory states "undertake" to submit to the OAU Secretariat periodic reports on "condition of refugees; implementation of the Convention; and laws, regulations and decrees" relevant to refugees. Secondly, states are duty-bound to "co-operate with the UNHCR." Finally, the "conflict resolution clause" designates the OAU Commission for Mediation, Conciliation, and Arbitration as the forum for resolving disputes related to the Convention's interpretation and application. Unlike the UN Refugee Convention, the OAU Refugee Convention eschews any detailed focus on political and economic rights of refugees. This has set a poor precedent for legislation in the region.

Tanzania. The largest of the three East African countries, Tanzania shares borders with the Democratic Republic of the Congo (DRC), Rwanda, and Burundi. All of these countries are recognized as

major refugee-generating countries experiencing armed conflicts of varying intensity and, therefore, constituting a real security threat to the region. Even in this environment, Tanzania lacks a national refugee policy.[5] As regards Tanzania's responses to refugees, both in terms of legislation and practice, one can identify two distinct periods.[6] There was the de facto open-door policy of the 1960s to the 1980s, and the restrictive approach from the 1990s to the present.[7]

The magnanimity and tolerance of the era of the "open-door" policy sits awkwardly with some of the draconian provisions one finds in the law of that time, the Refugees (Control) Act, 1966.[8] From the 1960s to the 1980s, refugees were given liberal recourse to group determination of status; land was allocated not only for housing, but also for farming; durable schools and hospitals were built for the refugees; and finally, the right to seek naturalization was extended almost universally.

Yet the open-door era coincides with the period during which the Refugee (Control) Act of 1966 was in force. What accounts for the discrepancy between law and practice? How does one also explain the shift from a de facto open-door policy to a de jure restrictive regime? Compared to the Refugees (Control) Act of 1966, the 1998 Refugees Act is legally more sophisticated, displaying sensitivity to international refugee law. Nevertheless, in practice, treatment of refugees after the 1998 Act has been increasingly restrictive. What accounts for these policy shifts and incongruity? Answers to this question are based in external as well as internal factors. Changing political climate, sliding economic fortunes, and the sheer magnitude of the refugee problem are all possible root causes.

From the 1940s to the 1960s, Africa was gripped by political struggles. The general public easily identified with those enmeshed in the conflicts, and hence sympathy and generosity towards refugees and freedom fighters was the norm. Whether by ministerial decree or prima facie recognition, group (as opposed to individual) determination became the predominant means of processing applications for asylum. In contrast, current conflicts in the Great Lakes region do not draw nearly the same level of understanding and sympathy, as did the wars against "colonial rule" or "racist regimes."

Besides the changed character of conflicts are equally changed socioeconomic conditions. While the population has continued to grow markedly, intermittent droughts, a debilitating national debt burden, and dwindling returns on exports pose awesome challenges for the economy. Combined with mismanagement and the conditions imposed by multilateral financial institutions, countries like Tanzania have found themselves on the UN lists of Least Developed Countries (LDCs) and Highly Indebted Poor Countries (HIPCs). Since the legendary "African hospitality" toward asylum seekers is a function of availability of resources, the dire economic situation in Tanzania necessarily brought about a reconsideration of the open-door policy.[9]

The changed political and socio-economic conditions in themselves might not have led to a policy shift had four other factors not come into play.

First, the magnitude of mass influxes has dramatically increased since the 1980s.[10] The resulting demographic imbalance and environmental degradation is not only well documented in study reports but was evident even to the unini-

tiated residents in the refugee-populated areas. Second, barriers against asylum seekers are going up worldwide—a development that has not gone unnoticed in countries such as Tanzania.[11] Third, and closely related, is the view that the international community is "shifting" rather than "sharing" the burden of hosting refugees to those countries unfortunate enough to be located near refugee-generating regions.[12] Finally, government officials in refugee-populated areas feel obliged to be seen as showing sensitivity to the members of their respective constituencies who must deal with the adverse impact of refugee presence.

There are also several security concerns that help explain the stricter refugee policies. Karen Jacobsen identifies the following security threats involved in refugee crises: security of relief agency personnel, security of refugees, security threats confronting communities residing in RPAs, and security threats posed by refugees to the host country.[13] The last two concerns are particularly relevant, as they seem to lie at the root of shifts in law and practice. To begin with, it is important to note that in excess of 90 percent of refugees in Tanzania are settled in the Kagera, Kigoma, and Rukwa regions of western Tanzania. The remoteness of these areas with their poor infrastructure and communication networks, coupled with stupefying numbers of refugees, complicates governance or "broadcasting of power" by the central government.[14]

A mass influx of refugees, particularly one which creates demographic imbalances, can bring about justified fears of being socially, culturally, and even politically overwhelmed in both the refugee-populated areas and the rest of the nation. Also, justifiably or not, refugee presence has come to be associated with such negative developments as rising criminality, environmental degradation, destruction of (already fragile) infrastructures, diversion of human and financial resources, and price distortions. Governmental authorities, thus feel pressured to reassert themselves. Since the unprecedented refugee influx of 1994, it has become common to hear statements of this nature from parliamentarians and government officials alike.[15]

The threat of a refugee influx can also be more direct. At the Regional Refugee Policy Workshop, one official noted the perception that "generosities" such as providing land for refugees would dissuade refugees from returning home, lead to a demographic imbalance in favor of refugees, promote the entrance of refugees into the government as legislators, and create conditions in which "refugees will ultimately consider taking charge of government" (as in the case of Banyamulenge in the DRC).[16]

Many allege that the mass exodus of Batutsi refugees is associated with a desire by the Bahima dynasty—purportedly entrenched in Burundi, Uganda, and Rwanda and attempting to grab power in the DRC—to establish an "empire" transcending the current international frontiers. Two situations in the region may explain why this highly questionable perception has gained currency.

The ruling elite in Burundi, Rwanda, and Uganda are believed to be strains of the Bahima peoples, which is then taken to explain these countries' sympathy and support for the Banyamulenge of eastern DRC, who trace their roots to Rwanda. Proponents of the Bahima expansionism theory also cite the erstwhile mutual military assistance between the ruling elite in Uganda and Rwanda as further evidence of a conspiracy. They

note the conspicuous involvement of Rwandese refugees in the armed struggle that brought the incumbent Ugandan administration into power in 1986, and the subsequent assistance Ugandan authorities extended to the Rwandese Patriotic Front's incursion and eventual takeover of Kigali in July 1994.[17] Those who believe in the Bahima conspiracy insist that it does not bode well for the security of the countries of the region, and hence advocate vigilance with respect to accepting Batutsi refugees.

This argument must be taken with utmost caution. There has yet to be a sustained and coherent study supporting the Bahima expansionism theory and there are other factors that help to explain these trends short of Bahima expansionism.

The Refugees Act of 1998. Tanzania's Refugees of Act of 1998 carries a more encompassing (but now antiquated) definition of refugees that was introduced by the 1969 OAU Convention.[18] The Act addresses a number of issues key to the promotion of the rights of asylum seekers and refugees. These provisions in a fairly bold manner facilitate the implementation of Tanzania's treaty obligations under international refugee law.

The provisions in the 1998 Refugees Act that deserve specific mention are those pertaining to governance of refugee settlements and constitutionality of orders emanating from authorities.[19] The earlier provision sets the stage for participatory, democratic governance through the creation of "Councils" or "Village Committees" to which will be elected leaders and representatives on principles of equality and universal suffrage, without discrimination based on sex, clan, tribe, nationality, race, or religion. The other provision requires authorities to "have regard" for international refugee law instruments.

On closer inspection, one finds a number of shortcomings. For example, not only is the establishment of Councils or Village Committees based on the discretion of the Minister, but to become operational, they must obtain a "Certificate of Incorporation" from the Director of Refugee Services. Should the application for incorporation be rejected, then appeal lies with the Minister who may legitimately "vary the decision of the Director as he deems appropriate and the decision…*shall be final*" (emphasis added). Provisions relating to discretionary powers and finality of decisions by authorities litter the Refugees Act of 1998.[20]

Ultimately, The Refugees Act of 1998 implicitly recognizes a number of key "basic rights and fundamental freedoms" relevant to refugees. These include freedom of movement, the right to own property, and freedom of association. Yet, while doing so, the Act laces the enjoyment of these rights and freedoms with restrictions—raising questions about their practical utility to refugees.

Kenya. Like her two fellow East African states, Kenya is party to the 1951 UN Refugee Convention, the Protocol of 1967, and the 1969 OAU Refugee Convention. Kenya also represents a key destination for asylum seekers, particularly from southern Sudan and Horn region countries such as Eritrea and Ethiopia.[21] In terms of specific responses to her obligations arising from international refugee law, Kenya is in a class of her own.

Despite an involvement with asylum seekers and refugees spanning nearly five decades, Kenya has neither refugee-specific legislation nor a national refugee policy. Kenya's legal framework is not

based on consolidated legislation, but draws authority from a host of diverse statutory instruments.[22] This makes coordination difficult and severely impairs any legal determination of rights. More importantly, the country is denied the very institutional and legislative framework on which to implement its obligations under international refugee law. There does exist a draft of a Bill entitled "The Refugees Bill." It made its debut in 1992, but overwhelming public antipathy and outright xenophobia toward refugees scuttled the legislative initiative.[23] Fresh efforts were initiated two years later, but for similar reasons, the process floundered. The existing draft to which this paper refers was drawn in 2000.

At the general level, in Kenya one finds legislative and policy shifts similar to those in Tanzania. This includes an aversion to local integration as a solution, ascendancy of individual over group recognition of status, and a tilt towards mandatory residence in camps. But in other instances, Kenya's response toward refugees has been novel and bold.

The retrogressive trend can be partly explained by the dramatic increase in the magnitude of refugee flows, the changed nature of conflicts, and the interplay of such factors as the proliferation of weapons, brutal inter-ethnic conflicts and local electoral politics.[24] Under Secretary Waweru makes two significant observations.[25] He contrasts the relatively modest numbers of asylum seekers in earlier periods with the "floods" of the 1990s, and also observes that in those earlier periods, asylum seekers were victims of either (sympathy-evoking) "colonial rule," "apartheid" or "oppressive and barbaric regimes." In contrast, present day conflicts pose a knife-edge dilemma for the Kenyan government. Present day refugees are characterized by their violent opposition to their home governments. Offering protection exposes the country of asylum to criticism for supporting subversive acts against a fellow Partner State, contrary to the 1963 OAU Charter and 1969 OAU Refugee Convention.

In Kenya, the initially modest numbers of asylum seekers did not warrant the establishment of a permanent national body. The "manageable" volume of business was such that it was common for "many refugees [to be] local integrated," namely, to "secure employment in the public and private sector, put up business and also mix with rural folks" [*sic*]. And even more, once integrated, the refugees "enjoyed the same rights with Kenyans on provision of services like health facilities and education opportunities." [26]

As in Tanzania, dramatic increases in the numbers of asylum seekers and the changed character of the conflicts help explain the emergence of restrictive legislation and practices, or what Peter Kagwanja terms "rigid policy."[27] In Kenya, it has been shown that the insistence on having refugees reside in camps, as opposed to settlements and urban areas, and the mass dismissal from the public sector of refugee professionals, were in large part directly influenced by the overwhelming size of refugee flows and the related political and security challenges.[28] As Kagwanja summarizes, faced with "acute shortage of arable land, insufficient social services in the urban sector, deepening rural and urban poverty, and high rate of unemployment, Kenya can ill afford to play host to a large population of poor and dependent refugees."[29]

It is presumed that once the Refugees Bill becomes enacted into law, it will occupy center stage in the regulation of asylum and administration of refugees.

Given this assumption, it should be viewed as a benchmark for assessing the country's responses to its international obligations. The draft Bill is an elaborate document comprising a substantive part and two schedules.[30] A considerable part of the draft Bill is dedicated to institutions—National Council for Refugees, Refugee Appeal Board, Director for Refugee Affairs, Refugees Trust Fund—and their functions. Curiously, unlike the Tanzania Refugees Act of 1998, the draft Bill makes no explicit mention of the UNHCR. A second portion of the draft Bill consists of those provisions dedicated to the rights and duties of asylum seekers and refugees. Included is a provision for the rights of refugee women and children and an insistence on their "appropriate protection and assistance" that represents a significant innovation in approach.

Despite these advances, there are holes. Contrary to Kenya's obligations under the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention, there appears to be little effort in the draft Bill to address the rights to education, work, social assistance, and health. The closest the draft Bill gets is the omnibus declaration that refugees and members of their families "shall be entitled to the rights and be subject to the obligations contained in (the 1951 UN Refugees Convention, the 1967 Protocol, and the 1969 OAU Convention)." Neither does the draft Bill provide for legal representation for asylum seekers or refugees—as is the case with the corresponding Ugandan draft—be it during oral interviews where the question of status is being determined, or at the appeal level.[31]

These deficiencies notwithstanding, adoption of the draft Bill represents a bold step. The mere existence of a refugee-specific statute is a welcome change. Even the government acknowledged that its absence was a fundamental shortcoming.[32] Further, the Bill has several promising aspects. First are the institutions envisaged under the terms of the draft Bill. The limitations of the thinly-staffed Eligibility Committee were dramatically exposed by the unprecedented refugee influx of early 1991. In contrast to the Eligibility Committee, which occupied the status of a mere "section" within the bureaucracy, the draft Bill provides for a "Directorate." This body will be relatively more independent and administratively superior. Thus, it will arguably be entitled to more human, financial, and material resources. There is also provision for a Refugee Appeal Board to which one finds no analogy in the Tanzania Refugee Act of 1998. Granted, one may question the Board's independence, but an aggrieved person is also entitled to appeal to the High Court on a point of law, against a decision of the Board.

Considered in its totality, the legal framework envisaged by the draft Bill places Kenya in a far better position to meet its obligations under refugee instruments than has thus far been possible.

Uganda. Like her East African sister states, Uganda lacks a coherent national refugee policy. But unlike Kenya, Uganda has a refugee-specific statute in place, called the Control of Alien Refugees Act of 1960 (hereafter, the Act).[33] While its existence is important, it is distinguished primarily by the fact that it is archaic.

One observer summarized the Ugandan statute in the following terms: "The Act neither provides for basic rights nor incorporates the provisions of the (UN Refugees Convention)." He adds that

the Act "is also completely inconsistent with Uganda's Constitution [of 1995] and international human rights standards."[34] Such a view is shared by another researcher, Abraham Kiapi, who stresses how "the Act treats refugees as undesirable intruders rather than people in need of protection from prosecution."[35] Also, its application is confined to "aliens" by which is meant persons who are not Ugandan citizens or citizens of the Commonwealth, effectively shutting out asylum seekers from the latter group of countries.[36]

Despite these concerns, there is a welcome discrepancy between the Act's precepts and actual practice—a phenomenon also observed in Tanzania and Kenya. For instance, Kiapi claims that whereas according to the law the decision to grant asylum is the prerogative of the Minister, in practice, this function has been executed by a collegial body, the Refugee Eligibility Committee, on which also sits a representative of the UNHCR.[37] Likewise, while the Act is explicit in its demand for mandatory residence in camps, in practice, this requirement applies "only to spontaneous large influx of refugees," while individuals whose asylum applications are successful reside in places of their choice. In addition, the enforcement of a number of provisions would preclude the integration of refugees. Instead, the practice has been to facilitate "local integration" of refugees, including their absorption into the labor market, military, and police.[38] Lastly, rarely have the authorities resorted to the draconian disciplinary or police powers the Act confers.[39]

The Uganda Refugee Bill. A new Refugee Bill has been drafted which, if passed into law, would repeal and replace the archaic Control of Alien Refugees Act. Drawn in 1998 and revised in 2000 and 2001, its preambular section reads: "*An Act to amend and consolidate the law relating to refugees to conform to international conventions and obligations in relation to the status of refugees and their rights and obligations, and to provide for the administration and regulation of refugee matters, and for other matters connected with the above*" (emphasis added).

The envisaged statute seeks to fulfill four objectives: first, to bring under one instrument the varied and independent pieces of legislation pertinent to refugees; second, to ensure that these laws correspond to rules of international law that are applicable to refugees; third, to ensure that refugees are granted the rights to which they are entitled; and fourth, to provide institutions and procedures governing refugees.

The second objective is particularly interesting because it deals with Uganda's treaty obligations. For a *dualist* legal system, it is more than symbolic that the Bill's opening statement recognizes international law. It may create the conditions for a progressive national judge to seize the opportunity to apply the more advanced and fair, but legally "alien," rules of international refugee law to domestic cases. Or it may provide the avenue for the bench to advance the promotion of international refugee law by lending a favorable and forward-looking interpretation of existing municipal laws.

At the core of international refugee law are the principles relating to asylum, non-*refoulement*, protection, non-discrimination, international cooperation, and durable solutions. It is heartening to find provisions in the Bill recognizing the right of asylum and prohibiting *refoulement*, expulsion, or extradition.[40] In a markedly novel development, the Bill also acknowledges "gender discriminating practices" as

Containment and restrictive laws are unlikely to reduce the mass influx of refugees into East Africa.

a ground for granting asylum.[41] In another and no less important development, the Bill goes beyond the corresponding provision in the Tanzanian statute by requiring key national institutions to be guided by a broad spectrum of legal texts and related instruments.[42]

While recognizing group determination of status, the Bill also contains the traditional clause that precludes persons who have occasioned serious violations of international law, including crimes against humanity, war crimes, and crimes against the peace.[43] The prominence given to the UNHCR in the Bill also deserves noting, bearing in mind the obligation of states signatory to the UN Refugee Convention to cooperate with this UN agency.[44] UNHCR's role both in the Appeals Board and the Eligibility Committee is of exceptional significance in promoting respect for the law.

There probably exists no legislation in the region that adopts a laissez-faire attitude regarding the right of movement of refugees. Invariably, all tend to take a restrictive approach, motivated by a policy of "containment." The Bill is similar to other states' legislation. Nonetheless, it does demand that the restrictions be reasonable, non-discriminatory, and consistent with the 1969 OAU Refugee Convention.[45]

Like the Kenyan Bill, the Ugandan Bill distinguishes itself by its specific provisions for the rights of refugee women and children.[46] Finally, the Bill is distinct in the bold and consistent manner with which it addresses the conventional solutions to the refugee crisis, namely, local integration. Property rights are explicitly recognized, as are the right to education, the right to practice one's profession, and the right to seek naturalization.

Unfortunately, the boldness with which the Bill addresses economic, social, and cultural rights is replaced with a distinct timidity and ambivalence in respect to civil and political rights. Refugees are entitled to the rights enshrined in such international human-rights instruments as the 1979 Convention on the Elimination of all Forms of Discrimination Against Women and the 1981 African Charter on Human and Peoples' Rights, and yet their "right of association" is confined to "non-political and non-profit making associations."[47]

Conclusion. Tanzania, Kenya, and Uganda, the East African states at the focus of this article, have responded to their obligations under international refugee law in a manner that illustrates boldness as much as ambivalence and timidity. First, none seemed to be in any hurry to either enact an enabling legislation or, in the case of Tanzania, have the existing 1966 Refugee (Control) Act amended, following the adoption of the 1969 OAU Refugee Convention to which all the East African states are signatories. None has a coherent national refugee policy. Second, over the years there has been a marked shift in legislation and policy, but also an incongruity between the letter of the law and practice. Third, the "shift" and the discrep-

ancies seem to have their roots in the overwhelming increase in the numbers of asylum seekers and the changed character of the conflicts that have given rise to increased refugee flows. As such, governments in the region increasingly view forced migration through the prism of national security. In Tanzania, this is evident in the fear of Bahima expansionism. Deteriorating economic conditions, and the evident impact of refugees on land and water resources, social facilities, and crime, explain why there has been a recoil from the open-door policy that characterized East Africa before the 1990s.

At the same time, containment and restrictive laws are unlikely to reduce the mass influx of refugees into East Africa. The root causes of forced migration have to be identified and addressed. They include unjust political, economic, social, and cultural systems within refugee-generating countries surrounding Tanzania, Kenya, and Uganda. The success with which the three East African states are able to intervene and influence these factors will to a large extent determine whether or not large-scale influxes continue. No less important is the need for support from the international community to help resolve conflicts and share the refugee "burdens." Finally, East African states should commit themselves to harmonizing their laws and policies on forced migration.

NOTES

1 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), 65–68.

2 Khoti Kamanga, "The Rwandan Conflict and the Genocide Convention: Implications for Tanzania," *African Yearbook for International Law* 5 (1997): 75–78.

3 The rule prohibiting the *refoulement* of an asylum seeker to the country he or she has fled from. See Art. 33 (1) of the 1951 UN Refugees Convention and Art. II (3) of the 1969 OAU Refugees Convention.

4 According to Art. V (1) of the 1969 OAU Convention, the "essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."

5 On November 30, 2001, the Centre for the Study of Forced Migration (CSFM) of the University of Dar es Salaam presented to the Government of Tanzania a study report funded by the European Union entitled "Review of Refugee-Related Policies and Laws" on the basis of which the government would draw national refugee policy.

6 For details on responses to the Rwandese crisis of 1994 see Bonaventure Rutinwa, "The Tanzanian Government's Response to the Rwandan Emergency," *Journal of Refugee Studies* 9 (1996): 291 and Odhiambo Anacleti, "The Regional Response to the Rwandan Emergency," ibid., 312. As regards repatriation practice see Human Rights Watch, "In the Name of Security: Forced Round-Ups of Refugees in Tanzania," 11 (July 1999), New York.

7 Addressing a Regional Refugee Policy Workshop organized by the Centre for the Study of Forced Migration (CSFM), University of Dar es Salaam, April 11, 2000, the Permanent Secretary of the Ministry of Home Affairs, Bernard Mchomvu, maintained that Tanzania continues to abide by the "open door policy."

8 Act No. 2 of 1966. Because of an error originating from the time of its enactment, the Act is also referred to as the Refugees (Control) Act, 1965. For a critique see Toby Mendel, "Refugee Law and Practice in Tanzania," *International Journal of Refugee Law* 9 (1997): 35.

9 Gaim Kibreab, "Local Settlements in Africa: A Misconceived Option," *Journal of Refugee Studies* 2 (1988): 468.

10 At the height of the Rwandese genocide of April–July 1994, as many as 250,000 refugees had streamed into Tanzania within forty-eight hours such that by May the population stood at around 800,000.

11 See for an example, Ryszard Piotrovich, "Facing Up to Refugees: International Apathy and German Sel-Help," *International Journal of Refugee Law*, 10 (1998): 410.

12 Guy Martin, "International Solidarity and Cooperation in Assistance to African Refugees: Burden-Sharing or Burden-Shifting?," Special Issue. *International Journal of Refugee Law* (Summer 1995): 250.

13 Karen Jacobsen, "A Framework for Exploring the Political and Security Context of Refugee Populated Areas," *Refugee Survey Quarterly* 19 (2000): 21. Another insightful work is Alex de Waal (ed), *Who Fights?; War and Humanitarian Action in Africa* (Trenton, NJ): Africa World Press, Inc., 2000), 75–101.

14 Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000), 145–152. Johnson Brahim, a Principal Refugee Officer has expressed himself in similar vein at a CSFM, University of Dar es Salaam Advisory Board Meeting, September 1999.

15 A typical example would be the 'assurances' recently given to parliament by the Deputy Minister for Home Affairs in response to the remark that refugees from Burundi and Rwanda "are neither honest nor patriotic" and that in countries where refugees "had lived for long" and "acquired citizenship" the direct consequence was "conflicts". His response was that the government was so "careful" on the question of granting refugees citizenship that "for the last three years" not a single refugee had been registered as a citizen. See *The Guardian* (Tanzania), 31 October 2001, 1.

16 Johnson P. Brahim, "Refugee Policy Framework: Tanzania's Experience," paper presented at the Regional Refugee Policy Workshop, Dar es Salaam, April 10–14, 2000.

17 Details of the 'Rwandese Connection' can be obtained from Ondoga ori Amaza, *Museveni's Long March from Guerilla to Statesman* (Kampala: Fountain Publishers, 1998), 140 – 146. In an interesting episode the book lists incumbent Rwandese president, General Paul Kagame, as a key leader (in fact chief of military Intelligence) of Museveni's National Resistance Army.

18 Act No. 9 of 1998. Enacted by Parliament on November 5, 1998 it was assented to by the President on January 24, 1999 and made operational on April 15, 1999.

19 Sections 19 and 21 (2) respectively.

20 They include sections 8, 12 (6), 19 (5) (b), 28 (1) and 35 (1).

21 U.S. Committee for Refugees, *World Refugee Survey 2001*, U.S. Committee for Refugees Report, 88-90.

22 They include the Citizenship Act, Immigration Act, and the Aliens Restriction Act.

23 Peter Kagwanja, "Investing in Asylum: Ethiopian Forced Migrants and the *Matatu* Industry in Nairobi," *IFRA Les Cahiers* 10 (1998) 53. Also, Peter Mulei, "Refugee Legal Framework: Kenya's Experience," Paper presented at the Regional Refugee Policy Workshop, Dar es Salaam, April 10–14, 2000.

24 FECCLAHA, *Report of Ecumenical Consultation on Small Arms and Light Weapons in the Great Lakes and Horn of Africa*, Limuru Conference Centre, Kenya, October 23– 24, 2000.

25 An under secretary, Nimrod Waweru made these remarks in a presentation at a Workshop on the Review of Tanzania's Refugee-Related Policies and Laws, Sheraton Hotel, March 30, 2001. Similar views were expressed earlier at the Regional Refugee Policy Workshop, April 10–14, 2000.

26 Ibid. In contrast, see the peculiar economic integration of Eritrean and Ethiopian refugees within the (Matatu) transport sector in Nairobi as discussed by Peter Kagwanja (footnote 23 above)

27 Kagwanja, ibid., 53.

28 Waweru, ibid.

29 Kagwanja, ibid.

30 The first is entitled 'National Council for Refugees' while the second bears the title 'Refugee Appeal Board'. Mulei justifiably questions whether the appropriate title for the later should not be the 'Refugee Status Appeal Board.'

31 Mulei, ibid., 4.

32 Waweru, ibid.

33 Chapter 64 of the Laws of Uganda.

34 Zachary Lomo, "The Role of Legislation in Promoting Recovery: A Critical Analysis of Refugee Law and Policy in Uganda," Paper presented at the International Conference, InDRA, University of Amsterdam, April 21–24, 1999, 2.

35 Abraham Kiapi, "The Legal Status of Refugees in Uganda: A Critical Study of Legislative Instruments," in A.G.G. Gingyera Pinycwa (ed), *Uganda and the Problem of Refugees* (Kampala: Makerere University Press, 1998), 42. This was further confirmed by the deputy director, Refugee Directorate, Office of the Prime Minister, Carlos Twesigomwe in a presentation at the CSFM Regional Refugee Policy Workshop, Dar es Salaam, April 10–14, 2000.

36 Kiapi, ibid., 43.

37 Kiapi, ibid., 49.

38 Kiapi cites the Police Force and the Military as examples. According to Waweru (2000) Kenya also allowed refugees to obtain employment in the public sector an arrangement that was formally rescinded following the massive influx of the early 1991 and in the face of rising unemployment.

39 Uganda. *Control of Alien Refugees Act, 1960*. Sections 21, 22 and 23 are ready examples.

40 Ibid., Section 3 (1).

Section 40.

41 Ibid., Section 4 (d).

42 Ibid., Section 35.

43 Ibid., Section 5 (a).

44 Ibid., Art. 35 of the 1951 UN Refugees Convention.

45 Ibid., Section 28 (2).

46 Ibid., Sections 31 and 30 respectively.

47 As provided under section 31.

See section 27 (g).

The Protection of Refugee Women and Children

Litmus Test for International Regime Success

Wendy A. Young

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Women and children constitute approximately 80 percent of the world refugee population. Refugee experts, the United Nations community, and donor and host governments widely cite this statistic when they call upon the UN High Commissioner for Refugees (UNHCR) to improve its program for refugee women and children.

Although women and children make up the majority of people forcibly displaced by armed conflict and human-rights violations, their protection under the international refugee regime is advancing slowly. The evolution of legal protection extended to women and children, and the physical protection they are afforded while in refugee settings, have reflected this sluggishness.

As the world community marks the fiftieth anniversary of the 1951 UN Convention relating to the Status of Refugees (the Refugee Convention), it is critical that the needs and rights of women and children become a centerpiece in the continuing effort to improve refugee protection.[1] UNHCR must demonstrate consistent leadership, and states must comply with their obligations under the Refugee Convention to ensure that the rights of women and children are fully addressed. Meaningful protection of women and children will

serve as a measure of the continuing success of the Refugee Convention.

Promoting a gender- and child-centered agenda is both more important and more challenging at this moment when the world community is evaluating its successes in the refugee context. Approximately 140 countries have ratified the Refugee Convention, which embodies the right of refugees not to be forcibly returned to their homeland.[2] Mass influxes of refugees continue unabated as more and more people flee political upheavals related to rogue governments and guerrilla forces. More people than ever are on the move, some voluntarily and some forcibly.

Large population movements have heightened states' concerns regarding their sovereign right to determine who is permitted to cross their borders and who is not. Despite obligations under the Refugee Convention, states have exhibited growing reluctance to host large refugee populations and implement expensive systems to determine refugee status. Moreover, they have shown intolerance for irregular migration as well as human smuggling and trafficking. Countries find themselves balancing refugee protection and self-interested migration policies—a delicate act that is often ineffective.

The advancing recognition of the human rights of women and children forms an important backdrop to issues confronting refugee women and children. This recognition is most concretely reflected in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).[3] Approximately 168 countries have joined CEDAW, and the CRC is the most widely ratified human rights treaty in history—only two states have failed to ratify it: the United States and Somalia.[4] Despite these advances, the challenge of fully integrating the human rights of refugee women and children into the international refugee regime remains.

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This article will assess the extent to which the rights and needs of refugee women and children are currently addressed by international refugee policy and practice. It will do so on two fronts. First, it will evaluate the degree to which the physical protection needs of women and children in refugee settings are being addressed. Next, it will examine the recognition of gender- and age-based persecution under refugee law, focusing primarily on legal developments in the United States. Finally, it will offer recommendations to the world community on how refugee women and children can receive better protection—both physically and legally.

Physical Protection of Refugee Women and Children. Undoubtedly, UNHCR has made significant progress, albeit only recently, in developing sound policies that promote the protection of refugee women and children. Largely in response to pressure

from women's and refugee rights advocates and the 1985 World Conference on Women, UNHCR issued its first Policy on Refugee Women in 1990.[5] The Policy was reinforced by the Guidelines on the Protection of Refugee Women (the Refugee Women's Guidelines) in 1991 and the 1995 Guidelines on Sexual Violence against Refugees: Prevention and Response (the Sexual Violence Guidelines).[6] UNHCR also adopted Guidelines on Refugee Children in 1988 and Policy on Refugee Children in 1993.[7] It then issued the revised and updated Guidelines on the Protection and Care of Refugee Children in 1994 (the Refugee Children's Guidelines) and Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (the Children Asylum Seekers' Guidelines) in 1997.[8]

Together, these guidelines help field workers in all areas of refugee assistance identify the specific concerns facing women and children. They also recognize the intrinsic relationship between physical protection and assistance. Poor planning in assistance efforts often inadvertently undermines the protection of women and children.

The Refugee Women's Guidelines and the Sexual Violence Guidelines also promote the full inclusion of refugee women themselves in decision-making and planning. The Refugee Children's Guidelines and the Children Asylum Seekers' Guidelines embrace the principles of the CRC, most fundamentally that the survival and development of a child is based on the primacy of the "best interests of the child" rule. The Guidelines also recognize the child's right to be heard and right to participate in decision-making, and the child's right to be free from discrimination on the basis of national, social, or ethnic origin.

Despite the laudable goals articulated in UNHCR's guidelines, implementation of the policies in field programs remains inconsistent at best. Ensuring the physical security of refugee women and children through special measures is often neglected in favor of what officials unanimously perceive as more pressing demands, such as food, shelter, sanitation, and health care. Refugee women's and children's needs and rights, however, are not adequately considered in programming within these sectors either.

Refugee women and children pay the price for these inadequacies. They are more likely to suffer abuses such as rape, sexual slavery, forced prostitution, forced marriages, abduction, and forced military recruitment. They often suffer higher rates of mortality than refugee men do. Children are frequently deprived of educational opportunities, and women are left out of skills training and microenterprise programs.

Donor and host governments, UNHCR, and their implementing partners are not unaware of these problems. Increasingly, the results of the lack of protection and planning for women and children are noted and documented by refugee and human rights agencies. The Women's Commission for Refugee Women and Children alone has issued over forty reports assessing protection problems for women and children in refugee settings around the world. Reports from groups including Human Rights Watch and Amnesty International have also verified the failure to address the needs of women and children. This advocacy by outside actors is gradually building momentum for reform.

In 2000, the U.S. and Canadian governments contracted the Women's Commission to conduct an evaluation of UNHCR's progress in implementing the Refugee Women's Guidelines. Scheduled to be completed by 2002, the assessment will be made through site visits to five refugee settings around the world, existing documentation from other settings, and interviews with officials at all levels of UNHCR and other implementing agencies.[9]

At almost the same time that the United States and Canada approached the Women's Commission, UNHCR itself contracted an independent team of consultants. Known as "Valid International," the group was hired to evaluate the extent to which UNHCR is effectively meeting the needs of refugee children, using the Refugee Children's Guidelines as the primary benchmark. The assessment has also utilized field visits and interviews to arrive at concrete recommendations for future UNHCR planning and programming.[10]

Together, these two studies should form a critical platform for improving the protection of refugee women and children. Donor governments supporting these initiatives have already indicated their desire to see UNHCR act on recommendations resulting from the assessments. Senior managers at UNHCR must take responsibility for systematically implementing any required changes in programming.

Legal Protection of Refugee Women and Children. Article 1 of the Refugee Convention delineates five grounds for refugee protection: race, religion, nationality, political opinion, and membership in a particular social group. An individual must prove that he or she would be persecuted on the basis of one of these grounds in order to obtain protection under the Convention. Nothing in the debates accompanying the drafting of the Refugee Convention indicates that gender- or age-related human-rights violations were even superficially considered as meriting eligibility for refugee protection. This oversight is not surprising, though; the Refugee Convention grew out of the experience of World War II in an era when women's and children's rights were neither widely discussed nor embraced at the international level.

Nevertheless, in much the same way that U.S. federal courts have debated the scope of constitutional protections encompassed in the U.S. Constitution and gradually have opened the door toward an expansion of domestic civil rights, so too has the international community massaged the refugee definition to either expand or contract its coverage. Developed countries have engaged in much of this jurisprudential wordsmithing, as they are the states that actually have the resources to implement refugee status determinations as implicitly envisioned under the Refugee Convention. The United States, European countries, Canada, Australia, and New Zealand have taken the lead in the legal interpretation of the Refugee Convention. UNHCR has offered its guidance along the way.

Recognizing gender- and age-related persecution under the Refugee Convention is a quandary for many states. States have sought to narrow the number of people whom they deem eligible for refugee protection, and thus limit their international obligations under the Refugee Convention. Yet the recognition of women's and children's rights has

opened the door to potentially large numbers of asylum seekers. Therefore, developed states, thus far, have been cautious in their acceptance of claims to asylum related to gender persecution or age. They perceive inclusion of women and children as potentially opening the "floodgates" to a refugee influx of unacceptable proportions. This fear is without basis, since the vast majority of women and children around the world lack the resources or capacity to seek asylum in western countries.

Adjudicators have generally considered gender- and age-related persecution claims as falling under the "membership in a particular social group" category. This category has historically been interpreted in a flexible manner to capture claims that do not fall neatly into the categories of race, religion, nationality, and political opinion.

The United States has adopted this approach, which has generated tremendous controversy and unclear legal guidelines. In 1996, refugee advocates heralded a decision by the Board of Immigration Appeals (BIA, the highest U.S. administrative judicial body to consider immigration cases) that granted asylum to Fauziya Kasinga. The young Togolese woman was given asylum based on her fear of female genital mutilation (FGM) in her home country.[11] In its effort to limit expansion of U.S. refugee law, the BIA defined the social group in question as only "young women of the Tchamba-Kunsuntu tribe, who have not had FGM, as practiced by the tribe, and oppose the practice."[12] Despite the narrow interpretation, the Kasinga decision did lead to a wider acceptance of FGM-related claims in the United States.

Refugee experts expected that the Kasinga precedent would lead to wider recognition of gender-related claims based on other forms of abuse. The BIA itself, however, threw the judicial equivalent of cold water on these expectations in 1999 when it denied asylum to a Guatemalan woman who had repeatedly experienced horrific domestic violence at the hands of her husband, but was denied protection by the Guatemalan authorities.[13] In a decision known as "R-A-," the Board found that while the respondent was credible and certainly experienced abuses that rose to the level of persecution, her argued social group—"Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination"—was not a cognizable group. The Board also found that the woman's husband was not motivated to persecute on the basis of the proposed social group.[14]

The R-A- decision instigated a tremendous outcry from refugee and women's rights activists, as well as from members of Congress. In response, former attorney general Janet Reno vacated the BIA's decision with orders to the Immigration and Naturalization Service to issue regulations to address the issue.[15] At the time of writing, these regulations

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had not yet been finalized, and the state of the law has remained in flux.[16]

A few other asylum countries, most notably Canada, New Zealand, and the United Kingdom, have been less circumspect in their handling of gender-related claims. Britain, for example, opened the door to gender itself being considered as a social group in a case known as "Shah," but narrowed that finding only to the nationality in question—Pakistani.[17] No country to date has rendered a blanket decision identifying gender as a defined social group, choosing instead to combine gender as a key attribute with other qualifying factors such as nationality. Generally, however, the trend is toward recognition of gender persecution as a basis for refugee protection. South Africa, for example, has incorporated gender as a recognized social group into its own law, although implementation remains to be seen. UNHCR has weighed in on individual cases. It has also issued policy guidance on gender persecution claims that suggest that women might constitute a social group, but has stopped short of sounding a trumpet call for such universal recognition.[18]

The recognition of age-related claims is even less developed. In the United States, it has only been in recent years that children's claims have been considered under the social group category. At this point, the BIA has yet to issue a precedent decision addressing children's claims. Nonetheless, decisions by lower-level immigration judges and unpublished BIA decisions have signaled that jurisprudence on children's claims may follow a smoother path than gender-based claims. Already, some children have been granted asylum for being child brides or street children, or for having been abused, forcibly recruited into a gang or army, or exploited as a child laborer. Others have gained asylum for having been persecuted due to sexual orientation or mental disabilities.[19]

Interestingly, in 1995 and 1998, the Immigration and Naturalization Service itself has issued both gender guidelines and children's guidelines establishing non-binding standards with which adjudicators are to strive to comply in their handling of women's and children's asylum claims.[20] The guidelines represent an important yardstick against which to gauge progress. Refugee advocates continue to press the United States to live up to these standards.

Conclusion. As the Refugee Convention passes its fiftieth year, the international community must embrace an agenda that actively ensures full protection of refugee women and children. Failing to do so will result in providing protection for the minority while leaving the most vulnerable outside the reach of the refugee regime. It will also represent a tremendous hypocrisy: states cannot endorse respect for women's and children's human rights on one hand, and

then ignore their protection needs when those rights are violated. With this in mind, the international community should take the following steps:

1) Move the UNHCR guidelines addressing the protection needs of women and children from mere policy into practice.

UNHCR is facing a serious budget deficit as donors fail to contribute promised funding. Consequently, the agency has indicated that it will have to make difficult choices and curtail programming in key sectors and regions. While the current High Commissioner has stated his commitment to *continue* to promote the protection of refugee women and children even in the face of budget shortfalls, the agency must actively *enhance* its efforts to improve programming on the ground for women and children. It must also recognize that assistance programs, which are the most likely to take a funding hit, play a crucial part in protection.

2) Implement programs to specifically test the recommendations of the Women's Commission's evaluation of the implementation of the Refugee Women's Guidelines and Valid International's evaluation of the implementation of the Refugee Children's Guidelines.

The international community, with the leadership of UNHCR, must maximize the use of these two evaluations. In 2001, in recognition of the fiftieth anniversary of the Refugee Convention, UNHCR launched a series of international "Global Consultations" to assess the progress made and critical challenges that remain in refugee protection. In 2002, the consultations will devote significant time to examining the protection issues that will confront women and children. This forum offers UNHCR a unique opportunity to present a platform of action on behalf of women and children.

3) Encourage adjudicators to embrace women and children as recognizable social groups under the refugee definition.

The refugee definition should be interpreted to recognize violations of the rights of women and children as defined by CEDAW and the CRC, and to accommodate the protection needs of refugee women and children.

The fiftieth anniversary of the Refugee Convention has offered the international community a significant opportunity to renew its commitment to protection of refugee women and children. In June 2001, a young African refugee woman addressed a session of the UNHCR Global Consultations. She shared the conclusions of a group of refugee women who had convened for their own consultation in the prior week to assess the state of the world's refugee women. The young woman observed:

> In our consultation, we talked about legal status and the quality of asylum. Women talked about how men often dominate and the women's voices and experiences are lost…We hope that refugees will be recognized as people who have human rights. We all hope that this energy will turn into something positive. We hope that the experiences we share with UNHCR will be able to change a lot of things. We are asking you to help us refugee women to have our voices heard.[21]

This is a request the world should not ignore.

NOTES

1 Convention Relating to the Status of Refugees 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954).

2 United Nations High Commissioner for Refugees, *The State of the World's Refugees* (New York: Oxford University Press, 2000), 23.

3 Convention on the Elimination of All Forms of Discrimination against Women 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

Convention on the Rights of the Child 20 November 1989. XX U.N.T.S. XX (entered into force 2 September 1990).

4 "Convention on the Elimination of All Forms of Discrimination against Women," on-line: <http://untreaty.un.org/English/Chapter_iv/treaty9.asp> (date accessed: 5 November 2001).

"Convention on the Rights of the Child," on-line: http://www.unicef.org/crc/crc/htm (date accessed: 5 November 2001).

5 *Policy on Refugee Women*, UN High Commissioner for Refugees (Geneva: 1990).

6 *Guidelines on the Protection of Refugee Women*, UN High Commissioner for Refugees (Geneva: 1991).

Sexual Violence Against Refugees: Guidelines on Prevention and Response, UN High Commissioner for Refugees (Geneva: 1995).

7 *Guidelines on Refugee Children*, UN High Commissioner for Refugees (Geneva: 1988).

Policy on Refugee Children, UN High Commissioner for Refugees (Geneva: 1993).

8 *Refugee Children: Guidelines on Protection and Care*, UN High Commissioner for Refugees (Geneva: 1994).

Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum, UN High Commissioner for Refugees (Geneva: 1997).

9 Women's Commission for Refugee Women and Children, "UNHCR Guidelines on Protection of Refugee Women: A Ten-Year Review of Progress" (report forthcoming).

10 Valid International, "Independent Evaluation of the Impact of UNHCR's Activities in Meeting the Rights and Protection Needs of Refugee Children" (report forthcoming).

11 *In re Kasinga*, Interim Decision 3278 (Board of Immigration Appeals: 1996).

12 *Kasinga*, supra note 14, at 13.

13 *Matter of R-A-*, Interim Decision 3403 (Board of Immigration Appeals: 1999).

14 *R-A-*, supra note 18, at 14-21.

15 Janet Reno, Attorney General, Executive Order 2379-2001 (Washington, DC: January 19, 2001).

16 "Asylum and Withholding Definitions," Proposed Rule, *Federal Register*, Vol. 65 (Washington, DC: December 7, 2000).

17 *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)*, 2 All ER 545 (House of Lords: 1999).

18 UN High Commissioner for Refugees, "Position Paper on Gender-Related Persecution" (Geneva: January 2000).

19 See Christopher Nugent and Steven Schulman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," *Interpreter Releases* 78 (October 8, 2001): 1583-84.

20 *Considerations for Asylum Adjudicators Adjudicating Asylum Claims from Women*, Immigration and Naturalization Service (Washington, DC: May 26, 1995).

Guidelines for Children's Asylum Claims, Immigration and Naturalization Service (Washington, DC: December 10, 1998).

21 Statement of A.G., UNHCR Global Consultations (Geneva: June 28, 2001) (identity withheld).